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WHAT NOTICE PAY SHOULD EMPLOYERS PAY TO EMPLOYEES ON FURLOUGH, IF THE EMPLOYEE HAS AGREED TO ACCEPT 80% OF PAY DURING FURLOUGH?

by Daniel Barnett, Barrister, Outer Temple Chambers

Employers are entitled to give notice of termination (whether on grounds of redundancy, or otherwise) to employees who are on furlough. Salary payments made by the employer during furlough can still be reclaimed from HMRC (subject to the limits of the Coronavirus Job Retention Scheme), despite the employee working out notice.

An unresolved issue is: if employees have agreed to accept 80% of their salary while on furlough, is their notice pay also paid at 80%, or does it revert by operation of law to 100%? Remarkably little has been written on this, in part because such a simple question entails an extremely complex analysis, and in part because even with that analysis, the answer remains opaque.

This article argues that despite the established statutory rules, which lead to the answer 'it depends', a court or tribunal would strain to ensure that an employee receives 100% of their normal pay during notice period – even if they have agreed to accept 80% - and there are a number of devices a court could use to achieve that outcome.

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THE ORTHODOX ANALYSIS

The orthodox analysis involves examining the strict contractual position between employee and employer, and seeing how that fits in to the complex statutory framework dealing with payments during notice periods.

The first question is: how much notice is the employee entitled to receive under their contract? The answer to that question affects whether certain minimum notice payment rights under the Employment Rights Act 1996 ('ERA 1996') are engaged.

If the employee is entitled to at least one week's more notice than the statutory minimum

If the employee is entitled to at least one week's greater notice under their contract than the statutory minimum notice period, then the right to minimum pay during statutory notice does not apply – see s87(4) ERA 1996.

Accordingly, unless the furlough agreement (or – unlikely – employment contract) says otherwise, the orthodox conclusion is that an employee is only be entitled to their 80% pay during their contractual notice period. This means that the employer will be able to reclaim some or, quite possibly, all of the notice pay from HMRC.

Example: *Kate has worked for her employer for 2½ years. Her contract says she is entitled to receive one month's notice. She has agreed, in a furlough agreement, to accept 80% of normal pay while on furlough. Because she has worked for 2½ years, her statutory minimum notice period is two weeks. Her contractual notice period, one month, is at least one week more than the statutory minimum. Accordingly, s87(4) results in her not being entitled to statutory minimum notice pay, and her notice entitlement while on furlough is one month at her current contractual entitlement, ie 80% of normal salary. Because there is still more than one month to go under the CJRS, her employer will be able to reclaim all her notice pay from HMRC.*

Example: *Dave has worked for his employer for 15 years. His contract says he is entitled to three months' notice. His statutory minimum notice is 12 weeks. He is given three months' notice on 27 February 2020, which expires on 26 May 2020. That is a contractual notice period of 12 weeks and 6 days. 12 weeks and 6 days is not at least one week more than his statutory minimum notice (12 weeks), and so he is entitled to statutory minimum notice pay, as calculated below.*

If the Employee is only entitled to Statutory Minimum Notice (or no more than a week's notice above statutory minimum)?

This applies to most employees.

If they are only entitled to statutory minimum notice (or no more than a week above statutory minimum), an employee gains the benefit of minimum guaranteed notice pay rights, as set out in ss88-91 ERA 1996. But it's not straightforward.

Is the employee sick, or 'ready and willing' to work?

The first question (according to ss88-89 ERA 1996) is whether the employee is either:-

a. incapable of working during notice, due to sickness or injury; or

b. "ready and willing to work" but the employer is not supplying work (that latter bit will always apply during furlough leave).

If either of those criteria are met, the employee is entitled to a statutory minimum payment during their notice period.

The first criterion is straightforward. If the employee is incapable of working because of sickness, they get their minimum notice period. Note this is different from being eligible for SSP (the criteria for which have recently been widened to cover a range of coronavirus-related absences). To fall within this requirement, the employee must actually be 'incapable of work' because of sickness or injury. Shielding, or living with someone who is shielding or unwell, is not enough.

The second criterion is trickier. Is a furloughed employee "ready and willing to work"? In my view, this will depend on the reason for furlough.

If the employer has furloughed the employee because there is insufficient work available, then in my view the employee will be 'ready and willing' to work, despite that they may have agreed (reluctantly) not to do so – in which case they do qualify for minimum guaranteed notice rights.

If the employee has asked to be furloughed because they are shielding, it is less clear. On balance, given they will have the tribunal's sympathy, a tribunal will probably decide they are ready and willing to work (but unable to because of government shielding advice), and so they do qualify for minimum guaranteed notice rights.

However, if the employee has asked to be furloughed because they would prefer not to be at work – and they're not shielding or otherwise unable to work – they are probably not willing to work, and so will not qualify for minimum guaranteed notice rights.

What if the furloughed employee on notice does not qualify for minimum notice rights?

If they do <u>not</u> qualify for minimum guaranteed notice rights, then the orthodox position is that their pay during a furloughed notice period will be whatever they have agreed to receive while on furlough – often 80% of normal salary subject to a £2,500 per month cap.

What if they <u>do</u> qualify for the minimum guaranteed notice rights?

It would be nice if there was a straightforward answer to this. But there isn't. Their notice pay is based on them receiving a 'week's pay', and the following is a simplified version of the rather complicated rules in ss220-229 ERA 1996.

Scenario 1: For employees with normal working hours, where remuneration does not vary with the amount of work done, a 'week's pay' is the amount of contractual pay due on the 'calculation date'. According to s226, that is the contractual pay due on the day before notice was given. That will normally be furlough pay, ie 80%, assuming the employee has varied their contractual salary entitlement by agreement to receive only 80% of normal pay.

Scenario 2: For employees with normal working hours where remuneration does vary with the amount of work done, a 'week's pay' is the average earnings over the 12 weeks before notice was given (the recent increase in the holiday pay reference period to 52 weeks does not apply here). Depending on the length of the notice period, that will very likely involve averaging out some non-furlough weeks (at 100%) and furlough weeks (at 80%).

Scenario 3: For employees without normal working hours (s224), the calculation is the same as in scenario 2.

Where does that leave employees, under the orthodox analysis?

Many employees will be entitled to their contractually varied furlough pay only while on notice (presumably 80% of normal salary with a cap of £2,500 per month). Others will be entitled to a figure on a sliding scale between 80% and 100%, if they fall within scenarios 2 and 3 above. That will require the employer to 'top up' the 80% it receives from the Coronavirus Job Retention Scheme.

WILL TRIBUNALS FOLLOW THE ORTHODOX APPROACH?

It is counterintuitive to allow employers to 'get away' with paying less than normal notice pay during a notice period, because an employee was willing to forego part of their normal salary in an attempt to help their employer remain solvent and save their jobs. It would be bizarre if an employee who claimed normal notice pay against the Redundancy Fund, because their employer was insolvent, was in a better position than an employee who tried to help their employer by agreeing to be furloughed.

In the author's view, there are a number of devices that tribunal might (and probably will) use to ensure that employees receive 100% of their notice pay even if furloughed.

First, a tribunal could find that the CJRS only applies when an employee is not under notice. The difficulty is that the CJRS is a device enabling an employer to reclaim salary from HMRC. It does not give rise to directly enforceable contractual rights between employee and employer.

Second, a tribunal could imply a term that the employee's agreement to reduce salary to 80% was only while they were not under notice, perhaps because the Coronavirus Job Retention Scheme is there to preserve, not remove, jobs.

Third, if an employee has a garden leave clause in their contract, and they are under notice, they could argue (with some force) that they are entitled to their normal garden leave pay, typically 100%. After all, they are on notice and being told not to do any work for their employer, which is exactly what garden leave is.

The flaws in this argument are that (i) such an implied term would be inconsistent with the expressly agreed term to reduce salary to 80% during furlough; and (ii) that the CJRS does, in places, contemplate jobs ending due to redundancy while somebody is on furlough.

Fourth, for those employees who are (i) entitled to guaranteed minimum notice pay; and (ii) work normal working hours and their remuneration does not vary with the amount of work done, they can rely on s221(2) of the ERA 1996. This provides:-

> *"...if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week."*

A tribunal is likely to hold that the words 'if the employee works throughout his normal working hours in a week' means they should get the amount they would normally get if they were not on furlough. Of course, this interpretation could never have been foreseen by those who drafted s221. But it is wholly consistent with the statutory wording and will allow tribunals to ensure those who fall within these categories receive 100% of remuneration.

In my view, tribunals are likely to use one of these routes to ensure employees receive 100% of pay during notice, notwithstanding the very real problems with each of the first two.

WHAT IF EMPLOYERS GET IT WRONG?

If employers pay 100% when the employee is strictly only entitled to 80% of salary while under notice, the employee is unlikely to complain. In theory, if the employer subsequently ceases to trade, an administrator or liquidator might seek to set those overpayments off against any other liabilities to the employee – but that is unlikely.

If employers pay 80% (or between 80% and 100%), as the orthodox view suggests, and a tribunal or court later rules that full salary ought to have been paid during notice, the employee will have a claim in the tribunal or civil courts for the shortfall. Of course, there is no financial loss to the employer in underpaying, as it will simply be ordered to pay what it ought to have paid anyway (ie there is no additional penalty). However, an employer which wants to rely on a post-termination restrictive covenant will find itself unable to do so, if it has dismissed the employee in breach of contract by underpaying notice pay.

Note that other issues arise if the employer tries to exercise a 'pay in lieu of notice' clause (in which case the payment may, arguably, not be referable to wages or salary and therefore may fall outside the CJRS scheme), or if the notice period goes beyond the closure of the CJRS scheme or an agreed period of furlough (in which case the employee's contractual entitlement might revert to 100%). Those issues are for another author, and another article.

Thanks to Peter Linstead of Outer Temple Chambers for his comments on an earlier version of this article.

IMPORTANT: This note deals with an unclear area of law. It represents the author's views, but you rely on them at your own risk. If you want specific advice, please contact Adam McDonald at Outer Temple Chambers (Adam.MacDonald@outertemple.com)