

Can I make Redundancies when the Furlough Scheme or Job Support Scheme is in Place?

It is estimated that there were approximately 9.6 million employees on the Coronavirus Job Retention Scheme (CJRS). On 29 May 2020, the Government announced that employers would have to make a financial contribution from 1 August 2020 to the cost of Furlough Pay. The tapering payments were as follows:

- **June and July:** The government paid 80% of wages up to a cap of £2,500 as well as employer National Insurance (ER NICs) and pension contributions. Employers are not required to pay anything.
- **August:** The government paid 80% of wages up to a cap of £2,500. Employers will pay ER NICs and pension contributions.
- **September:** The government paid 70% of wages up to a cap of £2,187.50. Employers will pay ER NICs and pension contributions and 10% of wages to make up 80% total up to a cap of £2,500.
- **October:** The government paid 60% of wages up to a cap of £1,875. Employers will pay ER NICs and pension contributions and 20% of wages to make up 80% total up to a cap of £2,500.

The current furlough scheme will come to an end on 31 October 2020.

However, a new Job Support Scheme (JSS) comes into force on 1st November 2020 until April 2021. The new scheme enables an Employee to work at least 20% of their contractual hours in return for 73% of their pay (subject to a cap). The scheme was extended on 9th October 2020 to support businesses who are instructed to close by the government due to a tier 3 lockdown. In such circumstances, employees will receive 67% of wages from the government (subject to a cap) during the closure and the employer is required to pay NIC's and pension contributions. Please see our separate guidance note on the JSS for more details.

Therefore, many businesses may now be seriously considering whether employees need to return from Furlough Leave, whether the JSS can be utilised or redundancies need to be made.

How does the introduction of the JSS affect the reasonableness of making redundancies?

Firstly, it is rare for an Employment Tribunal to challenge the rationale behind an employer's decision to make redundancies.

The Tribunal will consider whether the employer has satisfied the definition of redundancies under section 139 of the Employment Rights Act (ERA), e.g. is there a closure or a diminished need for employees doing work of a particular kind?

Secondly, the Employment Tribunal will consider the reasonableness of the employer's decision to make a redundancy in all the circumstances (section 98(4) of the ERA).

When is it reasonable to make redundancies in the current climate?

It is our view that employers remain free to make decisions regarding the business' requirements based on its projected future as at the date the decision is made to dismiss anyone due to redundancy.

Does the JSS affect the business' decision?

Of course, unions and employees may question why redundancies are being made when the JSS is in place? The key is that "conscientious consideration" is given to that question, should it be raised. However, the JSS does not necessarily mean a restructure can be avoided.

Employers may consider that the furlough scheme has enabled redundancies to be avoided so far. However, the end of the scheme or the parameters of the new JSS, which only applies to "viable jobs" and the requirement for at least 33% of hours to worked (unless the scheme is being used in the case of business closure due to a tier 3 lockdown) may trigger many businesses to review their position.

This change may create difficulties for many employers prompting a decision to make redundancies. It would not affect the reasonableness of the decision to make redundancies if a business cannot foresee their business improving sufficiently once the restrictions of COVID-19 are lifted; where it cannot provide at least 33% of an employee's contractual hours or indeed bear the increased cost of the new scheme (under which the Employer will be responsible for payment of at least 55% of the wages except in the event of a closure due to a tier 3 lockdown); or where it simply believes it needs to restructure to increase profitability or improve efficiency.

So, employers still have the freedom to make choices about what their business needs are and how it should be structured.

What if we get it wrong and there is a change in the future, prompting a need to increase the work force?

As section 139 of the ERA allows the employer to make its own choices. The future is not always predictable. A business can expand if circumstances change. That would not affect the reasonableness of a decision made in the past based on the facts at that time.

An employer would only need to show that there was a true redundancy situation, which is rarely challenged successfully, and the procedures followed when making those redundancies was reasonable in all the circumstances, including the impact of the furlough scheme or JSS at that time.

If you have any questions, please feel free to contact the Vista Team.

Vista Employer Services

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