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Hewitsons Employment

LEGAL UPDATE

April 2020

EMPLOYMENT LAW AND COVID-19

Coronavirus-related Statutory Sick Pay (SSP)

A third set of SSP regulations came into force on 16 April 2020. The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 3) Regulations 2020 provide that a person will also be deemed incapable of work when they are isolating themselves because:

- they are defined in public health guidance as extremely vulnerable and at very high risk of severe illness from COVID-19 because of an underlying health condition; and
- they have been advised to follow shielding measures.

On 3 April 2020, HMRC published guidance for employers to explain how they can claim back payments of SSP. The Coronavirus Statutory Sick Pay Rebate Scheme (the Scheme) will repay employers the current rate of SSP that they pay to employees for periods of sickness starting on or after 13 March 2020. The repayment will cover up to 2 weeks starting from the first day of sickness and employees do not have to submit fit notes for employers to make a claim.

An employer can use the Scheme if:

- they are claiming for an employee who is eligible for sick pay due to coronavirus;
- they have a PAYE scheme that was created and started on or before 28 February 2020; and
- they had fewer than 250 employees on 28 February 2020.

In an update to the guidance on 27 April, HMRC confirmed that the Scheme falls within the EU Commission's COVID-19 temporary framework for state aid. A claim should not be above the maximum of €800,000 when combined with other aid received under the framework although certain industries are subject to a lower maximum. The scheme covers all types of employment contracts including both full and part-time employees, those on agency contracts and flexible or zero-hour contracts. Employers must keep records of all the SSP payments they want to claim for a least 3 years.

The Coronavirus Job Retention Scheme (CJRS) and furlough: what we now know

The CJRS online application portal went live on Monday 20 April and has enabled employers to make claims in respect of their furloughed employees. More than 140,000 businesses applied using the portal on the first day alone.

HMRC's guidance on the CJRS for both employers and employees has been updated on numerous occasions throughout April and some of the key points from the latest versions of the guidance are as follows:

- The guidance for employees now confirms that a furloughed employee can take holiday whilst on furlough. Employees should be paid their usual holiday pay for any leave taken during furlough (i.e. holiday pay based on pre-furlough normal remuneration) and therefore the grant under the CJRS must be topped-up by the employer for the periods of annual leave.

- Wording was also added to the employer guidance on 23 April indicating that a collective agreement reached between an employer and a trade union is acceptable as a way of evidencing employee consent to furlough.

- The updated employer guidance has also clarified the options for re-hiring employees, including those on fixed-term contracts and now includes a useful eligibility table in relation to start date and RTI submission.

On 15 April the Chancellor issued a Treasury Direction (Direction) under the Coronavirus Act 2020. The Direction is legislative in nature and sets out the rules, detail and eligibility requirements of the CJRS. Quite extraordinarily, there are several discrepancies between the Direction and the guidance. One of the most notable inconsistencies relates to employee consent to being furloughed. The guidance does not require an employee to agree to furlough in a written response, but the Direction makes clear that an employee will not be considered to be furloughed by HMRC unless the employee has agreed in writing to cease all work in relation to their employment.

Strictly speaking, the legal status of the Direction means that it takes precedence over the guidance where the guidance deviates from it, although HMRC have indicated that they will interpret the Direction in light of the guidance. We await further comment from the government on this point. As matters currently stand, the cautious approach is to seek agreement in writing from the employee prior to commencement of their furlough period.

Update to Employment Tribunal guidance

Guidance on how Employment Tribunal (ET) and Employment Appeal Tribunal (EAT) proceedings should take place during the coronavirus pandemic continues to be updated. As it stands, all substantive ET hearings commencing on or before 26 June 2020 have been postponed and converted to case management hearings which will be conducted remotely using telephone or video conferencing. Preliminary hearings and some final hearings are also being conducted remotely if appropriate.

The EAT are not holding any hearings in person. Instead, the Employment Appeal Tribunal (Coronavirus) Amendment Rules 2020 now allow oral hearings to be heard electronically, provided it is just and equitable to do so and the parties and members of the public are able to hear and see the hearing. This has allowed a limited number of appeals to be heard remotely since 16 April 2020, and parties will be contacted by the EAT if this is to apply to their case.

In the meantime, a document containing FAQs about ET proceedings has now been issued. It will be updated as the pandemic continues to develop and can be accessed here.

High Court rules on administrators' implementation of Coronavirus Job Retention Scheme (CJRS)

On Easter Monday, the *Re Carluccio's Ltd (in administration)* judgement was released by the High Court.

Carluccio's collapsed into administration on 30 March 2020 and it decided to furlough staff in order to reduce employment costs whilst retaining its workforce pending any sale or recommencement of trading. The administrators wrote to 1,800 of the company's 2,000 workforce and informed them of the proposal to furlough. They asked employees to respond to confirm their agreement but in the absence of an affirmative response within 3 days, employees were warned that their roles could be at risk of redundancy. Over 95% of the employees expressly consented and 4 rejected, with the remainder failing to respond at all.

The court found that the furlough letter had validly amended the contracts of those who had expressly agreed to being furloughed. They would therefore remain employed on varied contracts which entitled them to wages in the sum of the grants to be paid to the company under the CJRS. However, the court rejected the argument that the contracts of those who had not yet responded had also been varied. While there is case law to show that implied acceptance by way of conduct is possible, it was not established in these particular circumstances as the letter required a positive response.

Snowden J was keen to point out that agreement could have been inferred had the furlough letter been "differently phrased" or if the letter could be proven to have been received. It should be noted that the decision predates the Treasury Direction. The case therefore seems to leave employers who have a larger workforce with the logistical difficulties of getting and keeping track of explicit agreement from each employee.

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