# Redundancy: new rules prescribe pay entitlements for redundant furloughed workers

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## Employment Law News

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**Redundancy: new rules prescribe pay entitlements for redundant furloughed workers**

**As the Coronavirus Job Retention Scheme (Scheme) winds down we**

**consider what employers are required to pay to redundant furloughed employees.**

The Coronavirus Job Retention Scheme (**Scheme**) has recently begun to wind down, with Government contributions dropping to 70% of pay from 1 September 2020 and then to 60% from 1 October 2020. The Scheme will close altogether on 31 October 2020. Employers with employees still on furlough must now grapple with whether they are able to bring those employees back to work, or whether the workforce will need to be restructured in the wake of the pandemic.

Where a redundancy situation has arisen, employers may commence redundancy consultation and, ultimately, make furloughed (or previously furloughed) employees redundant. On 31 July 2020, new regulations came into force which stipulate what employers must pay to redundant employees who are, or have been, furloughed.

## Notice pay

### Can the cost of notice payments be recovered under the Scheme?

Where an employer opts to make redundancies during the life of the Scheme, the guidance provides that an employer is able to make a claim under the Scheme for wages paid to an employee serving both statutory and contractual notice periods. However, claims may not be made under the Scheme to cover payments made in lieu of notice.

Where an employer opts to make redundancies after the closure of the Scheme, it will not be able to make any claim under the Scheme in respect of wages due for either the statutory or contractual notice period (assuming that notice period commences after the Scheme has closed).

This may act as an incentive for some employers to complete redundancy consultations and allow the notice period to run before the Scheme closes on 31 October 2020.

**How should notice pay be calculated for furloughed employees?**

The amount of notice pay due to a furloughed employee (or previously furloughed employee) will depend on the length of their notice entitlement and their particular working arrangements.

Where the employee is entitled to statutory notice only (or less than one week more than statutory notice), new regulations set out how a "week's pay" is to be calculated:

- where the employee has normal working hours, their pay does not vary with the amount of work done (e.g. most salaried employees) and notice is calculated on or before 31 October 2020, then a week's pay will be the employee's normal, contractual rate of pay; and
- where the employee has variable working hours or pay, it is calculated by reference to their pay over the preceding 12 weeks.

In either case, any reduction in pay as a result of being furloughed should be disregarded. In practice. this will usually mean that the employer will need to top up the employee's pay for the notice period.

The position appears to be less favourable for employees who are entitled to notice of at least one week more than statutory notice. The new regulations are only engaged where the legislative provisions governing what employers must pay in respect of the statutory notice period apply – and they do not apply to this cohort of employees. This means that the notice pay (both for the portion equivalent to the statutory notice period and for the additional contractual notice) should be based on the pay the employee would otherwise have received during their notice period. Both the employment contract and furlough agreement should be reviewed to understand the employee's entitlement here. In practice, this may mean that the employer is able to take into account any

reductions in pay as a result of being furloughed. However, employers should give careful consideration to the public relations consequences of reducing notice pay in this way. Employers such as Arcadia Group who are seeking to rely on this exception are facing heavy criticism for doing so.

As the rules in this area are complicated, we would recommend that employers take advice before calculating notice payments.

**Redundancy pay**

Employers cannot claim under the Scheme for an amount to cover either statutory or enhanced redundancy payments. The employer must cover the cost of any redundancy payment which is due.

Where the employee is entitled to a statutory redundancy payment, the new regulations set out how a "week's pay" is to be calculated:

- where the employee has normal working hours, their pay does not vary with the amount of work done (e.g. most salaried employees) and the statutory redundancy payment is calculated on or before 31 October 2020, then a week's pay will be the employee's normal, contractual rate of pay; and
- where the employee has variable working hours or pay, it is calculated by reference to their pay over the preceding 12 weeks.

Again, in either case, any reduction in pay as a result of being furloughed should be disregarded. However, the maximum cap on a week's pay for the purposes of calculating statutory redundancy payments still applies (currently £538).

Where an employee is also entitled to an enhanced redundancy payment, the amount payable will turn on what is said in the employment contract, any relevant policy and the furlough agreement. In practice, this may mean that the employer is

entitled to take into account any reductions in pay as a result of being furloughed.

**BDBF is currently advising many employers and employees on the challenges presented by the coronavirus. If you or your business needs advice on furlough or other coronavirus-related matter please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.**

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