Answers to frequently asked employment law questions arising out of the coronavirus crisis

Q1: Do normal employment law rules apply?

A: We are in unprecedented circumstances and it is difficult to apply normal rules of employment law to a completely abnormal situation. This is reflected in many of the answers below.

Q2: Do we require employees' consent to implement a pay cut?

A: If feasible, it is better to obtain employees' written consent to a pay cut. This will mean that there has been an agreed variation to contract for the specified period, and no further pay will be due. But we have been advising clients that in present circumstances, to ensure survival, some employers may have little option but to implement pay cuts unilaterally and without consent.

Q3: Wouldn't this lead to constructive dismissal claims?

A: Yes, in normal times unilateral reduction of salary is likely to be a constructive dismissal. But to claim constructive dismissal the employee has to resign. Why would they resign and have no job, as opposed to a job and a percentage of salary? And the prospect of return to full salary in the hopefully not too distant future will hopefully be enough to persuade them not to do this.

Q4: How would a constructive dismissal case play out?

A: Tribunal cases for unfair dismissal usually take more than a year to come to a final hearing. By then we hope things will have dramatically improved and the employer, having bought vital time, will have a number of options, including settling the case and reinstating.

Q5: Is an employee likely to win a constructive dismissal case arising out of a unilaterally imposed pay cut?

A: Yes, provided they have two years' service. However, as above, we think it is unlikely that employees will bring such a case as doing so will require them to resign in a very uncertain job market.

Q6: Can an employee remain employed and make a claim for unpaid salary instead?

A: Yes, but the employer will be able to buy vital survival time. Where there has been a unilateral imposition of a pay cut, the balance of pay is highly likely to be deemed due by a Tribunal. But, as above, a case could take a year to come to a full hearing and the employer has options to settle the case or otherwise deal with it after the crisis has passed.

This does mean the employer is likely to end up having to pay the employee for a period of time when no work was done by that employee. But the employer will have bought time to get it through the current crisis.

Q7: Doesn't a lack of work mean the employees are redundant?

A: Yes, in normal times, reduction in work or closure of workplace would result in redundancy. But in the current situation that is an unattractive route for most employers to take. Presumably most employers want staff to stay on with reduced pay so that they are in post when things start to return to normality. This seems to be a better situation than making redundancies now and then having to recruit new staff when business picks up again.

Q8: If an employee insists that he/she is redundant can we resist this?

A: This answer is similar to the answer given to Q3 above in relation to constructive dismissal. The employee would have to leave, bring an employment tribunal claim and wait for a year for that claim to come to a full hearing. In the interim he/she would have no job and no income, making it very unattractive option for employees. Weighed against that, a pay cut for a few months is likely to be a better outcome for most employees.

Q9: What about layoff?

A: The media tends to use the term "layoff" incorrectly. In employment law, layoff means a temporary suspension from work and it does not mean redundancy. Inaccurately and unhelpfully, the media has used the two terms interchangeably. Layoff, a temporary suspension from work on significantly reduced pay, is possible but only if there is an explicit layoff clause in contracts of employment. Layoff, where contractual terms permit it, can be for a maximum of 4 consecutive weeks, or 6 weeks in a rolling period of 13 weeks, after which employees can – if they choose to – effectively resign and claim a statutory redundancy payment. Whilst laid off, employees are entitled to £29 per day, rising to £30 on 6 April. However, this is only for up to five days in any three month period, so it really is a tiny amount.

Q 10: If we don't have a layoff clause in our contract of employment, can we implement it anyway?

A: By consent, yes. Absent consent, see answer to Q2 above. Much the same applies. An employer can unilaterally implement layoff but there are risks of constructive dismissal and claims for unlawful deductions from salary, but these are likely to take a year or more to reach a final hearing. So imposing lay off will buy time.

Possibly the best approach is to ask employees to agree to a period of lay-off in return for a promise that you will pay them back the monies lost when things improve provided they remain in your employment. That is likely to be the legal position anyway (if they claim unlawful deductions of wages) and offering it up front may sugar the pill and make the offer of unpaid time off

seem more attractive, which will buy you time to get through the immediate crisis.

Q 11: We see no alternative but to make redundancies. Do normal rules apply?

A: Employees with 23 months' service or less cannot claim unfair dismissal and no legal action can result if they are made redundant immediately. It is safer to use 23 months as the cut-off rather than 24, because notice periods can enable employees to cross the 2 years' service line. For employees with 2 years' service or more, in essence normal rules do apply, but consultation periods can be abbreviated.

Q 12: We may need to make 20 or more redundancies at one location within a 90 day period. Do the rules of collective redundancy apply?

A: In these circumstances it is necessary to enter into a period of consultation with employee representatives, either a trade union or representatives elected for the purpose. However, collective consultation is not required if "special circumstances" apply. Likelihood of insolvency is not of itself a "special circumstance" but the background to this crisis, with sudden Government announcements changing the employment picture overnight is, we believe, likely to be a "special circumstance", thus obviating the need to conduct collective consultation. The maximum penalty for failure to conduct collective consultation is 90 days' pay per affected employee. If a tribunal did find that collective consultation ought to have been conducted, any award in the present circumstances is likely to be much less than 90 days and, as above, a case could take a year or more to come to a hearing.

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Note 1: The information given in this FAQ document is by nature generic and there are a great number of uncertainties and challenges in the current situation. Individual advice in each situation is required before action is taken and Sherrards accepts no liability for any action or inaction taken on the basis of this document only.

Note 2: The information given in this document is based on the legal position as at 19 March 2020. The Government is considering emergency employment legislation which would change, possibly very significantly, the current legal position.