ELA Covid-19 Working Party

Job Retention Scheme
26 March 2020

Please note this paper was prepared prior to receipt of Government guidance released late on 26 March https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme

This paper will be updated as soon as possible to take that into account.

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Introduction

The Employment Lawyers Association's ("ELA") Legislative and Policy Committee has set up a standing working party to respond and make recommendations on measures relevant to employment law during the current coronavirus crisis.

ELA is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation or regulation, rather it is to make observations from a legal standpoint. ELA's Legislative and Policy Committee consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulations.

A sub group of the working party has prepared the paper below to consider employment law issues relating to the Government Job Retention Scheme. The sub group members are as follows and the full ELA Working Party is listed at the end of this paper.

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1. Job Retention Scheme

1.1 Context

The Chancellor of the Exchequer, Rishi Sunak, announced the Job Retention Scheme ("the Scheme") on 20 March 2020, in an attempt to avoid mass redundancies following the outbreak of the Coronavirus pandemic. Where there has been a full cessation of work for an employee, an employer can seek from HMRC the reimbursement of 80% of that employee's "wage costs" up to a maximum of £2,500 per month for an initial three-month period from 1 March 2020.

This note has been written prior to legislation being passed, and further to the Chancellor's announcement (https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-support-for-businesses), so the detail of the legislation is not yet known. ELA has sought to consider the practical questions that have arisen in relation to implementation of the scheme which we hope may be addressed when further rules and guidance are published.

1.2 Who does the scheme apply to?

This scheme applies only to employees (with no apparent limit on numbers or employer size) rather than workers who will only be permitted to access £5000 of state support under the Universal Credit scheme. Agency Workers and those on zero hours contracts, have precarious arrangements at the best of times, and may not have access to any work at this time. Given the current appellate case law blurring the distinction between workers and employees, and to avoid unnecessary delay and confusion to both employers and workers, ELA would hope that the Scheme is extended to both employees and workers. The announcement implies that the furlough arrangements are intended to apply only to those who are not working at all, rather than those who are able to work a little. This would seem logical given the potential for abuse, and distortion of markets, if some employers are effectively enjoying subsidised work.

At the time of writing we understand that a separate scheme has been suggested for the self-employed and we do not know if will resemble the proposed amendment to the Coronavirus Act 2020 (Self Employed Scheme).

1.3 Wage costs/Pensions

It is not yet clear exactly what 'wage costs' would include, e.g. whether employer's national insurance contributions, pension contributions or bonus would be covered. It is also not clear what will happen to pension entitlements under auto-enrolment. The Chancellor stated that employers will not be required to 'top' up wages to normal levels under the 'furlough' rules. However, unless legislation overrides this, employers will be obliged to seek agreement from employees to any reduction (see 4. Consent below). This would, presumably, be a condition of agreement to furlough and may be a fair trade for many.

1.4 Consent

When the Job Retention Scheme was announced it was stated that changing the status of employees "remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation."

It is assumed that this means that, unless there is a term in the contract of employment permitting the employer to lay-off the employee (i.e. require him/her not to attend for work but without any obligation to pay wages/salary) or place on short time (i.e. reduce hours with a concomitant reduction in pay), the consent of the employee is required if the Scheme is to be operated and cannot be imposed without risk of claims of constructive (and likely also unfair) dismissal and/or claims for unlawful deduction from wages for the shortfall between the contractual rate of pay and that paid under the Scheme. It is generally the case that simply providing the

employee with no work does not amount to a breach of contract although there may be some cases where that is not so – for example, where pay is dependent on productivity/sales or where being able to work is essential to maintaining skills and reputation, for example in the performing arts.

If consent cannot be obtained, then as noted at 5 - 7. below, (and subject to our comments at. below on frustration) the employer would seem to have two options – either to terminate and offer re-engagement on terms which incorporate the Scheme and/or include a power to lay-off/put on short time. In either case statutory consultation will be required where 20+ employees are affected with the logistical difficulties we have identified.

If consent proves difficult to obtain – which may be the case for those on low incomes where the 20% loss of pay is critical or for the higher paid where £2,500 represents a significant loss of income - consideration could be given to introducing a statutory power on the part of employers to lay-off/put on short time. This could be subject to some or all of the following limitations:

- for the purposes only of implementing the Scheme
- provided the employer has first consulted with a view to reaching agreement
- where the furloughed employees are certified by the employer as being otherwise be genuinely redundant as defined in s139 Employment Rights Act 1996
- such certification to be subject to sanctions if falsely given
- a furloughed employee is able to treat lay-off/short-time as amounting to redundancy triggering the right to a statutory redundancy payment

An alternative might be a provision whereby any dismissal arising as a result of refusal to accept furlough would be subject to a rebuttable presumption not to have been unfair.

1.5 Redundancy and/or return to work

The purpose of the Scheme is stated to be job retention (rather than, e.g., delayed redundancy). There does not appear to be any attempt to force employers to either keep roles open or take staff back at the end of furlough. There is no clarity regarding the interaction of the end of the scheme, redundancy and/or return to work. It is possible, for example, that furloughed employees might be given an opportunity to opt for redundancy where they have been furloughed for a specified period, perhaps aligned to existing lay-off rules. Clarity in this respect would be helpful. It is unclear whether legislation will provide for (the likely common) situation where an employee has already been made redundant and received termination payments, e.g. on 1 March before the employer became aware of the furlough option. Would repayment of the termination payments already paid be required?

1.6 Variations to Terms and Conditions and Redundancies

Where an employer is proposing to vary terms and conditions and in the absence of consent, terminate and re-engage employees to that end; or dismiss by redundancy 20 or more employees, collective consultation duties are triggered under s.188 TULRCA 1992. There are minimum periods of consultation which are not workable during such a crisis, given the speed at which employers and employees have had to react to the pandemic. Even if the 'special circumstances' provision in s.188(7) is engaged, an employer would need to comply with the duties so far as is reasonably practicable. If there are dismissals or even if duties are altered, redundancy payments will need to be made, which may not be possible given the loss of cash flow. The purpose of the Scheme is to prevent redundancies or avoid insolvency situation. However, an employer may have needs which require a reduction of work, rather than a complete cessation of work for some of its employees. In such circumstances it will find that it cannot access the Scheme or find that it is subject to redundancy legislation. Extending the scheme to employers who require their operation to continue, although in a reduced fashion will avoid the Scheme unwittingly closing certain operations altogether.

1.7 Variation to terms and conditions: Collective Agreements - Can Trade Unions agree to the Scheme without the consent of individual employees?

Collective Agreements as defined at s.178 TULRCA 1992 between trade unions and largely the public sector employers, tend to be incorporated into individual employees' contracts by a term of their contract. This "normative" effect of a collective agreement allows an individual to enforce that term against their employer. Collective Agreements can include terms and conditions of employment or the physical conditions of work; engagement, non-engagement, termination or suspension of employment or the duties of employment of one or more workers; and allocation of work or duties between workers or groups of workers. The terms that are "collective" in nature are unlikely to be incorporated into individual contracts of employment (*Kaur v MG Rover Group Ltd* [2004] EWCA Civ 1507).

As it stands, it is unlikely that any agreement with regards to the Scheme concluded by collective agreement will be binding on individual employees. There have been special legal interventions, e.g. during the second world war to permit collective agreements to have such a normative effect. As this is not the case currently, trade unions may not be able to agree to such changes on members' behalf. However, employers may wish

to pursue arrangements generally with trade unions, to the extent that they can, as to the employees deemed to be key and those that could be 'furloughed'.

1.8 Employee selection for furlough leave

Employers may need to select employees for furlough, for example from a group of employees performing similar roles. In doing so they will need to be mindful both of discrimination laws and the implied duty of 'mutual trust and confidence'. It seems likely that 'fair' selection will require similar considerations as those applicable to redundancy processes. It may be helpful to seek volunteers. Consultation with individuals and possibly trade unions (see 7. above) will be important to reduce the risk of inadvertent prejudice, discrimination, breaches of mutual trust and confidence etc., and this issue is considered further in the "Consent" section below. Note that the announcement states that the employer will confirm who is 'furloughed', i.e. the announcement confirms that employees will not be entitled to opt for furlough unilaterally. We hope this issue will be clarified.

1.9 Calculation of wages for employees on zero-hours contracts/irregular hours

It is unclear how rates of pay are to be calculated for those with irregular working patterns. As the law stands, s.224 ERA 1996 requires that a week's pay is determined by the previous 12 weeks' average pay (excluding weeks when there was no remuneration). ELA would assume that this will be left to employers to calculate, with the caveat that they will be subject to employment law.

1.10 Immigration status

The Home Office are yet to publish updated guidance in light of COVID-19. However, it is currently unclear whether migrants sponsored under Tier 2 will be eligible to participate in the job retention scheme. Currently, such migrant workers can take short periods of unpaid leave, but an employer must stop sponsoring a migrant who is absent from work without pay for 4 weeks or more in total in any calendar year (subject to limited exceptions). In addition, if an employer reduces a migrant worker's salary package to a lower rate than was stated on their Certificate of Sponsorship, the new rate must meet the current appropriate rate requirements. If the new rate is below the minimum rate, the employer cannot continue to sponsor them. We hope it will be clarified imminently whether migrant workers will be eligible to participate in the scheme, and if so, that the immigration rules will be relaxed for the duration of the furlough period so that the employer does not risk being in breach of their licence.

1.11 Interaction with other types of leave e.g. maternity leave

Consideration should be given to employees currently on maternity or other parental leave who may well be receiving remuneration at a lower rate than either the minimum

furlough scheme rate or a 'topped up' rate. There is potential for discrimination claims, e.g., where an employer chooses to 'top up' furloughed employees but not, for example, maternity pay for those on maternity leave.

1.12 Documenting furlough arrangements

It seems likely that any furlough arrangements agreed will need be documented, e.g. by way of letter signed by the employee to confirm consent, or more likely by way of return email given the current social-distancing context. (A pro-forma template, perhaps provided by Acas would be helpful.) That letter could include any additional clarity e.g. regarding the impact on commission, pensions etc.

1.13 Continuity of employment

Presumably a period of 'furlough' will count towards statutory continuity of employment in which case ELA would expect accrual of paid holiday (see separate note on Annual Leave). An alternative would be legislation that provided for continuous employment not to accrue but to be treated as unbroken on return to work. The unbroken but not accruing option might help avoid early decisions for employees who are coming up to the 2-year qualifying period for unfair dismissal. For employees whose employment ended before furlough began would the 'gap' be treated as a period of continuous employment?

1.14 Employers who do not pay out under the Scheme

Some thought would need to be given to enforcement, e.g. if the employer received payment from HMRC and did not pay it over to the employee and/or insisted that an employee worked during furlough. Our overloaded Tribunal system is not currently in a position to offer effective remedy. An HMRC-linked remedy may therefore be more effective. It would also assist if there were some mechanism by which HMRC informs the employee directly that a furlough grant has been made to the employer. A time-limit for paying over the furlough grant to the employee would also be helpful. This could be managed via the payroll system, but HMRC do not automatically have access to employee banking details, so they would presumably have to be entered into the system if direct payment is to be facilitated, which may not work for all employees.

1.15 Sickness whilst furloughed

Clarity will be needed via regulation and/or employer agreement regarding sick pay arrangements. For example, if pay were reduced to SSP during furlough due to sickness there would be little incentive to dial 111 to report inability to work/sickness.
Some other countries apply restrictions on dismissal for redundancy and re-engagement e.g. of employees who are on maternity leave, sick etc.

1.16 No dismissals when sick with Coronavirus

It is not clear whether any restrictions would apply here to restrict dismissal of a 'vulnerable' employee required to self-isolate or prevent removal of eligibility for job retention payments. Remedies would again need thought. The natural instinct would be to apply legislation similar to victimisation legislation.

1.17 Service of notice of dismissal / redundancy during furlough

Would service of notice be prohibited before/during/after furlough, and/or would notice need to be withdrawn?

1.18 Part-time/Term Time employees

How about teachers and others who are paid through the year but only work at certain times. Can an employee be furloughed if they were not due to work e.g. zero hours employees or if they would otherwise have been on school holidays.

1.19 Employees whose contracts are about to commence

Should there be a clear employment start date cut off for eligibility for furlough pay, ie to stop abuse through hiring. What about those who have been offered jobs but not started employment by 1 March? Could there be a cut off based on a concluded contract prior to 1 March even if start date is harder – would probably make admin much harder if relying on payroll records. Employees who are in transition between jobs are particularly vulnerable.

2. Frustration of Contracts and statutory protections of Furloughed Employees

2.1 Frustration of a contract occurs by operation of law where, without the fault of either party, some supervening event occurs which was not reasonably foreseeable at the time when the contract was made and which renders further performance of the contract either totally impossible or something radically different from what the parties bargained for. The doctrine of frustration treats a contract as being automatically discharged, so that the parties are no longer bound to perform their contractual obligations. Unless frustration has occurred, then a party failing to perform their contractual obligations, such as continuing to pay wages, will be liable in damages.

2.2 If Covid-19 were to frustrate a contract of employment, then it would forthwith be discharged by operation of law and an employer's contractual obligation to provide notice to an employee or indeed a worker, would fall away.

2.3 The position is more nuanced in the context of employee statutory rights. As the contract is automatically discharged, there is no "dismissal" and hence no unfair dismissal can arise. However the position in relation to statutory

redundancy is different, as the right to claim a redundancy payment is likely to be preserved, due to the application of the Employment Rights Act 1996 (**ERA**) section 136(5)(b). This section provides that a dismissal will still occur: "where in accordance with any enactment or rule of law - an event affecting an employer… operates to terminate a contract under which an employee is employed by him, the act or event shall be taken… to be a termination of the contract by the employer".

2.4 Pursuant to Section 139(4)(a), Where— the contract under which a person is employed is treated by section 136(5) as terminated by his employer by reason of an act or event, and is not renewed and he is not re-engaged under a new contract of employment, the employee shall be dismissed by reason of redundancy.

2.5 It is important to note that an employees' right to be included within entitlement for protective award, under section 188 of Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) also falls away, as dismissal is to be construed in accordance with Part X ERA s.95 ERA (see s.298 TULRCA). Any employer relying upon frustration will need to tread very carefully as if a tribunal were to determine that frustration had not occurred to terminate the employees' contracts by operation of law, then they will face a significant protective award of up to 90 days pay.

Is Covid-19 a frustrating event terminating employment contracts at common law?

2.6 As stated by Bingham LJ in In J Lauritzen *AS* v *Wijsmuller BV* [1990] 1 Lloyd's LR 1,

> "The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances."

2.7 The Court is likely to adopt a multi-factorial, favoured by most recent judicial authorities considering the test of frustration. Applying the test can't depend upon the point at which point at which the employer may treat the contract as being frustrated, because it arises by operation of law. It will not be correct to assess the issue retrospectively by looking back to see what actually occurred. It will be a complex test to apply and the question will arise as to whether it will be asserted that the frustration occurred at the point at which the lockdown was announced or will there be some other date at which it became apparent that the contract could not be performed, perhaps for instance when

an employer's supply or demand chain have collapsed. The more reports suggesting this Covid-19 crisis will persist for many months, the greater reliance employers may be tempted to place on the doctrine of frustration.

2.8 The "multi-factorial" approach is illustrated by the following passage in *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547 which held at paragraph 111 of the judgment:

> "*Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.*"

2.9 The assessment will need to take account of all the terms of the individual employment contract, in particular whether or not the employee had been furloughed and the proportion of normal pay covered by the Scheme and topped up voluntarily. Other highly relevant factors would include the length of the employment prior to the frustrating events and the anticipated length of the future employment relationship. The duration of the notice, with a fixed term contract more likely to be frustrated. The availability of other employees to undertake certain tasks will also be relevant. Whether there is a free standing right (or one can be implied) for the employee to actually carry out work, as opposed to merely receive payment of wages would be an important factor, however it would be strongly arguable that the right to work would be modified in many instances during the current crisis, where an employee is for instance unable to carry out work, due to their work place closure or without taking an excessive risk to their health and safety. There must however still be a grey area for employees who may otherwise be able to work effectively from home and those who undertake more highly skilled jobs who may need to work in order to allow them to keep up to date and hone their skills and avoid atrophy.

2.10 In practice it must be assumed that most tribunals will be very slow to conclude that a contract has been frustrated, with the loss of statutory protection that would flow from such a finding. There is also the analogy with the sickness cases where the tribunals have tended not to find frustration if the employee may be capable of returning, or where an employee needs to undergo re-skilling before returning to work (*Gryf-Lowczowski* v *Hhichinbrooke* [2006] ICR 425). Accordingly, a tribunal could conclude, that for many

employers the break in being able to operate, as normal, may well be temporary and that as most employment contracts do contemplate the possibility of absences, even long-term absences by the employee (due for instance to ill health), the disruption caused by Covid-19 does not actually make the contract impossible to perform or radically different from what the parties bargained for.

2.11 The decision may well be more finely balanced where the business has to shut down or lay off people off to survive. Employees on relatively short fixed term contracts are arguably most at risk, as are those employees who are highly remunerated and refuse to accept having their contracts varied or to become furloughed.

2.12 It does appear however that the Scheme will make it less likely both that employers will, at least in the short term, seek to rely upon frustration and that it will be found that Covid 19 was a frustrating event, in the context of an employment contract. However any enquiry of this nature will be fact specific.

3. Considerations for US/Global employers regarding Lay-off/Furlough leave

3.1 US employers, like all others in this global crisis, are having to make tough decisions to deal with the uncertainty and economic downturn. The same ideas as in the UK are being mooted by employers as alternatives to redundancy: furlough/temporary lay-off, reducing wages, mandated holiday. The US legal landscape is very different from in the UK, bringing into play both federal and state laws, issues under WARN legislation, wage and hour legislation and unemployment measures.

3.2 Many US headquartered global employers are seeking to conduct immediate lay-offs/redundancies across their international workforces. They are encountering challenges in light of the many different legal restrictions already in place across jurisdictions (e.g. collective consultation, works council approvals, social plans etc), plus those new rules that are emerging daily (such as the Coronavirus Job Retention Scheme in the UK). Such variations make it very difficult to take a global approach which is legally compliant in all jurisdictions, and depending on the employers' financial position, some are considering cutting corners with a view to saving what they can of their business. The faster local government support measures can be implemented, the better, from this perspective.

3.3 There are similar challenges when implementing reductions in force or lay-offs in the United States. For example, employers considering making large scale layoffs must determine whether reporting obligations are triggered pursuant

to the Worker Adjustment and Retraining Notification Act (WARN). Employers of certain sizes making large scale layoffs may have to provide at least 60 calendar days' advance written notice of such a closure. The position is complicated due to some U.S. states adopting mini-WARN Acts that often conflict with the federal act. Further, states have the power to suspend the operation of such mini-WARN Acts in response to the virus. Indeed, California recently suspended the application of the California WARN Act to help employers faced with Covid-19 layoffs. US employers with premises in different states must carefully consider how both local and federal laws may apply to them.

3.4 New laws – such as the Families First Coronavirus Response Act (which was signed into law on March 18 2020), the "New York State on PAUSE" Executive Order signed on 20 March 2020 and various "Stay at Home" Executive Orders issued in March 2020 - are likewise being introduced on a regular basis in the U.S.

3.5 Some global organisations are seeking to reach alternative contractual agreements with employees to avoid implementing lay-offs as part of a formal statutory procedure. For example, several are in discussions to place their employees on "furlough" leave at a significantly reduced rate of pay e.g. 25%, plus benefits, without relying on government subsidies (although in some cases there is a limit as to how long they will be able to continue to do this).

3.6 US Companies are also placing employees on "furlough" leave (e.g. Virgin Atlantic and Marriott). In the US, furloughed employees are absolutely banned from doing any work on behalf of their employer whatsoever. The position in the U.S. is also different in comparison to the UK due to the existence of "exempt" and "non-exempt" employees. If a salaried employee (i.e. an exempt employee) does any work while on furlough the employer must pay them the equivalent of their salary for the entire day. If an hourly employee works (i.e. a non-exempt employee) while on furlough the employer must pay them for the time worked.

3.7 Some large U.S. companies are hiring temporary workers who have been laid-off temporarily from struggling businesses as a means of avoiding permanent lay-offs. Companies including Amazon, Walmart, Dollar Tree and 7-Eleven have pledged to take on thousands (in some cases as many as 100,000) permanent and temporary workers to cope with increased demand. Further, furloughed Hilton employees in the US will be given direct access to an online resource center and expedited hiring processes at leading companies including Amazon, CVS Health, Lidl, Albertsons, Plastics Industry Association and Sunrise Senior Living. In particular, CVS Health is embarking on what it calls one of its most

ambitious hiring drives in its history. It intends on tapping directly into its customers' workforce by taking on furloughed workers from Marriott and Hilton hotels through the use of technology-enabled hiring processes such as virtual interviews and virtual job fairs.

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