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POTENTIAL ALTERNATIVES TO MAKING EMPLOYEES REDUNDANT

This note is intended to provide general information only and should not be treated as a definitive guide or relied on as legal advice. As legal advice must be tailored to the specific circumstances of each case, the contents of this note are not intended to be a substitute for taking advice in person from a qualified lawyer on the requirements for your particular circumstances, which, given the complexities of the law in this area, we would advise you to take.

We have set out below some potential alternatives to making redundancies in response to the current Coronavirus situation. This list is not intended to be exhaustive. Whether options are viable for your organisation and how you approach implementing any such arrangements will depend on your particular circumstances.

Coronavirus Job Retention Scheme – ‘furloughing’

- Assuming that you are able to make the contribution [announced by the government](#) at the end of May, one option is for employees to go on, or remain on, [furlough leave](#) for all or part of the period to the end of October.
- Whilst making any contribution to salaries is not desirable, the tapered contribution and the ability to claim back the rest of the salary may make this a viable option for members considering a ‘retainer’ type arrangement under which a limited salary is paid for a fixed period. **Please note that the last date that employees can be furloughed for the first time is 10 June.**
- When further detail (which is expected) is published on the changes to the scheme referred to above, you would need to consider whether any variations are required to the current furlough agreement with your employees, eg to include part-time working arrangements, to change the end date of their furlough leave (if there was one). Employee consent would be required for such variations.

Statutory lay-offs and short-time working

- Another option is to lay-off employees or place them on short-time working arrangements. Although the term 'lay-off' is commonly used to cover a variety of scenarios, the term is defined in legislation to cover a specific arrangement, as is 'short-time working'. There is a complex statutory procedure in relation to both, so this is only a summary of some of the key points, not detailed guidance on the procedure.
- An employee is laid off if they are provided with no work and **no pay** pursuant to a contractual right to withhold remuneration if there is no work. The employee would remain employed.
- An employee is kept on short-time working if, due to a reduction in the work the employee is employed to do, the employee is on reduced hours and receives less than half a week's pay (calculated in accordance with statutory rules). The employee would remain employed.
- Where there is no contractual right¹ to stop providing work and pay to employees or to reduce an employee's working hours and pay, to do so would give rise to potential claims, eg constructive dismissal, unlawful deduction from wages, breach of contract. You would, therefore, need to consult with employees and get their consent to such a temporary arrangement.
- If an employee has 2 years' service they will be able to claim a statutory redundancy payment ("SRP") if they have been laid off or placed on short-time working (or a combination of both), **in accordance with the statutory definitions**, for 4 consecutive weeks or for 6 weeks (of which no more than 3 are consecutive) during a 13-week period.
- The employer can defend the SRP claim if they reasonably expect that, within 4 weeks of the employee submitting the claim, they will have work for the employee for at least 13 continuous weeks, during which the employee would not be laid-off or put on short-time working. There is a prescribed process for this.
- Employees may be entitled to up to 5 days of statutory guarantee pay from you of up to £30 per day in a 3-month period. Any contractual remuneration paid for the same period can be set off against this.

'Retainer'

- This would be a contractual arrangement, the terms of which will depend on your particular circumstances and negotiation, eg 20% pay and no work for a temporary period with certain terms attached.
- You could consult with employees and seek consent to the changes (which is the safest option). Employees may be more willing to accept the changes in the current circumstances. Any changes agreed should then be documented in writing.

¹ There is no such contractual right in the SOLT/BECTU and UK Theatre/BECTU Agreements. House agreements and individual contracts would need to be checked.

- If employees do not agree, you could impose new terms by implementing the change unilaterally, but this would risk a breach of contract claim unless it is possible to imply consent through continued employment on the new terms. If the change is fundamental the employee may be deemed to have been dismissed or the employee may resign, which could give rise to an unfair dismissal or constructive dismissal claim. This is a risky approach, particularly in light of potential involvement from BECTU.
- If it is not possible to obtain consent, you could terminate current contracts and offer to re-engage them on the new terms (as an alternative to unilaterally imposing a change), but this is not without risk:
 - if the proposal to terminate and re-engage affects 20 or more employees, [the statutory collective redundancy procedure](#) would apply. Failure to comply with this procedure could lead to a penalty of up to 90 days' gross pay per affected employee, and criminal prosecution if the HR1 form is not submitted;
 - employees with 2 years' continuous service could bring an unfair dismissal claim;
 - if the applicable notice (or pay in lieu of notice) is not provided, employees could also claim wrongful dismissal.
- Employees whose employment is terminated because they do not accept the new terms may be entitled to SRP in this context. Employees who accept the new terms could still, in practice, leave at any point. The general position is that they would not be entitled to SRP if they resigned, but there may be circumstances which result in SRP being payable, eg conduct giving rise to a constructive dismissal claim.
- The appropriate approach for securing a retainer arrangement will depend on your particular circumstances, so we would advise you to seek legal advice on your specific case.

Unpaid leave/sabbatical

- You may wish to offer some unpaid leave or a sabbatical for a period. This would require employee consent and a carefully drafted agreement.

General points

Consultation involving clear communication, reasonableness and consent are going to be key in most cases.

Where proposals to change terms apply to 20 or more employees, some employers opt to commence the statutory collective redundancy procedure from the start of discussions whereas others may choose to only start the collective procedure if employees do not agree with the proposed changes and termination and re-engagement or redundancies are then proposed. Potential alternatives to what is being proposed, timing constraints and likelihood of employees agreeing are likely to be relevant factors in this decision, but you should seek advice on what is appropriate for your specific circumstances.

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If proposals are not being applied to all employees, then you should also ensure that your reasons for choosing the employees affected are objective and fair to avoid potential discrimination claims.

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