Daniel Barnett
Outer Temple Chambers, 222 Strand, London WC2R 1BA. Regulated by the Bar Standards Board.

THE CORONAVIRUS JOB RETENTION SCHEME: CLAIMING AGAINST HMRC


By Daniel Barnett, Barrister, Outer Temple Chambers, and Max Schofield, Barrister, 3PB Barristers

On 20 March 2020, the Chancellor Rishi Sunak MP announced as part of "an unprecedented package of measures" that businesses and their employees would be assisted by the Job Retention Scheme (the Scheme), thus bringing the word "furlough" into common usage.

The Scheme allows for a grant covering 80% of an employee's usual monthly wage up to £2,500 per month plus Employer National Insurance contributions and pension contributions up to the level of the minimum automatic enrolment employer pension contribution. It is a temporary scheme in place for at least 3 months starting from 1 March 2020.

At the time of writing, we are expecting the online portal to open on 20 April 2020 and the first grants to be paid by HMRC to employers within 6 working days (so as early as 28 April).

The Direction

The legal basis for HMRC to administer the Scheme is found in a Treasury Direction of 15 April 2020, entitled **The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction**.

This Direction, signed by the Chancellor of the Exchequer, is enacted through sections 71 and 76 of the Coronavirus Act 2020 which permit the Treasury to afford HMRC powers in addition to their existing functions of collecting and managing revenue under the Commissioners for Revenue and Customs Act 2005.

The Direction sets out the legal framework for the Scheme and includes dates, dynamics, information clarifying questions which were unresolved, and provisions on the purpose of the Scheme and the barring of abusive claims.

Before the Direction was released, on 26 March 2020, HMRC published their online Guidance in relation to the Scheme. The Guidance, therefore, was in place and available for nearly three weeks before the Direction was implemented and before HMRC had their administrative powers. The content in the Guidance has not remained the same throughout. It was amended on 4 April, on 9 April, and again on 15 April 2020.

Interestingly, the first iteration of the Guidance stated that any changes to the employment contract should be made by agreement and an employer merely needed to write to the employee confirming that they have been furloughed. The later iterations repeated this, and added that the employer needed to keep a copy of the written notification for five years. The language used suggested the letter could be sent at any time after the employee was furloughed, and did not have to be sent before, or on the first day of, furlough.

However, paragraph 6.7 of the Direction says something different. It provides that HMRC will only recognise furlough as valid:

> *"if the employer and employee have agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment."*

This means that an agreement cannot be inferred from conduct, because it has to be in writing, and the requirements go beyond just notification.

It also means that an employer is unlikely to be able to rely on a lay-off clause in an employment contract as amounting to valid agreement. A lay-off entails a complete waiver of normal salary, with a guarantee payment of £30 per day (max £150 every three months). If the employer tries to claim 80% of salary when the employee is not contractually entitled to it, HMRC would likely view a claim for the 80% by the employer under the furlough scheme as abusive (see para 2.5 of the Direction as discussed below) and not pay.

There will be many tens of thousands of employers who relied on the early iterations of the Guidance and simply notified employees they were being furloughed – perhaps asking them to agree to accept 80% of salary but not getting written agreement to them ceasing all work.

So, what can employers do if HMRC now refuse to meet the claims?

Employers can try asking the employees to sign a document now agreeing not to work. But that carries two problems. First, the language of para 6.1 and 6.7, read together, suggests the employee's written agreement must be received before furlough starts. Second, it is not immediately apparent what the consideration for such an agreement would be (unless it is the employer agreeing not to make the employee redundant in anticipation of HMRC not paying out under the furlough scheme).

Alternatively, if the Direction is followed by HMRC, employers who have furloughed staff and not obtained their written agreement not to work in reliance on earlier versions of the Guidance may have a credible judicial review claim against HMRC.

There may be further changes to the Guidance as well as additional Directions by way of s.76 of the Coronavirus Act 2020. If employers have followed HMRC Guidance, which is later amended and altered, they will want to consider judicial review proceedings, the details of which are set out below.

Judicial Review

At first glance, judicial review is a straightforward concept: as it says, it is a judge reviewing.

The judge reviews an act or decision by a public body, for example the Treasury or HMRC, not as an appeal against the decision itself, but to ensure the decision-making process was fair and lawful.

Judicial review claims can be brought on a number of different grounds. Irrationality is discussed below, but the most likely challenge to decisions made under the Scheme in light of the above will be on the basis of what is called 'legitimate expectation', that is: the employer expected to be treated in a particular favourable way by HMRC because of something HMRC said or did, but was treated differently.

A typical case of legitimate expectation is based on a public body giving guidance that they will make a particular decision in a particular way but then acting differently when it comes to actually making the decision.

HMRC Guidance

HMRC produce Guidance for the public to clarify their approach to legal and procedural issues concerning tax and credits. It is accepted that Guidance from HMRC can lead to an expectation on how an employer will be treated.

By way of example, in the case of *R (Vacations Rentals (UK) Ltd v HMRC*, an HMRC 'Business Brief' document had stated that card handling charges would be exempt from VAT in certain situations. The taxpayer company read and applied the terms of the Business Brief guidance to its card handling supplies. However, HMRC later refused to apply the terms in their guidance – attempting to alter the criteria for the exemption with an "inappropriately technical approach to construing the words" – and disagreed with the taxpayer's exemption, demanding VAT on the charges. Following an application for judicial review, the High Court quashed HMRC's decision in favour of the taxpayer company as the Business Brief had given rise to a legitimate expectation that the transactions were VAT exempt.

For a successful legal claim, the expectation needs to be based on a "clear and unambiguous statement without any qualifications". Therefore, the employer will need to show that there is not a caveat either in the specific section of the Guidance or by way of a catch-all health-warning.

The court will then look at whether it is unfair for HMRC to act contrary to that expectation. It used to be accepted that the onus fell on HMRC to justify their frustration of the expectation and that it was a "heavy burden", however, this is now disputed owing to Rose LJ's judgment in the 2019 Court of Appeal case of *R (Aozora) v HMRC*. In any event, the court will conduct a balancing exercise with the interests of both parties to establish either that HMRC's refusal to follow the Guidance is unreasonable and unfair, or that it is fair and in the public interest under their powers.

For example, in the case of *R (Hely-Hutchinson) v HMRC* concerning HMRC's guidance on a specific beneficial tax treatment of share options, it was not disputed that HMRC's guidance had given rise to a legitimate expectation. The court stated that a legitimate expectation could be overridden if there was a public interest in doing so but not if resiling from the guidance was so unfair as to amount to an abuse of power. In this case, there was not sufficient detriment suffered by the taxpayer to cause unfairness. The facts of this case are fairly unique for a number of reasons but it is notable that the Court of Appeal opined that a taxpayer will not necessarily benefit from a legitimate expectation if it involves the perpetuation of a mistake in HMRC's policy.

Concepts such as 'unfairness' and 'public interest' will need to be assessed in light of the unique challenges of the COVID-19 pandemic. One potential argument for the 'public interest' exception in HMRC's favour will be if the claim is not resulting from the coronavirus or is abusive as set out in para 2.5 of the Direction. Although employers will need to seek specialist legal advice, if they have been put in a worse position due to HMRC's failing to follow the Guidance, there will likely be grounds for a claim.

Irrationality

Another justification for bringing judicial review proceedings is when the Treasury, or HMRC, as pubic bodies, act irrationally. Irrationality, sometimes referred to as 'Wednesbury unreasonableness', means that no reasonable decision maker could have made the decision or arrived at the same conclusion.

This ground does not require a specific statement on which an employer will rely and instead applies if HMRC make a decision which the employer believes is entirely mistaken and unfair, or was made without considering relevant matters which might have led to a different conclusion, or for which no reasons were given in justification. (A full discussion on irrationality and unreasonableness is found in Chapter 11 of De Smith's Judicial Review 8th Ed.)

This is a very difficult ground on which to succeed as the courts are hesitant to interfere with the decisions of bodies who are tasked with, and specialise in, making such assessments. However, if HMRC mistakenly decide that, say, an employee was not furloughed when the employer has evidenced that they clearly did furlough the employee in accordance with the legal framework and Guidance, there may be grounds for a judicial review on the basis of irrationality.

Outcome

The court can quash the decision and require HMRC to conduct the decision-making process again but in a fair manner as well as ordering money damages, or they can impose an injunction to stop HMRC acting in a certain way. The remedy sought will depend on the employer's basis for bringing a claim. Employers should note that even if a decision is quashed, HMRC will likely have to re-make the decision correctly in light of the judicial review outcome. There is no guarantee that they will come to a different conclusion even if performed correctly (although given the issue above, if a court considers the Direction's requirement for agreement to furlough to breach an employer's legitimate expectations, we cannot see any result other than HMRC being ordered to pay the grant under the Scheme guidance on which they relied).

Costs and Procedure

Judicial review claims can be brought in the High Court. They need to be brought promptly, and no later than 3 months after the grounds to bring a claim first arose, i.e. when an employer first become aware of the breach of the Guidance (which, in most cases, will be the date that HMRC refused the claim).

The claim must be brought by someone with sufficient interest in the dispute, so an employer will normally be able to do so. An employee may have sufficient interest if they have signed an agreement with their employer providing that they will only be paid their salary when on furlough if, and only if, HMRC reimburses the employer – although few employees are likely to be able to afford to bring judicial review proceedings against the government without union support.

It is not entirely clear whether the Treasury or HMRC will be the correct Defendant, or whether both ought to be included in the proceedings. When it comes to HMRC making a decision on refusing a claim due to abuse or on the basis that the employee was not furloughed, they will be the decision-maker and the correct defendant to the proceedings. In relation to legitimate expectation, the position is not so clear. The first choice will likely be HMRC as

(1) they have the managerial discretion as to the amounts to be paid under the Scheme as set out in the Direction and (2) the Guidance, since the outset, is produced by, and held out as being from, HMRC. However, ultimately the Treasury has issued the Direction and HMRC can only act within the powers granted to it under that Direction.

The court needs to give permission on the basis that there is an arguable ground for the case to proceed to a full consideration. This means that the claimant needs to have their documents and evidence in order from the outset. A court fee of £154 is required for the permission stage, then a further fee of £770 must be paid if permission is granted.

The judicial review process can be lengthy and there is likely to be a significant backlog of work for the court to consider which has built up while so many of the courts have not been sitting. This means resolution can take months at the best of times and may be even worse due to the reduced court time in light of the COVID-19 restrictions.

An employer could request urgent consideration of their claim with Form N463. This will permit claimants to bring proceedings without complying with the normal pre-action protocol requirements, However, the claimant must set out good reasons for urgency; failure to do so may lead to refusal to deal with the case urgently as well as negative costs consequences. Normally, urgency would apply only in cases where some irreversible detriment would otherwise be done in the meantime, for example in the case of imminent insolvency or time-sensitive business disruption.

Employers should note that from 25 March 2020, applications must be made by way of email, filing the application with an electronic PDF bundle of documents. DX, post or over-the-counter applications will not be accepted.

As is normal in High Court litigation, the losing party usually pays the successful party's legal costs. However, ultimately the judge has a broad discretion as to who pays and how much.

Conclusion

It is fair to say that everyone appreciates that the Scheme is being introduced in difficult and time-pressured circumstances. This led to the bizarre situation whereby various iterations of the Guidance were released by HMRC before they even had any legal power to administer the Scheme. This has led to information changing and a possibility of employers being unfairly treated.

If HMRC act poorly with long delays and poor service, employers can follow the HMRC complaints procedure or contact the independent complaints bodies like the Adjudicator's Office.

However, if HMRC have contravened their Guidance on which an employer relied, an appeal lies by way of judicial review for legitimate expectation. If HMRC make a decision on whether an employee has been furloughed or whether a claim is brought abusively or contrary to the purpose of the Scheme, a claim on the basis of irrationality will be possible.

Daniel Barnett is an employment barrister practising from Outer Temple Chambers. Max Schofield is a tax barrister practising from 3PB Barristers. If any solicitors, or employers, would like bespoke advice and assistance with pursuing a judicial review, possibly as part of group litigation, please contact Outer Temple Chambers' Employment Team Practice Director, Nicholas Levett (nicholas.levett@outertemple.com).