Coronavirus Job Retention Scheme

When the Government initially announced its plans for the Coronavirus Job Retention Scheme (**CJRS**) on 20th March, this was greeted with a significant amount of relief from employers, many of whom at the time were contemplating the possibility of laying off staff or worse, commencing wide scale redundancies. The CJRS however provides employers with some financial protection in relation to their obligation to pay employee salaries.

Following last week's announcement, we now know that the scheme is due to run until 30th June 2020 when the Government will review matters and decide whether or not it is to be extended. This however gives rise to the question of what should employers be doing now? Anecdotally from discussions with many of our clients, the issue of redundancy planning frequently arises. The Confederation of British Industry (**CBI**) has recently expressed concern that employers who anticipate dismissing 100 employees or more within a 90 day period would have needed to commence a formal 45 day consultation period as early as Saturday 18th April in order to comply with the minimum requirements set out within the Trade Union and Labour Relations (Consolidation) Act 1992 (**TULRCA**) if the scheme had not been extended. For those contemplating dismissing 20 but less than 99 employees within the same period; they would have needed to start the process on 2nd May in order to ensure that they consult for a minimum of 30 days in accordance with TULRCA.

Some employers will thankfully not need to consider taking these measures as they can be fairly confident that once the Government lockdown starts to ease off, they are likely to return to working at the same if not higher capacity than prior to the COVID-19 outbreak, one example of this being employers engaged in the construction/house building sector. Unfortunately however, this is not the case for many. The majority of employers are anticipating reduced demand which will require changes being made to their workforce. If you fall within this category, you should now be starting plans to prepare for this eventuality if you are not already doing so.

The law makes it clear that employers should not make compulsory redundancies without first having given careful consideration to alternatives which can include, amongst other things, voluntary redundancies and changes to terms and conditions such as reduced salaries and working hours. What many employers fail to appreciate however is that the obligations under TULRCA do not relate to redundancies but "dismissals". Quite often, employers fail to appreciate that employees who are dismissed for refusing to agree to variations to their contracts of employment (reduced pay or hours for example) are taken into account when deciding whether the obligations under TULRCA are triggered. Similarly, TULRCA does not distinguish between employees who have and who have not accrued 2 years' continuous service (quite often, employers initially look to terminate the employment of those with less than 2 years' service as they generally do not have the ability to pursue a complaint of unfair dismissal.)

An employer's obligations under TULRCA can be at times complex and certainly time consuming. There is usually the requirement to put in place arrangements enabling employees to elect representatives who their employer must consult with. There is also a statutory obligation to give notice to the Secretary of State where an employer anticipates dismissing 20 or more employees within 90 days. Crucially, a failure to do so is a criminal offence which can result in BEIS pursuing criminal proceedings against directors as a consequence of them failing to comply with their regulatory obligations.In addition to ordinary compensation under the standard unfair dismissal rules, affected employees can also seek what is known as a *protective award* of up to 90 days' pay where their employer has failed to comply with their obligations under TULRCA. This can often provide a fertile ground for lawyers who pursue group actions on behalf of employees under damages based agreement arrangements (no win no fee) who encourage clients to direct colleagues to their solicitor in order to pursue a group action which can often be very lucrative for the lawyer concerned.

There is what is known as a *special circumstances* defence if they can demonstrate there are special circumstances which render it not reasonably practicable to comply fully with the information and consultation requirements of TULRCA. There is no definition of *"special circumstances"*. Prior to the announcement of the CJRS, it is likely that many employers would have potentially had the ability to rely upon such a defence if faced with a need to make a high volume of dismissals within a 90 day period. The CJRS however now means that employers have sufficient time to carefully plan any exercise which probably means that the special circumstances defence is likely to apply in only limited circumstances.

If you are not already doing so, unless you expect to return to the same levels of output as you were experiencing before the COVID-19 outbreak in the UK, it would be prudent to start giving consideration to whether you anticipate requiring the same number of employees once business returns to usual. This does not necessarily mean redundancies; as mentioned above there are various ways of avoiding redundancies which can be implemented with the agreement of the workforce. Where that agreement is not obtained however, any dismissals which follow (together with any possible redundancies) may trigger your obligations under TULRCA.

Glaisyers Employment Team

Russell Brown
Partner, Head of Employment
E russell.brown@glaisyers.com
T 0161 833 5667

Sarah Scholfield
Associate
E sarah.scholfield@glaisyers.com
T 0161 833 5689

Stevi Hoyle
Solicitor
E stevi.hoyle@glaisyers.com
T 0161 833 6962