Portal's Eve

19th April 2020

On the eve of the Scheme going live, David Reade QC and Daniel Northall examine the uncertainties that persist.

There is a principle in quantum physics called Heisenberg's Uncertainty Principle which, to paraphrase badly, suggests this: to look is not to see, because the act of observation causes the subject to move its position[1].

Which brings us on to the *Coronavirus Job Retention Scheme* in its latest guise. It was only Thursday morning that we put the full stop to our analysis of the Treasury Direction, confident that we knew what it said, even if we did not always know what it meant. But a day is a long time in the world of furlough and it turns out the Direction does not mean what it says anyway, at least in certain respects.

Friday evening saw the publication of a raft of additional guidance in anticipation of the application portal going live on Monday 20 April, including revisions to the guides for employers and employees, a new guide for calculating recoverable wage costs under the Scheme and a 'step by step' guide for employers making a claim. However, no amendments were made to the Direction itself, which remains in its original form.

Agreement to furlough

The most noteworthy amendment to the employer's Guidance concerns the employer's and employee's agreement to furlough.

Paragraph 6.7 of the Direction issued only two days before strongly indicated that an employee was only furloughed for the purposes of the Scheme if the employer and employee had agreed the employee's cessation of work *in writing*. That would require the employee's consent to furlough in writing also and, if correct, imposed a more exacting requirement than the Guidance which, even in its then most recent form, merely required the employer to notify the employee in writing that they had been furloughed, which written notification the employer was required to retain for 5 years. Although the employee's guidance could be read as requiring the employee's consent.

Whether or not in response to the unease caused by paragraph 6.7 of the Direction, the fifth iteration of the Guidance contains the exhortation that:

> *If this is done in a way that is consistent with employment law, that consent is valid for the purposes of claiming the CJRS. There needs to be a written record, but the employee does not have to provide a written response.*

[1] No cats were harmed in the preparation of this article

Yet the revised guidance is oddly structured. The above quoted addition to the Guidance is within a paragraph concerned with the employer's written notification of furlough. In context, it might be thought that the "*this*" that must be consistent with employment law is the written notification. However, that would make no sense since furlough is a concept which, prior to the introduction of the Scheme, was alien to employment law. It therefore has nothing to say about an employer's furlough notifications, whether written or otherwise.

The only reasonable explanation therefore must be that the addition to the Guidance concerns the form of agreement between employer and employee *viz.* provided the agreement is consistent with employment law, the employee's consent to furlough does not need to be in writing. None of the commentaries on the Direction exist in a vacuum and it may be the this was a quick reaction to what was an unintended consequence of the Direction and one which had sent many employers to try and get consents which had previously not been obtained.

If one adopts the revised Guidance, the position reverts back to the common law contract. If there is an agreement adequate to vary the contract, an absence of writing is not fatal to the employer claiming under the Scheme. The possibility of implied agreement by conduct, as examined by the High Court in ***Re Carluccio's,*** is then resurrected *Lazarus*-like and has not been dealt the fatal blow by paragraph 6.7 of the Direction that was originally feared.

But what of the Direction? An obvious objection to the above analysis is that the Guidance is not the law and is trumped by the Direction. On this issue, one is forced to recognise that the strict legal position and the practical reality may diverge, such that the meaning of paragraph 6.7 of the Direction is moot. It seems likely, if not inevitable, that HMRC policy on the need for agreement will follow the Guidance. Thus, an employer will be permitted to access the scheme where he has the agreement of the employee to being furloughed, irrespective of whether the agreement is in writing. Equally the present Guidance would support a claim where there has been no express agreement but the exercise of furlough involved no need on the part of the employer to vary terms and conditions. In each case the question then is not whether this is permitted by the Direction, but rather whether anyone is likely to try to enforce its terms.

An employee may seek to argue that an unwritten agreement to furlough, with a reduction in pay, is ineffective, meaning he or she is entitled to full pay during the period of furlough. However, one should remember that the Direction merely sets the terms by which an employer is entitled to recover wage costs through the Scheme. It does not of itself regulate the legal relationship between employer and employee. Whether an employee has validly waived the right to full pay during furlough is therefore a question of common law contract, and that is regardless off the meaning of paragraph 6.7 of the Direction.

Annual leave

Friday's updates saw the first statement on the relationship between furlough and annual leave, with sections inserted into the guidance for employees and into new guidance

addressing the method of calculating 80% of an employee's wages. The sections in both pieces of guidance are in materially similar terms.

It confirms that:

- A furloughed employee (or worker) can take holiday whilst on furlough.
- Employees should be paid their "usual holiday pay" for any annual leave taken during furlough i.e. holiday pay based on pre-furlough normal remuneration.
- The grant under the Scheme must therefore be 'topped-up' by the employer for periods of annual leave.

Many online commentators have taken the phrase "*Employees can take holiday whilst on furlough"* to mean that the Guidance recognises an employee can take annual leave at their election, but it is silent on whether an employer can require an employee to take annual leave during furlough. We do not think this is the obvious conclusion to draw from the wording of the Guidance.

The phrase "*Employees can take holiday whilst on furlough"* is neutral. It is not specifically concerned either with holiday taken at the employee's election, or with holiday directed by the employer. In either scenario, the employee "takes" holiday.

The Guidance also recognises within a later sentence that an employer has *"the flexibility to restrict when leave can be taken if there is a business need*" during both the furlough and 'recovery' period. An employer's ability to prevent employees from taking annual leave is an aspect of its right under Regulation 15 WTR to determine the dates on which leave is taken. It must follow that, if the employer's Regulation 15 right is recognised for one purpose, it should be recognised for all purposes, since there is no logical basis on which to permit the employer to exercise only a selected part of the right.

However, what is intended by the Guidance is not the same as what is permitted by the WTR when read consistently with the Working Time Directive. One therefore runs into the argument we canvassed in updates we published on 2 and 4 April on whether annual leave and furlough are mutually exclusive. Neither the Direction nor the updated Guidance changes the complexion of the argument and the reader is referred to our earlier updates rather than repeat the argument here.

<u>Furlough and SSP</u>

The remainder of this update focusses on two specific issues arising in the context of the Direction which give rise to particular difficulty and which have been the subject of recent discussion.

The first concerns the ability of an employer to furlough an employee otherwise eligible to receive Statutory Sick Pay (SSP) due to sickness. The issue has been made all the more pressing by the Statutory Sick Pay (General) (Coronavirus Amendment) (No. 3) Regulations 2020 which, from 15 April, brought those shielding within the definition of persons deemed

incapable of work within the meaning of Regulation 2 of the Statutory Sick Pay (General) Regulations 1982.

The difficulty stems from the apparent tension between paragraph 6.3 of the Direction and the Guidance.

Paragraph 6.3 of the Direction provides that:

> *Where Statutory Sick Pay is payable or liable to be payable in respect of an employee (whether or not a claim to Statutory Sick Pay is made) at the time when the instruction in paragraph 6.1(a) is given ("original SSP"), the period described in paragraph 6.1(b) in respect of the employee does not begin until the original SSP has ended (but any subsequent entitlement to Statutory Sick Pay by virtue of the employee becoming unfit for work again after the original SSP has ended must be disregarded).*

We will return to what this provision may mean shortly.

The Guidance deals with the position of an employee who is sick, self-isolating or shielding prior to furlough in the following terms:

> *If your employee is on sick leave or self-isolating as a result of Coronavirus, they'll be able to get Statutory Sick Pay, subject to other eligibility conditions applying. The Coronavirus Job Retention Scheme is not intended for short-term absences from work due to sickness, and there is a 3 week minimum furlough period.*
>
> *Short term illness/ self-isolation should not be a consideration in deciding whether to furlough an employee. If, however, employers want to furlough employees for business reasons and they are currently off sick, they are eligible to do so, as with other employees. In these cases, the employee should no longer receive sick pay and would be classified as a furloughed employee.*
>
> *Employers are also entitled to furlough employees who are being shielded or off on long-term sick leave. It is up to employers to decide whether to furlough these employees. You can claim back from both the Coronavirus Job Retention Scheme and the SSP rebate scheme for the same employee but not for the same period of time. When an employee is on furlough, you can only reclaim expenditure through the Coronavirus Job Retention Scheme, and not the SSP rebate scheme. If a non-furloughed employee becomes ill, needs to self-isolate or be shielded, then you might qualify for the SSP rebate scheme, enabling you to claim up to two weeks of SSP per employee.*

Comparing the quoted passage from the Direction with those from the Guidance, it is tempting to conclude that they are contradictory: the Direction does not permit an employer to furlough an employee eligible to receive SSP, whereas the Guidance does.

Paragraph 6.3 of the Direction is part of the general definition of "*Furloughed employees"* contained in section 6. The definition of *Furloughed employees* is important because it is only the employment costs of employees who meet the definition that the employer can claim from the Scheme in accordance with section 5.

The effect of paragraph 6.3 is to postpone the start of the period for which the employee ceases work within the meaning of paragraph 6.1(b) until the employee's entitlement to SSP ends. Even if it could be said that an employer can technically furlough an employee entitled to SSP (which is dubious), paragraph 6.3 prevents an employer from claiming the employment costs of an employee entitled to SSP until the entitlement ends. The practical effect is therefore the same as if the employee had not been furloughed at all – the employer cannot access the Scheme to meet all or part of the employee's wage costs for that period.

Is this position at odds with the Guidance?

The passages quoted from the Guidance above do not speak with one voice. The Guidance is clear that an employer cannot claim both from the Scheme and the SSP rebate scheme for the same employee for the same period of time. That much is consistent with paragraph 6.3 of the Direction. However, the Guidance also states than an employer can furlough an employee off sick for business reasons in the same way as other employees. In that situation, the employee should no longer receive sick pay and will be classed as a furloughed employee. It seems unlikely that "sick pay" in the context of this part of the guidance is a reference only to contractual sick pay. The clear inference is that an employer can elect to furlough an employee otherwise entitled to receive SSP.

One is therefore driven to the conclusion that the Direction and the Guidance are inconsistent save that, in respect of shielding employees who were furloughed prior to 15 April, their newly acquired status of being deemed incapable of work should not prevent them from continuing to be furloughed.

One potential argument in an effort to reconcile their respective provisions, is that for the purpose of paragraph 6.3 of the Direction, the original SSP may end at the employer's election. However, that interpretation does not sit easily with the language used. If the employee continued to be sick (or deemed incapable of work), SSP would still be payable or liable to be payable irrespective of the employer's decision to furlough.

We are therefore left in similar territory to the issue of agreement to furlough – guidance which is undermined by the Direction. However, the obvious difference is that HMRC has not issued revised or restated guidance in response to concerns over the meaning of the Direction. We are therefore left uncertain as to HMRC's future policy direction. Will it reimburse the recoverable employment costs of furloughed employees who were otherwise entitled to SSP? As with the issue of agreement to furlough, further urgent clarification is required.

<u>Qualifying costs and reimbursable expenditure</u>

The second issue can be summed up by the following question: does the Direction prevent employers from deferring furlough pay (i.e. the agreed reduced rate) until after the grant has been received from the Scheme? Put another way, does the employer have to make payment of furlough pay to the relevant employees before making a claim to the Scheme? Perhaps the most pressing issue on this Portal's Eve for those planning an early claim.

The issues arises under the Direction in the following way.

Qualifying costs are defined by paragraph 5 of the Direction. Qualifying cost are those costs "*in respect of which an employer may make a claim for payment under CJRS"*. To be qualifying costs, they must meet the conditions set out in sub paragraphs (a) and (b) of paragraph 5. Subparagraph (b) in turn requires costs to meet the conditions contained in paragraphs 7.1 to 7.15 of the Direction to qualify.

Section 7 of the Direction identifies "further conditions" of qualifying costs. Paragraph 7.1 provides that qualifying costs must relate to the payment of earnings to an employee for the period of furlough, and the employee *is being paid* either £2,500 or more per month or at least 80% of the employee's reference salary (our emphasis).

Paragraph 7.12 provides that:

> *7.12 This paragraph applies where-*
>
> *(a) in the period beginning on 1 March 2020 and ending on the third day after the making this direction an amount by way of wages or salary is paid in respect of a period of employment ("the original payment") to an employee,*
>
> *(b) the original payment is less than the amount required by paragraph 7.1(b)(ii) for the purpose of claiming CJRS,*
>
> *(c) before making a CJRS claim in respect of the original payment the employer pays the employee a further amount ("the further amount") in respect of the period of employment to which the original payment relates, and*
>
> *(d) the sum of the original payment and the further amount meets the requirements of paragraph 7.1(b)(ii).*

Paragraph 7.11 provides that:

> *Where paragraph 7.12 applies, the sum of the original payment described in paragraph 7.12(a) and the further amount described in paragraph 7.12(c) must be treated as having been paid at the time of the payment of the original payment for the purposes of paragraph 7.1(b)(ii).*

Section 8 of the Direction is entitled *Expenditure to be reimbursed*. Paragraph 8.1 confirms that a payment under the Scheme may reimburse "*the gross amount of earnings paid or*

reasonably expected to be paid *by the employer to an employee*" (our emphasis). Paragraph 8.2 then sets the now familiar limits on the payment.

The confusion is caused by paragraph 7.12 of the Direction, which clearly contemplates a payment to employees of some description before a claim is made to the Scheme. Indeed, paragraph 7.12(c) refers to an amount paid *"before making a CJRS claim"*.

If this paragraph were to require payment of furlough pay to employees as a condition of an employer accessing the scheme, it would seem to undercut the scheme's purpose. It is entitled a Job *Retention* Scheme because it provides a grant to employers who might not have the funds or finance to meet wage costs and would otherwise be forced to consider redundancies. Requiring employers to pay wages before the grant is issued may impose the sort of financial pressure which the Scheme is designed to ameliorate.

For this reason, we understand that it is not uncommon for an employer to seek as part of the furlough agreement to defer payment of wages until the receipt of the grant through the Scheme. This indeed was the whole approach of the administrator in *Re Carluccio's* where the agreement was that employees would not be paid unless payment was made under the scheme. If it is the case that payment has to be made before a claim under the Scheme there may be both an issue with cash flow and a risk of the claim not being met for administrators that would reverse the strategy of its use in administration.

Has this approach been undone by the provisions of the Direction?

We think not, based on the Direction read as a whole.

- Paragraph 8.1(a) of the Direction, which defines the expenditure to be reimbursed under the Scheme, makes plain that the Scheme will reimburse wage costs which the employer has paid but also those which it *reasonably expects to pay* to the employee. The reference to reasonable expectation is apt to include a promise to pay the employee on receipt of the grant through the Scheme.

- This interpretation of paragraph 8.1 of the Direction is reinforced by paragraph 2.2, which explains that the expenditure reimbursed is that incurred *or to be incurred* by the employer.

- The definition of *qualifying costs* in paragraph 7.1 of the Direction uses the present participle '*is being paid*' and is capable of including a situation in which there is a present, but unsatisfied promise to pay. Paragraph 7.1 avoids the use of the past participle '*has been paid*'.

- Paragraphs 7.1 and 8.1 are two sides of the same coin. It might at first blush seem unnecessary to define both the sum that can be claimed and the amount that will be reimbursed. However, both provisions exist to demonstrate that, for a sum to be reimbursed through the scheme, there must be a concomitant obligation on the part of the employer to pay the sum to the employee. No part of paragraphs 7.1 and 8.1 require the employer's obligation to be discharged before the sum is reimbursed.

- This interpretation of paragraphs 7.1 and 8.1 is consistent with the available HMRC guidance, which speaks of the grant being used to pay employees, not to reimburse the employer for payments already made.

- It is further consistent with the rescue culture that underpins the Scheme and the objective of preserving jobs.

That leaves the unanswered question relating to the meaning and effect of paragraphs 7.11 and 7.12 of the Direction.

The purpose appears to be to enable an employer who, on the basis of the previous Guidance, made a payment of wages or salary to employees in the period from 1st March 2020 to the date of the Direction to "top up" that payment if, on the terms of the Direction, it was an underpayment of what could be paid and then claimed. Three days were given to do that which of course takes up in working days to Portal Day. That would suggest you cannot correct mistakes as to past underpayments and the claim is limited to that which has been paid. But as noted the tension with the overall construction of 7.1. and 8.1 is that you do not have to have made the payment at all if you agreed, or are obliged, to pay it in the future, such as on the next pay run.

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