CORONAVIRUS AND EMPLOYMENT LAW
Newsletter from John Sprack

This bumper edition of the Newsletter deals with the package of employment legislation introduced by the government in response to the Covid 19 crisis. The job retention scheme, with the furlough scheme at its heart is different from anything previously to be found in the employment landscape. The reforms to statutory sick pay and the package for the self-employed are also significant.

But the crucial point for employment lawyers is the extent to which these new phenomena will impact upon the familiar framework of employment law. In particular, what effect will they have on the law relating to termination and dismissal, and that relating to discrimination? This newsletter poses a few of the questions which are raised, and attempts to come up with some answers.

At the outset, it is worthwhile outlining the package briefly. It is worth remembering the over-riding public policy aims involved. In summary, they are

- to delay and/or mitigate the impact of the pandemic upon public health, and
- to minimise its effects upon the economy by propping up business and providing some support to the workforce.

Central to those twin aims is the furlough scheme, which can be summarised as follows:

- the scheme is open to employers with a payroll scheme on 28 February 2020 and a UK bank account
- they can use it to benefit employees on their PAYE payroll on 28 February 2020
- employers will receive a grant from HMRC to cover the lower of 80% of the regular wage of the employee furloughed, or £2500 per month
- employer national insurance contributions and minimum automatic employer pension contributions are additional to that limit

- if the employee's pay varies, employer can claim the same month's earnings from the previous year, or average earnings from the 2019-2020 tax year
- the 80% calculation is based on pre-tax salary as at 28 February
- there is no requirement that employees who are furloughed would be made redundant if it were not for the scheme
- eligibility depends on being on PAYE, rather than fitting the legal definition of "employment"
- the scheme covers full-time and part-time employees, agency workers and those on flexible or zero hours contracts
- when on furlough, an employee cannot undertake work for or on behalf of the employer
- the minimum furlough period is three weeks
- an employee can be furloughed on multiple occasions, so that the employer can rotate furlough among its employees
- while the employer decides which eligible employees to place on furlough, the employee in question must agree
- if the employer does not top up the wages with the additional 20%, the employee must agree or the employer will be in breach of contract (unless there was a pre-existing clause in the contract allowing variation)

The package of legislation announced by the government includes an increased statutory sick pay entitlement, and measures to assist the self-employed. However, these measures do not have the same implications for dismissal and discrimination, so I will not be dealing with them in this Newsletter.

So what questions are posed about dismissal and discrimination by the new scheme?

Frustration

Turning to dismissal first, there is a line of argument that the current situation means that employers who are particularly hard-hit can avoid dismissing employees by claiming that their contracts are frustrated. If that is so, there could be no claim for unfair dismissal: *GF Sharp and Co v McMillan* [1998] IRLR 632 EAT. Before moving on to the merits of the argument, it is worth noting the terms of s 136 of the Employment Rights

Act 1996 which could be used to contend that the event in question was a redundancy, so triggering the right to a redundancy payment.

But is it frustration? The test set out in *Davis Contractors v Fareham UDC* [1956] AC 696 HL is that frustration must be based upon an unforeseen event which makes the performance of the contract impossible or radically different. In what way is this more true of the current situation than of an event causing insolvency, the result of which is to make employees redundant (s 139(1) of the ERA 1996)? Further, there is Court of Appeal authority to the effect that a party which is at fault is not entitled to plead frustration: *FC Shepherd and Co Ltd v Jerrom* [1986] ICR 802 CA. With the availability of government subsidy through the furlough scheme, the employer would be at fault in refusing to honour the employment contract, and hence would be barred from claiming frustration.

Unfair dismissal

So the right of an employee (generally with two years continuous service) to claim unfair dismissal continues to live during the crisis. What would be the position, then, of an employee who refuses to work because of fear of contagion? Can they be disciplined? Can they be dismissed? It would seem to be relevant whether they are in a vulnerable category. If an employee in England refuses to go into work in accordance with advice from Public Health England, and the employer takes disciplinary action against them, I would suggest that an employment tribunal would refuse to back the employer's actions. If the action was to dismiss, it would be likely to be held outside the band of reasonable responses. If it was to issue some other disciplinary action, a written warning say, then it could well constitute breach of the duty of trust and confidence, such as to give rise to a constructive dismissal claim.

Automatically unfair dismissal

So far, the scenario considered has been that of "ordinary" unfair dismissal. That, of course, would only be at the disposal of the employee with two years' continuous employment. But there may be other provisions which the employee could pray in aid, even without that employment record. Section 100 of the ERA 1996 will have relevance to an employee who leaves, or refuses to enter, the workplace which is unsafe. If the employee reasonably believes the circumstances in the workplace are dangerous, and the danger serious and imminent, they will be entitled to the protection of the section. The employee will not be covered if they could reasonably

have been expected to avert the dangerous circumstances. If they are dismissed for leaving or proposing to leave the workplace, or taking appropriate steps for self- protection, the dismissal will be automatically unfair. Importantly, the employee can bring a claim for unfair dismissal from the first day of dismissal. Further, there is no cap upon the compensatory award in such a case. The criteria for protection set out in s 100 seem particularly apt to cover the employee genuinely and reasonably in fear of traveling into work, or remaining there when safeguarding steps are inadequate.

Must the employee consent?

As far as the application of the furlough package itself is concerned, the first question is whether the employer can impose furlough on an employee. The government guidance emphasises that this depends upon the contractual position. The practical answer depends on what the employer is actually proposing to do as a result of the furlough. If it is to limit the wages of the employee to the 80% received by way of subsidy, then agreement is necessary unless there was a pre-existing term in the employee's contract which permits such an arrangement. If the employer is proposing to top up to continue full wages and benefits, however, then there would not seem to be any need for consent, subject to those few occupations which require a right to work for reputational reasons and the like.

So consent for furlough would normally be required. This might run up against communication problems in the present situation. Can consent be implied? Courts and tribunals are reluctant to imply consent to significant contractual changes, particularly where these work to the disadvantage of the employee (e g the employer refusing to top up the extra 20%). In practice, there would have to be communication by the employer, by post or email if face to face contact was not possible. If the offer was clearly set out, and the employee then accepts pay under the scheme, I would suggest that consent is likely to be implied.

At this point, it is worth taking a reality check. In the real world, would the employee have much choice? If they refuse to be furloughed, redundancy would seem to be the likely alternative. Of course, that may be an outcome which some employees would welcome, but they must be in a small minority and in any event would have to take care not to lose the right to redundancy pay as a result of their refusal.

The question of topping up raises the issue of: what happens if the employer refuses to pay the additional 20%, there is no contractual right to reduce salary, and the employee refuses to agree to furlough. Is the employee likely to succeed in a claim for constructive dismissal? Certainly, the unilateral reduction in salary would constitute a fundamental breach of contract. If the employee resigned in response without significant delay, then he or she would have been constructively dismissed. That does not mean, however, that the dismissal would be unfair. The case of *Garside v Laycock and Booth* [2011] IRLR 735 EAT provides some assistance as to what might be regarded as fair in a situation where an employer makes wage cuts without consent .

In *Garside* the employer needed to cut costs and increase profit, It asked employees to accept a pay reduction of 5%. The claimant refused and was the only one to hold out against the change. He was dismissed and the tribunal found it was unfair. The EAT upheld the appeal. It was wrong to say that an employer may only offer less favourable terms if the survival of the business depended on it. Nor was it right to assess reasonableness by asking what was reasonable for the employee to do. The issue was whether the employer, having established SOSR (some other substantial reason), acted reasonably. Langstaff P in the EAT indicated that whether the employer acted reasonably had to be judged by the whole of the test laid down in s 98(4) of the ERA 1996. The decision must be 'in accordance with equity' with the implication that the cut should be fairly administered across the board. It must also involve a fair procedure. In the scenario which we are currently dealing with, a constructive dismissal could be fair, but it would need to comply with those criteria.

Redundancy

The reason upon which the dismissal in *Garside* was based was SOSR. What impact does the legislative package introduced to meet Covid 19 have upon redundancy as a reason for dismissal?

Clearly the closure of a business, or a cessation or diminution of its requirements for employees will meet the statutory definition of redundancy (s 139 ERA 1996). In other words, there may well be a potential redundancy situation. But the employer must still act reasonably in deciding to dismiss for redundancy, to ensure the dismissal is fair, and to avoid the

prospect of unfair dismissal claims from employees with two years or more service.

The yardstick for fairness in redundancy decisions is laid down in *Williams v Compair Maxam* [1982] ICR 156 EAT. It lays emphasis on consultation, which should be both collective (with the workforce as a whole), and individual (with those under threat of redundancy). Crucially, it requires the consideration of alternatives to redundancy. Furlough must surely be at the forefront of the reasonable employer's mind as an alternative. While that does not mean that redundancy is ruled out, it does make it distinctly less likely, given that 80% of salary and associated costs can be recovered. Whilst there is still the possibility that an employee will refuse furlough unless the additional 20% is part of the deal, the consultation process and the absence of alternatives should resolve the immediate necessity to lose jobs. Once the subsidy package comes to an end, it may be a different story, but that is an issue for another day.

Choosing which employees to furlough

The availability of furlough raises a different problem: how should an employer choose which employees to select for furlough? Probably most employers will begin the process of selection for furlough by seeking volunteers. The suspicion is that the majority of employees will find the prospect of drawing at least 80% of their wages, while being positively prohibited from working, an attractive one.

From those volunteers, the employer is likely to eliminate from the list for furlough those who are needed to ensure the continued operation of the organisation. On the other side of the equation, the employer may seek to include in the list for furlough those who are in the vulnerable age group and those who are vulnerable because of a disability. Will application of these latter positive criteria amount to discrimination?

As far as preference for the elderly is concerned, that would certainly be positive discrimination on grounds of age. However, direct discrimination with regard to age is permitted under the Equality Act 2010 s 13(2), provided that it is done for a legitimate aim and by means which are proportionate. In this context, the clear public health policy behind the furlough scheme is a legitimate aim, and selection of those who are most vulnerable is likely to be viewed as proportionate.

Where disability is a factor in selection for furlough, then there is no standing for a person to claim that they were discriminated against because they were not disabled. Disability (provided it falls within the statutory definition) is a prerequisite for claiming disability discrimination.

There will also be a strong argument, other things being equal, for an employer to award furlough to those who have childcare commitments as a result of school closures. It could be contended that a failure to do so would constitute indirect discrimination against women.

Overall, however, it is suggested that there is no need for employers to draw up a matrix such as would be appropriate in a redundancy exercise. What is required is that the employer should consult with staff, make it clear that the above factors have entered into the decision making process, and make sure that they do.

Anecdotally, ti appears that some employers are stating that they will reward staff who work on, rather than being furloughed. The rewards talked about include bonuses, extra holiday entitlement and protection from future redundancy when full operation is resumed. The converse reasoning applies to that discussed above in discussing selection for furlough.Such rewards could potentially render the employer liable to claims for disability, age or sex discrimination. In the aftermath of the crisis, if a redundancy exercise becomes necessary, the employer will have to take care to maintain its integrity and transparency.

Collective consultation

The other aspect of redundancy which requires consideration is whether the duty to undertake collective consultation is triggered where the number potentially involved is 20 or more (s 188 TULR(C)A 1992). The purpose of furlough is, at least in part, to avoid redundancy. It follows that redundancy may be the alternative fate for at least part of the workforce. A potential argument for the employer is that the furlough process is intended to avoid redundancy. However, in *Hardy v Tourism South East* [2005]IRLR 242 that argument was rejected, and it was held that the duty of collective consultation was engaged even though the employer intended to avoid redundancy.

Clearly carrying out collective consultation will face communication barriers in the current situation. Will the employer be able to raise the “special

circumstances" defence set out in s 188(7) of the 1992 Act? In order to establish that defence the employer must show that it was not reasonably practicable to comply with the timetable set out (30 days for 20 or more employees, 45 days if the number is 100 or more). If that is done, the employer must still take such steps as are reasonably practicable in the circumstances. Further, the "special circumstances" defence does not provide immunity from the employer's duty to ensure that there are appropriate representatives elected by the workforce and that they have access to affected employees and appropriate facilities (s 188(1A) and (5A). In the circumstances, the employer will no doubt be well-advised to complete the HR1 form. At the same time, it will wish to make it clear that it is seeking to avoid redundancy by making use of furlough, and that those who agree to furlough are not at risk of redundancy.

It is worth emphasising that at the time of writing, the necessary legislation to implement the job retention scheme has not been published. This link gives the latest guidance:
https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme

When the legislation itself comes out, I will aim to provide an update on my website.

I will be dealing with these issues in a training course in the near future. The session will be run as a virtual classroom by Central Law Training on April 17th at noon. What that means is that the session will be live, and there will be opportunity for questions. You can book using the following link:
https://www.clt.co.uk/eng/legal-training/coronavirus-and-the-law-relating-to-dismissal-and-discrimination/

Previous editions of this Newsletter, dealing with various employment law topics, are to be found on my website www.johnsprack.co.uk

I hope that all my readers are in good health, and keeping safe

John Sprack
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