Slaughter and May Podcast
Redundancy in focus: The aftermath - what comes next?

Clare Fletcher	Hello and welcome to the fifth and final episode in our series of Slaughter and May podcasts, “Redundancy in focus”. I’m Clare Fletcher, a professional support lawyer in the Employment team, and today I’m joined by one of our partners Padraig Cronin. In today’s episode, Padraig and I will discuss the aftermath of redundancies. Once the dust has settled on a redundancy process, what comes next? There are five key points we are going to discuss today: 1. The recent extension of furlough and postponement of the Job Retention Bonus 2. How employers might deal with “survivor guilt” 3. The importance of reviewing policy and process in the aftermath of a redundancy process 4. Can an employer go out into the market and recruit following a redundancy process 5. When making redundancies in batches, how does an employer know if they need to collectively consult? And hot off the presses, we have a judgment from the European Court handed down just this morning to discuss, so stay tuned for that. I should say this podcast is being recorded on 11 November and reflects the law and guidance as it stands today. So Padraig, would you like to start us off on the first point; how might the extension of furlough impact redundancies (and their aftermath)?
Padraig Cronin	Clare of course, as most listeners will be aware, the Chancellor announced on 5 November that the furlough scheme was being extended until the end of March 2021. In the hope I think that this will help to avoid redundancies which would otherwise have been probably inevitable during this second or winter wave of the pandemic. Because we have already seen record redundancies in recent months, according to some ONS statistics published yesterday, a record 181,000 increase in the number of people unemployed in the three months to September. So, those numbers undoubtedly linked to the expected closure of the pre-existing CJRS at the end of October.

	So now that the CJRS is being extended, there is certainly scope for employees who were made redundant in the period before now to be rehired and furloughed which is good news for them and potentially for their employers also. And they can be rehired and benefit from the extended CJRS provided they were on the employers' payroll on 23 September of this year, and certain other eligibility requirements are also met. But the key message is that people already let go can be rehired and benefit from the CJRS as extended.
Clare Fletcher	And that's useful flexibility Padraig, I agree. But I guess the question on my mind is – is there any real incentive for an employer to do this?
Padraig Cronin	Yes that's been a sort of question hanging over the extensions to the CJRS all along I think and you know, at heart the question remains what is the likelihood of the relevant employees job still being a viable job once the CJRS ends again for the second or third time on schedule in March 2021. And as with everything to do with Covid I guess, and these difficult times it's quite difficult for people to form secure judgements, you know, even looking at what's even six months ahead at this stage. There is also the question as to the level of CJRS support that's now available. Initially, the contributions on this extended CJRS will be equivalent to what was offered in August of 2020. That is that employers can reclaim up to 80% of wages for the furloughed employees, subject to a cap of £2,500 per month. But the sting in the tail for the extended scheme is that the Chancellor has said that the level of employer contributions will be reviewed in January 2021. So the visible certainty of 80% up to £2,500 cap. The messaging seems to be that that's going to be driven downwards when it's reviewed in January 2021. So for some employers, the extended CJRS may simply be keeping people in employment for November, December and some of January and then the inevitable may happen I guess, if the funding support in January is decreased significantly.
Clare Fletcher	And of course what employers thought is that if they kept people employed until January they might benefit from the Job Retention Bonus. As a reminder that was something that was put in place when we first thought that the furlough scheme was ending at the end of October to incentivise employers to keep people on payroll until the end of January next year. They could then reclaim £1,000 per retained employee. However, the Chancellor announced at the same time as the extension of the CJRS that the Job Retention Scheme is no longer going to apply. They have said that there will be an alternative retention incentive put in place at the appropriate time. Not yet clear what that's going to look like, so employers will need to keep an eye out for further details.

	What we did know from the JRB was that it was payable to employers. And if that remains the case with whatever new retention incentive is put in place, employers are going to need to decide if they nevertheless want to pass it on to employees, as part of their package for incentivising survivors. We talked a little bit about incentivising survivors from a remuneration perspective in our last podcast; and what we want to move on to look at now is a related topic of how employers can deal with 'survivors' guilt'.
Padraig Cronin	I have to say Clare I dislike the word survivors but I know what it means so let's use it any event because that's the term I think. The concept of 'survivor's guilt' is certainly taking on a renewed importance in the current circumstances, given all the other strains on employees' mental health, family life, worrying about money, productivity generally. So in this employment context, survivor's guilt is referring to emotional, psychological and physical effects on employees who are not dismissed during a redundancy process. Because those people may feel guilty that they were 'saved', or angry that colleagues, perhaps close friends in the work place have been dismissed, or most relevantly perhaps they're concerned/anxious that they themselves even though they've avoided the chop might be in the next round of redundancies. So difficult issues for people to grapple with. And redundancy processes are always destabilising even to those who aren't ultimately made redundant, and employees do need time to adjust to perhaps new working patterns. And as I said, people they're used to seeing in the workplace will no longer be there, and quite often those who remain have taken on perhaps larger workloads than was the case beforehand. And as a result of those things, it isn't uncommon to see a drop in productivity of the survivors, of those who remain following a redundancy process. And that's despite the fact that obviously one of the aims of designing and running a redundancy process is always to seek to retain the best performers amongst the relevant cohort of people.And that it's easy to assume that those who remain in the workforce will work harder, in order to secure their jobs. So some difficult issues to navigate through there I think.
Clare Fletcher	Absolutely, so what can employers do to manage these issues? We would say one of the main things is to keep your 'survivors' engaged throughout the redundancy process. I think what some employers will do is that they will identify those who are not at risk and they'll essentially leave them to get on with their jobs and focus on the employees that are at risk.

	Whereas, if you actually keep the survivors engaged and they are reassured that redundancies are necessary, and they've been carried out fairly that will minimise the risk of issues developing down the line. Another thing that we would suggest is that employers extend their redundancy processes; so that it doesn't stop when the last employee has left the building. Instead try to build in a process for engaging with survivors in the aftermath. And in practical terms, this means for example, arranging regular one-to-one catch-ups between surviving employees and their managers to discuss how they are coping. Another useful point can be to ensure that your managers are trained to spot the issues or signs of issues at an early stage, and that they can help to support employees who are struggling. It might also be that employees themselves need some retraining to help with any changes in their role. And finally, ensure that mental health support is available for employees. What we've seen is that most employers have really stepped up their offering in the past few months on the mental health support side because of all the challenges the pandemic has created for their employees.
Padraig Cronin	And I guess the sort of linked point to just bring up at this stage is that Clare, in terms of the process, the end of the process, post process period is around the importance of reviewing redundancy related policies and procedures. And as you know with all sorts of difficult projects; once they are complete, the temptation is to really breathe a sigh of relief, thank god it's over and move on to the next thing, and hopefully the next sort of palatable thing. But particularly in the case of redundancies, I think where we have discussed, even those who remain will be impacted by the process. It is important think to take time to look back at how the process went immediately after it was over, when people have fresh memories of what happened and it'll be obvious points on what worked well and what didn't. That's the time to try and capture any sort of learnings, anything spotted, any process improvements so that the next time such a process is needed, it can be run more efficiently from the employers perspective and with less strain on the employees from their perspective.
Clare Fletcher	I agree and I think given the likelihood of a prolonged economic downturn, and the stop-start nature we've seen of government support around the pandemic, I think it looks likely that a lot of businesses will need to implement more than one redundancy process over the coming months. So there is going to be an opportunity to assess and make improvements as you go along. There's also another thing to bear in mind, the sheer rate of change in developments at the moment means that employers need to be even more vigilant than usual in reviewing their processes to make sure they remain

	compliant. So the furlough extension is just one example of these sort of fast moving developments. And another one is the European Court decision which we are going to look at shortly. But before we get to that though, our fourth key point we wanted to look at today is whether an employer can recruit following redundancy process? And I guess the starting point is, if you have new vacancies or alternative employment available, that's always going to be relevant when you're looking at a redundancy process. On the one hand it might actually negate the suggestion that there is a redundancy situation at all, which could of course render any redundancy dismissals unfair. Bit in any event, it is also a key aspect of a fair redundancy process that the employer must consider whether there is any alternative employment which could be offered to a redundant employee. And even where there is ostensibly no other work to do, a failure to at least try to find alternative employment could make an otherwise fair redundancy unfair.
Padraig Cronin	Yes absolutely, and advertising as sometimes happens for new recruits shortly after a completed redundancy process is another factor which is always going to put the fairness of pre-existing redundancies under quite close scrutiny. The books are full of cases dealing with instances like that, which flag the concern around that sort of timing unhappiness, as it were. On the other hand, if the vacancies genuinely don't arise until after the completion of redundancy processes then the employer's failure to consider the redundant employee for those newly opened up posts wont of itself retrospectively render an otherwise fair dismissal unfair. So in a sense the timing, the actual facts on the ground, those are the key things to be alive to and be aware of.
Clare Fletcher	So, our final point today relates to successive redundancies, and the need to collectively consult. As we have mentioned in previous podcasts, the obligation to carry out collective consultation arises where an employer proposes to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. And it's that 90 day period we're focusing on now. A question we are often asked and again particularly at the moment is: what happens where redundancies are carried out in stages? So if for example, an employer initially proposes 15 redundancies, but then proposes another 15 say within the same 90 day period - has the obligation to collectively consult been triggered?

Padraig Cronin	And on this point Clare, as it comes up relatively often in practice this is one of those areas of law which has never been as clear as it might be partly because of the interaction of EU law and domestic English or UK law. But that said, in general terms, you can't artificially stagger redundancies to try and evade the 90 day period, in order to avoid the collective consultation obligations. So using your example Clare, if the employer knew at the outset they did in fact need to make 30 redundancies within the 90 day period, then trying to escape the consultation obligations just by, if you like, presenting it as an initial 15 followed by a further 15 within the 90 days just isn't going to work. That said, if there are two genuinely distinct or separate proposals, or the original proposal to dismiss 15 genuinely changes to a dismissal of 30, then on the basis of UK law to date, it's certainly possible to argue relatively persuasively albeit not conclusively that that there are two proposals and they should be treated as two separate proposals, neither of which in itself triggers the collective consultation obligation. So in your example, where there was an initial 15 as a genuine matter and then a subsequent 15 as a genuinely new matter, it should be possible to avoid consultation on both of those batches and neither would require consultation. So as I say, there's sort of a reasonably settled position which is always subject to knowing the facts I think but the reasonably settled position has been that you calculate the 90 day period looking forwards, forwards only from the point the employer formulates the redundancy proposal and it's that point Clare that has now been pronounced upon this morning by the Courts of Justice of the European Union.
Clare Fletcher	Absolutely, so that's what we want to look at now. So it concerns a Spanish case so it's *UQ v Marclean Technologies*: And the fact pattern was similar to what we have just been discussion; so two separate batches of redundancies, which looked at individually didn't trigger the threshold for consultation. And one of the employees who was part of the first batch of dismissals brought a claim, essentially arguing that there had in fact been a series of "covert" collective redundancy process. And the Spanish court referred the case to the European Court, for guidance on how the 90 day period should be calculated. And the Advocate-General gave his opinion back in June, and his view was that the obligation to consult will be triggered where the requisite number of redundancies are actually made over a period of 90 days. And that 90 day period could be measured backwards before the worker's dismissal, or forwards after it, or indeed across the dismissal date. And all that was required is that the 90 day period is consecutive, and the worker is dismissed within that period. Now when that came out in June, it was seen as quite a surprising interpretation given the wording of the Directive as reflected in our UK law,

	which applies the consultation obligations where the employer is contemplating or proposing collective redundancies. So it requires you to look forward as Padraig has just mentioned, to see how many redundancies are contemplated. The European Court as we've said gave its judgement this morning and it's in effect upheld the Advocate-General's opinion. It said that the 90 day period is any consecutive period which includes the individual dismissal concerned which produces the largest number of 'redundancy' dismissals and therefore gives the greatest chance of consultation obligations being triggered. It follows a consistent theme that we see from the European Court which is always trying to enhance the protection for employees as much as possible. And what that means is that employers are going to be required to look both backwards and forward over what's essentially a rolling 90 day period, to determine whether the threshold number of redundancies is met.
Padraig Cronin	Yup, as we were saying, it is quite a different approach to what's understood to be required up to now. It's a very interesting decision. I mean in some ways it's relatively straightforward to apply because you're taking a photograph of what's happened before and afterwards of the dismissal you're thinking about. But equally it certainly makes the process of planning for identifying whether you need a consultation, you know, there are going to be more I guess than there would have been before this case was decided. And one thing we were just discussing when we were on the lookout for this judgement this morning was well does any of this matter to us in the UK given we are six weeks away from ceasing to be subject to European law. But nonetheless this decision does have relevance for us because that decision and the underlying directives will remain a part of UK law, unless and until parliament legislates to overturn or until either the Supreme Court or the Court of Appeal decides they aren't binding in the UK. So unhappy as it may be from an employer's perspective, the decision this morning in *Marclean* case is relevant to us here and will need to be taken into account by employers who are working out whether any set of proposed dismissals when looked at context of effectively a fluid 90 day period backwards and forwards, whether that's going to trigger a collective consultation or not.
Clare Fletcher	Thanks Padraig, so that brings us to the end of today's podcast – and indeed this series. Thank you all for listening. You can find all of our podcasts in this series and more broadly on the Slaughter and May website. Thank you and goodbye for now.