

# SLAUGHTER AND MAY

## Slaughter and May Podcast

### Redundancy in focus – Brexit and the COVID-19: The perfect storm

<b>Clare Fletcher</b>	<p>Hello and welcome to the first in a new series of Slaughter and May Podcasts. This series focuses on redundancy and over the 5 episodes we will discuss the most business critical areas for employers to think about in the current climate. I am Clare Fletcher, a professional support lawyer in the employment team and today I am joined by one of our partners, Phil Linnard.</p> <p>In today's episode, Phil and I will share our insights on how Brexit and COVID-19 are shaping the landscape for redundancies. There are 5 key points we are going to discuss today, firstly:</p> <ul style="list-style-type: none"><li>• Some of the legal changes we have seen already and those that are potentially coming down the line.</li><li>• Secondly, when to start redundancy consultation.</li><li>• Thirdly, the types of downturn some businesses are seeing and the solutions those may require.</li><li>• Fourthly, are jobs disappearing or in fact just changing?; and then</li><li>• Fifthly how new problems will need new solutions.</li></ul> <p>So to start on our first theme, the legal changes we have already seen really relate to COVID-19; the introduction of the job retention scheme, the job support scheme and the job retention bonus, and of course we have also had new legal restrictions on attending work and which workplaces can legally open, and with what COVID secure measures in place. And we have said lots about that in previous podcasts and briefings that you can find on our website.</p> <p>All of these COVID measures have had a clear impact on the level of redundancies we have seen, over the last six months or so, and indeed that we are likely to see going forward. The early indications are that the job support scheme and the job retention bonus may be less effective at staving off redundancies than the job retention scheme was. Although the recent extension to the job support scheme will, no doubt, be welcomed by businesses who are forced to close in the coming months.</p>
<b>Phil Linnard</b>	<p>Thanks Clare in terms of Brexit on the other hand, the employment law changes, if any, are all yet to come. The status quo has been maintained during the current implementation period and we are looking ahead to what happens from the 1<sup>st</sup> January 2021 onwards. We know already that there's likely to be an immediate impact on UK companies who participate in European Works Councils. We know that European Works Councils or EWC's are often used to provide consultation mechanisms on large scale redundancies. Especially cross border ones, but after the 1<sup>st</sup> January 2021 it is possible that they may no longer be able to carry out that role in respect of</p>

	<p>UK employees. So for companies with a EWC, those companies should now be thinking about what changes they might need to make in January to either amend their current consultation arrangements or put in place alternatives.</p> <p>Looking further ahead to the medium or the long term, there may be scope for changes to several UK employment laws which had until now been underpinned by EU law. How much change is possible, and how much change happens, depends on what deal, if any, the UK can strike with the EU about the future trading relationship. We know though that the level playing field for workers' rights has been one of the major talking points in the deal negotiations so far.</p>
<p><b>Clare Fletcher</b></p>	<p>Absolutely, and in fact one of the sticking points we might even say, and assuming that there isn't any kind of deal either with the EU or any other country which prevents them doing so, it might be that the UK government looks to make changes to some of the laws that govern redundancy.</p> <p>So broadly speaking the UK employment laws that govern individual redundancy process and the fairness for redundancy dismissals are purely domestic laws and won't be directly affected by Brexit. On the other hand, the requirement for collective redundancy consultation is derived from EU law and it is here that changes could be made as a result of Brexit. How those laws work in an insolvency context, for example, has been recognised as problematic for many years, and we will be talking a bit more about the insolvency angle on redundancies in a later podcast.</p> <p>Looking now though at the collective redundancy consultation process in a bit more detail that brings us on to our second theme, which is, when to start that collective redundancy process.</p> <p>Now this is a difficult question at the best of times but even more so in the context of Brexit and COVID-19. The need for this collective redundancy consultation arises where an employer is proposing to dismiss as redundant twenty or more employees at one establishment within a period of ninety days or less. Now what's relatively clear is that the consultation has to take place before the final decision is made, and that the redundancy dismissals can't be affected until that consultation process is concluded and that's really important for employers to remember from a planning perspective.</p> <p>The more difficult issue though is deciding when the need to consult is triggered, legally there needs to be more than a mere possibility that redundancies might be needed. The employer has to have a clear, albeit provisional intention to make redundancies.</p>
<p><b>Phil Linnard</b></p>	<p>You are right Clare that this is a difficult area for companies, on the one hand no company will want to start consulting on redundancy planning before its ready. On the other hand, leave the consultation too late and companies can be open to challenge on the quality of their consultation, or can be accused of making decisions before having consulted workforces properly.</p>

	<p>In reality many businesses will have spent many of the last few months thinking about various scenarios for their businesses going forward which may involve changes to their workforce. Where companies have been carrying out that modelling process, we would always advise that internal documents around the modelling contain caveats to protect the company. For example, that no decisions had been made so any decisions are subject to applicable informing and consulting processes. Or even, assuming that this is the case, that any modelling scenarios in internal documents are provisional only and are part of an ongoing, but not yet completed review. What is important is that at the time that the company pulls the trigger, it can demonstrate that the consultation is genuine and that the views expressed during the consultation will be taken into account by the company, in reaching its final decision.</p> <p>Companies will also at the moment be very much aware that the COVID and the Brexit landscape can change over the next few months quite significantly, and that we expect that companies are going to be cautious, where they have choices about the timing of their head count exercises, before launching consultations just in case the business environment for them changes significantly after the consultation is launched.</p> <p>So Clare, I think on the consultation planning side, it's all about doing effective modelling within businesses but not making decisions at this stage until the full consultation has happened.</p>
<p><b>Clare Fletcher</b></p>	<p>Absolutely, I think what we, just to talk a bit more about COVID, what we have seen there is that similar with Brexit really, there has been a bit of wait and see, and the CJRS has allowed that to a certain degree with COVID. The job support scheme on the other hand might continue to allow employers to take that approach but potentially to a lesser degree, as I mentioned earlier.</p> <p>There's an interesting distinction between what employers can do with redundancies between the CJRS and now the JRSS. So where employees were furloughed under the CJRS the employer could undertake redundancy consultation with employees, and even a few notices of redundancy to furloughed employees while still receiving grants under the scheme.</p> <p>Contrast the position with the JSS where the limited guidance we have at the moment, says that an employee can't be made redundant or even put on notice of redundancy whilst the employer is claiming a grant for that employee through the JSS. So far we don't have any clarity about whether the employer can undertake redundancy consultation with employees whilst utilising the JSS. So there looks to be a clearer distinction as the employer between utilising the JSS and implementing redundancies than there might have been with the CJRS. There's less overlap, I think, going forward.</p>
<p><b>Phil Linnard</b></p>	<p>Thanks Clare, and I think one final point on this topic before moving on, and that's companies have to remember that consultation can be triggered in unexpected scenarios. We know, and we have just talked about collective redundancy consultations being carried out where companies genuinely propose to reduce their head count in response to business performance, but</p>

if for example, the company wants to change terms and conditions, a pay-cut or introduce short time working, then if the employer wants to implement that change by terminating existing contracts and offering re-engagement on new terms, or says to employees that they will face redundancy if they don't accept the new terms, then employers need to be careful because they could again be in collective consultation territory. So it's really important not only for companies to plan their consultation process with headcount reductions, but be alive to the potential consultation in other scenarios where they are looking to change the arrangements for their work force.

Moving on then to our third theme for today. That's the question for each business of what kind of effects are you experiencing as a result of Brexit, as a result of COVID, for how long, and what's the right response. It became evident very quickly as the pandemic progressed that some businesses were fairing much better than others, and we know that some businesses have been and will be impacted by Brexit to different degrees to others. There is simply no size fits all approach here to redundancies and workforce planning, as companies respond to the pandemic and to Brexit. But we do know that there are some common factors that companies can be looking at when planning their headcount requirements going forward. A non-exhaustive list, let's give some examples; clearly companies will have to think about their financial situation. Sometimes it may simply be a case of how many employees they can afford to pay and for how long. In other words companies may have no choice about redundancy planning, other companies may be in the position of having some flexibility. They will need to look at the outlook for their own businesses and for their own industries across the different areas of the country and indeed the world in which they operate.

Companies will need to look at the terms of any trade deal that the UK might reach with the EU and with other countries. Companies will have to look at any local or national COVID related restrictions will apply in the areas where they operate. They also have to think about whether and to the extent to which they have taken any advantage of any COVID related financial support and any restrictions that come with that financial support, in terms of how they deal with their headcount going forward.

For many companies, it may be that Brexit related impacts are more sustained than COVID related impacts. For example, the new rules on immigration that might come from Brexit could result in a longer term shortage of employees. Which companies may have to balance out against any short term excess of employees that's resulting from a business downturn caused by the pandemic. Companies are going to have to do a difficult balancing act between current need in a depressed business environment as a result of the pandemic, and on the other hand future anticipated need, taking into account how they think their business is going to recover from the pandemic, how it is likely to be impacted by Brexit and the availability of workers that their business needs.

<p><b>Clare Fletcher</b></p>	<p>I think that leads quite nicely in Phil to the fourth theme which is; are jobs actually disappearing for your business or are they just changing?</p> <p>So there has been lots of focus on the COVID pandemic actually accelerating changes in the job market, and with that comes a renewed focus on what jobs are viable. So some employers have been able to do an analysis of what jobs within that business are viable on quite a nuance basis and looking beyond the immediate requirements of COVID and Brexit. Others however simply haven't had that luxury, as you have mentioned Phil, given the immediate and severe impact of COVID on their business. Even where jobs might appear viable in the long term and the business hopes to re-hire employees in the future, it might be that as of now redundancies are needed. That's likely to be primarily a financial decision, balancing the cost of continuing to employ those individuals even with things like the job support scheme and the job retention bonus, against the redundancy costs and what the company can actually afford to pay at the moment.</p> <p>It's not just the types of jobs that are changing, I think we are seeing though it's also the way in which they are carried out so flexible or agile working has soared during the pandemic and certainly looks like it's here to stay.</p>
<p><b>Phil Linnard</b></p>	<p>You are right Clare, we see headlines everyday about companies looking ahead to how they are going to staff their businesses going forward, whether their workforce will be in the office, at home or a combination of the two and we might see more changes in law to reflect that, the right to work from home has been muted since the early days of lockdown here, and in Germany the government has recently confirmed that there will be a right for at least 24 days a year, if the needs of the business and workflow allow to work from home. So it is a limited right but we can see the direction of travel.</p> <p>We also know that Brexit will likely have an impact on the nature of jobs going forward. We expect that Brexit will mean that immigration, for certain types of role, in particular at the low scaled end of the workforce will become more costly and more complex for employers, and that may change the makeup of workforces over the time. We might also speculate that the increase in remote working accelerated by COVID means that some jobs, in particular those that don't require an in person presence will become more globalised. And that increased immigration costs that could result from a post Brexit immigration regime could be off-set by companies deciding that there workers don't need to be in the country where they operate and can work in effect from wherever they like on the globe.</p> <p>We saw in the last financial crisis, some employers introducing a right to vary as or pay in some circumstances, and we know anecdotally that those employers may of come in to the pandemic in a more flexible and stronger position than companies that had less flexibility in their employment terms. Now what's possible in terms of flexibility on employment terms is going to depend on the employment law landscape after Brexit and what future governments decide to do in respect of employees rights, but we could well see companies thinking over the coming years of how they position themselves for future business shocks, and how to give themselves the</p>

	flexibility in their workforce to respond to unforeseen developments in the business environment.
<b>Clare Fletcher</b>	<p>Which brings us on nicely to our final theme on the idea that new problems need new solutions. We are clearly in uncharted territory here that would have been the case with either facing Brexit or COVID on their own. But certainly the combination is looking like it is providing the perfect storm, and the approaches that companies might have used in the past, to their workforce planning or their redundancy processes may simply be no longer fit for purpose, and those new solutions that we are starting to see emerging might need to work within a legal framework that is struggling to catch up.</p> <p>I hope what we have done today is bring through some consistent themes; the importance of careful planning, early intervention and coming up with well thought out tailored solutions for your particular business. Ultimately the sort of uncertainty we always create challenges but it can also create opportunities, and I think we will continue to see that as both Brexit and COVID play out.</p> <p>So that brings us to the end of today's podcast, thank you all for listening. Do look out for future episodes in this series which we will be publishing in the coming weeks. You can find all of our Podcasts via the Slaughter and May website. Thank you and goodbye for now.</p>