

COVID-19, furlough and potential claims

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Agenda

- 1. H & S detriment and dismissal**
- 2. Whistleblowing**
- 3. Selection for furlough/redundancy:
discrimination claims**
- 4. Implementation of furlough, the contract of
employment and wages**
- 5. Interplay between furlough and TUPE**
- 6. Consultation obligations**



H & S detriment and dismissal

Covid-19: a unique challenge to the workplace

- Health worker – imminent danger? PPE provision?
- Train engineer – group work? Necessary to work?
- Convenience store worker – Social distancing?
- Teacher – vulnerable family member?

“The coronavirus is the biggest threat this country has faced for decades and this country is not alone... All over the world we are seeing the devastating impact of this invisible killer.”

PM Boris Johnson

Health and Safety activities

- Automatic unfair dismissal: s.100 ERA 1996
- Unlawful detriment: s.44 ERA 1996
- Selection for redundancy: s.105(3)

- Employee only
- Potential interim relief (dismissal)
- Cf. Whistleblowing dismissal / detriment (more to follow)

Health and Safety – s.100 ERA 1996

- An employee raising his own health and safety concerns with the employers:
s.101(1)(c)
- leaving work in the face of serious and imminent danger: s.100(1)(d)
- taking protective steps to avert serious and imminent danger: s.100(1)(e)

Key concepts

- Circumstances of serious and imminent danger?
- Construed broadly: ***Harvest Press Ltd v McCaffrey*** (1999) EAT

- Reasonably believed – who?
- EMPLOYEE
- ***Oudahar v Esporta Group Ltd*** (2011) EAT
 - 1st step: Circumstances? Reasonable belief?
 - If yes, then 2nd stage: dismissed because of doing/saying that?
 - Employer's belief in circumstances?

Going away and not coming back ...

- S.100(1)(d) & s.44(1)(d) ERA 1996
- ***Harvest Press Ltd v McCaffrey*** (1999) EAT
- Danger: limited to dangers generated by the workplace itself? (e.g. machinery)
- No: "The word "danger" is used in the section without any limitation and was intended to cover any danger, however originating."
- Belief: genuine and reasonable

Potential sticking points

- Concerned individual (1)(c)
 - Health and safety committees first port of call
 - Not reasonably practicable
 - Employee must behave reasonably:
 - Belief
 - Means. e.g. *Balfour Kilpatrick Ltd v Acheson* (2003)
- Protective action (1)(e)
 - Serious and imminent danger
 - Danger to himself / others
 - Appropriate steps?
 - All circumstances: s.44(2)/s.100(2) (subjective element)
 - Negligent response: s.44(3)/s.100(3)

Which way to go?

Health and safety

- ✓ No public interest
- ✓ Concerns
- ✓ Reasonable belief

- ✓ Reasonable means/action
- ✓ Employee

Whistleblowing

- Public interest
- Information
- Objective/subjective belief
- Improper means

- Worker (detriment)

Practical outworking

- Health worker – PPE provision?
 - Reasonable belief?
 - Public interest?
- Train engineer – group work?
 - Breach of legal obligation?
 - Public interest?
- Teacher – vulnerable family member?
 - Low risk?
 - Public transport?
 - Social distancing in schools?

Selection for furlough/redundancy & discrimination claims



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Selection; discrimination

Scenario 1

Reduced staffing needs; select those to keep working; all others on furlough. Redundancy exercise at end of furlough period

Scenario 2

No particular plans for redundancies; but want to save money on staff not doing much (or anything) during restrictions

Selection; discrimination

Scenario 1

(A) Initial selection of those to continue working

(B) Subsequent selection for redundancy after furlough

- (A) = **redundancy selection**, if refusing furlough means redundancy. Objective criteria required.
- Becomes more difficult with increased numbers staying at work

Selection; discrimination

Potential claims?

- Dismissal after refusing furlough, likely to be fair
- Later redundancy exercise will need to be fair and non-discriminatory
- Particular care around mat leave etc (s.99 ERA); reg.10 MPLR 1999, in usual way

Selection; discrimination

Discrimination?

- Higher earners a problem: furlough = pay cut
- Also: general resentment over not being retained
- Risks:
 - Assumptions re ability to work at home with children;
 - Assumptions re disability;
 - Failure to make reasonable adjustments

Selection; discrimination

Scenario 2

- Saving money only, eg on **maternity pay**
- Doubt as to whether covered by scheme:
 - TD para.2.1; 2.5
 - TD para.6: “instructed” to cease work?
 - Guidance: can claim through the scheme for enhanced contractual pay

= CONFLICT, but assume possible

Selection; discrimination

Problems

- Will arise when employers look to furlough higher earners on generously paid leave
- Women on mat leave, full pay coinciding with furlough; £60k, £5k/month down to £2.5k
- Scrunity of circs in which agreement obtained
- If targeted, may well be claim under s.18 EqA 2010

Selection; Discrimination

Long-term sickness absence

- Doubt as to rules
- TD para.6.3: no furlough where SSP entitlement
- Guidance: can furlough those on *long term* sickness
- Only for long term absence after 28wks expired, or any?

Selection; discrimination

- Even on pessimistic view, >60k employee on half pay after 28 weeks could be furloughed;
- Pay cut would result
- If targeted for that reason: s.15 claim possible
- Justification? Cost only, no redundancies at time?

Selection; discrimination

Those kept at work

- Variation required for them to work from home?
- Might refuse: H & S; workstation, ability to work from home, although seems unlikely. Could furlough instead, or redundancy.
- Unwise to give any priority to those who weren't furloughed, in later redundancy process

Implementation of furlough, the contract of employment and wages



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Implementation; contract; wages

- Contractually, must be by agreement
- ***Re Carluccio's Ltd (In Administration) [2020] EWHC 886 (ChD)***
 - No agreement by silence
- Will probably want term clarifying extent of liability: only get what is received from HMRC

Implementation; contract; wages

Possible issues where clause included

- What if employer messes up and doesn't pay 80%?

- Implied term? ***Briscoe v Lubrizol [2002] IRLR 607 (CA) [PHI]***

First West Yorkshire v Haigh [2008] IRLR 182 (EAT) [IHR]

Implementation; contract; wages

- What if it turns out HMRC won't pay at all, because employee ineligible for some reason?
- Is employee “ready and willing to work”? ***Miles v Wakefield MDC [1987] AC 539 (HL)***
- See also ***Burns v Santander UK Plc [2011] IRLR 639 (EAT); Kent County Council v Knowles (09.03.12 UKEAT/0547/11)***
- Full pay due, despite clause?

Interplay between furlough and TUPE

Furlough and TUPE

- Application: TD paras.9.3; 10.1-10.2.
- Transferee can take over staff on furlough; can furlough those that transfer itself
- Administrators can furlough: ***Re Carluccio's***

Furlough and TUPE

Possible claims

- Dismissals pre-transfer: increased risk of finding they were to make undertaking more attractive for sale: ***Kavanagh v Crystal Palace FC Ltd and anor [2014] IRLR 139 (CA)***
- Don't need to do it
- Transferees will have to deal with redundancies after furlough

Furlough and TUPE

Dismissal post transfer

- More likely auto-unfair (reg.7(1)) if effected when could be furloughed
- ETO reason? Even if so, increased risk of unfairness
- Breach of contract: implied term? Shouldn't dismiss when option of furlough available at no cost

Furlough and TUPE

Information and consultation

- Election of representatives; reg.13(11)
- “Special circumstances” under reg.13(9)?

Post-furlough variations

- Reg.4(4) void where transfer is reason; 4(5): ETO
- Reg.4(5A): ETO includes change of location
- Reg.9 if transferee in administration

Consultation obligations



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Furlough and proposed redundancy

- Is a duty consult under S.188 of TULRCA engaged where furlough is proposed?
- Why is furlough being used?
- What is furlough?



Furlough principles

- If no work for workers to do
- Or no money to pay workers
- Is redundancy inevitable? But for

Considering, steps, proposals ...

- Variation of terms (only)
 - Intention to seek agreement
 - Involvement of unions (if applicable)
- What if furlough cannot be agreed?
- What is the plan?
- 20+ people redundant? S.188 engaged

Practical problems

How would you ...

- Hold elections?
- Brief the workforce/unions?
- Consult?
- Protective awards?

- **Special circumstances: s.188(7) TULRCA**

(7) ... special circumstances which render it not reasonably practicable for the employer to comply ... the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances.

Q&A



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Finally

Thank

you!

