Slaughter and May Podcast

COVID-19: Redundancies

Clare Fletcher	Hello and welcome to the fourth in our series of Slaughter and May podcasts, looking at key topics for employers in the context of the COVID-19 pandemic. My name is Clare Fletcher and I am a professional support lawyer in the employment team.
Phil Linnard	And I am Phil Linnard, one of the partners in the employment team.
Clare Fletcher	Today's podcast focuses on redundancy. Phil and I will discuss how the COVID-19 outbreak has shaped the outlook for redundancies and then look at some of the pitfalls that employers might face when they are planning for job cuts in the current climate. I should say this podcast is being recorded on 30th July and reflects the law and guidance as it stands today. So Phil can I ask you to start by taking us through the redundancy landscape we have seen so far?
Phil Linnard	Sure Clare, when the lockdown was first imposed there was clearly significant concern across the market about the potential for mass redundancies. The Coronavirus Job Retention Scheme or the CJRS as we are going to call it during the podcast, has certainly had an impact here in terms of saving jobs or delaying redundancies and it has had very significant coverage and participation. With some sectorial exceptions, notably aviation and high street retail we haven't yet seen the mass redundancies that we might have expected. I'd say that this is due in part to the CJRS but it is also down to the ability that companies have shown to raise capital, whether through other government support schemes or in the market. We are expecting that the picture may change in the next few months, driven in part by the winding down of the CJRS as listeners will know the scheme is already closed to new entrants and from 1st August there is going to be a tapering down of the level of government support. We are expecting the CJRS to close altogether at the end of October and the government has been quite clear on that despite many calls for further extension. So overall Clare and unfortunately, it is likely that over the coming months as we go into the autumn we will see an increase in redundancies especially in hard-hit sectors such as creative industries, transport and leisure.
Clare Fletcher	Let's talk a bit then about how COVID might affect an employer's approach to redundancies and the first point I would like to make is that the UK hasn't implemented any kind of restriction on redundancies in the context of COVID-19, and this is in contrast to the approach taken in some other countries. In Italy for example a ban on redundancies was implemented back in March and it has since been extended to run to at least until 17th August.

	To give another example in the Netherlands, it was made a condition of their COVID related wage subsidy scheme that the employer had to commit not to make any redundancies during the period for which the subsidy was provided. Of course no such condition was attached to the CJRS in the UK and I think it fair to say that the UK was quite unique in that regard. There were of course some conditions applied to other UK government support schemes like the Coronavirus Corporate Financing Fund and the Large Business Interruption Loan Scheme, and broadly those restrictions require that companies accessing the scheme couldn't pay any cash bonuses or award any pay rises to senior management other than in some limited circumstances. What they didn't do however is place any restriction on those companies making redundancies.
Phil Linnard	And Clare we were going to talk about companies which have suffered during the pandemic, so companies that have become quieter or have been temporarily closed, and we wanted to talk about how those companies can determine whether they do in fact have a redundancy situation for employment law purposes before going ahead and pulling the trigger with any kind of consultation or dismissals. Broadly, as listeners will know under UK law, there needs to be either closure of all or part of a business or workplace or a reduced need for work of a particular kind for a company to have a redundancy situation, and the question that comes out of the pandemic is that where a company has been temporarily closed or has partially suspended operations and doesn't yet know when the rebound will come or if the rebound will come for that particular business when and whether to pull the trigger on redundancies. So how do we look at this? Well we think that for a redundancy situation to exist in these businesses the closure doesn't need to be permanent, it can be temporary. We have clearly seen a lot of temporary closures related to COVID-19 and are likely to see more in the context of local lockdowns. However, there is a tipping point here and we don't think it would be safe where an employer thinks that it is going to have an extremely short-term closure or suspension of operations to choose to launch a redundancy consultation. However when a temporary closure extends into a closure of significant duration or looks like it might become permanent, we think that that is the point at which employers could well decide that they have a reasonable basis for starting redundancy consultations and dismissals.
Clare Fletcher	And I think just to build on that Phil, I think we are likely to see this becoming particularly relevant where the CJRS is withdrawn before businesses reopen and this might be because the particular business is still legally restricted from opening as for example is still currently the case for nightclubs and conference centres for example, but it might also be that where the business is legally able to open but operationally it has chosen not to do so and a good example of that would be things like gyms and restaurants in city centres where they would rely on office workers and there just isn't that foot fall there at the moment.

Phil Linnard	I agree Clare but I don't think we should over-do the point and that's because although employment tribunals will look carefully at redundancy cases, they generally are reluctant to interfere with an employer's assessment of whether a redundancy situation exists. Tribunals generally see that decision as a commercial judgement.
Clare Fletcher	Absolutely, so whilst that aspect is quite light touch, there is however quite an important legal trigger that employers do need to be aware of as part of the assessment of redundancy situation and that relates to collective consultation. So the obligation to undertake this type of consultation arises where an employer proposes collective redundancies and by that we mean 20 or more at one establishment within a period of 90 days or less. Now this topic could form a podcast all by itself but suffice to say for today's purposes that there is a risk that employers may inadvertently trigger this collective consultation obligation, and be technically proposing collective redundancies as part of their ongoing COVID-19 business planning. One example we have seen in practice is where employees are being asked to agree to a certain cost saving measure say for example a pay-cut, and the employer makes clear to those employees that if they refuse to accept it, the alternative is that they will be made redundant. And we did see this also with furlough when it was first implemented at the start of lockdown and if that is the approach employers are taking it is arguable that actually at this point the consultation obligation has been triggered.
Phil Linnard	You are right, employers need to be careful when framing this sort of proposal, particularly around the language that they use. This kind of ultimatum might be effective in practice in getting employees to agree to changes in terms and conditions, but it could have unintended consequences for example triggering consultation obligations at an earlier point than expected and when employers aren't ready with fully baked proposals.
Clare Fletcher	And just to build on the timing consideration, once the obligation to consult is triggered there is a minimum period of either 30 or 45 days depending on the numbers of redundancies involved, which needs to elapse from the start of consultation before the first redundancies can take effect. Now these are minimum periods, we often find that longer is required particularly where employers need to arrange an election of employee reps before the consultation can begin. And there is likely to be an interplay here with the winding down of the CJRS at the end of October, if that is when the redundancies are intended to take effect then employers will really need to count backwards and think about starting the consultation process in mid-to-late September or potentially even in earlier September especially for large scale processes.

Phil Linnard	Thanks Clare and I think before we leave the collective consultation regime, let's just address the frequent question we have been getting about the special circumstances defence. As listeners will know if a company can show that there are special circumstances there can be a defence for any failure to comply with collective consultation obligations and clearly in real world terms, the pandemic is special circumstances. The issue though is that for the purposes of the collective consultation regime in respect of redundancy, the defence is very narrowly interpreted, so insolvency for example isn't generally an excuse. It is possible for a company to claim special circumstances where there is a sudden disaster whether that is physical or financial and it makes it necessary to close the company suddenly but to take a counter example if insolvency results from a gradual run-down of the company, when the company can see it coming the defence has been found not to apply in most cases. So how does this work here? We have a sudden unexpected pandemic but it is going on for a sufficient duration that companies can plan and can respond to it, and we think that the availability of the CJRS and other government support schemes along with the duration of the pandemic make it quite difficult for companies here to claim that special circumstances exist such that they don't have to carry out collective consultation in respect of redundancies. However we do think that if a company has found not to have complied with its collective consultation obligations, that the overall circumstances that the business world is experiencing right now, may well be a useful set of facts in mitigation and could point towards courts and tribunals taking a more lenient approach to the amount of an award that might be made.
Clare Fletcher	We may also find that this defence could be of some use to employers where there are some procedural difficulties associated with consulting remotely, and we will pick up on that in a moment. But what I would like to do now is to move on to some of the specific issues that redundancies might give rise to for employers who have made use of CJRS, who have currently got furloughed employees. And the first point I would like to make relates to redundancy selection so where some employees have been furloughed employers may well be tempted to select those employees for redundancy particularly where they have been on furlough for quite a few months. This approach might however be classed as unfair and it could even lead to issues of indirect discrimination given that there is some evidence that the CJRS has been disproportionally used for low paid, usually younger, predominately female workers. There might also be the other issues to think about we are selecting employees who are less visible in other ways, for example because they have been shielding or they are working from home. Or to give another example, some employees might have been less productive during lockdown because of balancing childcare with work for example and again this could all amount to potentially unfair selection or discrimination.

Phil Linnard	Another area where we have seen some focus is the position of women who are pregnant or are on maternity leave. I think there is a temptation or a fear on the part of some employers to automatically exclude women in these positions from a redundancy process so to take them out of the selection pool, out of a worry of being seen to discriminate against them if they were then selected as redundant. However from an employment law perspective, if women who are pregnant or on maternity leave are genuinely in scope they should be included otherwise the employer can risk discrimination claims from other employees. Of course women on maternity leave do have other forms of protection for example, they have the right to priority when considering suitable alternative employment but this doesn't mean that they should be excluded from the selection process altogether.
Clare Fletcher	I think employees are going to need to be quite sensitive to these issues when they are looking at redundancy selection.
Phil Linnard	Yes I agree Clare but moving on to our next point, we wanted to talk about redundancy consultation with furloughed employees. At the start of the lockdown there was a lot of uncertainty about whether and how employers could communicate with people who are on furlough, and that was because of the prohibition in the CJRS on employees undertaking any work while they participated in the furlough scheme. The government has clarified the guidance helpfully, and it has been confirmed that employee representatives can carry out their duties for the purposes of individual or collective representation while they themselves are on furlough. And we think that it is implicit from that, that other employees who aren't employee representatives but who need to be consulted in respect of their employment position could also take part in a redundancy process while they are furloughed. We think that there are going to be some real practical difficulties to get over with carrying out consultations remotely and we have seen that through the pandemic period with TUPE consultations but also with collective redundancy consultations. Employers are going to need to think really carefully about the practicalities of getting in touch where employees don't have work email addresses, or employees who have had their access to work communications cut off while they are on furlough. Employers are going to have to think about how they'll enable employees to have a union rep or a workplace colleague attend remote meetings with them, and there might also be some issues about the data security of consultation platforms, for example when it comes to electing employee representatives as that would usually be done in secret. And finally Clare if employees are being flexibly furloughed under the latest version of the CJRS there might be some scope to carry out face to face consultation meetings with social distancing to avoid some of these, but that will depend on the extent to which flexible furlough has been rolled out across a workforce and how frequently employees are available for that kind of meeting.

Clare Fletcher	So the next area I wanted to look at is what amounts might be payable to employees who are made redundant in these circumstances and what amounts can and can't be reclaimed via the CJRS. And the first point is in relation to notice, we do now have some clarity in the guidance after a period of uncertainty that employers can serve notice to employees who are furloughed and they can claim for both statutory and contractual notice periods via the CJRS. We have also had quite an interesting change in the law announced just today, which means that employees who are furloughed will have their statutory notice pay calculated on the basis of their full normal salary, not any reduced amount that they have been receiving during furlough. And that change is also going to apply to some other statutory payments including statutory redundancy pay which will also be calculated on the basis of full normal salary. However it seems that this change doesn't apply to any additional contractual notice period which is longer than the statutory minimum, which does mean that in that scenario the calculation could be quite complex and we'd suggest that employers should seek specific advice to ensure that the right amounts are paid.
Phil Linnard	I agree Clare the CJRS rules are really complex but it's important I think to bring out here, that the focus for employers is recovering their employees' regular wages while they are on furlough. And we think that that means that an employer couldn't claim back a payment in lieu of notice under the CJRS because that would be a discretionary payment and it probably wouldn't fall within the concept of regular wages. We also think that you can't reclaim statutory redundancy pay or any other enhanced redundancy pay via the CJRS for much the same reason.
Clare Fletcher	So what about employers who have chosen not to use the CJRS? And one of the other questions that we have been asked is if you have got an employer in that situation who then needs to make redundancies would their decision not to use the CJRS affect the fairness of those dismissals? Now clearly this is as yet an untested question, but in our view the risk for employers would be quite low. From a legal perspective, the fairness of a redundancy dismissal depends on all the circumstances at the time, and there might be many different reasons often reputational but not necessarily why a company chooses not to use the CJRS and we have seen how quickly circumstances can change at the moment meaning that the outlook could be very different by the time redundancies are on the cards. So it is not necessarily unfair we would say to make employees redundant where the CJRS support is available but isn't being used. Of course the CJRS as you have mentioned Phil is already closed to new entrants and it is in the process of winding down which I think makes the risk even lower for employers. The point I would though add is that what we might see in this scenario is greater scrutiny and particularly by employees and the media of what other cost savings that the employer has implemented if it is not using the CJRS particularly at executive level.

	So things like salary freezes and bonus deferrals and we have seen plenty of examples of these whether as part of the financial support packages that I mentioned earlier or more generally and it is really going to come down to I think a balance of reputational risk for employers in these circumstances.
Phil Linnard	I agree Clare and I think we could say the same about employers who have taken CJRS grants and who have later paid them back. We have seen more examples of that recently, taking a few ASOS, Taylor Wimpey and Ikea have gone public on their repayment of the CJRS money. These are generally companies who have had better than expected performance during the lockdown period and are therefore in a good financial position to pay back the CJRS grants that they received.
Clare Fletcher	So the final thing I would like to look at today is the Job Retention Bonus that was announced by the Chancellor on 8th July. The JRB as we will call it for today's purposes is going to be payable at a rate of £1000 per employee and payable to employers who bring back employees from furlough and keep them in their jobs at least until 31st January, 2021. and the obvious intention of this scheme is to incentivise employers to protect jobs instead of making redundancies.
Phil Linnard	Although Clare as I am sure you will explain, it is not yet clear if the scheme will be popular or whether it will achieve that aim.
Clare Fletcher	Absolutely I think almost from the moment it was announced there was some speculation about that and the institute for fiscal studies think tank, warned quite early on that a lot and probably in fact the majority of the JRB money will actually go in respect of for jobs that would have been returned from furlough anyway and were never at a risk of redundancy. And we are already seeing reports of several employers such as Primark, Rightmove and Compass saying quite publically that they won't be taking the bonus despite bringing back thousands of employees from furlough.
Phil Linnard	We are expecting more details on the JRB in the coming days and we do know that some employers are waiting for the more detailed government guidance before making a decision. So it may be that the level of take-up and popularity of the scheme changes at that stage. However for the time being we think that if an employer decides not to take the JRB that wouldn't of itself result in unfairness, if there were later redundancies. For much the same reasons that we have just discussed in relation to the CJRS.

Clare Fletcher	And that brings us to the end of today's podcast, thank you all for listening. We have got two more episodes coming up in the series which we will be publishing in the next few weeks. You can find all of our previous podcasts in this series on our website. In the meantime, if you would like more information about anything that we have discussed in this podcast, please do feel free to contact either Phil or me or your usual Slaughter and May contact. Thank you and goodbye for now.