

HBAA – Webinar 23 June 2020 Q+A

The answers below are generic and are based on the questions asked without knowing all of the specific details. The Government Guidance was updated on 12 June 2020. The answers have been updated based on this new Guidance. For information please see:

<https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>

Specific advice should always be taken. For help and support, please contact Emma O'Connor @ eoconnor@bojesturner.com

Q. Can you make someone redundant if they are on furlough leave?

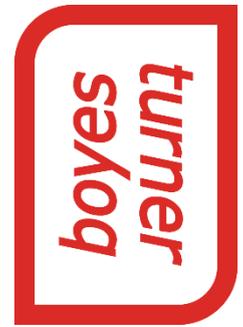
Yes, HMRC guidance states that someone on furlough can be made redundant whilst on furlough or shortly thereafter. Whether the redundancy is fair, will depend on whether the reason given, ie redundancy, is genuine and also on the employer following a fair process prior to termination. We expect that, if challenged in an Employment Tribunal, employers will need to show greater reasons as to why the employee needed to be made redundant now rather than wait till the end of the JRS so, in addition to ensuring fairness, keeping evidence of decisions and business rationale would be advisable.

Q. If redundancy consultation has started can you put them on furlough?

Possibly, but it will depend upon whether the employee can be furloughed under the terms of the JRS. The JRS closes to new entrants on 30 June 2020; which means that any new entrants should have been furloughed for 3 consecutive weeks from 10 June 2020. If not, unless they fall into one of the exceptions, they cannot be furloughed. If an employee has been previously furloughed for 3 consecutive weeks between 1 March and 30 June 2020, they can be refurloughed (subject to monthly claim caps from 1 July 2020).

Q. What is the procedure for making less than 20 individuals redundancies?

In these circumstances there will be no requirement to collectively consult. However, in order to ensure that the redundancies are carried out fairly, it will still be necessary to engage in individual consultation with affected employees. If employees have to be selected for redundancy, the employer should do so fairly, using non-discriminatory criteria. Therefore, it is recommended that employers notify all affected employees of the potential for redundancies once these are being considered, and provide them with information at an early stage about the process and proposed selection criteria to be applied. Once employees have been selected for redundancy and placed 'at risk', the employer should then engage in individual consultation with selected employees to explore ways of mitigating or avoiding their redundancy, and to consider whether alternative roles are available. If selected as redundant, employees should be given the right of appeal. A "rough" rule of thumb would be to have a consultation period of 2-4 weeks.



Q. Holidays – can you force employees to take holidays when on redundancy notice?

Sometimes, such a clause is included within the contract of employment – a good clause to have! Rather than “force”, I would say “designate”. If employers give twice the amount of notice for the holiday that is to be taken, then it can designate holiday to be taken during the notice period. Remember that holiday pay has to be paid at 100% of pay.

Q. Pay cuts – if you have made pay cuts to staff and then make them redundant, do you pay redundancy on the pay cut or previous salary?

This is going to depend on the terms of any pay reduction, whether it is temporary or permanent, what the employee/er intended to happen to notice pay in these circumstances. Although, there have been no cases on this coming through the Tribunal, there is a sense amongst commentators that the Employment Tribunal will try and do what it can to rule that employees should not be penalised in not receiving 100% of their pay during the notice period. One can envisage lots of arguments from employees saying they didn’t consent to the pay reduction, it wasn’t what they intended and it wasn’t made clear to them they would only receive temporary pay during the notice period.

Q. Notice Period – what should someone on furlough leave be paid during their notice period?

Notice pay is tricky as there is nothing in the Guidance to date as to how notice pay is paid for those employees who are furloughed - as you say do we pay the 80% under the JRS or do we have to “top up” to 100%?

With regards to notice pay for furloughed employees it depends on many different factors such as how long their notice period is when compared to the statutory minimum notice period, whether they have a fixed wage/hours, who requested furlough (the employer or employee) and whether they are “ready, willing and able” to work.

- If an employee’s contractual notice period is at least **one week longer than the statutory minimum notice period** they would otherwise receive, then the employee will be entitled to their contractual remuneration during their notice period. So, for example, if the employee has been employed for 2 years’ and would under statutory rules be entitled to 2 weeks’ notice, but under the contract is entitled to 4 weeks. This may be reduced furlough pay or full pay, depending on the wording of the employment contract or of any agreed contractual variation between the parties in a furlough agreement.
- If an employee’s contractual notice period is the **statutory minimum notice period or less than the statutory minimum plus six days**, then they may be entitled to statutory minimum notice pay. There are specific criteria that must be met for an employee to qualify for such statutory protection, relating to whether they are incapable of working due to sickness or incapacity, or whether they are ready and willing to work but there is no work being provided by

their employer and the employer chose to furlough them. The employer must therefore closely consider the reason for the employee being placed on furlough to determine whether the employee qualifies.

- If an is ready, willing and able to work but their employer has no work for them, the employee qualifies for the statutory protection. The level of statutory minimum notice pay will be based on a 'week's pay'. The calculation used to work out a 'week's pay' will depend on whether the employee's hours and pay vary, as follows:
 - If an employee's hours and pay **do not** vary then a 'week's pay' will be based on the normal remuneration. 'Normal' remuneration means pre-furlough full pay.
 - If an employee's hours and/or pay **do vary** then a 'week's pay' will be based on an average of the last 12 week's pay. This may involve an average of some furlough weeks (at 80% pay for example) and some non-furlough weeks (at 100% pay).
- If the employee is paid in lieu of notice (PILON), so employment ends and notice then paid, notice would be payable in accordance with the contract of employment. PILON is not claimable through the JRS.

Difficulties arise if the employee has requested to go onto furlough leave as there seems to be some tension between paying notice pay at the furlough rate of pay or pre-furlough pay as the employees is not ready, willing and able to work. There could be potential discrimination claims here as it is likely the employee may have requested furlough because of health or other protected grounds and they are being paid reduced pay because of it. Something to consider here.

Do employers have to top up to 100% of pay if the employee is only entitled to furlough pay? Not unless it has agreed to.

What happens when the grant reduces to 70% and 60%, can employers pay this reduced rate? The intention under the JRS is that employees do not earn less than 80% of the monthly pay capped at £2,500 a month. Our advice is no, where the employee is entitled to the furlough rate of pay; employers should top this up so the employee receives the intended 80% figure.

Paying notice pay at the rate of furlough pay is not without risk. As we have said HMRC may investigate redundancies, notice pay and JRS grants. Also, if notice pay is reduced employees might seek to bring an unlawful deduction of wages claim or a breach of contract claim, which calls into question the enforceability of any post termination restrictions. Ultimately, employment tribunals will have to decide if notice pay should be paid at 100% or the reduced furlough rate should claims be brought and our guess is that employment tribunals are going to go out of their way to find in favour of employees who have had their notice pay reduced because they are on furlough leave. Lots of factors to consider when it comes to notice pay and risks to weigh up.

Q. Re-employing after redundancy (if business picks up) – what is the time frame?

Although there is nothing legally preventing you re-hiring after redundancy, unless you have a caveat in a settlement agreement. Employers cannot ask for the redundancy money back – unless again you have agreed it should be repaid but this wouldn't apply to statutory redundancy pay.

In terms of a "time frame", we assume this concerns continuity of employment and whether this can be broken. Service is important for statutory rights such as unfair dismissal and redundancy pay. Usually we say a 2 week gap between contracts and work to break continuity but these are exceptional times. Also, if you are breaking continuity to then rehire someone on less favourable terms this could be an issue. This will concern the genuineness of the reason for doing so. But in theory, yes employers can re-hire, watch the continuity of service point, might be best to leave a longer gap but be aware of the risks.

Q. Can length of service be used as a criterion for redundancy selection?

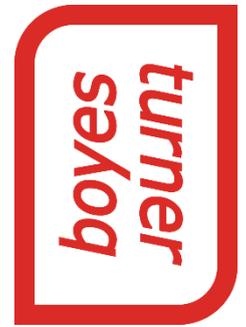
Length of service or using "last in, first out" has fallen out of favour and could be possibly age discriminatory as in some circumstances, the "first in" are often graduates or those who are new to the jobs market who are often those of a younger generation. It would be advisable to use other objective, non-discriminatory criteria.

Q. Rather than making redundancies, can we change the contracts so that they are part time (3 days a week)?

Yes but such fundamental terms of the contracts of employment cannot be changed at will by employers. There has to be consultation and agreement with the employee before the change can take effect. Using silence as acquiescence is not recommended. Employers cannot unilaterally change contract terms. TO do so if a breach of contract entitling the employee to resign and claim constructive dismissal. If employers are proposing to amend terms such as pay or hours of work, it would need to consult on the change, issue a change letter and ask the employee to sign their agreement. The change could be permanent or temporary. However, you need decide what will happen if people will not sign and also what happens to things like notice pay or other benefits – are these reduced as well?

Q. Is there a time limit on how long the consultation can last for individual redundancies? E.g. advising them that they are at risk now for end of October etc.

Yes and no – if there is a collective consultation period, then yes, there are for minimum 30/45 day periods depending on numbers as set put in Statute. However, if there is individual consultation only, then there are no minimum/maximum periods, although a rule of thumb would be 2-4 weeks as stated above. If employers want to give a longer consultation period this would be acceptable but the employer still has to consult during this period, look for alternative employment, confirm the decision and give the right of appeal. Also, what will happen to notice thereafter – work notice or pay PILON? How will this fit with the ending of the furlough scheme?



Consistent with our policy when giving comment and advice on a non-specific basis, we cannot assume legal responsibility for the accuracy of any particular statement. In the case of specific problems we recommend that professional advice be sought.

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Boyes Turner LLP, Abbots House, Abbey Street, Reading, Berkshire, RG1 3BD, UK
Tel: 0118 959 7711 Fax: 0118 957 3257 Email: elg@boyesturner.com

Website: www.boyesturner.com

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