The Coronavirus Job Retention Scheme: an addendum on annual leave

David Reade QC and Daniel Northall provide an addendum to their fourth update following revised ACAS guidance.

We won't call this the fifth update, but rather an update to an update in this fast-moving area.

In our fourth update we discussed the relationship between furlough and annual leave, including ACAS guidance which hinted that annual leave could not be taken (and so could not be required to be taken by employers) during periods of furlough.

ACAS has since revised its guidance and can be found at the same web address as before: https://www.acas.org.uk/coronavirus/using-holiday

To the best of our knowledge, ACAS has not announced that it amended the guidance. The only clue to its revision is at the foot of the webpage, which states ***Last reviewed 2 April 2020*** (the original guidance was published on 31 March 2020).

The guidance continues to give furlough as one of three reasons why a worker may be unable to take annual leave because of coronavirus. Therefore, much of the debate in our fourth update concerning the consistency of that part of the guidance with the Supreme Court decision in ***Russell v Transocean*** remains valid.

The revised guidance includes an important new section on the treatment of bank holidays. It is worth quoting in full:

> *Bank holidays are usually part of the legal minimum 5.6 weeks' paid holiday. Employees and workers must get their usual pay for bank holidays.*
>
> *Employees and workers may still be required to use a day's paid holiday for bank holidays, including when they're furloughed. If bank holidays are given on top of the 5.6 week's paid holiday, employees and workers should check their contract or talk to their employer about taking this holiday.*
>
> *If employees and workers usually work on bank holidays but are currently furloughed, they should check with their employer to see if they have to take holiday on that day or if they can take the time off at a later date.*
>
> *If employees and workers cannot take bank holidays off due to coronavirus, they should use the holiday at a later date in their leave year.*
>
> *If this is not possible, bank holidays can be included in the 4 weeks' paid holiday that can be carried over. This holiday can be taken at any time over a 2-year period.*

This discussion on bank holidays has two striking features. The first is ACAS's warning to employers that workers "*must get their usual pay for bank holidays*". The second is that it

recognises an employer's right to require a worker to use a day's paid holiday for bank holidays *even during a period of furlough*. We will discuss each in turn, but in reverse order.

No part of the Working Time Regulations stipulates that the UK's customary bank holidays (eight in England and Wales, nine in Scotland and ten in Northern Ireland) form part of the total annual leave entitlement guaranteed by Regulations 13 and 13A. Although it is common for employers to include bank holidays within annual leave through their contracts of employment.

However, once so designated by the employer, a bank holiday is no different from any other day of annual leave: it forms part of a worker's annual leave entitlement and must be remunerated in accordance with Reg.16(1) (now understood to equate to the worker's "normal remuneration").

Once one appreciates that there is no difference in principle between a bank holiday designated as annual leave by the employer and any other annual leave, one is driven to the conclusion that the updated ACAS guidance now recognises two things: annual leave may be taken during furlough and it may be done so at the employer's request.

If correct, furlough and annual leave are not mutually exclusive and so placing a worker on furlough does not provide an absolute bar to workers taking annual leave. It also provides some reassurance that annual leave does not 'break' the period of furlough. One cannot believe that ACAS would provide advice that, if followed, would jeopardise the right of employers to access the scheme. It provides timely clarity to employers who were otherwise concerned by how it should treat the upcoming Easter bank holidays.

The outstanding question is whether an employer is entitled to require its workers to take annual leave at times other than bank holidays. If the answer to this question is a simple, unqualified 'yes', one is forced to concede that it leads to a superficially unattractive proposition: an employer can run down annual leave entitlement to nought by requiring its staff to take lengthy or repeated periods of annual leave during periods of furlough. In this way, workers would receive neither additional leave nor additional pay and, so the argument would go, the right to annual leave would be illusory.

However, is this a legally principled objection to employers taking this approach? The provision of annual leave is a measure concerned with the health and safety of workers, not with their pay. It is required to be paid leave merely to ensure that workers are not deterred from taking leave. It is a popular misconception that holiday pay is a 'top up' to contractual pay.

Similarly, as the Supreme Court in ***Russell*** expressly recognised, annual leave is not a means of guaranteeing time off in addition to the time outside of a worker's contracted hours. It merely had to be time when the worker was genuinely free from the obligation to work, irrespective of whether the worker was otherwise required to work at that time.

One solution to this conundrum may lie in observations of the EAT in the decision of ***Sumsion v BBC (Scotland)***. There, the EAT recognised that there may be occasions where an

employer abuses its Reg.15 right to prescribe the dates on which annual leave is taken. Such abuse was identified in ***Sumsion*** in these terms:

> *That is not to say that there may not be cases in which, if the whole facts and circumstances are examined, it can be demonstrated that the employer, in nominating Saturday as a leave day, is not affording real leave at all …But it must, in our view, be a matter of examining the particular facts and circumstances of each case.*

These observations were cited with approval by the Supreme Court in ***Russell***. However, in neither case did the EAT or Supreme Court seek to lay down guidelines on what amounts to an abuse of the Reg.15 right, other than to indicate that its use should not deprive a worker of "real leave".

The updated ACAS guidance may therefore be reconciled in these terms: it is not an abuse to require workers to take annual leave on bank holidays which were designated as such by the contract of employment long before the *Covid-19* crisis began. However, it would be an abuse for an employer to run down the annual leave entitlement of its staff by arbitrarily requiring its workers to take annual leave during furlough.

This view is reinforced by the amendment made to Reg.13 WTR addressed in the ACAS guidance and which we discussed in our last update. The amendment appears to be made in recognition of two things. Firstly, workers should not be disadvantaged in taking annual leave through losing a large part of the leave year due to the *Covid-19* crisis. Secondly, employers should not be disadvantaged by being required to give workers the balance of their accrued annual leave in the much reduced leave year that remains once the crisis ends: the burden may be spread over the following two leave years.

What is clear, however, is that the amendment would be rendered otiose if employers were permitted to run down annual leave during furlough.

It remains to consider the effect of the ACAS guidance on the difficult question of what pay is due to a worker for annual leave taken during furlough. The guidance warns that workers must get their 'usual pay' for bank holidays. Implicit within that warning is the suggestion that workers should be paid their normal remuneration; that is to say, what the worker would have been paid for annual leave if they were not on furlough.

The answer seems to us to lie in how the contractual variation brought about by furlough is construed.

As we now know following various European and domestic judgments on the issue, a worker must receive their 'normal remuneration' for any period of annual leave. But what is 'normal remuneration' for a furloughed worker?

One argument is that their 'normal remuneration' during furlough is simply the pay they will receive while in furlough; specifically 80% of their pay, but excluding any element of bonus and commission.

Another argument is that the contractual variation brought about by furlough in a typical case does not extend to the rate of pay for annual leave. Workers would then be paid their normal remuneration based on the pre-furlough period.

A third alternative is that the old rules apply, but in new circumstances. Where the employer takes an average of pay as the basis of the rate of pay for annual leave, the average would include periods where the worker is paid at their full rate, but progressively more at the reduced rate as the worker moves through the furlough period. The annual leave rate would therefore lie somewhere between 80% and 100%.

Plainly, the safest course (and the one apparently endorsed by ACAS), and which would eliminate all risk of litigation, is to take the first of these three options and pay the full, pre-furlough rate of remuneration.

There is force in the argument that “normal remuneration” during furlough is something less than pre-furlough remuneration, but it remains to be seen whether employers are willing to take that step.

As ever, there are no easy answers in this area. Furlough has the quality of a snowflake: closer scrutiny does not lead to greater simplicity.

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