Employment

Limiting liability for wages during furlough

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In the first case addressing the Coronavirus Job Retention Scheme, the High Court reviewed whether contracts of employment had been successfully varied to limit an employer's liability to pay wages to only that which the company could recover under the Coronavirus Job Retention Scheme.

Background

Carluccio's, a high-street chain of Italian Restaurants, went into administration as a result of the restrictions imposed on its business by the government in response to the pandemic. The administrators wished to know, among other things, whether they could take advantage of the Coronavirus Job Retention Scheme to place employees on furlough leave in order to gain access to the government grant which would cover the cost of continuing to pay the employees 80% of their regular salary up to a maximum of £2,500 per month. The grant was the only means the company had to continue to pay salary. The alternative to furlough was therefore redundancy.

As the legal foundations of the scheme had not been published, even in draft form, by the date on which the administrators were required to act before they would be deemed to adopt new contracts of employment, the administrators applied to the High Court for the determination of a number of questions of law. Importantly for employment lawyers, one of those questions was to determine the effect of the steps which the administrators had taken to vary the employment contracts to limit the company's liability for wages to only that which could be recovered under the scheme.

The administrators had written to all employees not immediately required by the administrators, offering to continue to employ them on terms that took advantage of the job retention scheme ("the Variation Letter"). The Variation Letter set out the existence of the job retention scheme, then stated that the company *"is unfortunately not in a position to meet the remaining portion of your regular wage given its financial position."* It therefore set out the terms of the variation as follows: *"By agreeing to go on Furlough Leave you also accept that your pay will be reduced for the period of Furlough Leave. Your varied contractual pay for this period will be the portion of your regular wages which the Grant will cover."*

Most employees responded accepting the offer. Some rejected the proposal, stating that they wished to be made redundant. Some had not replied at all by the date of the hearing. The question for the Court was whether the employment contracts of employees in each of these positions had been successfully varied.

The Effect of the Variation Letter

Unsurprisingly, Mr Justice Snowden decided that employees who had expressly agreed to the terms of the Variation Letter had agreed to the variation of their employment contracts to limit their salary to *"the amount of your regular wages which the Grant will cover."* The position for those who expressly rejected variation was similarly clear. The variation had no effect and these employees would be dismissed.

In the case of employees who did not respond, Snowden J considered the authority on employees accepting contractual variation by conduct. In the circumstances of this case, he concluded that non-responsive employees had not acted in such a way to give rise to the clear inference that they must have consented to the proposed variation. However, Snowden J emphasised that *"the inferences that can be drawn must depend on the particular circumstances of each case."* He made it clear that his findings may have differed had, for example, the company proved that these employees had received the letter, more time had elapsed before the hearing, or the circumstances of the non-responding employees had been explained *"in more granular detail."*

Practical implications

The structure of the job retention scheme places employers in a difficult position. It is a reimbursement scheme - employers receive the grant on behalf of their employees and must pass it on. The aim of most employers will be to do what the administrators in this case aimed to achieve - to have the grant provided by the job retention scheme cover all payroll costs for furloughed employees. However, it does not follow that because an employee has been placed on furlough that an employer's liability for wages is limited to the amount that will be recovered from the scheme.

Importantly, it does not follow from the fact that an employee has agreed to be placed on furlough that they have agreed to any reduction in pay. Absent any agreement on that term, the contract will not be varied and employee will remain entitled to their ordinary pay. The employer will therefore have to meet the shortfall between its liability to its employee and the amount that it will be able to recover from the scheme.

The approach taken by the administrators in this case - expressly linking employees' entitlement to wages to the amount that could be recovered under the scheme – seems prudent. If an employee agrees to the proposed terms and the employer properly avails itself of the scheme then the matter is dealt with. However, as Snowden J's analysis shows, employers cannot assume that their employees will agree to the proposals, or even if they will respond at all. Employers should consider how to anticipate this situation and whether, for example, disciplinary action may be justified if employees fail to respond at all to such an important communication.

It is crucial that employers take the appropriate steps to ensure that they successfully vary the employment contracts of those employees placed on furlough if they wish to avoid liability for the balance of wages due over and above that which is paid under the furlough scheme. Much attention to date has been focused on the terms of the scheme itself and the way in which these have evolved through various iterations of the guidance which (until publication of the Treasury Direction of 15 April 2020) provided the only information as to eligibility for the scheme. However, as the claims process opens, employers must be aware that even a successful application for a grant under the job retention scheme has no effect on their liability to their furloughed employees. That can only be effected by varying the employment contract; something entirely unaffected by the legislative response to the pandemic.

Sam Way has a busy and varied practice in all areas of employment and discrimination law. He has a particular interest in issues arising out of the Coronavirus Job Retention Scheme, and as a combined employment and tax practitioner is well placed to advise on all issues arising out of eligibility for and implementation of the scheme.