



Employers' briefing: redundancies following the furlough scheme

This note provides an overview of the origins of the furlough scheme, its implications for employers in relation to potential redundancies and key factors they need to consider, along with some associated complexities around working from home.

The introduction of the furlough scheme – a new term in UK employment law

The Covid-19 pandemic has seen huge numbers of businesses and workplaces closing or reducing the scope of their operations. In order to avoid large-scale redundancies, the UK Government introduced the Coronavirus Job Retention Scheme in March 2020. Under this scheme, employers can agree with an employee whose work is not needed (or not needed to the same extent) that the employee takes leave of absence from work but remains employed. In turn, the employer is then able to claim a grant from the Government covering a portion of the employee's wages in respect of the hours they are not required to work, up to a maximum of £2,500 per employee per month.

This process of laying an employee off and claiming for their wage costs from the Government has become known as "furlough". A term new to employment law in the UK. The scheme has certainly not prevented all redundancies, as 693,000 fewer people were in paid employment in the UK in February 2021 compared with February 2020. However, with furlough claims peaking at 8.9 million in May 2020, it appears the scheme has prevented (or at least deferred) the redundancies of millions of employees.

The end of the furlough scheme and what this means for employers

The scheme finally ended on 30 September 2021 after running for 18 months. Best estimates are that approximately one million people were on furlough leave and claiming support in September and so the ending of the scheme could have a significant impact on many employers. This may be assessing how best to return staff to the workplace and try and return to pre-Covid business as usual, or it could be looking to cut costs and considering whether the number of employees is sustainable.

Redundancies are a particularly strong possibility in the sectors that are expected to suffer a prolonged downturn, which is likely to correlate with sectors that have made the largest number of claims under the furlough scheme – namely retail (close to 2 million at its peak) and hospitality (just over 1.5 million at its peak).

Key issues to consider and steps to take when making redundancies

These are the key points that an employer needs to take into account in a redundancy situation:

A genuine redundancy situation?

This is a closure of the business for which the employee was employed, a closure of the place of business where the employee was employed to work, or a reduced requirement for employees to carry out work of a particular kind.

Alternatives to redundancy?

Alternatives may include a reduction in hours, paid or unpaid holiday, sabbaticals, parental leave, lay off, moving staff to alternative roles, job-sharing and cost-cutting measures such as cuts to overtime, no use of temps, a recruitment freeze etc.

How many redundancies are proposed?

If 20 or more redundancies are proposed at one establishment within any period of 90 days or less, collective consultation will be required with trade union representatives or, if there is no recognised trade union, with representatives elected by the employees. The employer will also have to file an HR1 form.

Decide on the pool for redundancy, if selection will be necessary

This is the group of employees from which redundancies will be made.

Start consultation with affected employees

This is necessary in order for any dismissals to be fair and is required whether or not collective consultation takes place. It must be genuine and meaningful.

Set the selection criteria

These must be objective and non-discriminatory.

Select employees for redundancy

Two managers should score those at risk of redundancy independently to avoid any bias.

Consider suitable alternative employment

This can either be with the employer or an associated employer. Where the employer identifies a suitable vacancy, the employee has a statutory trial period of four weeks. Note that employees on maternity, adoption and shared parental leave have additional rights in relation to alternative employment.

Inform employees of the outcome

It is unclear whether an employer must offer a redundant employee a right of appeal against dismissal but failing to offer a right of appeal may affect the fairness of the dismissal. Good practice is therefore to offer a right of appeal in the dismissal letter and explain how the employee should appeal and the time limit that will apply.

Issue redundancy notices and calculate statutory redundancy payments (SRPs)

This should not be done until consultation has been completed. Where the employee has been furloughed, the SRP will be based on their normal pay, not their reduced furlough pay, up to 30 September 2021. Payments will need to be made when the employment terminates and a P45 will also need to be issued.

Decide whether employees will work their notice period or be paid in lieu

Note that employers cannot claim for any day that a furloughed employee is serving contractual or statutory notice. Where the employee has been furloughed, a payment in lieu of notice will need to be based on their normal pay, not their reduced furlough pay, up to 30 September 2021.

Allow employees paid time off to look for another job or training

This applies where employees have 2+ years' employment. The amount of time off must be reasonable.

Failure to consider these points could result in potentially time consuming, disruptive and expensive employment disputes and actions. For further information, please see the [PrivateEdge guidance note on redundancy](#).

Work from home or return to the workplace?

The Prime Minister held a press briefing on 5th July, confirming that from July 19th there will be a lifting of many of the COVID19 restrictions that we have been operating under for so long. This included the guidance to ‘work from home’ where you can, which means that employers will be able to start to plan a return to the workplace. Keep in mind that it will still be up to individual employers. Some may decide to continue with working from home for the foreseeable future.

Right now, many employers and employees will be considering their longer-term wishes as regards work location. Some employers may be interested in maintaining a degree of home-working indefinitely, others may want their staff to return to an office environment full time and many are considering some form of hybrid working, where employees work partly from home and partly in the office. At the same time many employees may be keen to continue working from home, while others may be keen on returning to the office.

Potential actions around working from home

The relaxation of the government guidance to work from home and the different preferences of employees and employers going forward in this respect, throws up some potential employment pitfalls for employers:

Flexible working

An employee who does not wish to return to the office may make a request for flexible working and this will need to be handled in line with the legislation, in order to avoid a claim to the employment tribunal. If a request to work from home is rejected, this could have an impact on the overall fairness of any redundancy dismissal.

Flexible working requests

An employee with over 26 weeks’ service can make a written request to change their hours of work, the times when they work or their place of work. The employer has three months to consider the request, meet with the employee to discuss it and notify the employee of the outcome. The employer can only refuse a request for one (or more) of eight reasons set out in the legislation, eg the burden of additional cost, the effect on the ability to meet customer demand, and an inability to reorganise the work among existing staff. Only one request can be made in any 12 month period and any change agreed is permanent.

Redundancy situations

Employers should be mindful that a redundancy situation could arise in the event of a workplace closure even if the job still remains on a remote working basis. In this case the “key issues” around redundancy outlined in the section above are still relevant and need to be considered.

Employment contracts

Working from home had to be introduced quickly in order to comply with the laws and guidance relating to COVID-19. It is unlikely that employers would have had time to agree changes to employees’ contracts of employment or to set out in writing what would happen when working from home was no longer required. Before changing an employee’s place of work, an employer should review what the contract of employment says about the employee’s place of work and mobility; changing the place of work without the employee’s consent could lead to claims for breach of contract and/or constructive dismissal, and invoking a mobility clause could lead to discrimination claims.

Further information

For further advice or guidance, the PrivateEdge helpline is open 24 hours for expert, confidential legal advice from a top 50 law firm on any issue that policyholders think might lead to a claim under their PrivateEdge policy.



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