



Employment Law Newsletter - October 2020

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Must you put redundant employees on your bank list?

Many of you will have made employees redundant this year. You're obliged to consider ways of saving their jobs but does this duty extend to putting employees on your list of bank workers?

In [Aramark \(UK\) Ltd v Fernandes](#), the Employment Appeal Tribunal ('EAT') said no.

When Aramark made Mr Fernandes redundant, it had a list of around 120 bank workers to cover staff absences. It didn't employ them nor was it obliged to provide them with work. However, the bank workers had a reasonable prospect of obtaining ad hoc work.

Mr Fernandez said that Aramark should have put him on the bank list because 'it offered him the chance of employment, which was better than no employment'.

Overturning the tribunal's decision that the dismissal was unfair, the EAT said that placing Mr Fernandes on the bank list would only have given him the prospect of work. It wouldn't have avoided his redundancy. Section 98(4) of the Employment Rights Act 1996 addressed 'the mischief of dismissal', but it didn't provide 'a statutory right to an alternative that might have had the potential to mitigate the adverse effects of dismissal'.

The dismissal was fair, but the case reminds us that:

- Consulting affected employees on ways to avoid redundancies is crucial to ensure that any dismissal is fair.

- You should make reasonable efforts to find suitable, alternative employment for redundant employees, but you're not required to go beyond what is reasonable.
- You have a separate duty to offer any suitable alternative vacancy to an employee who is on maternity, adoption, or shared parental leave at the point of the redundancy.

Do speak to us if you need help with redundancies.

Act now for the end of the Brexit transition period

The Brexit transition is the period agreed in the UK-EU Withdrawal Agreement in which the UK is no longer a member of the EU but continues to be subject to EU rules and remains a member of the single market and customs union. It ends on 31st December 2020.

What should you do?

Check the right to work

Until 30th June 2021, you should check a job applicant's right to work in the same way as now. So EEA citizens can continue to use their passport or national identity card. If they give you a share code, you can use the online right to work checking service.

EU Settlement Scheme

EEA citizens and their family members who are living in the UK before 1st January 2021 need to apply to the EU Settlement Scheme by 30th June 2021 to continue living in the UK. You may want to remind your employees about the EU Settlement Scheme.

New immigration system

A new immigration system will apply to people arriving in the UK from 1st January 2021 and EEA citizens moving to the UK to work will need to get a visa in advance. EEA citizens applying for a skilled worker visa will need to show they have a job offer from an approved employer sponsor to be able to apply. If you're planning to sponsor skilled migrants from 2021, and aren't currently an approved sponsor, get approved now.

To assess what actions your business needs to take, here's a checker tool <https://www.gov.uk/get-ready-brexit-check> where you answer questions and receive a detailed personalised action plan. It includes family and personal circumstances. Once you have your action plan, you can subscribe to updates about further changes that may affect you.

Alternative employment was constructive dismissal

In *Argos Ltd v Ms K Kuldo* an employee who was given a new job role during a restructure has successfully argued that she was constructively dismissed.

Argos told Ms Kuldo that her job was at risk of redundancy, but she would be given a new role. The employer said that the old and new roles were 'broadly similar'. Ms Kuldo disagreed. She said that the two jobs were different because the new job was of lower status, had fewer responsibilities and different duties. She claimed it was unsuitable and refused to accept it. When she received a letter confirming her appointment to the new job, she resigned. The EAT agreed that Ms Kuldo was entitled to resign.

Where an employee is being made redundant you are legally obliged to offer them any suitable alternative employment that's available within your business. So where did the employer go wrong?

Consultation

Don't automatically move an employee into a new job. This should only be done with their express agreement. Consult them and discuss their concerns. Don't assume they'll want the new job. Failing to do so may breach the implied duty of trust and confidence.

Employee's view

In a redundancy exercise, the suitability of alternative employment must be considered from the employee's perspective, not the employer's perspective. Does the alternative job match the employee's skills and experience? Can they be promoted? Will commuting be more difficult?

Writing

Put the offer of alternative work in writing. If an employee refuses what you believe is suitable alternative work, ask them to put their full reasons in writing.

Should you extend probation if a new hire has been absent?

A new employee has been absent for most of their probation period. Where do you stand?

Assessment

When someone joins your business, you want to use that honeymoon period to assess their abilities and whether they are suitable. It is for you to decide how long that process will take. Typically, the more senior the position, the longer the probationary period. It's rarely longer than six months.

The clock doesn't stop

While they're away, the employee's probation period continues. You may not have had sufficient time to assess them and you may be unable to meet them to discuss their progress. Extending their probation is logical but you need to have the contractual right to do it.

Contract

Retain the right to extend probation with the following wording in offer letters and employment contracts: *'If you are absent from work during your probationary period we may extend it by the period of your absence so that we can assess your performance.'*

Reason for absence

Where an employee is absent because they're sick, you should take them at their word unless you have compelling evidence that they're lying. That would be a disciplinary issue. Remember that the employee may be absent for other reasons such as family-related leave, annual leave or self-isolation, particularly if the probationary period is six months.

Communication

Draw the probationary clause to your employee's attention. Note the date two weeks before probation should end so that you're not surprised. Speak to the employee regularly about the process and note those discussions. If you extend an employee's probation period, do it in writing.

Should you dress up for a remote meeting?

Working at home is more relaxed than being in the office. This extends to dress. But an online meeting is a professional setting. So, your employees should dress appropriately for your business and the nature of the meeting. Remind staff of your standards if you are concerned. This includes their location. Their background must be appropriate.

If you're concerned about a particular employee, speak to them informally to check whether they need support. Their dress and appearance may be an indicator of declining mental health.

Don't call your boss a **** (rhymes with flat)

A tribunal found that an employee was guilty of gross misconduct when he referred to his bosses as 'twit and ****' in a text to a client. However, he won his unfair dismissal claim, albeit with a 50% reduction in compensation for contributory fault. Where did the employer go wrong?

Facts

Mr Boulter had a strained relationship with Mr Trickett and Mr Skeemer to whom he reported. In February 2019 when Mr Skeemer was visiting a client, Mr Boulter texted the client 'Are twit and **** still there or have they gone?' The client told Mr Skeemer.

Mr Froggatt, the company's commercial director held an investigatory meeting with Mr Boulter who said his text was private and a mistake. Mr Trickett was present. Mr Froggatt also conducted the disciplinary meeting and dismissed Mr Boulter. Mr Trickett took notes.

Mistakes

The company had other directors available so Mr Froggatt's involvement in both investigatory and disciplinary stages rendered the dismissal procedurally unfair.

Mr Trickett was present at both meetings despite the employer knowing that he had a strained relationship with Mr Boulter.

Different people should investigate disciplinary allegations and hold any required disciplinary hearing. A third person should hear any appeal to demonstrate independence.

Extended furlough scheme

On Saturday 31st October the Prime Minister announced that the Coronavirus Job Retention Scheme (the furlough scheme) has been extended for a month. It was due to end on 31st October, but it will now run until December. It will pay employees up to 80% of their current salary for hours not worked up to a maximum of £2,500 a month.

Here we answer your questions:

Which businesses are eligible?

The extended scheme includes small, large, charitable, and non-profit employers. All employers with a UK bank account and UK PAYE schemes can claim the grant.

Which employees are eligible?

Employees must have been on an employer's PAYE payroll by 23:59 30th October 2020. This means a Real Time Information (RTI) submission notifying payment for that employee to HMRC must have been made on or before 30th October 2020. Employees can be on any type of contract. You can agree on any working arrangements with employees.

What can you claim?

For hours not worked by the employee, the government will pay 80% of wages up to a cap of £2,500. The grant must be paid to the employee in full.

When can you claim?

The Government will confirm shortly when claims can be made for employee wage costs during November, but there will be no gap in eligibility for support.

Must you top up employee's wages to 100% of their normal pay?

No, you don't have to, but you can if you wish.

Is the extended scheme flexible?

Yes, you can bring furloughed employees back to work part-time or furlough them full-time.

What about National Insurance Contributions (NIC) and Pensions?

You, the employer, must cover NIC and employer pension contributions for the hours the employee does not work. The Government says that, for the average claim, this accounts for just

5% of total employment costs.

What will happen to the Job Support Scheme (JSS)?

The JSS was set to replace the furlough scheme on 1st November 2020 and run for six months. It aimed to protect jobs in businesses facing lower demand owing to COVID-19 and subsidise employers' wage costs where they are legally required to close their premises. The government contribution under JSS was planned to be 61.67% under JSS Open and 66.67% under JSS Closed.

It has been postponed until the furlough scheme ends. We are waiting for further guidance.

How will the extended furlough scheme work?

It will operate as the scheme did before. You will be paid upfront to cover wages costs. However, there will be a short period when the legal terms of the scheme are changed, and the payment system is updated. Employers will be paid in arrears for that period. Details will be issued on how to use an updated claims service.

You can claim the grant for the hours your employees are not working, calculated by reference to their usual hours worked in a claim period. You will need to report and claim for a minimum period of seven consecutive calendar days. You will need to report hours worked and the usual hours an employee would be expected to work in a claim period.

Can our business use the furlough scheme now for the first time?

Yes. You can access the extended furlough scheme even if you haven't used it before.

Can we furlough someone that we haven't furloughed before?

Yes, neither you, the employer, nor the employee needs to have used the furlough scheme before.

Can we use the scheme if we're publicly funded?

The government doesn't expect publicly funded organisations to use the scheme. However partially publicly funded organisations may be eligible where their private revenues have been disrupted.

If you've dismissed someone to coincide with the end of furlough, can you bring them back?

The announcement didn't cover this. We'll need to know how to treat employees that you have either dismissed or given notice of redundancy.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

watershedhr.com

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