

Bryony Clayton, 14.4.20

Background

1. The Chancellor, Rishi Sunak, announced the Coronavirus Job Retention Scheme ('CJRS') on 20th March 2020 with the aim to protect jobs during the crisis. A recent estimate is that this could cost £30-£40 billion over three months¹ and the take-up by businesses is much higher than expected such that 50% of companies are putting most of their staff into the scheme². We are all becoming familiar with the term 'furlough' (i.e. to allow or force someone to be absent temporarily from work) and up to nine million workers are now expected to be furloughed³. The Scheme was necessarily hastily written in response to an unforeseen crisis and, despite government guidance issued on 27th March 2020 which was updated on 4th April 2020 and then again on 9th April 2020⁴, employment lawyers are finding themselves advising on the gaps in the regime. The online service through which employers can make a claim is expected to be up and running by the end of April 2020 however in the interim employers, with the help of their advisors, are having to interpret the guidance to inform significant business decisions.
2. There is of course now also provision for the self-employed through the Coronavirus Self-employment Income Support Scheme, the government guidance for which was published on 26th March 2020⁵, although this is outside of the scope of this article.

¹ According to analysis by the Resolution Foundation, using the latest figures on take-up of the scheme from the British Chambers of Commerce

² Figures provided by the British Chamber of Commerce ('BCC')

³ According to a BCC estimate on 8th April 2020

⁴ https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme?mc_cid=177bacbc11&mc_eid=fbad6e80dc

⁵ <https://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme>

Key points of the scheme

3. The following is a summary of the key points of the guidance, as updated. The full guidance can be accessed using the link below⁶.
 - a. The scheme is available to all employers that had a PAYE scheme in place on 28th February 2020;
 - b. Any organisation with employees can apply including charities, recruitment agencies and public authorities (albeit the take up by public bodies is expected to be limited);
 - c. Employers can claim up to 80% of wage costs up to a cap of £2,500 per month, plus the associated employer NICs, minimum autoenrollment pension contribution on that wage, compulsory commission and fees. This does not include benefits in kind;
 - d. An employer can top up to 100% but does not have to do so;
 - e. To be eligible the employee must have been on the payroll on 28th February 2020. Employers can reinstate those made redundant after that date and put them on the scheme (but they cannot be forced to do so);
 - f. Furlough leave must be taken in minimum blocks of three weeks;
 - g. Rotating furlough leave amongst employees is possible;
 - h. The employee cannot work at all for the company or to a linked employer: they must not provide services to or make any money for their employer;
 - i. The scheme does not apply if the employee is working reduced hours or for reduced pay;
 - j. Employees can work for another employer whilst furloughed (this could be prohibited by the contract of employment, but the employer could waive this);

⁶ See footnote 4

- k. Employees can be furloughed multiple times – each furlough period must be at least three weeks;
- l. Employers must notify employees in writing if they are furloughed;
- m. Apprentices can be furloughed subject to the minimum wage requirements;
- n. Employers can furlough newly TUPE'd employees.

One area of Ambiguity: Interaction between furlough and other types of leave

- 4. There are a number of areas of ambiguity within the scheme however a common theme upon which clients are seeking advice is the interaction of furlough leave with other types of leave. The position as regards sick pay and maternity pay is reasonably clear yet the interaction with holiday pay/annual leave is less defined.

Sick Pay

- 5. The government guidance for both employers and employees addresses sick pay. The employer's guide says that 'employees on sick leave or self-isolating should get Statutory Sick Pay ('SSP'), but can be furloughed after this'. The employee's guide says 'you should get SSP while you are on sick leave or self-isolating, but can be furloughed after this'. The suggestion is that employees can only be one type of leave – either sickness or furlough. The ACAS guidance published on 31st March 2020 as amended on 2nd April 2020 appears to agree with this⁷.
- 6. What is not clear from the guidance is whether if an employer is paying contractual sick pay (for example where there is an employee on long term sick leave unconnected with the current pandemic who has exhausted SSP) whether an employee can be furloughed and then the cost of the same be claimed back. At the moment there is nothing to clarify this either way, but employers would be well advised not to assume that this is the case. On one side of the argument is that the purpose of the scheme is to prevent dismissals by providing support to

⁷<https://www.acas.org.uk/coronavirus>

employers and so at first blush furloughing those on contractual sick pay would seem consistent with the scheme. However, against that is the apparent rationale for not allowing SSP and furlough to run concurrently – the government appears to be seeking to avoid employees moving to a higher rate of pay than they would receive if absent through sickness.

7. The third version of the guidance clarifies that the CJRS is not intended for short term absences for work due to sickness. Short term illness/self-isolation should not be a consideration in deciding whether to furlough an employee but if employers want to furlough employees for business reasons and they are currently off sick then they are eligible. The employee would no longer receive sick pay and would be classified as a furloughed employee.
8. Another practical issue not addressed until the most recent version of the guidance is if a worker becomes ill whilst furloughed: is the worker moved onto SSP or does the worker continue to be furloughed? The third version of the guidance states: *'Furloughed employees retain their statutory rights, including their right to Statutory Sick Pay. This means that furloughed employees who become ill must be paid at least Statutory Sick Pay. It is up to employers to decide whether to move these employees onto Statutory Sick Pay or to keep them on furlough, at their furloughed rate'*.

'Shielding' employees

9. People who are at very high risk of severe illness from coronavirus because of an underlying health condition have been advised to stay at home and avoid face to face contact – this is 'shielding'. Shielding employees and those that live with them together with employees with caring responsibilities are covered by CJRS as is set out revised guidance. These individuals can therefore be furloughed and do not have to be placed on sick leave.

Maternity Pay

10. It appeared from the original guidance that an employee can be on maternity leave and be furloughed: the employer's CJRS guidance regarding maternity leave said 'If your employee is eligible for Statutory Maternity Pay (SMP) or Maternity Allowance, the normal rules apply and they are entitled to claim up to 39 weeks of statutory pay or allowance... if you offer enhanced

(earnings related) contractual pay to women on maternity leave, this is included as wage costs that you can claim through the scheme'. The revised guidance expressly provides that 'the normal rules for maternity and other forms of parental leave and pay apply. You can claim through the scheme for enhanced (earnings related) contractual pay for employees who qualify for maternity, adoption pay, paternity pay and shared parental pay'. This part of the guidance at least provides clarity.

Annual Leave

11. The thornier issue is that of 'holiday pay', or, more neutrally in the current climate, 'annual leave'.
12. The purpose of statutory annual leave (5.6 weeks in the UK) is to ensure that employees get enough rest and keep healthy both physically and mentally. The ACAS guidance recognises the employer's right to tell workers when to take annual leave, subject to the requirement to provide staff with at least twice as many days notice before as the amount of days they need people to take. Ordinarily employees and workers should use their paid annual leave in their current leave year. However temporary new legislation⁸ allows employees and workers to carry over up to 4 weeks of annual leave over a two-year period. This applies if employees cannot take leave because of coronavirus, for example if self-isolating⁹ or too sick to take leave before the end of their leave year, or they have had to continue working and not take leave. The ACAS guidance says that 'the employee may also need to carry over holiday *if they've been furloughed and they cannot take paid holiday* because of coronavirus' (my emphasis). This part of the guidance therefore suggests that both annual leave and furlough leave *cannot* be taken at the same time and are mutually exclusive. The guidance does not expand upon why a worker 'cannot take holiday' when furloughed.
13. The revised ACAS guidance deals with the treatment of bank holidays (no doubt in light of the impending Easter bank holidays) and explains that workers must get their usual pay for bank holidays. There is nothing in the Working Time Regulations 1998 ('WTR') which stipulates that

⁸ The Working Time (Coronavirus Amendment) Regulations 2020 which introduced an amendment to Regulation 13 of the Working Time Regulations 1998

⁹ Self-isolators would qualify for SSP under the Statutory Sick Pay (General (Coronavirus Amendment) Regulations 2020)

bank holidays form part of the total annual leave entitlement for a worker but is it of course commonplace for this to be provided for in the employment contract. Is there therefore any difference between a bank holiday designated by the employer as forming part of annual leave and other annual leave? This additional guidance regarding bank holidays does seem to be inconsistent with the guidance quoted at the end of the previous paragraph.

14. Although furlough is a new concept for employment lawyers, there is a helpful decision of the Supreme Court which is arguably analogous. In *Russell v Transocean*¹⁰ oil workers had their shifts arranged on a rotating pattern so that each worker spent a fixed period offshore working and then a fixed period onshore referred to as a 'field break'. The employer required workers to take their annual leave during their field breaks and the workers argued that they were not obliged to work during field breaks and so these periods could not qualify as annual leave. The Supreme Court rejected the workers' argument and found that a 'rest period' was any period which was not working time.
15. If furlough and annual leave are not in fact mutually exclusive then workers run the risk of unscrupulous employers insisting that workers take their annual leave during furlough. If this was the case they would receive neither additional leave nor additional pay and so the right to annual leave would be effectively meaningless. There may be some protection afforded to workers by the EAT decision in *Sumsion v BBC (Scotland)*¹¹ which recognised that there could be situations where the employer abuses the right under Regulation 15 WTR to prescribe the dates on which annual leave could be taken. This would depend upon 'the particular facts and circumstances of each case'. It could be that the revised ACAS guidance seeks then to avoid abuse by employers of insisting that workers take their annual leave during furlough (save where this had been agreed prior to the coronavirus crisis for example as regards bank holidays).
16. In the absence of any clearer guidance it seems the safest course of action for employers would be to pay the full pre-furlough rate of remuneration for the forthcoming bank holidays to

¹⁰[2011] UKSC 57 – judgment can be accessed here: <http://www.bailii.org/uk/cases/UKSC/2011/57.html>

¹¹ [2007] IRLR 678 – judgment can be accessed here:
http://www.bailii.org/uk/cases/UKSC/2007/0042_06_2103.html

furloughed employees. Indeed on 7th April 2020 HMRC Customer Services tweeted that this is exactly what employers should do¹².

Conclusion

17. Some of the guidance is clear whilst other parts of the CJRS remain imprecise. The need for further clarification has been underlined by a recent document prepared by David Reade QC, door tenant at Parklane Plowden, together with Sean Jones QC, Michael Ford QC and Caspar Glynn QC called 'A Collaborative View on the CJRS'¹³ summarising the scheme and seeking further guidance from the government on areas of ambiguity. It is hoped that the government will respond promptly to assist employers and workers alike.

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<https://www.parklaneplowden.co.uk/barristers/bryony-clayton>

¹² <https://twitter.com/HMRCcustomers/status/1247470902767489024>

¹³ <https://www.dropbox.com/s/c7fn0yft86cw2j0/4%20Silks%20CJRS%20Collaborative%20View.pdf?dl=0>