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# BTMK

## SOLICITORS

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## COVID-19: WHAT HAPPENS AFTER FURLOUGH?

### THE IMPACT OF COVID-19 ON EMPLOYMENT

It is safe to say that the government's Coronavirus Job Retention Scheme (CJRS) or "furlough" has been a lifeline for many businesses in this difficult and unprecedented time. Whilst this support will not be available indefinitely, BTMK Solicitors can help guide businesses through the challenging times ahead.

Whether its multiple redundancies, individual settlement agreements, or changing the terms and conditions of employment contracts, our employment team can help you make the right decisions for your business and assist you with the process.

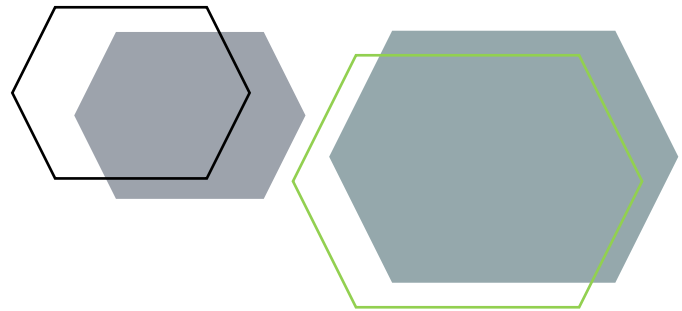
# BREACH OF CONTRACT CLAIMS



## THE CONSEQUENCES OF THE RUSH TO FURLOUGH

The sudden lock-down left many businesses rushing to take advantage of the CJRS, but in the early days of the scheme certain areas were left ambiguous. What is clear is that placing an employee on furlough leave and reducing their salary to just 80% could be a change of their contract of employment. As a result, failure to obtain an employee's consent to this change could amount to breach of contract and unlawful deduction of wages.

Employers should be careful to obtain the employees consent to be placed on furlough leave and confirm the position in writing in order to minimise the risk of a claim. If you are considering placing an employee on furlough leave we can advise you on whether a consultation process is required or prepare a furlough agreement to minimise the risk of a claim. Call us on 03300 585222.



# DISCRIMINATION CLAIMS

## THE EQUALITY ACT 2010 AND FURLOUGH

The government guidance makes clear that equality and discrimination laws apply to furlough in the usual way. If an employer needs to urgently furlough employees in order to be able to continue to trade, a limited selection procedure carried out on an urgent basis is likely to be acceptable. However, where an employer does not have any immediate financial concerns, it is likely to be more reasonable for it to follow a more comprehensive procedure. Employers should draw up a matrix of objective criteria in a similar way to redundancy scoring.

Employers should ensure that their decisions on who to select for furlough leave are not based on discriminatory criteria. If you need advice on how to select employees for furlough or defending a discrimination claim call us on 03300 585222.



# CHANGING TERMS OF EMPLOYMENT

## WHAT CAN AN EMPLOYER DO?

Once the lock-down is over and employees can return to work, some employers may find it necessary to make changes such as reduced working hours, reduced salaries, or changes to contractual sick pay and bonuses. These changes can often be made with the written consent of the employee, however things can be more challenging where an employee refuses to give their consent.

Employers should first check if the terms of the employee's contract of employment authorise the change. This authorisation may take the form of a specific flexibility clause (permitting the employer to vary a specific area), or a general flexibility clause (permitting the employer to vary the terms of the contract).

In circumstances where the employment contract does not authorise change, there are two options available: unilaterally impose the change and rely on the employee's conduct to establish implied agreement, or terminate the employee's employment and offer re-employment on the new terms. These options are not without risk and can leave employers open to claims such as breach of contract, unlawful deduction from wages, discrimination and unfair dismissal. If you would like advice on how to change terms of employment, call us on 03300 585222.



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## SETTLEMENT AGREEMENTS

### HOW CAN THEY HELP?

Settlement agreements can be a useful tool when terminating employment or settling employment claims. They form a binding agreement between the employer and employee which prevents an employee from pursuing a number of claims against the employer in exchange for a settlement payment. Settlement agreements are often the most efficient and cost effective method of terminating employment.

In order for a settlement agreement to be valid certain conditions must be met. In particular, the agreement must be in writing and the employee must have received legal advice from a relevant independent adviser on the terms and effect of the proposed agreement. It is also usual for employers to make a token contribution to the employee's legal fees for obtaining advice.

Settlement agreements can be used to settle existing claims or attempt to prevent an employee from bringing a claim in the future. Negotiating the terms of the agreement is conducted on a without prejudice basis which cannot be referred to in any subsequent court or tribunal matters in the event that the offer is not accepted. If you need advice or assistance in relation to preparing a settlement agreement, call us on 03300 585222.



# REDUNDANCY

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## INSTEAD OF OR AFTER FURLOUGH

For many employers, the coronavirus and its impact on the economy will make redundancies unavoidable both during the lockdown (if furlough is not suitable) and after. Despite the unprecedented circumstances, the law surrounding redundancy and unfair dismissal continues to apply as usual in this context. It remains open to employees who have two years' service to challenge the fairness of their dismissals, and as such employers must ensure that they follow a fair procedure and make dismissal decisions that are fair and reasonable in the circumstances.

As usual, employers should ensure that they maintain a fair approach to selecting employees for redundancy. A fair selection process involves the application of objective selection criteria to a pool of employees. In order to be fair and reasonable, the redundancy selection criteria should be as objective as possible. Potentially fair selection criteria includes: performance and ability, length of service, attendance records and disciplinary records.

Employers should ensure that they consult with potentially redundant employees individually to discuss their scores, the proposal to select them for redundancy and the terms of the redundancy. Where an employer proposes to make 20 or more employees redundant in any 90 day period, it must also consult with trade union representatives or other elected employee representatives before redundancies are made. The employer will need to meet with the employees who are to be made redundant at a further individual consultation meeting in order to communicate the decision to them and discuss the redundancy package. Employees should also be given the option to appeal.

To maintain a fair process, employers must consider whether suitable alternative positions are available. If an employee accepts an alternative position, it might be subject to a four week statutory trial period. The purpose of the trial period is for both the employer and employee to assess the suitability of the alternative employment for the employee. If an employee rejects the offer of an alternative position the consequences of them doing so will depend on whether the alternative position was suitable and whether the rejection was reasonable.

Employees with at least two years' continuous service are entitled to a statutory redundancy payment in addition to any contractual redundancy payment or other benefits that the employer may provide. Employees with two years' service may also be entitled to time off to look for alternative employment.

If any aspects of the process followed by the employer are conducted unfairly the employee may have grounds to bring a claim for unfair dismissal. At this early stage it is unknown whether choosing to make someone redundant instead of placing them on the furlough leave will amount to an unfair dismissal, but these matters will be decided by the employment tribunals by looking at the individual circumstances of each case, and taking into account the size and resources of the employer.

If you require advice or assistance in relation to a possible redundancy situation or defending a claim in the employment tribunals, please call us on 03300 585222 or by e-mail at [info@btmk.co.uk](mailto:info@btmk.co.uk)