SQUIRE PATTON BOGGS

"Furlough" – 1. Verb (US): Grant Leave to; 2. Verb (UK): Grant Hope to

24 March 2020

Some recent UK employment legislation has been harder to untangle than a sack of coat hangers, so we must hope that Rishi Sunak's Job Retention Scheme announced on 20 March is simpler than its own publicity suggests.

"Furlough", a US word not previously seen in English employment legislation and now probably the most Googled word in the UK, is defined online as either the granting of a period of leave or the leave itself. To qualify under the new Scheme, says the Public Health England website, the worker must be "designated as furloughed" and that status must be "changed subject to existing employment law and, dependent on the employment contract, may be subject to negotiation". This would all obviously be splendid in "peace-time", but that is not where we are. In today's reality, "furloughed" means, essentially, that you have told the employee that you cannot afford to pay him and that his only alternative to a period of unpaid leave is that he and/or others lose their jobs.

We think it is very unlikely (not least because it would be politically unacceptable) that the Job Retention Scheme will contain any material number of technicalities within it, or any hurdles for employers to comply with in terms of effecting the furlough lawfully which would take any substantial period of time. If you have over 100 employees who may lose their jobs if they do not take unpaid leave, for example, the collective consultation obligations are technically triggered. But that would take over six weeks to do properly and, by that time, the employer's business could be dead and buried. Our experience over recent weeks has been that unions and other staff representative bodies have genuinely and fully understood the enormity of what faces both parties here and have been very amenable to shortening that period dramatically. We see no real chance that the Chancellor's 80% payment will be conditional upon the furlough having been imposed on proper notice or even necessarily with employees' agreement. Someone who does not like it can quit and claim constructive dismissal if he wishes, but realistically, why would you?

We have also heard that "subject to employment law" may mean (or at least include) "not determined in a discriminatory manner". However, while that is obviously a very worthy point, it cannot actually be a condition to the Job Retention Scheme payment either. It would take an Employment Tribunal (ET) to find discrimination and, given the recent adjournment of all live ET hearings, someone who feels discriminated against in the furlough process will be lucky to get an answer from an ET much before 2022.

There is, so far, very little detail around the mechanics of the payment. That is maybe unsurprising to a degree for something so huge done at such speed. Nonetheless, it is to be hoped that government guidance can soon be issued to deal with some of the basic questions which Treasury Chief Secretary Steven Barclay struggled with so obviously in his BBC interview on 21 March. Chief among these was whether this could be applied retrospectively if employers now choose to re-hire those already made redundant because of the crisis. Technically the Scheme as announced does not cover those who have already lost their jobs, but given its overall objectives, we would not be surprised if there were some latitude for re-hires of those made redundant after a certain date, potentially 1 March, when the Scheme kicks in for those still in employment.

We do not believe that HMRC will have the time, manpower or (more particularly) interest, to vet employer applications particularly carefully. This is a crisis measure which only retains jobs if the money is available immediately. After all, by the time you have coughed up £330 billion to save the economy (and your government) from the biggest economic threat since World War II, pretty much everything else is *de minimis* anyway. No doubt the implementing regulations will include provisions similar to those in the tweaked SSP Regulations allowing recoupment from employers in the event of overpayment, but, realistically, that must be seen primarily as a backstop for the event of fraud (for example, if your previously-reported payroll figure suddenly goes up in either cost or employee numbers) and not triggered by the sort of administrative slips or confusions of the sort absolutely inevitable here.

It has been queried whether the Scheme will allow people to be moved in and out of furlough over the duration of the crisis. No official word as yet. However, our experience has been that employers have done their best to spread the financial pain by not having employees on furlough for longer than they can avoid and, instead, having different people on unpaid leave at different times. That helps keep people in employment (because some might otherwise be better off on benefits) and, so, we think that, provided the relevant names and salaries are properly notified to HMRC (and especially where it makes no difference to the overall cost), furlough swapping will probably go through on the nod.

Will the availability of this funding make dismissals for redundancy unfair? No – whether the employer can afford to keep the employee on has never been part of the definition of redundancy in the UK. As a matter of optics, however, and especially if the employee is swiftly re-hired by the same employer once the crisis lifts, it is not hard to think that the ET might think the employer a little heavy-handed. Whether that is the same as taking the dismissal outside the range of reasonable responses is a separate question.

37663/03/20