

Holidays and Furloughing Staff

Over the past two weeks, employment lawyers have been scratching their heads, trying to make sense of the Government's Coronavirus Job Retention Scheme. This allows employers to place employees on "furlough" and obtain a grant from the Government covering a substantial proportion of the furloughed employees' wage costs (up to 80% with a monthly maximum of £2,500).

The particular challenge for employment lawyers is that the scheme is not an employment law measure. Indeed the Government has been at pains to point out that it sits alongside, but does not change, the requirements of the contract of employment and the various statutory rights that employees have. Unavoidably, however, there are points of contact between the scheme and employment law where we must consider how the concept of furloughing will interact with specific statutory rights.

One of these is the right to take paid annual leave under the Working Time Regulations 1998 (SI 1998/1833). The central question is whether an employee who has been furloughed can also take part of their annual leave. A related, and perhaps more important, question is whether the employer can require the employee to take their annual leave while on furlough. The guidance that the Government has published so far says nothing about the issue.

There would seem to be nothing in the design of the scheme itself that suggests that the Government would withhold a grant to an employer that had allowed an employee to take annual leave while furloughed. The central requirement of the scheme is that the employee does no work for the employer while furloughed. The guidance does say that employees on sick leave should not be furloughed, but does not make a similar suggestion for those who have booked annual leave. Nor does it suggest that an employer should not allow an employee to take annual leave once a period of furlough has begun.

So it seems that there is no reason to suppose that the Government would object to an employer claiming a furlough payment in respect of an employee where the period of furlough overlapped with a period of annual leave. The more difficult question is whether an employee who is on leave under the furlough scheme can also be on leave for the purposes of the Working Time Regulations. We know that an employee cannot be required to take annual leave while on sick leave and must be allowed to carry over any unused leave into the next holiday year (see [*Pereda v Madrid Movilidad SA* \[2009\] IRLR 959 ECJ](#)). We also know that an employee cannot be required to take annual leave during maternity leave (see [*Merino Gómez v Continental Industrias del Caucho SA* \[2004\] IRLR 407 ECJ](#)). So is there a similar restriction in the case of an employee who has been placed on furlough? I think not.

The European Court of Justice (ECJ) has always been clear that the purpose of the entitlement to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure. In the case of both sick leave and maternity leave, the Court stressed that these requirements could not be met. But if an employee is furloughed there would seem to be no reason why the requirements would not be met. There is nothing about being on furlough per se that prevents an employee from resting or enjoying leisure time. Of course, in the current circumstances, the opportunities to pursue leisure activities are severely curtailed. But that limitation arises from the Government's restrictions on all of us - the restrictions are not limited to furloughed workers. An employee who is currently working normally must surely be allowed to take annual leave and rest from that work. The fact that they could not go on holiday or pursue outdoor activities would not affect the fact that they were on paid annual leave.

It might be argued that the point is that annual leave must allow the worker a period of rest from work - and a furloughed worker is no longer working. However, we know that there is nothing to require

annual leave to be taken at a time when the employee would otherwise be at work. In *Russell and others v Transocean International Resources Ltd and others* [2012] IRLR 149 SC, the employees worked on oil rigs with a rota of three weeks offshore followed by three weeks onshore. There was very little required of them while they were onshore, so essentially they had to work for only about 26 weeks a year, and were paid a substantial salary for this. The employer believed that their annual leave entitlement could be taken during periods when they were scheduled to be onshore, but the employees argued that annual leave had to involve being released from the obligation to work, and they were not under that obligation when they were onshore.

The Supreme Court sided with the employer. It considered the cases of *Pereda* and *Merino Gómez*, but held that the ECJ had never suggested that a preordained rest period could not also function as a period of annual leave under the Working Time Directive (2003/88/EC). Applying that logic, there would seem to be no reason why a period of furlough, during which the employee is positively instructed not to perform work for the employer, could not also function as a period of annual leave. This now seems to be the view that Acas is taking. Their guidance on the Coronavirus Job Retention Scheme initially suggested that employees could not take annual leave when on furlough - but it has now been changed to state that furloughed employees can still take their annual leave.

It must be the case, however, that an employee who takes annual leave during a period of furlough should be paid in full for that period rather than the amount funded by the Coronavirus Job Retention Scheme. Leaving aside the likely view of the ECJ (which would still be binding on this issue despite Brexit), a worker on annual leave must be paid a "week's pay". For workers with normal working hours that means the amount they are paid when they work those hours in a week. It cannot possibly be suggested that, by agreeing to be furloughed, they have reduced their normal hours to zero. Those employees whose pay varies will have their pay averaged over 52 weeks (an increase this month from the previous 12-week average), and that average will include the bonuses and commission that are not covered by the furlough scheme.

An employer that is relying on the furlough scheme to cover its wage costs during lockdown might therefore struggle to comply with a leave request if that would mean topping up the pay of the employee beyond what the scheme will fund. Under the Working Time Regulations, employers can deny employees' requests to take leave, but doing so is likely to lead to a large part of the workforce building up a glut of annual leave to take towards the end of the leave year.

This potential problem might lie behind the Working Time (Coronavirus) (Amendment) Regulations 2020 (SI 2020/365). These allow workers to defer untaken annual leave for up to two years when the impact of coronavirus means that it is not practicable for them to take some or all of their leave in the current holiday year. When leave is carried over under this provision, the employer will not be able to defer future requests to take that leave without good reason. There is of course another, rather sobering, reason why the 2020 Regulations may be needed. The Government may anticipate that some key workers will simply be too busy for much of this year for their employer to be able to spare them for a period of annual leave. When things finally return to normal for these workers, an extended holiday is the least they will deserve.