

Summary of the Bar Council Online Employment Law Q&A Event Wednesday 22 April 2020

Coronavirus Job Retention Scheme ('CJRS')

- Chambers are taking advantage of the Coronavirus Job Retention Scheme ('CJRS') by furloughing members of staff; particularly junior clerks, administrators and those for which physical presence is a prerequisite of their role i.e. receptionists and facilities managers. Some chambers have also used the CJRS to furlough members of their marketing teams, specifically where their main function relates to events management.
- A variety of approaches have been taken, with some furloughing their staff on rotation and/or choosing to fully remunerate their employees by topping-up the statutory minimum of 80% of an employee's existing salary (capped at £2,500 per month). It should be noted that where chambers top-up their employees' salaries they cannot ask the individuals concerned to undertake work on e.g. one working day of every five; furloughed staff should not do any work (see below for further information).
- The [CJRS](#) is currently available up until 30 June 2020 for employees who were on the payroll up to, and including, 19 March 2020. The minimum period of furlough is three weeks and employees can be furloughed and un-furloughed provided that the period of furlough lasts for at least that length.
- The website for employers to apply for the furlough funds opened during the week beginning Monday 20 April 2020 and furloughing can be backdated. However, chambers can only receive a grant covering the period following the date on which the relevant employee ceased work (provided that was after 1 March 2020) and that the period of furlough existed for the minimum period (as above).
- Employees need to consent, in writing, to each period of furlough, which means that if they are being furloughed on rotation with a colleague it is sensible to gain their consent at the time in respect of each separate occasion. If an additional period of furlough has not been anticipated or agreed to but chambers requires it, then the employee's consent for that period must be sought separately. Before asking an employee to be furloughed, chambers ought to consider the information that they will be providing the relevant individual with e.g. around the continuation of their existing employment rights, in relation to any changes to their salary and annual leave entitlement, and in order to ensure that they are reassured as to their status within the organisation. Chambers should be aware that, due to the frequent updates that are being made to the CJRS [guidance](#) released by Her Majesty's Revenue & Customs

(‘HMRC’), the use of pro-forma template agreements for furlough are not recommended.

- Furloughed employees must not be asked to do any work by chambers or any of their members during the period of furlough, as that will be viewed by HMRC as generating profit or providing services for the relevant organisation (which the CJRS doesn’t allow).
- Chambers must take particular care in relation to this point as the *Coronavirus Act 2020 Functions of HMRC (Coronavirus Job Retention Scheme) Direction* (‘the [Direction](#)’) requires that a furloughed employee must have been “instructed by the employer to cease all work in relation to their employment” and so does not appear to be subject to a de minimis principle that undertaking a small amount of work will be acceptable..
- As employees’ common law rights remain in existence, chambers should however ensure that they continue to meet their obligations to their staff. These obligations include taking steps to safeguard the mental health and wellbeing of chambers’ employees and, as such, it should be noted that furloughed members of staff are not excluded from joining e.g. chambers’ social events.
- Employees on furlough are permitted to undertake training and also alternative unremunerated or remunerated work with a different employer (provided that any such work does not conflict with the terms of their contract of employment i.e. they must not agree to work for a competitor etc.).
- Chambers can re-employ recently departed employees and furlough them, but only where they were dismissed due to circumstances arising as a result of the coronavirus pandemic e.g. where chambers terminated their contract of employment at an early stage of Covid-19 in anticipation of potential financial difficulties.

Government guidance

- It is worth noting the guidance does not appear to have any applicability in law and that it is not wholly consistent with the legally superior Direction issued by the Treasury. This means that chambers ought to take great care when considering what they need to implement the CJRS and it is recommended that legal advice is sought from an employment lawyer.
- Chambers are reminded that the guidance and the Direction do not, in and of themselves, change the existing common law principals applying to employees and that there is a need to ensure that employers are still acting in accordance with any relevant employment legislation and ACAS guidelines.

Holiday accrual

- Employees are entitled to a pro-rata allowance of 28 days of paid annual or statutory leave per annum, which includes the eight bank holidays in England & Wales. Some chambers choose to offer their employees additional days through their contracts of employment. Under the CJRS employees on furlough are entitled to accrue the former, but they may not be entitled to accrue the latter if the written agreement between themselves and chambers precludes them from doing so (which would amount to a variation to the employee's contract of employment).
- Furloughed employees cannot be required to take holiday whilst on furlough but, where they choose to take holiday, they must be paid their normal rate of pay regardless of any reductions that they have agreed to through the applicable furloughing agreement.
- To manage the backlog of accrued but unused holiday, chambers are able to insist that their employees take their leave during a specified period so long as they give twice the amount of notice as the duration of the holiday i.e. if chambers wanted an employee to take a week off during the week beginning Monday 11 May 2020, it would need to give them two weeks' notice (during the week beginning Monday 27 April 2020).
- The Government has also [introduced new provisions](#) allowing employees to carry over up to four weeks' annual leave entitlement in to their next two holiday years. This law applies to any holiday that the employee has not reasonably been able to take because of the coronavirus pandemic.
- Some chambers have asked their employees to agree to take their holiday on a pro-rata basis (i.e. to take two or three days per month) on the understanding that it will ensure the safeguarding of their mental health and wellbeing during an unprecedented period of considerable pressure.

Redundancies and unfair dismissal

- It seems that relatively few chambers are currently considering redundancies and, of those that are, most are simply contemplating how appropriate it might be to activate redundancy plans that existed prior to the coronavirus pandemic.
- Where chambers are contemplating making employees redundant, they are duty-bound to notify them and to enter into a period of consultation. It has been suggested that engaging with a consultancy process does not constitute 'work' for the purposes of those employees currently on furlough.
- Chambers should be aware that furloughing an employee is likely to be considered an alternative to redundancy and will form part of the consideration attached to claims

of unfair dismissal. Furthermore, it should be noted that employees who are made redundant during the current crisis and claim unfair dismissal are unlikely to be able to mitigate their loss by finding alternative employment, which means that it is in the interest of chambers to keep them on furlough and defer any decision relating to dismissal by way of redundancy.

- When making decisions relating to both the furloughing and redundancy of employees, chambers can mitigate the risk of claims of discrimination by communicating openly and transparently with their employees; ensuring that they understand the rationale for contemplating the redundancy or the furlough by evidencing the application of an objective criteria and reasoning. Chambers should be careful not to make assumptions around whether furloughing an employee might be in their interest, particularly where that employee has e.g. caring responsibilities or underlying health conditions.

Pay cuts, deferrals and other remuneration-related matters

- Chambers are at the early stages of considering the implementation of alternative cost-saving measures and some are starting to discuss the possibility of temporarily cutting salaries or reducing hours and pay commensurately. It is anticipated that the current situation will lead to a lot more scrutiny being applied to chambers' practices in relation to pay, particularly where they have historically awarded annual pay increases in line with inflation or introduced discretionary bonus schemes.
- Where chambers are looking to reduce the working hours and/or salaries of their employees they need to apply common law principals; ensuring that they have clear reasons for doing so and that the agreement of the relevant person(s) has been recorded in writing.

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Friday 23 April 2020