ELA Covid-19 Working Party

Outstanding questions on the Coronavirus Job Retention Scheme (CJRS)

21 April 2020

The law is constantly changing and the position set out in this paper may not be current. You should not rely on this or other ELA papers as a comprehensive statement of the law but should always seek advice if you require it from a qualified lawyer. ELA does not give legal advice.

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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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Executive Summary

The Government has now issued iterative versions of guidance in relation to the CJRS, and a number of questions remain outstanding and new ones arise as the guidance changes. As an initial observation, the many iterations of the guidance and the Treasury Direction have caused confusion on a number of key issues, and it would be most helpful if the guidance could be consolidated into one place, with links to final confirmed rules on each issue set out there. We should be grateful if priority could be given to the areas of conflict identified within the current versions of the guidance, as highlighted further below.

In light of the extensive commentary on the CJRS published by many esteemed employment law colleagues and interested parties, ELA's Working Party has limited its analysis to the following key questions identified by the ELA Working Party and their clients, which ELA should be grateful for clarity on.

1. **Furlough leave and collective consultation**

The following questions relate to the interaction between collective consultation and furlough leave. Further clarity on the issues identified from the Government and/or HMRC would be welcomed.

1.1 Does an employer have to collectively consult when initiating furlough scheme and if so, when?

The government guidance notes that, "if sufficient numbers of staff are involved, it may be necessary to engage collective consultation processes to procure agreement to changes to terms of employment". No further detail is given on the circumstances on which this will be required, and employers are expected to "seek advice" if necessary.

As regards timing, the ELA Working Party considers the following propositions are generally reasonable where an employer is proposing to place 20 or more employees within one establishment on furlough leave:

(i) if the employer is merely considering a furlough scheme in the hope that sufficient employees accept to avoid compulsory redundancies being necessary, it would be reasonable to take the view that the collective consultation obligation is not yet triggered at the stage at which the prospect of furlough is introduced and employee consent is sought;

(ii) if sufficient numbers of employees do not consent to furlough leave such that the prospect of redundancy becomes a reality for 20 or more employees in the establishment, or if employer intends to dismiss and re-engage those employees on new terms if the scheme is unsuccessful, the obligation to collectively consult would be triggered at that stage; and

(iii) given that proposing to dismiss is generally held to occur at an earlier state than an actual decision by the employer to make redundancies, if the furlough scheme is being considered alongside a "well-advanced" (see case law below) plan to make redundancies, the obligation may be triggered as a result

It may be difficult to rely on the special circumstances exemption to justify no or short consultation processes given the existence of the CJRS, as employers may be less likely to face severe and urgent financial difficulty if they take advantage of the government's financial support. However, whether or not the special circumstances exemption will apply will inevitably be fact-specific. It may be possible, for instance, for employers to invoke the defence where there is a pressing, sudden and unexpected need to place workers on furlough and the practicalities of consultation make elections unworkable. Employers must bear in mind that they would still need to take all the steps to comply with collective consultation obligations that it reasonably and practicably can when invoking this exemption (this may involve virtual briefings with the workforce and their union/representatives via online platforms).

Confirmation from the Government as to whether this is a fair interpretation would be welcome. As a minimum, we should be grateful for confirmation that the existing legislation regarding collective consultation will not be changed in any way, which will allow employers to proceed in confidence on the basis of the existing legislation an case law.

1.2 Does acting as an employee representative constitute "work" for the purposes of furlough, and therefore break the furlough period for that employee/make them ineligible for Government support?

There is no definitive answer to this question, although ELA's Working Party understands that this issue is on BEIS' radar as the same question has been raised by Trade Unions.

The Guidance states that when employees are on furlough, the employer cannot ask an employee to do any work that:

a) Makes money for the organisation
b) Provides services for the organisation

Employees can take part in volunteer work or training so long as they do not provide services to or generate revenue for or on behalf of the organisation. Broadly, then, an employee on furlough cannot do any work for their employer that generates revenue or constitutes providing services.

Acting as an employee representative clearly does not make money for the relevant organisation. Whether or not acting as an employee representative constitutes "work" for furlough purposes depends therefore on whether it would constitute "providing services". In the absence of clear guidance on this issue, it is not known whether working as an employee representative would constitute providing a service for the employer. Commentary on this issue to date leans towards the suggestion that this **would not** constitute work for the purposes of furlough for a number of reasons, including that:

(i) Tasks are carried out as part of a separate role from that of employee;
(ii) The beneficiary of the work being done by the employee during the consultation exercise is primarily the employee body themselves, not the employer; and
(iii) The employee is not in carrying out such activities making an economic contribution to their employer.

The case of *Edwards and another v Encirc Ltd* (2015) https://www.bailii.org/uk/cases/UKEAT/2015/0367_14_2302.html established that time spent by a health and safety representative or shop steward attending health and safety committee meetings and other union meetings at their workplace counted as "working time" for the purposes of the Working Time Regulations 1998. There may be a concern that this case could be applied by analogy to the present issue. However, it this is unlikely for the reasons set out below:

(i) whether the employees in *Edwards* were workers was assessed against the definition of work within the Working Time Regulations i.e. the worker must be (a) working (b) at the employer's disposal and (c)

carrying out his activities or duties, which would not generally be the case where the furloughed employee is simply acting as an employee representative;

(ii) the meaning of work was clearly not assessed against the meaning of work in the Government's furlough guidance – therefore it is unclear whether the ET would come to the same conclusion in these new circumstances; and

(iii) it may be difficult for the ET to apply the principles set out in this case outside of the working time context.

Notwithstanding this, it would be very helpful if confirmation could be provided by the Government/HMRC on this issue.

We should also be grateful for confirmation of whether an employee engaging with their employer a part of collective consultation would constitute "work" for the purposes of the furlough guidance. We do not believe it should constitute "work", on similar principles to those set out above (and because it would be very difficult for employers in practice to comply with collective consultation obligations *vis a vis* furloughed employees were this to be the case). Urgent clarification would be appreciated.

1.3 Can an employer commence collective consultation on proposed redundancies while employees are on furlough leave?

It is clear that the Government's intention in establishing the CJRS is to protect the jobs of employees who would otherwise be made redundant without the Government's financial support. In reporting to the Treasury Select Committee on 8 April 2020, we understand that HMRC said that they would check high risk claims before paying out, and that they would rely on individuals to contact them if they were aware of employers abusing the scheme. What is not clear is the circumstances in which an employer would be considered to be "abusing" the CJRS. It is very possible that many employers will, in good faith, place employees on furlough leave, but within a few weeks, their financial circumstances will be such that they may be forced to wind up all or part of their business, requiring collective redundancies to be carried out whilst employees are on furlough leave. ELA's Working Party presumes this would not be considered to be an abuse of the scheme.

The Guidance envisages that some employees may need to be dismissed at the end of the furlough period, depending on the employer's circumstances. However, where should the line be drawn? Some employers may know at the

point they place employees on furlough leave that the prospect of retaining a large percentage of them is extremely unlikely; should this mean that they cannot claim, or that they will be required to repay government funds in respect of the employees that are subsequently dismissed?

We should be grateful if the government would confirm whether notice of termination can be served while an employee is on furlough leave without the government grant being withdrawn or at risk of being clawed back. Confirmation of this issue would allow employers to take such steps as are considered necessary based on their financial circumstances and the potential need to urgently restructure.

2. Annual leave

Up until last Friday (17 April 2020), there government's guidance on the CJRS had not provided any clarity on the ability for employees/workers to take and be paid for annual leave if they were furloughed. However, this issue has now been address in the latest guidance published on 17 April https://www.gov.uk/guidance/work-out-80-of-your-employees-wages-to-claim-through-the-coronavirus-job-retention-scheme which includes the following passage [our emphasis]:

"Holiday pay
Furloughed employees continue to accrue leave as per their employment contract. The employer and employee can agree to vary holiday entitlement as part of the furlough agreement, however almost all workers are entitled to 5.6 weeks of statutory paid annual leave each year which they cannot go below. Employees can take holiday whilst on furlough. Working Time Regulations require holiday pay to be paid at the employee's normal rate of pay or, where the rate of pay varies, calculated on the basis of the average pay received by the employee in the previous 52 working weeks. Therefore, ***if a furloughed employee takes holiday, the employer should pay their usual holiday pay in accordance with the Working Time Regulations****…."*

Can an employer force an employee to take annual leave during furlough?
Whilst the above is helpful as it provides clarity that annual leave can be taken during a period of furlough, and what pay should be made during such annual leave, a question mark remains over whether employers can use regulation 15 WTR to force an employee to take their annual leave during furlough.

There is case law about offshore workers, or examples of teachers or footballers who are required to take their leave at a certain time in the year. However, if the purpose of annual leave is to have rest and leisure, a furloughed employee is unlikely to achieve this in a period of lockdown during a pandemic. Enforced leave is also unlikely to sit happily with the new regulation 13 (10) where the Government has enacted statute to

allow employees to take their leave at another time because it was not reasonably practicable for them to their leave as a result of the effects of the coronavirus. But without clarification from the government, in the form of legislation, the position remains unclear and could lead to litigation further down the line.

3. CJRS and the difficulties in obtaining adequate consent to vary the employment contract

3.1 The Scheme is unusual given that the Government has chosen implementation via a series of announcements and HMRC published guidance, rather than through the rigour of legislation, with all the checks and balances that go alongside the legislative process. This gives rise to the potential for a disconnect between important principles of employment law and how the Scheme does actually operate in practice. A recent example of the difficulties which this approach can give rise to was the Social Care Compliance Scheme set up by HMRC, which was not written or interpreted by HMRC officers in line with the National Minimum Wage Act or Regulations or indeed BEIS guidance on this issue.

3.2 There has already been much comment regarding the many areas of uncertainty surrounding the Scheme. However a key area of difficulty which has not perhaps so far received sufficient coverage are the obstacles that employers of all sizes face in ensuring that the employment contracts is varied in such a manner that they are not exposed to subsequent claims for unlawful deduction of wages being pursued.

Earlier versions of the Guidance stated that:

> *"Both you and your employer must agree to put you on furlough"*
> *"If you and your employer both agree, your employer might be able to keep you on the payroll if they're unable to operate or have no work for you to do because of coronavirus (COVID-19). This is known as being 'on furlough'.*
> *Employers should discuss with their staff and make any changes to the employment contract by agreement. When employers are making decisions in relation to the process, including deciding who to offer furlough to, equality and discrimination laws will apply in the usual way."*

3.3 At this time of collective crisis management, many employers and employees will understandably have breathed a collective sigh of relief that this lifeboat scheme has been introduced, and will not have been too bothered by the formalities of following a proper process (from an employment law

perspective) to vary the employment contract by agreement. However, paragraph 6.7 of the CJRS Treasury Direction requires evidence that furlough terms are "agreed in writing". This is in variance to the earlier iterations guidance and has caused significant concern to employers as to whether employers need to now seek agreement in writing incurring time and additional cost to them.

3.4 No doubt there will be some employers, particularly those organisations with greater resources and access to advice, as well as those operating in an unionised environment, that will have put in place adequate steps to ensure that binding agreements are/were reached with their employees changing their employment contracts and being furloughed before the Treasury Direction made this a requirement. There will be some employers that intend to change the employment contracts lawfully but may not take adequate steps to do so and there will many employers that will have imposed this new furloughed status by edict, or without obtaining anything close to free and informed consent from their staff.

3.5 Once the Government grant ceases, many employers may well come to realise that they have unwittingly exposed themselves to large scale uncapped potential employee claims for unlawful deductions of wages. The relevant provisions are now found at Sections 13 to 27 of the Employment Rights Act 1996 (ERA 1996). The claims could be particularly high in the case of higher paid senior executives and managers.

3.6 This area of legislation is amongst the oldest piece of social legislation in force, dating back to the Truck Acts 1831–1940 and numerous other provisions relating to the payment of wages and the ring of protection placed around them, designed to prevent unscrupulous employers from arbitrarily deducting pay, where for instance, there has been a cash or stock shortage.

3.7 The legislation offers important protection to workers who might otherwise be vulnerable to exploitation and will certainly apply to the current circumstances whereby employees' wages are being reduced as a by-product of the Scheme. Indeed there does appear to be a common misconception (amongst many employers and employees) that wages are reduced by the scheme, leaving many employers exposed, in some cases unwittingly, to claims, where agreement to vary the employment contract has not been reached.

3.8 Where the requisite level of prior written consent has not been obtained, to vary the employment contract, and pay is being reduced, it will be classified as being an unlawful deduction from wages under the ERA 1996. This will

also apply to the millions of employees who are working reduced hours, rather than being furloughed (as they are continuing to work) many of whom will not have provided adequate consent to the pay reduction.

3.9 Pursuant to Section 13 (1) (b) ERA 1996, an employer is permitted to make a deduction (amongst other circumstances) where 'The worker has ***previously*** signified in writing his agreement or consent to the making of the deduction'. This requirement is construed very strictly. It will certainly not cover a situation in which an employer has written to its staff and told them that they are being furloughed. It is also unlikely to be sufficient for an employer to seek agreement from an employee retrospectively, after the decision has been communicated that they are to be furloughed.

3.10 It does appear that the agreement or consent of the worker referred to in ERA 1996 s 13(1)(b) must be obtained not only before the deduction has been made but also before the incident which is said to justify the deduction has occurred. This is because ERA 1996 s 13(6) provides that *'any agreement or consent signified by a worker … does not operate to authorise the making of a deduction … on account of any conduct of the worker, or any other event occurring, before … the agreement or consent was signified'*.

3.11 Put simply, what this means is that an employer cannot gain authorisation for a deduction after the event which gave rise to the deduction has taken place — whether the event is the worker's conduct or anything else. A contractual variation or a worker's written consent can only lawfully provide for deductions in respect of conduct or events happening in the future. The policy reason behind this safeguard is to prevent any pressure being placed on an employee to agree to deductions and that can only be achieved if the agreement or the variation or the consent is made before the happening of the event which is the cause of the dispute between the employee and his employer (see *Discount Tobacco and Confectionery Ltd v Williamson1993 ICR 371*).

3.12 This restriction on obtaining retrospective consent does not sit well with the HMRC Guidance regarding the Scheme. Which states that "*The grant will start on the day you were placed on furlough and this can be backdated to 1 March 2020*". Thus Enabling employers whose places of work were closed (prior to the Scheme even being even announced on 20 March) to claim the grant in respect of days lost during which their employees had already been unable to work due to social distancing measures.

3.13 Many employees will have been asked or indeed required to consent, after the event, i.e. after they have already ceased working, against a backdrop, in

many instances, of the explicit or implicit threat that they may otherwise be made redundant.

3.14 It is also far from clear that obtaining an employee's agreement, to merely being "furloughed", will in and of itself be enough to signify consent. As this would not convey to an employee the specific amount by which their pay was to be reduced. Indeed, many employers have been in the dark since the Scheme was announced as to exactly how it is to operate and by how much an employee's pay is to be reduced by.

3.15 Will the Section 13 (1) ERA 1996 requirement be satisfied in the perhaps more common situation where an employer has written to an employee notifying them that they face a choice of being made redundant or being furloughed and seeking their agreement in writing to be being furloughed? It may be more doubtful that it will be satisfied, especially in a situation where the employer wrongly suggests, based on the Scheme, that it has a right to reduce the wages to 80% and secures agreement to being furloughed on 80% wages on that basis. Could that agreement be set aside for misrepresentation even though the employees should be just as capable as the employer of checking the position?

3.16 Employers who have furloughed their staff, may well find in due course that they are faced with defending multiple unlawful deduction of wages claims, against the backdrop of a legislative regime that is purposefully weighted in favour of their employees. These claims can be brought by employees who are still in employment as well as by those employees who have been dismissed. Certainly, employees who are subsequently made redundant may indeed consider that they have little to lose in making a claim. All employees and workers are eligible to claim regardless of their length of service.

3.17 If an employment tribunal finds that a deduction was unlawful it must make a declaration to that effect, and must order the employer to pay the amount unlawfully deducted. There is no upper limit on the amount that an employment tribunal can order to be paid where there has been an unlawful deduction from wages. Consequently, employers in higher paid industries who have furloughed their staff on the maximum £2,500, may well find they are facing very hefty claims.

3.18 Furthermore, employment tribunals can also impose an additional penalty, where an unlawful deduction of wages has been found, it can award a sum that it "considers appropriate" to compensate the worker for "any financial loss sustained by him which is attributable to the matter complained of". This

may cover, for example, bank charges or interest where due to the deduction the worker's bank account has become overdrawn.

3.19 Some employers that are furloughing employees, may ultimately fall into insolvency. Certain debts owed to employees, by an insolvent employer, are payable out of the public purse via the National Insurance Fund (NIF). These include paying out to employees of insolvent companies, their statutory notice pay (subject to the current maximum statutory limit on a week's pay of £538), statutory redundancy payments, holiday pay and unpaid pension contributions and liability for a Protective Award (of up to 8 week's pay subject to statutory limit on a week's pay of £538), where an employer has failed to engage in collective consultation.

3.20 However, there is also potentially a further significant sting in the tail which may be incurred by the NIF, arising out of the Scheme, which the Exchequer may well not have budgeted for. As included within the list of debts payable out of the NIF, are arrears of pay, up to a maximum overall limit of eight weeks (subject to the £538 per week statutory limit) adding up to a potential claim per employee for pay arrears of £4,304. Unlawfully deducted wages is an arrear of pay. Accordingly, a significant proportion of any wages found to have been unlawfully deducted by an employer furloughing its employees, which subsequently falls into insolvency, may ultimately end up being discharged by the NIF.

3.21 The requirement for express consent to furlough under paragraph 6.7 of the CJRS Treasury Direction must be the legally correct approach. However, given the contradictory guidance that came before (as well as information coming out of HMRC's Twitter account: https://twitter.com/hmrccustomers/status/1251171505985196038?s=12) it is clear that immediate reassurance is required for employers who did not obtain express consent at the outset that this will not affect payments to be made to them under the CJRS even if they have left themselves open to legal challenge from their employees.

4. Matters where further clarification is sought to assist employers and protect against redundancies, dismissals and failure to provide work to employees under zero hours contract

There are a number of employees who may find themselves in vulnerable positions, which are either not addressed by the Government guidance or where the guidance fails to give clarity to employers, who may in those circumstances decide not to use the job retention scheme for the benefit of employees.

The issues on which there is lack of clarity include (this is non-exhaustive but includes the most frequently asked queries and common concerns from employers and employment lawyers):

4.1 Those on zero hours contracts, this may particularly be the case for those roles in organisations funded by public funds, which the guidance anticipates will not be likely to use the scheme, but whose employers may choose not to provide work.

4.2 Those working for an employer in administration or which goes into administration during the period the scheme is operating.

i. The guidance states that administrators would not be expected to use the scheme unless there is "*a reasonable likelihood of re-hiring the workers*". This does not, however, appear to place a strict prohibition on using the scheme where there is no expectation of re-hiring but may make administrators reluctant to do so given the wording of the guidance. They may also be concerned that subsequent guidance is published which does actually prohibit them using the scheme in these circumstances, given the rate at which the guidance is being updated.

ii. The High Court's judgment in *Re Carluccio's Ltd [2020] EWHC 886 (Ch)* will provide some comfort to administrators, but, it was based on the guidance in effect at the time and subsequent guidance or regulations may change the position. Of note, the judge was satisfied that there was a reasonable prospect of re-hiring so the difficult issue of whether that is an absolute requirement was not addressed. The case also highlights the issue of whether administrators have a legal basis to pay the employees the grant they receive under the scheme from HMRC which receipt will become an asset of the company. The Court considered this could be achieved under Paragraph 99 of Schedule B1 of the Insolvency Act 1986 which enables payments of wages and

salary in priority to other expenses and payment.

iii. An expectation of re-hiring does not apply to employers not in administration who are able to furlough even if they anticipate that the worker may be made redundant after the scheme ends.

iv. If there is a re-hiring requirement, employees whose employers go into administration would enjoy a lesser level of protection than those whose businesses survive at least until 31 May 2020, but then make redundancies, despite the aim of the scheme being to avoid redundancies and terminations during the current period. This would be an odd outcome.

4.3 Those who were terminated before the furlough scheme was announced, but who could nonetheless qualify but need their employers to agree to re-hiring them. Similarly, those offered new roles, who have left their previous roles, are having offers withdrawn because they can't be furloughed, these employees are finding themselves unemployed, on benefits to the extent those are available if their previous employers will not re-hire them.

i. In particular there is confusion on the part of employers as to whether the earlier termination needs to be related to coronavirus or not – from an employee's perspective, even if unrelated, coronavirus is likely to impact that individual's ability to get another role.

The Treasury Direction states:

> *"the instruction [not to work] is given by reason of circumstances arising as a result of coronavirus or coronavirus disease."*

For an employee who was terminated for another reason and then re-hired, they were already not working, for reasons unrelated to coronavirus and therefore may not satisfy this criterion, but the reason they presently cannot work for the employer may be coronavirus related.

ii. The guidance is potentially unclear on which employees can be rehired and furloughed. It states

- Employees must be on payroll as at 19 March 2020 to qualify;

- But also*, "This applies to employees that were made redundant or stopped working for you after 28 February, even if you do not re-employ them until after 19 March." [emphasis added];* and
- And also*: "Employees that were employed as of 28 February 2020 and on payroll (i.e. notified to HMRC on an RTI submission on or before 28 February) and were made redundant or stopped working for the employer after that and prior to 19 March 2020, can also qualify for the scheme if the employer re-employs them and puts them on furlough." [emphasis added]*

The first statement from the guidance suggests that the termination date can be after 19 March, the second statement suggests termination needs to have taken effect by 19 March.

Many employees will be seeking re-hiring as a way to mitigate the economic impact of Covid-19 but employers will want absolute clarity before re-hiring that the employee will qualify for the scheme. As drafted, we would expect employers of employees whose termination dates fell after 19 March 2020 to be hesitant to re-employ even where notice may have been given prior to 19 March and therefore prior to the announcement of the CJRS.

The Treasury Direction does not deal with this issue.

iii. Unclear position on holiday means the liabilities which accrue are presently unclear;

iv. The employer may not have a role for that individual at the end of the period covered by the scheme, they will therefore have to manage that issue in months to come, with the additional liability that brings, including risk of unfair dismissal claims and payment of notice and redundancy payments.

4.4 Those whose pay varies will receive the greater of either their average monthly pay over the 2019-20 tax year (or shorter period if they have a shorter period of employment) or their pay for the same month in the prior year. This could result in employees whose hours and pay increased shortly before March 2020 suffering a drop in income (greater than the 20% drop because of furlough) during the period of furlough. This could be quite extreme if, for example, someone commenced employment on a zero hours

or part time basis, perhaps as a trial, and then increased their hours significantly on a regular basis in the latter few months of the 2019-20 tax year but still has variable pay and is therefore not a "fixed rate" employee under the scheme. This may also disproportionately affect women who are more likely to move from part-time hours to longer working periods.

4.5 Employees who have had their hours or pay reduced already, in an attempt to avoid redundancies by the employer, may find employers think they cannot be furloughed and instead seek to terminate, this is because of this statement in the guidance:

> ***"If your employees are working reduced hours***
> *If an employee is working, but on reduced hours, or for reduced pay, they will not be eligible for this scheme."*

We presume this refers to employees not being able to work part-time or on reduced pay at the *same* time as being furloughed, but it introduces uncertainty which is concerning employers and impacting their decisions.

4.6 Speed of reimbursement. Employers are concerned about how quickly the reimbursement will be paid and whether they can afford to maintain staff on furlough vs terminating them due to cashflow. Current indications from HMRC is that the scheme will be active from Monday 20 April 2020 but unclear when the reimbursements will actually be received by employers although commentary suggests in time for April payroll. This is particularly acute for employees who are on zero hours contract, in circumstances where the alternative is to not provide work under zero hours contracts and employees with less than two years' service who would not be entitled to a redundancy payment if terminated. Employers may simply take the decision to provide no work and to terminate where that has a clear benefit on the cashflow, and consequently on the business' prospect of survival.

4.7 Clarity is also required as to eligibility of employees on unpaid leave or unpaid sabbatical to a payment under the CJRS. The reference to those on unpaid leave "before or after 19 March 2020" at paragraph 6.5 of the CJRS Treasury Direction is confusing and it would be helpful to clarify that this means that that those on unpaid leave are unable to be furloughed. It would also be helpful to understand whether an individual on unpaid leave could be furloughed if it is agreed that the unpaid leave is to be brought to an end immediately before being furloughed; and that in those circumstances, an employer could claim for a payment under the CJRS.

Members of ELA Covid-19 Working Party

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