

3 Aug 2020

Coronavirus (COVID-19): redundancy guide

Understand how the COVID-19 pandemic and the Coronavirus Job Retention Scheme impacts on redundancy procedures

The coronavirus (COVID-19) pandemic poses a significant threat to people's health and huge disruption to businesses. People professionals will need to rapidly adapt their practices and procedures to suit the current situation but also to ensure their business continuity and viability. Part of this response could involve redundancies. The nature of the virus will mean that employers must consider adapting their usual redundancy procedures, especially considering the ability to furlough employees under the Coronavirus Job Retention Scheme. Below, we have outlined how the Coronavirus Job Retention Scheme affects redundancy procedures.

For more specific questions relating to coronavirus, visit our [Coronavirus hub](#).

How does the Coronavirus Job Retention Scheme affect redundancy procedures?

On 20 March 2020, the UK Government announced the implementation of the Coronavirus Job Retention Scheme, to help businesses deal with the economic consequences of the Coronavirus (COVID-19) pandemic and consequent lockdown measures. Details of the scheme are set out in HMRC Guidance Notes (for both [employers](#) and [employees](#)), a [Treasury Direction](#), and [periodic updates](#). The Scheme aimed to help employers whose operations have been severely affected by coronavirus until it ends on 31 October.

The Scheme allowed organisations to 'furlough' employees, ie place them on a temporary leave of absence. Under the first phase of the scheme (until the end of June) employers could reclaim 80% of furloughed staff wage costs from HMRC, subject to a cap of £2,500 per month. A further flexible phase of the scheme is operational between 1 July and 31 October. During this phase employees can be partially furloughed, combined with part-time working. Employers need to pay for any working time but can still claim a grant for periods of furlough, subject to certain conditions. Employers need to pay employers' NI

and pension contributions from August onwards and contribute 10% and 20% towards furlough pay in September and October respectively. Employees must agree to being furloughed (and to any decrease in salary). They must be furloughed for a minimum of three weeks, and cannot carry out any work for their employer during the first phase of the scheme but after 1 July any pattern on working can be agreed and any furlough periods can be claimed for in blocks of at least 1 week.

The usual rules around redundancy have not been changed. However, whilst the furlough scheme is in place (until the end of October) there are some additional considerations to be borne in mind, such as:

- **Logistical issues** which will need to be overcome if redundancy consultation processes take place remotely with staff who are furloughed.
- Organisations will have to think carefully about ensuring that redundancy **pooling and selection criteria** are fair. In particular, if an organisation is proposing to select staff for redundancy based purely on the fact that they are furloughed, there is a risk that this approach may give rise to an unfair or even discriminatory redundancy process and/or dismissals. The extent of the risk will depend on the reasons for staff having been placed on furlough in the first place, and the selection process that was used to do this.
- Staff are entitled to be paid their full salary during their notice period even if they have only been receiving the relevant percentage of furlough pay during furlough, although this depends on whether the notice period is contractual or statutory. Redundancy pay should be based on full salary not furlough pay. Any outstanding annual leave should also be paid at the full rate of pay.
- Redundancy dismissals may be an **unfair dismissal**, if they take place in circumstances where an employer did not properly consider alternatives, including retaining the employee on furlough if possible and the Job retention bonus explained below.

The duty to explore all alternatives includes taking into account the Job Retention Bonus of £1,000 which the government is offering to UK employers for every furloughed employee who remains continuously employed until the end of January 2021. This is a one-off payment to encourage firms to retain furloughed workers.

An important point to bear in mind is that new Government guidance is being published on an almost weekly basis and fundamental changes have been made since the first guidance notes were published. This means it is important for businesses to keep matters under close review.

Redundancy situations

For many organisations placing staff on furlough, redundancy is likely to be considered at some stage; if not in the immediate term, then potentially whilst staff are on furlough or when the furlough scheme ends on 31 October 2020. If so, the usual rules around redundancy processes, including around what constitutes a genuine redundancy situation and a fair process, will still apply.

However, the question of whether and/or when a genuine redundancy situation has arisen, may not be entirely straightforward. For example, to what extent will employers be expected to leave staff on furlough and claim the staff costs associated with doing so from the scheme, rather than making those staff redundant whilst the scheme remains operational? Does making redundancies whilst the scheme is operational make those redundancies more likely to be substantively and/or procedurally unfair, unless the employer had a particularly compelling redundancy situation? Alternatively, does serving staff with notice of redundancy whilst they are furloughed constitute an “abuse” of the scheme that would result in any grants paid by the Government being withdrawn? The Government have confirmed that employers can still make furloughed employees redundant but have urged employers to avoid making redundancies if they can.

As the scheme nears its end on 31 October, and employers are faced with making contributions to furlough pay, and will keep the question of whether staff can be brought back to work under review, or whether redundancies may be necessary. The Guidance Notes are clear that redundancies may be a necessity: as the scheme nears its end employers must make a decision, depending on their circumstances, as to whether employees can return to their duties and, if not, it may be necessary to consider alternatives or ultimately termination of employment (redundancy). In such cases, the usual employment law rules would apply in relation to the substantive and procedural fairness of any such redundancy process.

Redundancy consultation

The usual obligation to consult staff both individually and collectively about any redundancy proposals and allow them to comment on these before they are finalised, and rules about what a fair consultation should entail, will continue to apply irrespective of whether staff are furloughed or not. Though the question of what a fair process will look like in the circumstances may be slightly different.

One of the primary issues to bear in mind when undertaking redundancy consultation processes with staff who are furloughed, will be the obvious logistical issues which are likely to arise from consulting with staff remotely. Redundancy consultation meetings will still need to take place individually and/or collectively, as appropriate, but these may have to be arranged and carried out remotely; for example, via video call or conference call or

in writing. Employers may need to build extra time into the consultation process to allow for any logistical issues which may arise.

Employees should still be given the right to be 'accompanied' to redundancy meetings (if that is your normal practice), even if such meetings are carried out remotely or virtually. Employers will therefore have to consider how best to enable this – the most likely solution being via video call or similar. Where video calls are not possible telephone will be required.

Employees and staff representatives will still be allowed to 'accompany' colleagues to redundancy meetings even if they themselves are furloughed, as the [updated employer's guidance](#) on the coronavirus job retention scheme confirms that 'whilst on furlough, employees who are union or non-union representatives may undertake duties for the purpose of individual or collective representation of employees or other workers.'

If the collective consultation is triggered because an employer will be making 20 or more redundancies in a 90 day period; the employer will need to ensure that they consult collectively with the appropriate Trade Union or existing staff representatives, and that they meet the 30 day (or 45 day for 100 or more redundancies) deadline for commencing consultation. However, the effect of the pandemic may mean that there are practical difficulties with appointing representatives in the normal way and/or undertaking full consultation. These issues could be more pronounced where there is no recognised Trade Union or existing staff representatives (meaning an election has to take place before consultation can begin).

Employers should bear in mind that the furlough scheme is due to come to an end on 31 October 2020; and consideration should be given to how this may impact on the timeframe for any redundancy consultation period (whether that be on an individual or collective basis). More information is available in our [returning to the workplace guide](#).

The special circumstance defence is less likely to apply to redundancies happening now because the initial urgency of redundancies may well have passed now and almost certainly will have passed once the Scheme ends.

Compassion during a redundancy situation

A redundancy situation can have a significant impact on the morale and wellbeing of employees in the organisation. Fears about job security and income loss have risen during the pandemic and many people's mental health is already at a low ebb. The economic climate and predicted large-scale increase in unemployment will further exacerbate some people's concerns about finding another job.

Therefore, it's important that employers approach a redundancy process with compassion and treat everyone with dignity, respect and kindness. Handling redundancy

in a humane and compassionate way can make a significant difference to how people cope with the process. It will also have an impact on other employees in the organisation, who can be affected by the unsettling experience of seeing their colleagues being laid off and feeling their own job security is at risk.

Regular, honest and two-way communication throughout the redundancy process is vital so that employees don't rely on the grapevine to hear about what's happening. Take time to explain the reasons for the redundancy and why it's a hard business decision, and the actions that were taken to avoid redundancy and facilitate redeployment. Make sure that everyone knows their contribution to the business was valued and that redundancy selection is in no way a reflection on them personally.

Be prepared to deal fully with people's feedback and concerns, and ensure that the information given out is clear, and understood by those concerned. Giving notice is a difficult task and managers should be trained to handle redundancies with sympathy and clarity. They should feel confident to have supportive and sensitive conversations with people, listen with empathy and signpost anyone who needs further wellbeing support to the right resources.

Being selected for redundancy can have a significant detrimental impact on someone's mental health, regardless of their previous health history and personal resilience. Immediate and ongoing support should be available to the individual to safeguard their health and wellbeing. This should include access to occupational health assessment where requested or needed, as well as counselling and other services via an employee assistance programme (EAP) if this is available. Some EAPs provide continued support for employees who have been redundant for up to three months after employment has ceased, so try to make this available and that people know how to access it.

Where possible, outplacement advice should also be offered to leaving employees to maintain their morale and help them find alternative employment. Employees may need support to accept reality and mount an effective job search. A well-designed redundancy programme should enable employees to refresh their interview skills, redraft CVs and reply effectively to job advertisements.

Redundancy selection process and criteria

A key consideration in any redundancy process will be the criteria by which staff are pooled, and selected, for redundancy. To be fair, selection must involve the fair application of objective selection criteria to a reasonably constituted pool of employees. The selection criteria and process must not be directly or indirectly discriminatory in any way. Staff should be consulted about the selection criteria / process before these are finalised.

In the case of a redundancy process involving furloughed employees, these requirements

remain. The Guidance is clear that, for furloughed staff, usual employment law and employee rights will apply, including protection from unfair dismissal and discrimination. So employers will have to be careful to ensure that selection pools and criteria are fair, objective and reasonable; are not directly or indirectly discriminatory; and that staff are consulted about them before they are finalised.

Automatically selecting employees for redundancy purely on the basis that they have been furloughed could be problematic for a number of reasons:

- First, the question of whether being on furlough would be a fair basis for selection for redundancy will depend on how staff were selected for furlough to begin with, what the process and criteria used were, and whether these were fair in the circumstances and remain a fair basis on which to select for redundancy. It is likely that an employer would have to reassess the fairness of pools and selection criteria (and consult staff about this) at the point that redundancies became necessary, to ensure that any ensuing redundancies were not substantively or procedurally unfair.
- Second, if staff have been put on furlough because they have caring responsibilities, or are shielding for health reasons, subsequently pooling and/or selecting these employees for redundancy is likely to constitute indirect discrimination based on sex, disability or age. If the principle reason for furloughing staff is that they have child-care responsibilities, a health condition or are more vulnerable to COVID-19 because of their age, it will be important that the employer ensures that they are not placed at greater risk of redundancy by virtue of the fact that they have been furloughed.
- Third, as mentioned in above, there remains something of a grey area around the question of whether selecting someone for redundancy when they could remain on furlough may result in the ensuing dismissal being unfair. Employers need to consider whether it would be reasonable in the circumstances (taking their financial position into consideration) to wait until the furlough scheme came to an end, and/or the organisation was able to claim decreased staff costs under the scheme, before effecting any redundancies. This assumes that the reason for the redundancy was or is coronavirus. If it was unrelated this is less likely to apply; but should still be considered.

Employers should bear in mind that the duty to explore other alternatives to redundancy and look for suitable alternative employment.

Redundancy dismissals

The guidance indicates that employees may be made redundant while on furlough, or afterwards. The [note for employees](#) states *your employer can still make you redundant*

while you're on furlough or afterwards and the [note for employers](#) states *when the government ends the scheme [employers] must make a decision, depending on [their] circumstances, as to whether employees can return to their duties [and] if not, it may be necessary to consider termination of employment (redundancy)*. The Guidance is clear that, whilst on furlough (and afterwards), employees still have the same employment rights; including in relation to redundancy rights and protection from unfair or discriminatory dismissal.

It is therefore crucial that employers only effect redundancy dismissals where:

- there is a genuine redundancy situation, and
- they have followed a fair redundancy procedure (including in relation to consultation, selection, searching for suitable alternative employment, etc.) according to the usual employment law rules.

As discussed above, automatically selecting staff who are on furlough for redundancy may give rise to an unfair or discriminatory dismissal. We have also discussed above, the fact that there does remain some grey area in respect of whether a dismissal effected whilst an employee is on furlough (in circumstances where it may be possible for that employee to remain on furlough rather than being made redundant) is likely to be unfair. The latter will depend very much on the particular circumstances of the case, including the size, resources and financial position of the employer.

Employees being made redundant would, of course, be entitled to redundancy pay (if they have two or more years' service), their contractual notice period (or pay in lieu), and any accrued but untaken annual leave (or pay in lieu). We deal with this in more detail below.

Redundancy payments

Employees with two years' continuous service are entitled to statutory redundancy payments based on a multiplier of:

- half a week's pay for each year of employment up to age of 22;
- one week's pay for each year between the ages of 22 and 40;
- one and a half week's pay for each year over the age of 41.

There is a maximum of 20 years' service which can be taken into account and a statutory maximum limit on the week's pay (currently £538 per week). For those made redundant on or after 6 April 2020 the maximum statutory redundancy pay is £16,140. Employers may offer more generous contractual redundancy payments.

Redundancy and furlough pay

The guidance is clear that employees' redundancy rights, and other employment rights,

will not be affected by being furloughed. So, any employee who is made redundant whilst on furlough will be entitled to a statutory redundancy payment if they have two years' continuous employment, as well as any contractual redundancy entitlement. Furloughed employees who are made redundant will receive redundancy pay based on their normal wage.

Statutory redundancy payments must be calculated based on an employee's pre-furlough salary. This was confirmed by the Government on 30 July with [legislation](#) coming into force on 31 July. The legislation does not apply to employers who had already made redundancy or notice payments before 31 July.

The furlough scheme ends on 31 October. Therefore, calculation of any statutory redundancy pay, or statutory notice pay based on pay on or before then must ignore any reduction in wages resulting from the employee being furloughed.

If employees' pay varies, or they have no normal working hours, then pay is normally averaged over the previous 12 weeks. If this period includes at least one week of furlough then the averaging must be based on full rather than reduced pay.

For other claims a week's minimum pay applies such as claims for unfair dismissal basic awards, and failure to provide written particulars the employees' normal (non-furlough) salary should be used.

The calculation of any contractual redundancy entitlement will depend on the contractual terms governing that payment (and subject to any valid contractual variation made before the employee was furloughed). The new legislation does not affect enhanced contractual redundancy pay as it only applies to basic statutory redundancy pay entitlements.

Notice periods

Employees who are made redundant whilst on furlough are entitled to notice of termination in accordance with their contracts. The Government have confirmed that statutory notice pay during the notice period is also payable at the rate of the employee's full contractual normal salary not their wages under the furlough scheme.

There were some complex legal arguments surrounding this, especially regarding the distinction between contractual and statutory notice pay. The new rules permit employers to pay a lower rate of pay for contractual notice periods, as long as these notice periods are at least one week longer than the statutory minimum period. Note that employers cannot reclaim any payment made in lieu of notice under the furlough scheme.

Reclaiming amounts

Even where an employee has been furloughed before being made redundant under the furlough scheme, employers cannot reclaim the cost of:

- statutory redundancy payments
- contractual redundancy payments
- payments in lieu of notice or untaken annual leave
- extra compensatory payments for termination of employment.

Employers are likely to be able to reclaim a portion of:

- the cost of notice pay for any notice period whilst on furlough; and
- the cost of any annual leave taken during the notice period

Both these items are only claimable for up to 80% (or 70% or 60%) salary subject to the relevant monthly cap.

Holiday: Furloughed employees who are made redundant are entitled to be paid in lieu for any accrued but untaken leave (bearing in mind that annual leave continues to accrue during furlough leave). Employers will not be able to reclaim payments in lieu of annual leave under the furlough scheme. They can claim a furlough grant for the cost of any annual leave taken during the notice period, of up to 80% (or 70% or 60%) salary subject to the relevant monthly cap. This leave will have to be topped up by the employer to the rate of the employees full (pre-furlough) salary.

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