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"The human race is faced with a cruel choice: work or daytime television" – squaring lockdown with the Job Retention Scheme (UK)

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A well-known term of the CJRS is that the employee shouldn't while on furlough do any work for the employer or provide any services to it. A simple enough proposition, one might think, despite the unknown pundit whose wise words appear above, but as with much of this Scheme, once you get down into the weeds of it, questions inevitably arise at the margins.

Here are our thoughts on some we have received:

Should we cut off the email access of furloughed employees?

This was based on some fairly strident Covid-19 guidance put out by the CIPD, which includes the statement that "*even tasks such as basic administration, replying to customer care emails or briefing colleagues with handover information are services…..and may count as work*". If HMRC later audited email folders for the relevant period and saw such activity, for example, could the employer be required to pay anything back, let alone (as the CIPD suggests) "*all the payments under the Job Retention Scheme*"? Would such activities lead to the employer being exposed to the criminal proceedings referred to in the Guidance?

Some perspective must be maintained here. The aim of the no-work rule is that employers should not be able to obtain a direct benefit from their employees at the Government's expense. It is not to make employers' lives unnecessarily difficult or to obstruct their ability to carry on as far as possible in difficult times. Reading the CIPD's guidance literally would mean that you would have to ensure that a completely comprehensive handover had been done before furlough, such that no single follow-up question could be left outstanding. It would mean that if a client emailed furloughed employee X about a work opportunity, X could not forward that to employee Y or tell the client that he had done so, and the opportunity would then be lost to the business, to everyone's detriment. Basic administration left undone would mean that the work of others remaining active in the business would be made more difficult and less efficient, just at the time when the opposite is most required. Of course, these will be questions of degree. If X simply passes on the client email to Y saying "Please see attached — can you take care of this?", that is clearly a different matter from X then adding material commentary about what Y should do or offering technical assistance with the enquiry.

Nonetheless, it is hard to see that these tiny oilings of the corporate wheel are what HMRC had in mind by that rule, or that it would relish a public dispute with the employer if the only evidence of someone working in furlough was at this very basic level.

[As a side point, we do not recommend cutting furloughed staff off emails anyway – they may be feeling isolated, bored and dispensable enough already, so treating them like leavers will only make their anxieties worse. By all means tell them that they must not use it for work purposes (and instruct managers not to encourage or allow this), but there is nothing in the CJRS rules which prevents staff on furlough from staying in contact with their friends at work that way, and there are significant engagement and retention benefits in their being able to do so. Keep in mind here the cheery views of that well-known ER specialist George Bernard Shaw: "A perpetual holiday is a good working definition of hell".

I have been elected as a staff representative for TUPE consultation purposes – can I do that while on furlough, or is that working?

There is nothing in the guidance on this, but on balance we do not consider that acting as staff rep will count as working or providing services to the employer. By analogy with the position relating to directors, it is merely the performance of a statutory function. The whole purpose of the legal obligation on employers to pay staff representatives for their time spent in this function is to stop them withholding salary on the basis that it isn't work for the employer. In any case, any other conclusion would mean that an employer which had had to furlough large parts of its workforce could not go through any collective consultation exercise about a sale or redundancies without bringing people back from that leave at potentially very considerable expense in order to act as elected representatives.

I had to call in one of my furloughed employees for a day to deal with an unexpected workplace emergency – does this affect my eligibility to claim furlough support for him?

This clearly is work and so you should certainly not claim for that day. The bigger question is whether, if that day's work means that his uninterrupted furlough is less than three weeks, you then lose the whole period? Again, there is no guidance. On a strict reading, yes, but it is impossible to think that HMRC intended that a day's unplanned emergency work for the benefit of the whole business would lead to a three week loss of benefit. It would still probably be sensible to keep a record of specifically why you had to call that employee back in (and it had better be convincing, as to both the urgency of the situation and your inability to use anyone for the task who was not on furlough).

In all these cases (and many more besides in relation to the CJRS) it must be assumed that HMRC did not intend the Scheme's operation to produce material injustices, unnecessary hardship or outcomes repugnant to common sense. Any such conclusion would be hugely damaging to public perception of the Scheme and its backers, i.e. the government. It must also be assumed that when it comes to retrospective claims for repayment by HMRC, it will not want to litigate publicly on a strict reading of the guidance or the Treasury Direction if that would be the outcome. On that basis we see very little chance in practice that the Revenue would raise much of an eyebrow at any of these examples.

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