

An Employer's Guide to Redundancy during Furlough Leave

Under the Coronavirus Job Retention Scheme, all UK employers can now access support to continue paying part of their employees' salary for those employees that would otherwise have been laid off or made redundant during this crisis. At present the scheme is open to all UK businesses and applies to all employees listed on your PAYE payroll as of 19th March 2020. Payments under the scheme will be backdated from 1st March 2020. The ability to furlough employees under the Coronavirus Job Retention Scheme has been operational since Monday 20th April 2020 via the HMRC portal. The scheme is backdated and will apply from 1st March 2020 until 30th June 2020 (unless further extended).

However, despite this scheme, some employers may find they are forced to consider longer term workplace reduction plans, particularly if the job retention scheme is not extended beyond the end of June. Some options may include seeking candidates for voluntary redundancy or early retirement, but if this not feasible, compulsory redundancies will need to be instigated as a last resort.

Redundancy During Furlough Leave

Employers can start a redundancy process at any stage, including the period when employees are on furlough. Furlough does not have to be ended before starting the redundancy process, and effective communication through consultation during the furlough period is paramount.

The coronavirus job retention scheme is designed to minimise redundancies, but employers can still make staff redundant during or after furlough. The redundancy process can be commenced at any time provided the correct procedures and consultations are followed. The HMRC furlough guidance does warn employees that they can still be made redundant while on furlough or following furlough. It also reminds employers that furlough grants cannot be used for redundancy payments. HMRC will be closely monitoring this once the scheme has closed.

The initial stage of redundancy is planning and considering whether redundancy is necessary at all. Planning discussions may be taking place at senior level before, during or after the furlough period.

Process

Some employers may have their own written redundancy policy in place which should be followed carefully. Employers with no written procedure should still carry out a fair redundancy process including full information and consultation. Although genuine redundancy situations may be satisfied in current circumstances, there still has to be a fair pooling and selection process, consideration of suitable alternative

employment/redeployment, notice payments and statutory or enhanced contractual redundancy packages.

Normally the role must be disappearing for there to be a true redundancy. Redundancies are usually caused by the employer needing to reduce the workforce. Common reasons include:

- new technology or systems reducing the need for employees
- downturn in work due to the impact of COVID-19 and expiration of the Government job retention furlough scheme
- the need to cut costs resulting in a reduction in staff numbers
- the business closing down altogether or moving

A genuine redundancy only arises if the dismissal is attributable to the fact that the employer requires fewer employees to carry out work of a certain kind or expects that the requirements for employees has reduced.

To dismiss fairly for redundancy an employer must establish that the role is genuinely redundant, follow a fair consultation procedure and consider whether there is suitable alternative employment.

If an employee is dismissed for redundancy, he or she may qualify for redundancy pay, if the requisite conditions are satisfied.

Consultation

The obligatory redundancy consultation with employees can be either collective or individual and, in many cases, both types of consultation are required. Given the current climate and in line with Government lockdown guidelines, it will be acceptable practice to undertake consultation via video conferencing calls utilising Zoom, Microsoft Teams or other platforms.

If employers fail to consult employees in a redundancy situation, any redundancies made will almost certainly be unfair and employers could be taken to an employment tribunal.

Collective Consultation

Employers must follow 'collective consultation' rules if making 20 or more employees redundant within any 90-day period at a single establishment.

There are no set rules to follow if there are fewer than 20 redundancies planned, but it is good practice to fully consult employees and their representatives over a minimum period of 7 to 14 days. An employment tribunal could decide that an employer has dismissed staff unfairly if not.

Follow these steps for collective consultation:

1. You must notify the Redundancy Payments Service (RPS) before a consultation starts. The deadline depends on the number of proposed redundancies – see below.

2. Consult with trade union representatives or elected employee representatives - or with staff directly if there are none (further details in step by step guide below).
3. Provide information to representatives or staff about the planned redundancies, giving representatives or staff enough time to consider them.
4. Respond to any requests for further information.
5. Give any affected staff termination notices showing the agreed leaving date.
6. Issue redundancy notices once the consultation is complete.

Notification

Notify RPS by filling in form HR1. Instructions on where to send it are on the form. You can be fined an unlimited amount if you do not notify RPS.

The deadline for notifying RPS depends on the number of proposed redundancies (for 20-99 redundancies notification should be 30 days before the first redundancy, and for 100 or more redundancies, notification should be 45 days before the first redundancy).

Information you must provide to representatives or staff

You must provide written details of:

- the reasons for redundancies
- the numbers and categories of employees involved
- the numbers of employees in each category
- how you plan to select employees for redundancy
- how you will carry out the redundancies
- how you will calculate redundancy payments

Selection Criteria

Many aspects of redundancy are misunderstood, for example, selecting individuals for redundancy based on age or length of service (last in, first out) should usually be avoided as this may also pose specific discrimination problems for employers. Employers must still be mindful of fair selection criteria if pooling has to be implemented, and consider any protected characteristics under The Equality Act 2010 to avoid future risk of any discrimination claims.

Pooling selection will apply whereby you have more than one individual employee undertaking the same or similar type of role. Each employee in the redundancy pool is scored against each of the criteria and the employees with the lowest scores are selected for redundancy. The benefit of doing it this way is that it is absolutely clear what is being taken into account and how the decision has been made. If any employees challenge the decision, it is going to be much easier to defend.

Employers have discretion over which criteria to choose, with the aim of retaining staff who are most valuable to the organisation. You need to be able to assess everybody against the criteria in an objective way, so you need to choose criteria that are measurable, clearly

evidenced and not just based on subjective opinion. Some examples of both fair and unfair selection criteria are outlined below:

Fair Selection Criteria

Fair reasons for selecting employees for redundancy include:

- skills, qualifications and aptitude
- standard, speed and accuracy of work and/or performance
- attendance/absence record
- timekeeping/punctuality
- disciplinary record

Unfair Selection Criteria

Some selection criteria are automatically unfair. You must not select an employee for redundancy based on any of the following reasons:

- pregnancy, including all reasons relating to maternity
- family, including parental leave, paternity leave (birth and adoption), adoption leave or time off for dependents
- acting as an employee representative
- acting as a trade union representative
- joining or not joining a trade union
- being a part-time or fixed-term employee
- age, disability, gender reassignment, marriage and civil partnership, religion or belief, sex and sexual orientation
- pay and working hours, including the Working Time Regulations, annual leave and the National Minimum Wage

Step by Step Guide

Step 1

The first step (and throughout this process) is effective, timely and consistent communication with your staff, being as open and transparent as possible with any information you are able to provide with regard to the business rationale as to why compulsory redundancies are necessary (in essence this is your first day of consultation). It will be good practice to hold a group meeting with the affected pool of employees who are in scope (this would normally be face to face but in the current environment would need to be via a video/audio conference call), to inform them that they are at risk of redundancy and outline the business reasons as to why.

The business rationale for redundancies must be clearly explained and you must have evidence to back this up, such as downturn in work or financial constraints. In the event that you are only looking to make a small number of employees redundant there is no minimum

period if not undertaking collective consultation, however a tribunal will consider that you have been a fair and reasonable employer in your time frame of meaningful consultation, so we would therefore recommend at least a 7-14 day consultation period. Each employee must receive a letter confirming all of the above and we would recommend that this is emailed to them immediately after the group meeting has been held.

Step 2

As part of the consultation process, send a letter inviting all employees within the affected pool to attend an individual one to one meeting as soon as practicably possible following the initial communication (again this could not be face to face just now so utilise alternative methods).

In this meeting, the employee needs to be informed that they are at risk of redundancy and that the purpose of the one to one session is to consult with the employee and gain their feedback on any ideas to avoid redundancy. Give them a clear, reasonable deadline to submit ideas following the one to one meeting. A letter should be sent following this one to one meeting summarising the discussion and any actions that will be taken arising from these. This letter should also include the date and time of their next one to one meeting.

Step 3

Once feedback is received from the one to one meetings held, you must seriously consider all ideas and concerns raised (please be mindful that in the present climate, it is likely that you will be challenged by your employees as to why you are not keeping them on furlough at this stage as an alternative to redundancy so you need to be able to justify the reasons for this).

The business is also legally bound to consider suitable alternative employment within the company where there is a risk of displacement and evidence that this has been considered. If after all of that there is no alternative but to proceed with compulsory redundancies, then hold a second one to one meeting with each affected member of staff to discuss their feedback and rationalise any further business decisions at that point; this also provides another opportunity for your employees to discuss any additional concerns or ask any questions regarding the process. A letter should then be issued to each staff member individually summarising the discussion/actions from this second one to one.

Step 4

Hold a final one to one with all affected staff and inform them of your decision, the rationale as to why and that following consideration of all options, you are confirming their position will be made redundant.

You would then supply them with a letter that contains confirmation of their redundancy payment, any accrued untaken holiday pay, their notice period and if you will be paying them

in lieu of notice. Please note that any notice period payments must be paid at full salary rate, and it is unlikely employers will be able to claim any notice payments back through the Government scheme.

Also, this letter must give the employee the right of appeal within 7 days of receiving their final letter. Appeal must be heard and concluded with a decision provided in writing to the employee before the process reaches conclusion or any final redundancy payments are issued. At this stage it should be clear to the employee when their last working day with the company will be.

Redundancy packages will then be calculated and paid to the individual employees affected in their final pay, and P45 issued as normal.

It is recognised good practice for employers to retain all employment documentation relating to any redundancy processes for a minimum period of 6 years in the event of any future employment tribunal claims.

Please note all staff have the right to representation throughout this process and at every meeting either by a trade union representative or a workplace colleague. Again, this would normally be face to face but must still be allowed if holding these meetings via video calls or audio conference.

If we can help you with this or any other HR issue, please do not hesitate to contact a member of our HR Team at HR Services Scotland Ltd on

0800 652 2610 – select option 2 for HR