EMPLOYMENT LAW JOURNAL

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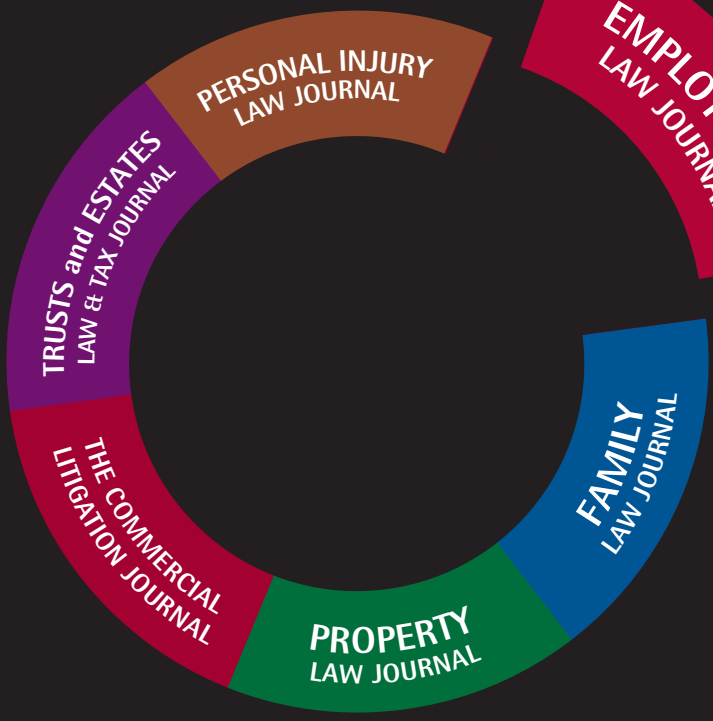

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Employment update

Catherine Turner rounds up recent case law and developments affecting employers and their advisers

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Furlough scheme extended to 31 October 2020

On 12 May 2020, the government extended the Coronavirus Job Retention Scheme (CJRS), which is now due to end on 31 October 2020 and not 30 June 2020. The extension recognises employers' continued need for financial support (and the government's desire to prevent a June 'cliff edge'). However, as some businesses show signs of recovering from the coronavirus pandemic, it also acknowledges that they will need more flexible support.

The 12 May announcement confirmed the following points:

- There will be no changes to the CJRS until the end of July 2020.
- With effect from 1 August, new flexibility will be introduced to get employees back to work. This will include part-time furloughing (currently, furloughed employees must not carry out any work for the employer), with employers paying a percentage of those salaries.
- The existing government grant of 80% of wages (up to £2,500) per furloughed employee will remain in place until the end of October. However, with effect from 1 August, employers will be required to share the cost of the government grant.

Employers are awaiting the specific details of the changes, particularly the level of cost sharing from August. We understand that announcement of these details is imminent.

Employers can force employees to take holiday while on furlough

On 13 May 2020, the government published its guidance on holiday entitlement and pay during coronavirus (Covid-19).

Many employers wish to require employees to take a holiday while on furlough to prevent the accrual of untaken annual leave. This is important for two reasons:

- Employees (en masse) may otherwise seek to take a holiday while businesses are just starting to recover.
- If furloughed employees are ultimately made redundant, the employer is liable to pay for any untaken holiday, which increases termination costs.

The current position is that employers can require workers to take statutory holiday at a set time if they give two days' notice for every day of leave.

The fact that an employee is furloughed has not changed this position. However, the guidance provides that employers should consider any restrictions that an employee is under, such as the need to socially distance or self-isolate which would prevent them from resting, relaxing and enjoying leisure time (this being the purpose behind holiday, as stated by the European Court of Justice). An employee may argue that lockdown is akin to sickness, when employees may defer taking their holiday. This argument is untested, but in the author's view it is difficult to imagine an employee successfully challenging a requirement to take holiday simply by virtue of being in lockdown (especially now it is being progressively relaxed) or having to socially distance. The situation is arguably different for employees who

'Employers should not view data protection as a barrier to sharing information with authorities for public health purposes or with the police if necessary and proportionate.'

are self-isolating to prevent the possible spread of the disease or shielding and who are now deemed incapable of working for statutory sick pay purposes.

In any event, emergency legislation now provides that where it was not reasonably practicable for a worker to take some or all of their statutory annual leave entitlement because of the effects of coronavirus, they are entitled to carry forward the untaken leave into the following two leave years.

Morrisons was not vicariously liable because the unlawful disclosure of the data was not sufficiently closely connected to what the employee was authorised to do by Morrisons.

ICO publishes guidance on workplace testing

The Information Commissioner's Office (ICO) has published guidance for employers on workplace testing for Covid-19, or the symptoms of Covid-19, such as a raised temperature. Carrying out these tests will involve processing information that relates to an identified or identifiable individual so employers will need to comply with the GDPR and the Data Protection Act 2018 (DPA). This means that employers will need to handle information lawfully, fairly and transparently.

Key points to note from the guidance include the following:

Lawful basis

Employers must decide what their lawful basis for testing employees is. The guidance states that legitimate interests is likely to be appropriate (or carrying out public tasks if the employer is in the public sector). However, organisations will need to carry out an assessment and consider which reason applies.

Special category data

As the data relates to health, it is special category data, which has greater protection. Employers will therefore need to identify an additional legal basis for the processing. The guidance states that the relevant condition will be the employment condition in Article 9(2)(b) of the GDPR, along with Schedule 1 condition 1 of the DPA. This permits the processing of data necessary for performing or exercising obligations or rights in connection with employment.

Impact assessment

The guidance suggests that organisations should conduct a data protection impact assessment (which will not be a new concept for employers). The impact assessment should set out:

- the type of testing being proposed;
- the data protection risks;
- whether the proposed testing is necessary and proportionate;
- the mitigating actions that can be put in place to counter the risks to employees' privacy; and
- an action plan or confirmation that mitigation has been effective.

Data storage

It will be particularly important that employers only collect and retain the minimum amount of information needed to fulfil the purpose of the testing. As part of this, the guidance recommends that employers record the date of the test results to ensure that the information held is accurate. Any test results held should be held securely and treated as confidential.

Transparency

The guidance flags the importance of making clear to employees why the organisation is processing their data. If testing for Covid-19 or checking for symptoms, employers need to be clear about the decisions that they will make with that information.

Privacy: striking a balance

Importantly, the guidance states that data protection laws do not prevent employers from complying with their duty to ensure the health and safety of all employees. They can therefore keep staff informed about potential or confirmed Covid-19 cases among colleagues, although they should avoid naming the individuals if possible.

Employers should also not view data protection as a barrier to sharing information with authorities for public health purposes or with the police if necessary and proportionate. They also need to take into account the risks to the wider public which may be caused by failing to share information and take a proportionate and sensible approach.

Intrusive monitoring

If they are planning to do temperature checks or use thermal cameras, employers need to give thought to the purpose and context of the use of intrusive technologies and make a case for it. Monitoring of employees needs to be necessary and proportionate and in keeping with their reasonable expectations. Employers should ask themselves whether they can achieve the same results through less intrusive means and, if so, adopt the less intrusive means.

FCA extends time period for senior manager cover

Under the Senior Managers Regime, non-approved individuals can cover for a senior manager for 12 weeks before Financial Conduct Authority (FCA) approval is required. The FCA has temporarily relaxed its rules for solo regulated firms in this regard. Firms can now submit an application (known as a modification by consent) to allow cover for 36 weeks without approval where:

- the senior manager is absent because of Covid-19; or
- recruiting a replacement for a senior manager has been delayed because of Covid-19.

The modification also allows firms to allocate an absent senior manager's prescribed responsibilities to the individual covering the role.

Morrisons not vicariously liable for data breach

Amid the Covid-19 crisis, employers and advisers may have missed the Supreme Court's ruling in *WM Morrisons Supermarkets plc v Various*

Claimants [2020] (*Morrisons*). In this case, a disgruntled employee seeking revenge on Morrisons published the personal data of approximately 100,000 of the retailer's employees on a public website using his home computer. Some of those employees brought proceedings against Morrisons for breaches under the DPA 1998 and a claim that it was vicariously liable for the data breach.

The lower courts had relied on the Supreme Court decision in *Mohamud v WM Morrison Supermarkets plc* [2016]. This purportedly held that:

- a connection exists between an employment relationship and the wrongdoing if there is an unbroken temporal or causal chain of events; and
- the motives of the employee wrongdoer are irrelevant.

The Supreme Court in *Morrisons* has now held that *Mohamud* has been misunderstood and it did not change the law on vicarious liability. The Supreme Court highlighted that in *Mohamud* it was important whether the wrongdoer was acting on the employer's business or for personal reasons.

The test clarified by the Supreme Court in *Morrisons* is whether the wrongful conduct was so closely connected with acts the employee was authorised to do that it is fair and proper to attribute vicarious liability to the employer. The court held that Morrisons was not vicariously liable because the unlawful disclosure of the data was not sufficiently closely connected to what the employee was authorised to do by Morrisons. The employee was not furthering his employer's business but pursuing his personal interests.

This will be a welcome decision for employers left concerned by the lower courts' conclusion that Morrisons was vicariously liable for actions that were not only unauthorised but were intended to harm the employer. ■

Mohamud v WM Morrison Supermarkets plc
[2016] UKSC 11
WM Morrisons Supermarkets plc v Various Claimants
[2020] UKSC 12

Issues to consider as the furlough scheme winds down

David Palmer explores the issues for employers resulting from the Chancellor's announcement that government support for furloughed employees will be gradually withdrawn. The announcement will affect one million employers and more than eight million jobs

David Palmer is a senior associate in the employment team at Herbert Smith Freehills LLP

'Despite the fraught evolution of the CJRS and the uncertainties which arose about its rules, it has so far achieved its principal aim of avoiding many of the redundancies which would have otherwise occurred.'

On 29 May 2020, the Chancellor announced changes to the Coronavirus Job Retention Scheme (CJRS). The four key changes are as follows:

- the latest an employee can be placed on furlough for the first time is 10 June;
- partial or part-time furlough will be possible from 1 July;
- throughout August, September and October, the amount employers can reclaim via the CJRS will decrease; and
- the CJRS will close on 31 October 2020.

This article examines the key employment law considerations for employers and their advisers arising from these changes, including the need to plan for the use of partial furlough and to collectively consult on redundancies if necessary.

Current scheme

In March 2020, the government introduced lockdown restrictions which were intended to limit the spread of Covid-19. Many businesses were told to shut, others could not operate safely and comply with the restrictions and others simply had no or little custom due to the ensuing economic shut-down. It was obvious that, as many businesses could not generate the cash flow needed to pay staff, unless something was done, a large swathe of the UK workforce would have been made redundant in March or April. The shock to the UK's consumer economy would have been unparalleled, other than in times of war.

The proposed solution was the CJRS, announced on 20 March. The scheme is principally intended to provide financial assistance to organisations affected by the Covid-19 pandemic. Under the CJRS framework, which remains in its current form until 30 June, businesses can temporarily place staff on blocks of furlough leave of at least three weeks in duration. During furlough, the employee cannot do any work for the employer but will continue to be paid at least 80% of certain normal remuneration (capped at £2,500 a month) and receive certain minimum pension contributions. Provided businesses comply with the CJRS framework, they can claim a grant from the CJRS to recoup these costs plus related employer's National Insurance contributions (NICs). Employers can top up the CJRS grant themselves if they wish so the employee receives 100% of normal remuneration.

The effect of the CJRS is that an employer can potentially continue to employ its staff at nil net cost, thereby avoiding the need for redundancies, even if it has no means itself to pay

its employees. The CJRS was initially intended to last only until 31 May 2020, but has since been extended.

There was uncertainty about the precise rules of the CJRS for much of March and April. The guidance was first published by HMRC on 26 March but was subsequently updated several times. Updates were often released after close of business and on the eve of a weekend, much to the chagrin of employment lawyers. The legislation which underpinned the CJRS was not published until 15 April and was subsequently amended on 22 May.

In May, the Chancellor stated that the Treasury would have to unwind the CJRS to protect the public purse and to encourage businesses and the workforce to re-engage with or ramp up economic activities.

Where we are now

Despite the fraught evolution of the CJRS and the uncertainties which arose about its rules, it has so far achieved its principal aim of avoiding many of the redundancies which would have otherwise occurred. It is difficult to overstate the severity of the economic situation facing employers over the past few months. Many businesses faced imminent insolvency as their revenue was significantly diminished and the CJRS was a lifeline to stave this off. It has allowed them to continue to function at reduced capacity or even to mothball their activities (or parts of their activities). As the lockdown restrictions are eased, the hope is that they can re-emerge, with their workforce intact, ready to resume normal trading again.

Employers have taken different approaches to furloughing staff. Best practice includes steps such as consulting with employees and their representatives, negotiating and agreeing written terms for furlough leave and topping up pay to 100% of pre-furlough salary. Not all employers have taken these steps, however, due to the need to act quickly to avoid insolvency.

Some businesses that have continued to operate but at a reduced capacity have rotated staff on furlough leave. This has avoided the animosity that might occur if some employees had to continue to work for their pay, while their colleagues were paid to be at home.

It is beyond question that the CJRS has been popular. As of midnight on 24 May 2020, the scheme had been used by over one million employers, with the total value of claims being £15bn. The government states that the CJRS has protected around 8.4 million jobs.

Businesses that use the CJRS can now plan, with increased certainty, for the unwinding of the scheme.

Changes to the CJRS

On 29 May 2020, the Chancellor confirmed the following changes to the CJRS. Further guidance is due to be published on 12 June.

No new entrants from 10 June

From 1 August 2020, employers can only make claims for employees whom they have previously furloughed for at least one three-week period. Accordingly, the latest an employee can be placed on furlough for the first time is 10 June. Employers have until 31 July to make any claims for the period to 30 June 2020.

From 1 August, employers also cannot submit a claim for more employees than the maximum number they have previously claimed for in one application.

Flexible furloughing

From 1 July 2020, employers can claim for partial furlough where employees work part of their normal hours. The employer must pay the employee for the hours worked in accordance with their employment contract and can make a claim under the CJRS for the hours not worked. There is no restriction on the working hours or shift patterns during a period of partial furlough. However, employers must agree the arrangement in writing with the employee (presumably so HMRC can carry out an audit).

Tapering of wage support

The government will wind the scheme down as follows:

- During July, the CJRS grant will continue to cover 80% of certain remuneration for unworked hours (subject to the monthly cap of £2,500 or, for partial furlough, a proportionate cap reflecting the hours not worked), plus associated employer's NICs and pension contributions.
- From 1 August, employers must pay employer's NICs and pension contributions for furlough payments made for hours not worked. The CJRS grant will continue to cover 80% of pay for those hours.
- From 1 September, the employee must continue to receive 80% of pay for hours not worked. However, the CJRS grant reduces to 70% of pay for those hours and the employer must meet the cost of the remaining 10% of furlough pay.
- From 1 October, the CJRS grant reduces to 60% of pay for the hours the employee does not work. The employer must pay the remaining 20% of furlough pay.
- The scheme will close on 31 October 2020.

What employers need to consider

Businesses that use the CJRS can now plan, with increased certainty, for the unwinding of the scheme. There are three main issues which most employers should consider:

Resuming operations

Businesses need to consider when and how they will resume or ramp up their activities. As part of this, they will have to decide how many furloughed staff they need to return to work and for how many hours or days per week.

When announcing the changes to the CJRS, the Chancellor gave the example of an employee working two days a week (during which time the employer would pay their wages as normal) and then being furloughed for three days a week. A corollary issue (especially for mothballed businesses) is how quickly the business can contact staff to begin making arrangements for them to return.

Updating contracts and agreements

Depending on the answer to the point above, the business may need to amend

employment contracts or furlough agreements. For example, furlough agreements will typically state that the employee cannot work for the employer during any period when they are furloughed – given that this was a requirement of the initial scheme. Terms such as this will have to be amended if an employee is returning to work part-time.

Naturally, the starting point will be to seek employees' agreement to any arrangements to return to work part time. This will have to be documented in a written agreement with each employee. It is still unclear whether these agreements could be made via collective bargaining with a trade union. However, it seems likely that this will be the case, given that it is expressly permitted by the current furlough rules. Employers should also agree with their employees how long any part-time working arrangements will last.

If employees do not agree to return part time, then, depending on the reasons, it might amount to a disciplinary matter. However, employers have to be careful if the reason an employee is refusing to return to work part time is due to health and safety concerns. Individual employees can bring a claim for unlawful detriment or automatic unfair dismissal (regardless of their length of service) if:

- they are treated less favourably or dismissed for refusing to attend work if they reasonably believe they are in serious and imminent danger (and they could not reasonably have been expected to avoid that danger); or

- they raise health and safety concerns (in certain circumstances).

Taking disciplinary action or withholding pay for a refusal to return could also be unlawful discrimination if the employee is in one of the clinically vulnerable or extremely vulnerable groups. They may be entitled to adjustments, including paid suspension if they are pregnant or disabled. Employers should also consider the risk of indirect sex discrimination claims where the proposed measures for returning to work could disproportionately affect female employees with childcare commitments.

Considering redundancies

Businesses may also have to consider making redundancies given that, from 1 August, they will start to bear costs which until now have been covered by the CJRS but before revenue returns to pre-pandemic levels.

This last point is perhaps the most important in terms of legal risk. If an employer is proposing to dismiss 20 or more employees at one establishment within a 90-day period, it must elect employee representatives (if necessary) and inform and consult with them regarding the proposed dismissals. Employees can each claim a protective award of up to 90 days' uncapped pay if the employer has failed to comply with this duty. Consultation must begin in good time and at least 30 days (for 20 or more dismissals) and 45 days (for 100 or more dismissals) before the first dismissal takes effect.

Working back from 1 August, this leaves little time for employers to take the necessary steps. A 45-day consultation period timed to end by 1 August would have to commence, at the latest, on 16 June. This doesn't include time for electing employee representatives and may not allow time for consultation to be meaningfully concluded by 1 August. If an employer has a redundancy procedure in place (especially if it is contractual), this may impose additional burdens which increase the time (and cost) involved in preparing for redundancies. The employer also has an obligation to notify the Secretary of State for Business, Energy and Industrial Strategy at least 30 or 45 days (as applicable) before any of the dismissals take effect.

There is a limited defence available to an employer which fails to comply with the collective consultation rules. This is that 'special circumstances' rendered it not reasonably practicable for the employer to comply with any or all of the consultation requirements. However, the defence can be difficult to establish and, even if it applies, the employer still has to take all other steps towards compliance that are reasonably practicable in the circumstances.

In most circumstances, an employer cannot make a decision about redundancies until they have consulted individually and, where relevant, collectively with staff. Bearing in mind the continuing restrictions on personal contact and that some workplaces remain closed, arranging an election and consulting with staff (which may have to be done remotely) is likely to be administratively difficult and to take longer.

Another risk is that employees with at least two years' service can claim unfair dismissal if their dismissal by reason of redundancy is procedurally or substantively unfair. Employers must also avoid dismissing any employee in breach of their contract, including any terms on redundancy and notice pay.

Aside from these legal risks, employers should consider the longer-term implications for employee relations and any reputational risks. ■

Key actions

Consider how to revive or ramp up operations as the government eases lockdown restrictions.

- Think about whether you wish to furlough any additional employees for the first time on or before 10 June to give you extra flexibility later.

- Keep an eye out for the government's updated online guidance on the CJRS, due out on 12 June.

- Look at whether and how to take advantage of partial furlough.

- Update furlough agreements if necessary and obtain employees' consent for part-time working or new working patterns.

- Consider redundancies and the timing of collective consultation, if applicable.

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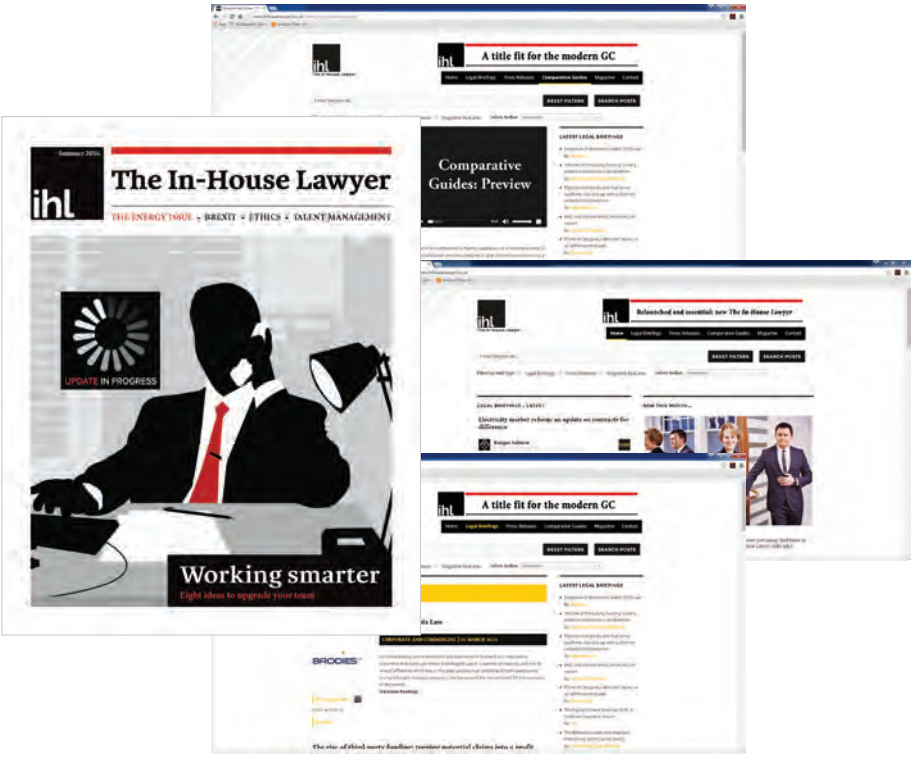

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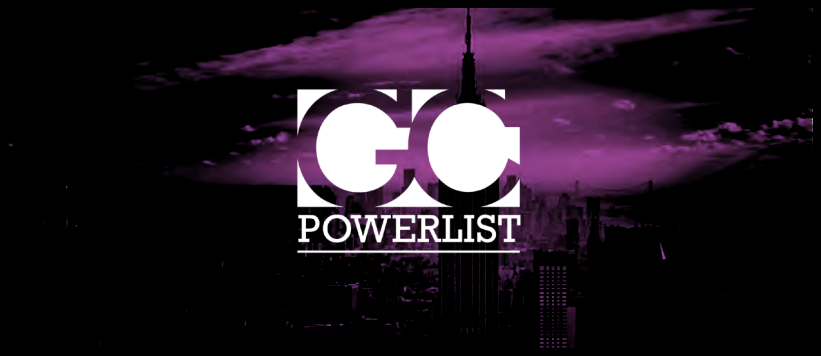

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