

WEBINAR: REDUNDANCIES IN THE CONTEXT OF COVID-19

Sarah Brett

Head of HR & Legal - South

makeuk.org/business



INTRODUCTION

AGENDA

- Overview of a normal redundancy procedure (and alternatives)
- Statutory collective consultation
- How to run a selection process
- One to one consultation
- Calculating redundancy pay (including for furloughed employees)
- When should you serve notice? What notice pay is due? And what about holiday pay?
- Furlough, redundancy and unfair dismissal

OVERVIEW OF A NORMAL REDUNDANCY PROCEDURE (AND ALTERNATIVES)

ALTERNATIVES TO REDUNDANCY

MANAGING HEADCOUNT

- Recruitment freeze
- Deferral/withdrawal of job offers
- Terminating non-permanent staff
- Secondments
- Redeployment and retraining
- Voluntary redundancy or early retirement

TIME OFF

- Voluntary sabbaticals
- Holidays and unpaid leave
- Lay-off
- Furlough under Job Retention Scheme

REDUCING HOURS

- Part-time and flexible working
- Short-time working
- Overtime ban

PAYROLL REDUCTIONS

- Pay freeze
- Pay reduction
- Changes to pension or bonus
- Removal/restriction of discretionary benefits and policies

DEFINITION OF REDUNDANCY

- Redundancy is a dismissal which is caused when an employer:
 - **ceases business**, either completely or in the place where the employee was employed; or
 - **requires fewer employees to carry out a particular kind of work**, or a particular kind of work in that place.
- Redundancy includes a situation where a business' need for an employee's work has **temporarily diminished** (s139(6) ERA 1996).

NOT A REDUNDANCY

- The following are not redundancy situations:
 - Business **reorganisation** where the number of employees/type of work remain the same but tasks are reallocated.
 - A **change in shift patterns** or hours (in most circumstances).
 - A **performance-related dismissal** which is labelled as a redundancy just to avoid having to follow disciplinary/performance management procedures.

IS IT STILL A REDUNDANCY IF YOU MAY HAVE WORK IN THE FUTURE?

- Yes. **Redundancy is not about less work** - it is about a requirement for fewer employees to do that work.
- E.g. if you decide to reduce the number of accounts assistants from two to one, the accounts assistant who is made redundant cannot legitimately complain that the number of invoices to be processed remains the same. If you require fewer accounts assistants to process the invoices, there is a redundancy situation, whatever the number of invoices.
- A redundancy situation can exist even when you are making a **healthy profit**.

NORMAL REDUNDANCY PROCESS

1. Is there a genuine redundancy situation? **How many** redundancies are proposed? Consider whether collective consultation is required and, if so, timings.
2. If selection is necessary, consider **pool and selection criteria**. List alternative vacancies.
3. File **HR1** form (if collective redundancy).
4. Group meeting with all employees who might be made redundant. Explain:
 - how many jobs are at risk;
 - how ways of avoiding redundancies are being explored;
 - pools and proposed selection criteria (if relevant); and
 - that employees have a right to take time off to seek alternative employment.

NORMAL REDUNDANCY PROCESS

5. Letter to employees confirming information from group meeting (including selection criteria and scoring guidelines if relevant).
6. Collective consultation if required (hold elections if needed and **consult with appropriate reps**).
7. Scoring (by two managers) followed by **individual consultation** meetings (see later slides).
8. Dismissal letter.
9. Possible right of appeal.

RISKS

- Failure to file an HR1 form with BEIS in time is a strict liability **criminal offence**.
 - Possible unlimited fine and/or prosecution of company officers.
- Risk if you do not collectively consult: **protective award** up to 90 days' gross pay per employee.
- Failure to follow a fair redundancy procedure, including consulting individually, risks **unfair dismissal claims** (where employees have over 2 years' service).
- Remember that **discrimination** rights arise from “day one” of employment.

STATUTORY COLLECTIVE CONSULTATION

THE LAW: TRIGGERS FOR COLLECTIVE CONSULTATION

- Collective consultation is triggered if you are proposing **20 or more** redundancies at the **same establishment** within a **90-day period**.
- Case law indicates you are proposing when you have a **clear, albeit provisional, intention**.
- Consultation must begin **in good time** and, in any event, at least **30 days** before the first dismissal takes effect, or **45 days** if 100 or more redundancies are proposed.

THE LAW: APPROPRIATE REPRESENTATIVES

- You must consult **appropriate representatives** of **affected employees** before you finalise your proposals and dismiss any employees.
- If the employees are of a description in respect of which a trade union is recognised, you must consult with reps of the **recognised trade union**.
- Otherwise, you can choose whether to consult with:
 - directly **elected representatives** (i.e. elected specifically for the purpose of redundancy consultation); or
 - a **standing body** of elected or appointed reps whose mandate would include consultation about redundancies (but who are not specifically elected for redundancy consultation).

THE LAW: SUBJECT MATTER OF CONSULTATION

- The consultation process begins when you disclose the required **specified information** about the proposed redundancies to the representatives and invite their views.
- Consultation must be **genuine** and cover:
 - the reasons for the redundancies;
 - possible ways of avoiding or reducing redundancies;
 - ways of 'minimising the impact';
 - selection methods, and;
 - timing of redundancies.

CAN YOU COLLECTIVELY CONSULT DURING THE PANDEMIC?

- Whether statutory collective consultation is triggered is a **matter of law**, not choice.
- But it may be more challenging during the lockdown.
- You can carry out collective consultation during furlough:
 - Affected **employees or reps can remain on furlough** during collective consultation.
 - But **employees running the process will be working**, so you cannot claim for them under the CJRS.
- Do you need to make use of the CJRS to cover salary costs during collective consultation and notice periods?

COVID-19 CONSIDERATIONS: MANAGERS

- Who will be involved in running the collective consultation?
 - HR? Senior managers? Line managers? IT?
- Are they in a position to undertake the tasks required?
 - Are they on furlough? If so, **give notice to end the furlough period.**
 - Are they looking after children/caring for a member of their household?
- If working at home, can they access the data and information they need?
 - Are **security measures** sufficient?
- How will you co-ordinate planning and preparation for meetings?
- Do you need more resources or assistance?

COVID-19 CONSIDERATIONS: ELECTING REPS

- Employer is responsible for deciding:
 - How many reps are needed; and
 - If they each represent a constituency or if all reps represent all affected employees.
- Be clear about minimum requirements when calling for nominations:
 - Time commitment? Reliable internet access? Minimum level of IT skills?
- What process will work best for nominations of reps and voting for nominated reps?
 - Online forms? Voting buttons? Postal ballot?
- What if employees do not put themselves forward for election?
- **Online training** for representatives advisable.

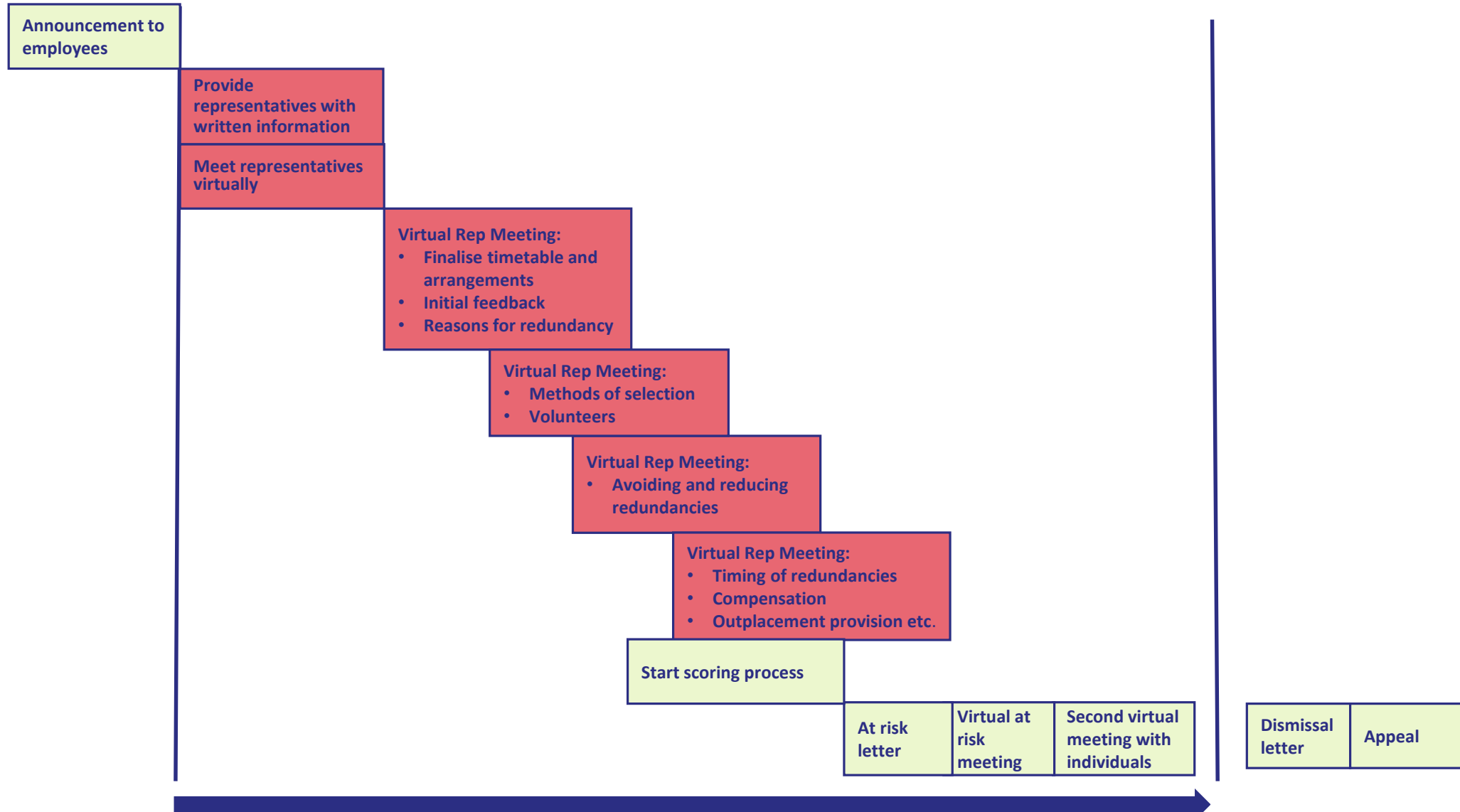
COVID-19 CONSIDERATIONS: EMPLOYEES AND REPS

- How will you make the first employee redundancy announcement?
 - If on furlough, via communication method agreed during furlough?
 - Group meetings with social distancing?
- How will you communicate with affected employees thereafter?
- How will you communicate with reps and how will they communicate with their constituents?
 - Providing IT equipment e.g. ipad/company mobile phone?
 - Bear in mind security of personal data.
- Use of hubs to make sharing of information easy and secure:
 - E.g. to host employee questions, meeting notes and answers to questions.

EXAMPLE PLAN OF COLLECTIVE CONSULTATION PROCESS

Day 1 of consultation

End of consultation
Day 30/45



COVID-19 A SPECIAL CIRCUMSTANCE?

- The **special circumstances** defence allows you to shorten the timeframe of collective consultation where:
 - it was not **reasonably practicable** to comply with the collective consultation requirements in full; and
 - the circumstances behind this were **“special”**.
- The current emergency may count as ‘special’, but it may well be reasonably practicable to comply.
- The obligation to carry out as much consultation as you can remains.
- Consult your Make UK adviser.
- (It is also possible, but rare, to be able to end collective consultation if the representatives agree that all consultation is exhausted).

HOW TO RUN A SELECTION PROCESS

IMPACT OF COVID-19 ON SELECTION?

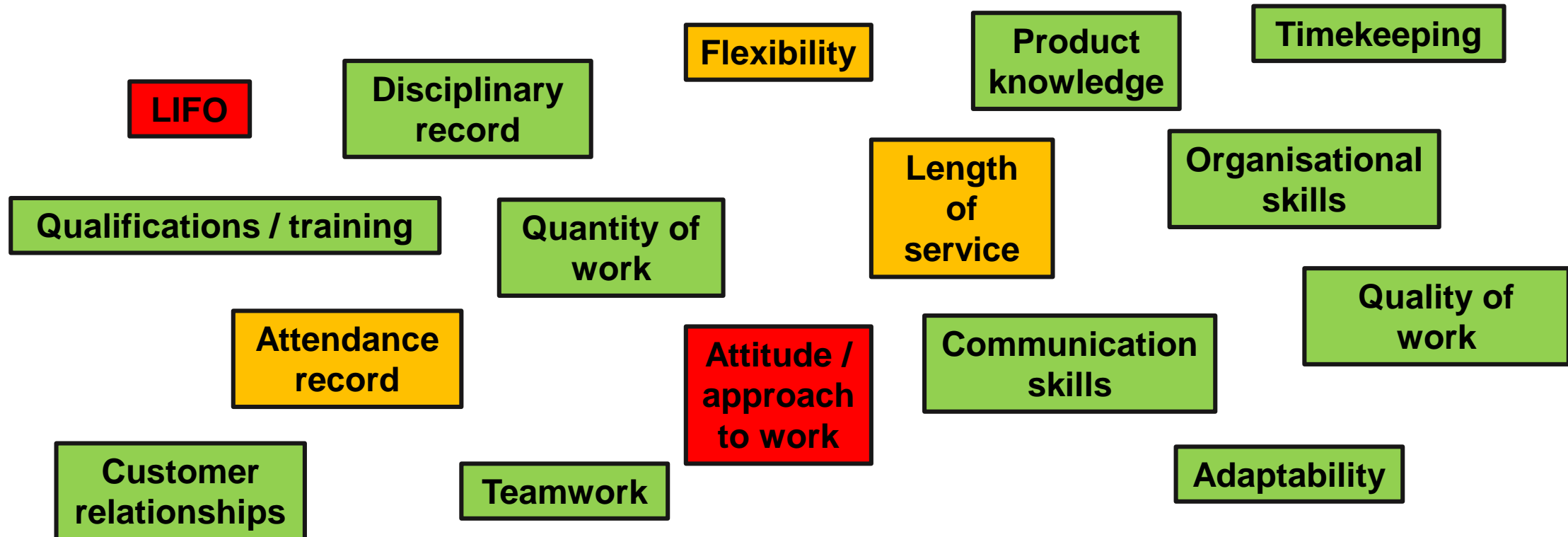
- Focus on the **skills you will need** after lockdown.
- Discrimination rules apply in the usual way (assuming selection is needed).
- So make sure you carry out a thorough and **objective selection exercise**.
- Think about logistics:
 - Will moderating be difficult if you are working remotely/can't be in the same room?
 - What data do you have access to while you are working at home?

IMPACT OF COVID-19 ON SELECTION?

- Don't simply select as redundant those employees who are currently on furlough!
- Employees may be on furlough because they are self-isolating, shielding, or because they have childcare issues – age, disability and/or sex **discrimination** risks.
- Seek advice if employees are pregnant, on maternity leave or on long-term sick leave.
- Remember bumping.

TRAFFIC LIGHTS

Some selection criteria are less risky from a discrimination perspective than others...



THE SELECTION MATRIX

Example selection matrix for a skilled employee

Criteria	Absence (number of times absent in last 12 months, or pro-rata if less than 12 months service)	Disciplinary record	Quality of work	Quantity of work	Technical knowledge of the service or product or subject	Customer relationships	Level of supervision required	Ability to meet deadlines	
Completed by: HR/Line manager	HR	HR	LM	LM	LM	LM	LM	LM	
Score									
Weighting (if applicable)					x 2	x 2			
Total score									Grand total:
Reviewed by									

ONE TO ONE CONSULTATION

THE NORMAL PROCESS

- At risk meeting followed by at risk letter.
- First consultation meeting.
- Possible second consultation meeting.
- Invite to final consultation meeting via letter.
- Final consultation meeting.
- Inform employee of decision in writing.
- No legal right to be accompanied, but can be offered.
- No legal right to an appeal, but can be offered.

IMPACT OF COVID-19 ON ONE TO ONE CONSULTATION

- Who is available to lead the meetings and to take notes?
- How will you communicate with employees who are not on site/in the office, whatever the reason? Video call/Phone call? More questions and answers in writing?
- Specific training for managers.
- Do you need additional employee and manager **wellbeing support**?
- Will you allow employees to have a member of their household present?
- What if employees do not engage in the process?
- Agree how you will keep in touch during the notice period.

CALCULATING REDUNDANCY PAY (INCLUDING FOR FURLOUGHED EMPLOYEES)

STATUTORY REDUNDANCY PAY FORMULA

- Redundant employees with at least 2 years' service are entitled to statutory redundancy pay.
- Calculated using **statutory formula** based on age and length of service:
 - each complete year of service below age 22 = 0.5 week's pay;
 - each complete year of service between ages 22 and 40 = 1 week's pay; and
 - each complete year of service from age 41 = 1.5 weeks' pay.
- Maximum 20 years' service can be taken into account.
- Statutory **cap on a week's pay** (adjusted annually) – currently £538 per week.
- Maximum statutory redundancy payment (based on max years' service and max amount of a week's pay = £16,140).

A WEEK'S PAY & THE CALCULATION DATE

- A week's pay is calculated in accordance with the **ERA provisions**.
- Reference period (for employees with normal working hours and variable pay, or no normal working hours) = 12 weeks before the 'calculation date'.
- If calculation date is the last day of a week, the 12 weeks ends that day. Otherwise, it is the 12 weeks ending with the last complete week before the calculation date.
- A week ends on Saturday, or on pay day for weekly paid employees.
- What is the '**calculation date**'?
 - Dismissal without notice / with less than statutory notice – when contract would have ended had statutory notice been given.
 - All other cases – date on which (working back from termination date) employer would have had to give notice to comply with statutory minimum notice requirement.

IMPACT OF FURLOUGH ON REDUNDANCY PAY (1)

- **Normal working hours, no variation (salaried)** – basic pay for normal working hours. Furlough doesn't change normal working hours, so a week's pay is still the normal rate whether on full furlough or part-time furlough. SRP not affected.
- **Normal working hours, variation with time of work (shift worker)** – pay in 12 week reference period, divided by hours worked in period, multiplied by average weekly hours. BUT exclude whole weeks of no work. If on full furlough (i.e. no work), a week's pay is at normal rate and SRP not affected (or only very slightly if furloughed for *part* of a relevant week) BUT weeks in reference period on part-time furlough are counted and SRP may be impacted (unless employer tops up furlough pay to full pay).

IMPACT OF FURLOUGH ON REDUNDANCY PAY (2)

- **No normal working hours** – all pay in 12 week reference period divided by all hours worked. Weeks of no work still count provided some remuneration. Assuming furlough pay = remuneration, full or part-time furlough weeks count and SRP may be impacted (unless employer tops up furlough pay to full pay). Reduction may be less if employee is on part-time furlough as paid normal rate for working hours on top of furlough pay for non-working hours.
- Note – contractual redundancy pay unlikely to be affected, but check scheme wording.

**WHEN SHOULD YOU
SERVE NOTICE?
WHAT NOTICE PAY IS
DUE? AND WHAT
ABOUT HOLIDAY
PAY?**

WHEN SHOULD YOU SERVE NOTICE?

- Not appropriate to serve notice of dismissal until consultation is exhausted.
- Concern that giving notice during furlough may be contrary to purpose of CJRS.
- But Government guidance confirms you **can** dismiss for redundancy **during** (or after) furlough – subject to usual employment rights (e.g. redundancy pay, protection from unfair dismissal).
- You can't recover PILON under CJRS, but we think you can recover notice pay, so it may make sense to dismiss on notice rather than paying in lieu, while CJRS is in operation.
- If you wait until CJRS ends, employees will still be entitled to notice pay.

IMPACT OF FURLOUGH ON NOTICE PAY (1)

- Employees dismissed as redundant are entitled to notice pay in accordance with their contract (or statutory notice, if greater) – and are often paid in lieu.
- If an employee is served notice during furlough, their entitlement to pay will depend on both the contract and **s86 to 89 of the ERA**.
- These provisions only apply if contractual notice is less than a week more than the statutory minimum notice period.

IMPACT OF FURLOUGH ON NOTICE PAY (2)

- If contractual notice is at least a week more than statutory minimum, notice pay is based on contract alone – so if the employee remains (fully or flexibly) furloughed during notice, then only notice pay in accordance with furlough terms is due as their agreement to furlough varied the contract.
- Under s86 to 89 ERA, if contractual notice is less than a week more than statutory minimum notice, an employee who is otherwise ready and willing to work is entitled to full pay for the statutory notice period.
- The amount of notice pay due under these provisions is calculated based on a week's pay – determined in accordance with the ERA.
- If employee is on flexible furlough during their notice period, they would be entitled to pay at normal rate for the working time, but may be able to argue they should receive pay calculated under these ERA provisions for the non-working time. (You could still claim the relevant percentage of furlough pay under the Revised Scheme for the non-working time.)

IMPACT OF FURLOUGH ON NOTICE PAY (3)

Calculation under the ERA provisions, if applicable:

- **Normal working hours, no variation (salaried)** – a week's pay would be normal remuneration for working normal hours in a week – and being on furlough does not alter what normal working hours are, so amount of notice pay not affected whether employee has been on full furlough or part-time furlough.
- **Normal working hours, variation with time of work (shift workers)** – calculate a week's pay based on 12 week reference period before notice was given, but whole weeks of no work (i.e. whole weeks of furlough) are excluded, so amount of notice pay not affected if on full furlough. Weeks on part-time furlough are counted so notice may be impacted (unless employer tops up to furlough to full pay).
- **No normal working hours** – calculate a week's pay based on 12 week reference period before notice was given, but weeks of no work count if employee received remuneration (incl. furlough pay), so notice pay may be reduced. Reduction may be lower if on part-time furlough (as normal rate paid for these hours).

FURLOUGH, NOTICE & HOLIDAY PAY

- Employees are entitled to **pay in lieu for accrued but untaken holiday**.
- Normally, you can direct employees to take holiday on particular days by giving the required WTR notice – including during the employee’s notice period.
- Employees can take **holiday during furlough** – and if they do then employers must top up furlough pay so employees receive holiday pay in accordance with WTR.
- Government guidance on holiday entitlement and pay during coronavirus confirms employers can **direct** employees to take holiday during furlough.
- Guidance advises employers to **engage with their workforce** and explain reasons for wanting them to take leave before requiring them to do so.
- Guidance also cautions that the employer should consider whether any restrictions the employee is under, such as the need to socially distance or self-isolate, would prevent the worker from resting, relaxing and enjoying leisure time.

FURLOUGH, REDUNDANCY AND UNFAIR DISMISSAL

REDUNDANCY AND FURLOUGH

- Government guidance for employees on the Scheme states that an employer **can dismiss** an employee as redundant **during furlough** or afterwards, subject to the employee's ordinary statutory employment rights (i.e. the right not to be unfairly dismissed and the right to a statutory redundancy payment, if applicable).

REDUNDANCY AND FURLOUGH

- Possible reasons for making redundancies during furlough:
 - Employers may be facing such difficulty that they decide they must close altogether;
 - Business costs may have to be **drastically** cut back to allow the company to weather the storm; or
 - Employees may not be willing to go onto furlough with the resulting 20% pay cut.
- Look for **alternatives** to redundancy during furlough.
- If the situation improves, consider deferring redundancies and/or extending furlough.

UNFAIR DISMISSAL: OVERVIEW

- Is it unfair to make redundancies if the furlough scheme is still available?
- The scheme has **no effect** on existing employment rights.
- For a dismissal to be fair, you must have a fair reason.
 - Redundancy is a **potentially fair reason** for dismissal, s98 ERA 1996.
- You must act **reasonably** in treating that reason as sufficient to justify dismissing the employee.

UNFAIR DISMISSAL: PROCEDURE

- You must adopt a fair procedure, but how does furlough affect this?
 - How do you **consult** fairly?
 - How is a fair **selection** carried out?
 - Alternative employment considerations or other possible **alternative solutions** – short time working, temporary lay-off or furlough?

UNFAIR DISMISSAL: ACCESS TO FURLOUGH

- Unlikely that a general rule will develop that failure to exhaust the Scheme will render a dismissal unfair.
- Serious **consideration** necessary.
 - Size and resources of employer.
- Employment Tribunal assessment.
- How to assess **compensation** - what would have happened if the employee had been furloughed rather than dismissed?

QUESTION TIME

HOW WE CAN HELP

- Our Redundancy support includes:
 - Guidance to help you manage the process
 - Support and advice with; trade union negotiation, collective consultation, outplacement support, redundancy consultation, notice period or redundancy pay, plus alternatives to redundancy such as layoffs, changing shift patterns and short time working
 - Training for managers and employee reps
- Our Outplacement support includes;
 - Employee Job Search Toolkit
 - Outplacement workshop
 - 1to1 virtual coaching and employee support
 - Executive coaching
 - CV review service
- Coronavirus hub: www.makeuk.org/coronavirus
- Policy input: please contact Covid19.enquiries@makeuk.org