Returning to work after furlough: the impact for employers

Expo shorts

In conversation with Gillian MacLellan, partner from CMS

28 August 2020

JF   **Today we are joined by Gillian MacLellan, an employment law specialist to hear her views on the various issues employers should be thinking about when employees return from furlough.**

GM   Overall I think it's been a success in terms of avoiding the immediate impact of redundancies. It's so odd now thinking back but in March when we went into lockdown the word furlough was something I'd never even heard of before – the whole concept was alien to us in the UK. Furlough in the UK is basically the coronavirus job retention scheme – where employers could keep employing their staff but the government paid their wages up to a maximum of £2500 a month or 80% of wages. Until July employees could not work at all during furlough but the system was changed to allow flexible furlough. Employers are also required to contribute towards furlough costs and the scheme winds up completely at the end of October.

So the fact that the government has managed to get this scheme up and running in a month, when some 9.6 million people were furloughed is really amazing. It was obviously very challenging for us when we were advising employers because the information coming out from the HMRC was not detailed enough, it kept changing, there was a feeling that the goalposts were being moved, but to be fair that's understandable given the pace of change.

And it hasn't been perfect - I know there were gaps in protection and some individuals did not qualify under the scheme or indeed under other government schemes.

The difficulty of course now is that it's very much the lucky ones who are coming back from furlough. There are significant numbers of people who are about to be made redundant. It's interesting that in France their equivalent scheme is running for 2 years and Germany's kurzarbeit scheme will not run for as long as the French one but is still longer than here.

Despite calls from business to prolong the UK scheme, an extension has not been forthcoming. Instead, the government has announced a new £1,000 coronavirus job retention bonus, intended to incentivise employers to keep employees on the payroll after the furlough scheme ends on 31 October. The new scheme will allow employers to claim a £1,000 job retention bonus in respect of each eligible employee, which will be paid out in early 2021. Broadly speaking, an eligible employee will be anyone who has previously been furloughed

under the CJRS, and who is continuously employed during the period from 1 November 2020 to 31 January 2021 and earns an average of at least £520 per month during that period.

JF   For those employees who are returning from furlough, what should employers be thinking about?

GM   I think first and foremost its about safety. I have said this many times now, but the virus has redefined what safety means in a workplace. Health and safety is now the key issue for every organisation's COVID-19 recovery plans.

For all employers, COVID health and safety risk assessments are the starting point. The obligation on employers is to do everything that is "reasonably practicable to minimise the risks", with the UK Government guidance recognising that employers cannot completely eliminate the risk of COVID-19.

For some risk assessment is a whole new world. Employers in the manufacturing and construction sectors are well versed in risk assessments and health and safety compliance. In the past office environments have tended to adopt a lighter touch, or at least less visible approach to risk assessment. But that's all changed now.

JF   And what sort of health and safety queries are you getting from employers?

GM   So we are getting a lot of queries from employers about what health and safety compliance means in practice, what level of health and safety consultation they are required to carry out with their workforce, and what should be in a COVID-19 risk assessment.

And there is a huge range of social distancing requirements and hygiene measures that employers need to organise. There are also a number of physical changes that need to take place to premises. Some employers need to also factor in PPE - and only this week I've been reading about the UK government starting to encourage routine virus testing in the workplace. So the situation is constantly evolving and employers need to keep up with this and take into account the relevant government guidance. So in the creative industry the Scottish Government issued guidance at the end of June covering studios and shared spaces. So employers sending their employees to another location need to think about this and speak to their employees and understand the arrangements elsewhere. Communication around safety measures is really vital and it can't be a one off update it needs to be regular and ongoing.

I guess if I was to sum it up I would say 4 things: worker consultation around health and safety is a must, this needs to feed into a risk assessment, think about the physical measures and the PPE and communicate with employees before they come back to work and after they are back.

JF   So employers should be giving employees information before they come back from furlough?

Yes definitely. One of the really strange aspects of furlough is that employees were not allowed to work at all – even dialling in to catch up meetings, that sort of thing was prohibited in terms of the rules, so for employees who have been furloughed coming back into a workplace is about communication about what has changed and being told about what

measures have been put in place to make them feel safe. This approach also feeds into their legal duty to consult with staff and ask them if there are any individual concerns around Covid and returning that they need support with.

JF **And what sort of individual concerns should employers be taking into account when they support people back to work?**

GM   Although the virus can affect anyone we all know that it affects some people far worse than others, so employers need to be aware of these differences and take individuals circumstances into account.

Some people who have been shielding or have medical conditions have real anxieties about the prospect of returning to a workplace and being around other people.

We also know that childcare has been a major issue for many parents and obviously in Scotland now most schools have gone back this makes the situation easier for many parents.

The evidence is also telling us that BAME employees have been disproportionately affected by the virus, so what additional steps are necessary here?

We also know that mental health has suffered during lockdown as people have felt isolated and anxious about their jobs. The ONS reported last week that depression amongst adults had doubled during the coronavirus. And we also know that being at work is good for people's mental health so bringing people back should hopefully be a positive step when an employee has been furloughed.

Public transport is another issue where we have seen concerns. Employers have been offering staggered start times and taking a flexible approach here. There may also be an obligation to make reasonable adjustments if the employee is disabled, so we have been telling employers to speak to individuals who raise concerns and discuss these issues in advance and there may be options in terms of access to work financial support for disabled employees.

So as you can see there are a lot of barriers and individual issues to consider.

Most employers have dealt with this by sending out questionnaires to understand whether there are barriers which might prevent people coming back to the workplace and having supportive discussions. There may also be employees who want to change the way they work and make requests to work flexibly, so there may be longer term issues to consider here.

JF **That sounds like a lot to consider on an individual employee basis particularly when employers have also had to follow the government rules about when their workplace can open. Is it the case that most workplaces now can re-open?**

GM   Actually there are still quite a few areas where we have still to see businesses re-open and its been different in Scotland and England. The creative industries in Scotland have been in the later phases of the Scottish route map. We've seen that up here museums, cinemas and galleries could re-open from 15 July – but we have yet to see a number of indoor venues

such as theatres or certain indoor music venues re-open – although there is now at least an indicative date of 14 September for both of them.

Non-essential offices and call centres have still not been given a firm date to re-open by the Scottish Government. And many larger indoor venues are still waiting for a date to reopen.

The position remains in Scotland that working from home and working flexibly is the default. This is very different to the English position which changed on 1 August to encourage workers back to their desks, in what has been seen as an attempt to stimulate the city centre businesses that are dependent on city workers.

But what they have found is that people have not been rushing back to work because of issues like childcare and concerns over public transport.

JF   **But if the employer is not willing to make changes or they can't agree – can an employee simply refuse to come to work?**

GM   Well it's never quite as straightforward as that, since both parties have rights and obligations towards each other. Under the Health and Safety at Work Act 1974 employers are under a duty to do all that is "reasonably practicable" to protect the health, safety and welfare of their employees. If an employee has a reasonable belief that they face serious and imminent danger and they have been subjected to a detriment or dismissed (for example, disciplined for not travelling to work) then they may bring an employment tribunal claim. So there is some scope for an employee to refuse but it's not something we are seeing. Our clients are extremely concerned about the safety of staff and working out a solution.

JF   **So what are the main points you would recommend employers should be doing to help staff return safely?**

GM   So there are two key things. In terms of the return process - speak to staff on an individual basis. Listen to what their concerns are and work out what support is appropriate. Hopefully in time as people re-adjust back into the workplace this will get easier but if you've been at home and furloughed for 5 months, listening to government advice to stay at home, and be socially distant, this is not an easy step for anyone.

And secondly start future proofing your organisation now. What are the next steps that might happen here? Employers need to think about contingency planning over the winter. This is a fluid situation and we have yet to fully appreciate how colds and flu interact with the virus and increased absence levels at work as a result of testing and self isolation. Employees, especially those with young children who have temperatures or virus symptoms will be isolating until they have test results back. Does that mean that you need to put people into shifts such as an A team and B team to know that you have emergency cover if one shift goes down because they all have to self isolate.

JF   **And if there was one thing that you would share in terms of advice or wisdom what would that be?**

GM   I suppose looking at this in the context of the workplace and the virus my advice is to both individuals and employers that they should flexible and adaptable. Pandemics press fast

forward on change and although we might just be through phase one of the immediate crisis – more change is coming – and I think we need to get used to situations changing. So talk to our staff and each other about how we can adapt and make change a good thing. The management speak on all of this is about embracing disruption and never waste a crisis, but I mean this much more on an individual level and how people interact at work, except that very little is certain. Be flexible.

USEFUL LINKS

Further information and guidance on the Coronavirus Job Retention Scheme and other employment law issues can be found at the following links:

- CMS Future of Work series
- CMS Diversity in 2020
- CMS Employment Law Resources
- UK Government Guidance Working Safely during Coronavirus
- Scottish Government Guidance Returning to work safely
- Creative studios Scottish Government Guidance

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