Employment Law Brief

with

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These are unprecedented times for employers in every sector. The coronavirus outbreak – and the lockdown that has been imposed in response to it has been a huge shock to the economy and affected the working lives of almost everyone. The sheer scale of the crisis is illustrated by the Coronavirus Job Retention Scheme.

This will allow employers who cannot provide work to employees to place them on 'furlough' for periods of three weeks or more and claim 80 per cent of their wages (to a maximum of £2,500 per month) from public funds on their behalf. It is the most radical intervention in the labour market ever made by a British government.

In local government, of course, many employees are working harder than ever – either remotely or in the frontline delivery of essential services. For others however it is simply not possible for them to do their jobs given the current restrictions. While there may be some scope for reallocating employees to other areas of work some will simply have to be sent home.

Technically the furlough scheme is available to public sector employers – including local authorities. However, the Government has made it clear that it does not 'expect' such employers to make widespread use of the scheme. The reason for this is straightforward. The scheme is designed for employers who have suffered a sudden and catastrophic fall in income. The public sector, however, will continue to have its staff costs funded in the normal way. Furlough should only be used therefore when it can be demonstrated that the lockdown has led to a loss in the revenue that is specifically relied upon to pay for those employees.

Leaving aside those limited exceptions, local authorities will be expected to continue paying employees as normal without recourse to the furlough scheme – irrespective of whether it is possible for the employees to perform work. This is a legal obligation as well as a moral one. Unless they are ill or self-isolating, employees are ready, willing and able to work - and the fact that the employer has no work to give them is no fault of theirs.

For employees with a salary or guaranteed working hours this is a straightforward calculation. The difficulty comes in the approach to casual workers or those whose pay varies significantly - whether week by week or month by month.

For a genuinely casual worker it would be possible to make a legal argument that since they are not guaranteed to be given any work at all, they are not entitled to be paid when no work is offered to them. There are a number of reasons, however, why this would be the wrong approach for local authorities to take.

To start with a legal argument; casual workers are often not as casual as they first appear. The original contract may well have specified that work was not guaranteed and that the worker would be engaged only as an when needed. Over time however it is common for a more predictable working pattern to emerge. If the worker has reliably been working 20 hours a week for several years, then it is really open to question whether the contract still allows the employer to offer no work at all. If the issue was contested there would have to be a careful examination of how work was allocated and whether a separate decision about the availability of work really was being made each week or whether both sides in practice accepted that the worker would have a more regular and predictable work pattern.

More important than the legal argument however is the question of public policy. The Government wants employers – as far as possible – to continue to employ and pay their workforce. In the private sector, casual workers who are on the employer's PAYE system can be placed on furlough and be paid based on their average earnings. Since local authorities will continue to be funded for their use of casual workers as before, then the right thing to so is clearly to continue paying them even if there is no work for them to do.

When it comes to calculating how much they should be paid during the lockdown period there are no fixed rules. This is not like the calculation of holiday pay where employers have to navigate a complicated legal definition of a week's pay as modified by rulings from the European Court of Justice. The best approach is probably to make a reasonable estimate of how much work the casual worker would have done over the relevant period if the coronavirus lockdown had not intervened. Where that approach does not give a clear answer then you could either look at the equivalent period for last year or apply an average of the workers earnings over the previous three months. It is really just a question of coming up with some way of calculating pay that seems fair and reasonable and which does not cause too much disruption to the workers' income.

Agency workers are in a rather more complicated position. They are actually 'employed' (in the widest sense) by the agency rather than by the end user. If no work is being offered to them then the agency has the ability to place them on furlough under the Government scheme and receive funding of 80 per cent of their pay to a maximum of £2,500 per month – all of which must be passed on to the individual agency worker. It is one of the quirks of the scheme that the pay that is due will not be based on the current assignment but on the average pay over the previous tax year – or the pay in the corresponding month of the previous tax year if that is higher.

It would obviously not be right to continue paying an agency in respect of an agency worker who is being placed on furlough – that would simply mean extra profit for the agency at public expense. On the other hand an agency worker on furlough will not – unless the agency agrees otherwise – be fully compensated for the work they are losing. Indeed, depending on their earnings in the last tax year, they could be considerably worse off. If the budget of a local authority or school included a sum for the engagement of agency workers – and that budget is continuing – then it would make sense for the agency worker to be paid in full from that budget and not be placed on furlough at all. That, however, is an arrangement that must be made with the agency concerned.

This is a crisis that calls for flexibility on all sides. Many employees are having extraordinary demands placed upon them and many employers are facing challenges on a scale they have never encountered before. This is not a time for relying on technical legal distinctions and local authorities will want to act in a way that protects employees while we get through this current crisis. Employers who manage to retain a skilled and motivated workforce will reap the benefits of their approach when things return to some semblance of normality.

Don't forget to check more about Darren Newman on his blog at A Range of Reasonable Responses or on twitter at @DazNewman