Consulting with furloughed employees about redundancies and changing terms

Colin Leckey and David Hopper explore the challenges of consulting remotely and holding remote elections for employee representatives when staff are on furlough or working from home

Colin Leckey (pictured) is a partner and David Hopper is a managing associate in the employment, immigration and reward division of Lewis Silkin LLP

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The Covid-19 pandemic has created a situation where many employees are furloughed under the government's Coronavirus Job Retention Scheme (CJRS) or working from home and likely to be self-isolating or practising social distancing. This makes it a challenge for employers to carry out collective and individual consultation which would normally be done in person.

Issues under the furlough scheme

Before coming to the practicalities, it should be noted that questions have arisen as to whether employers are even entitled to carry out individual and collective redundancy consultation during furlough. There are two specific issues to consider here. The first is whether employers can still use the CJRS once they intend to make redundancies. It is very likely that they can (as discussed in our previous article on notice pay during furlough).

The second issue is whether an employee consulting with their employer is 'working', which is prohibited by the furlough scheme. The HM Revenue & Customs (HMRC) guidance does not explicitly state whether collective or individual redundancy consultation can be carried out during the furlough period, or whether it would fall under the prohibition on doing work. It is not making money for the employer or providing services, however, so is most likely permissible.

Employee representatives can be furloughed and continue in their role as a representative if they are only being consulted about possible redundancies or related matters. The HMRC guidance says that employees who are union or non-union representatives may undertake duties and activities for the purpose of individual or collective representation of employees or other workers while they are on furlough, so long as they are not providing services or generating revenue. This strongly suggests that individual and collective consultation with employees is also allowed.

Collective consultation with a workforce on furlough

Employers may wish to consult collectively during the furlough period if they know they are likely to need to make redundancies post-furlough and want to begin consultation in good time, as required under the collective dismissal legislation. Providing certainty and clarity for staff as soon as possible is another benefit. Employers may also wish to use the time employees spend on furlough to absorb part of the cost of the consultation process. However, the employer should be clear that it will review the need to make redundancies if the business situation improves.

Whether employers need to consult collectively with their workforce depends on the number of employees involved. Under the Trade Union and

Labour Relations (Consolidation) Act 1992 (TULRCA), collective consultation is required where an employer proposes to dismiss 20 or more employees 'at one establishment' in a 90-day period for a reason unrelated to the individual. This encompasses both 'classic' redundancies and 'fire and rehire' exercises aimed at imposing less favourable terms. If fewer than 20 redundancies are anticipated, only individual consultation is required.

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Collective consultation must start 'in good time' to allow the relevant discussions to take place and at least:

- 30 days before the first of the dismissals takes effect where between 20 and 99 dismissals are proposed; or
- 45 days before the first dismissals where 100 or more dismissals are proposed.

The new flexible furlough scheme which started on 1 July 2020 may allow some consultation to take place in person on days when employees are working. However, many employees will still be working from home and those on flexible furlough are likely to be in work at different times, meaning remote consultation will still be required even where some employees have returned to the workplace.

Carrying out information and consultation obligations remotely has generally been regarded as permissible before the coronavirus pandemic and it is unlikely to be regarded as a problem in the current, highly unusual circumstances. Employers can make use of technology to hold online 'town halls' to inform employees about proposed measures and should prepare to run several of these to ensure the whole workforce is notified properly rather than via the grapevine.

Collective consultation with employee representatives could also be done remotely. However, employers need to make sure that:

- all the representatives have the technology required to participate;
- only relevant parties receive an invitation to the online meeting;
- the line or portal for hosting the meeting is secure and compliant for data protection purposes; and
- they set a clear protocol in advance about how the meeting will be run.

Alternatively, it may be possible to collectively consult in person after assessing the risks, implementing protective measures and considering current government guidance

Remote elections of employee representatives

Consultation should take place with the 'appropriate' representatives of the affected employees. If an employer recognises a trade union in respect of the affected employees, it must consult with the union representatives. Otherwise, it can choose whether to consult with existing employee representatives who have the appropriate authority (for example a staff consultative forum, depending on its mandate) or representatives elected specifically for the purposes of the consultation.

The representatives must be given a range of specified information and then consultation should cover, as a minimum, ways to:

- avoid the need for dismissals;
- reduce the number of dismissals; and

Special circumstances

Section 188(7) of TULRCA provides a defence to a failure to collectively consult where there are 'special circumstances which render it not reasonably practicable' for the employer to comply with the requirements. This defence applies to failures to consult in good time, failures to consult on the required topics with a view to reaching agreement or failures to provide the required statutory information on which consultation is based.

There is no definition of 'special circumstances' but an impending insolvency situation on its own is not enough. The case law also indicates that it is difficult to rely on this defence to justify a complete failure to consult except in the most extreme circumstances. If a business has cash to keep it going and is making redundancies to remain profitable (or to make a smaller loss), it will be practicable to consult, even though it may be costly – consultation is regarded as a 'cost of business'.

The CJRS, coupled with other support for business (such as guaranteed loans, no business rates for the retail, hospitality and leisure sector, and deferral of VAT payments) will make it difficult to rely on the special circumstances defence to justify no or short collective consultation. It is therefore important for employers to comply with the collective consultation requirements as best they reasonably practicably can, whether they are making collective redundancies or changes to terms via a 'fire and rehire' process.

The defence may work best if there is a procedural failing, so long as the employer has taken what steps it reasonably can. The measures an employer took in the circumstances may also reduce the size of the protective award an employment tribunal might make for failing to consult, even if there was a breach of the requirements. The starting point for a protective award is 90 days' uncapped pay per affected employee, with the employer required to show why that amount should be reduced. So taking all practicable steps, including remote consultations – even if they are imperfect – is important in reducing what might otherwise be a large penalty.

- mitigate the consequences of the dismissals (for example, support for dismissed employees).

Consultation must take place with a view to reaching agreement but the employer does not have to agree with the representatives' views.

If employees have not already elected representatives, employers will need to consider what arrangements they need to make to ensure any election is fair. This may include arranging online voting. The voting process is supposed to be secret so far as reasonably practicable, which can present a challenge when it cannot happen in the physical workplace. Some possible options are to:

- use a third-party online voting platform, which ensures anonymity but may come at a cost;
- design an internal system – for example, an employer could nominate one independent person to run the ballot, although strictly this would not then be a secret election; or
- use an existing consultation body, provided its mandate will extend to the redundancy consultation.

Individual consultation with furloughed workers

Once collective consultation with representatives is sufficiently far advanced, individual consultation with affected employees is also likely to be required. The furlough guidance makes it clear that the ordinary redundancy principles continue to apply during this time, although, where collective consultation has been carried out, it is generally possible to follow a shorter one-to-one process.

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There are various issues to be aware of when consulting individually with employees who are on furlough or working remotely. First, the employer needs to think about how it will contact them and send the relevant paperwork. Does it have employees' home email addresses (if they no longer have access to office email or never had it) and a home or mobile telephone number? Does the employer know whether the employees have access to a computer?

For people without access to a computer, employers could post or courier documents. If individuals will be reading emailed documents on a smartphone, the employer should consider formatting issues and what type of documents to send.

If employers propose to carry out the individual consultation meetings by video conferencing, they should check the employee (and, if applicable, their companion) will have access to a computer or smartphone. Alternatively, employers can consult by conference call but should bear in mind it will be harder to see how people are reacting to the news. If someone is on flexible furlough and in the workplace for some of the time, it may be possible for some (or all) of the consultation to happen face-to-face (with appropriate social distancing) on days they are working.

It is commonplace to allow employees to be accompanied at redundancy consultation meetings (and any appeal meeting) by a colleague or trade union representative, although this is not a statutory right. The furlough guidance has confirmed that

Tips for employers for consulting individually with furloughed or remote workers

- Ensure that only relevant parties receive an invitation to the online meeting, and that the line or online portal for hosting the meeting is secure and compliant for data protection purposes.
- Ask the employee to attend the virtual meeting from a private and quiet room, if possible. Check if their individual circumstances will make it difficult for them not to be disturbed.
- Ask the parties to speak clearly, let them ask questions when necessary and confirm their understanding. Ask the parties to mute their microphone when they are not speaking to avoid any distractions for other participants. Make use of online tools, such as screen sharing, to refer to documents.
- Explain that you will take notes or minutes of the meeting and send the employee a copy. Remind them that they may also take their own notes during the meeting.
- At the start of the meeting, ask the employee to confirm that they (or any companion) are not recording the meeting. If you are particularly concerned about this, you could remind them that they do not have a legal right to record the meeting and this may be viewed as a breach of trust and confidence as well as misconduct. You could also explain that covert recording may be in breach of data protection legislation. Remember, though, that recording may be a reasonable adjustment for someone with a physical or mental impairment.
- Allow employees time to speak privately to their companion during the meeting.
- During the meeting, check with the employee whether they need to take a break in the same way as you would during an in-person meeting.

Reference point

CJRS guidance for employers: www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme

CJRS guidance for employees: www.gov.uk/guidance/check-if-you-could-be-covered-by-the-coronavirus-job-retention-scheme

acting as an employee representative does not amount to 'work', so colleagues who are furloughed can still act as a companion without the employer risking the furlough grant.

Bearing this in mind, it is essential to conduct communications and consultation meetings fairly and with regard to employees' personal circumstances. The employer should support employees appropriately after any meetings and hold regular catch-ups to check on their wellbeing. There should be a clear method for employees to raise questions and discuss concerns.

In practice, it will be difficult for employers to ensure nobody else is present in the room while holding the meeting remotely.

Employers are under no legal obligation to allow the employee to be accompanied by a friend or a family member. However, they may allow this under their own policies and procedures or wish to do so as a discretionary measure in the current circumstances. In practice, it will be difficult for employers to ensure nobody else is present in the room while holding the meeting remotely (especially if this is by phone rather than videoconference). So it might be sensible to allow a friend or family member to accompany the employee.

A redundancy process is always stressful but is likely to be particularly so in the current circumstances, due to the combined effect of the pandemic, lockdown and uncertainty about the future and finances. Employees are already likely to be stressed and anxious and may be struggling with their mental health.

Employers should consider other things they can do to support individuals, such as providing counselling, other professional medical help or employee support helplines. They could also offer redundancy outplacement services and point employees to useful websites and resources.

Although dismissals for business reasons related to coronavirus are likely to be a genuine redundancy, dismissals can still be unfair if the employer fails to follow the correct procedures. These include a fair selection process, proper individual consultation and consideration of alternatives to redundancy.

Changing terms and conditions

Employers may decide to push for changes to employees' terms and conditions (such as reduced pay) as an alternative to redundancy. If the employer recognises a trade union for collective bargaining purposes, it may be able to agree the change with the union. Depending on the terms of any collective agreement, this may either be binding on all employees or may at least facilitate individual agreement.

If there is no union, the employer must obtain individual employee consent in writing (in the absence of clauses permitting unilateral changes, which are extremely rare).

If the employer is seeking agreement before it has formulated any proposal to dismiss 20 or more employees, this will not trigger collective consultation under TULRCA. This means that the employer must not have formulated a definite plan that is likely to result in dismissals if employees do not agree to the proposed change. If it has already formulated a proposal to dismiss as redundant anyone who does not agree, or to force the change through by dismissing and re-engaging if necessary, then collective consultation will arguably be triggered.

If an employee refuses to agree to the proposed change, the employer will need to consult individually with them and attempt to explain the reasons and necessity for the proposed change. If the employee still refuses after additional time and further discussion, the employer will need to decide whether to impose the change by dismissal and re-engagement on the new terms or adopt different measures. Dismissals in these circumstances can be fair, so long as there is a clear business need for the change and the employer has followed a fair process. ■