Briefing on employer and employees responsibilities on returning to work in the wake of coronavirus (COVID-19)

On Monday 11 May 2020 the government published its guidelines for returning to work, from Wednesday 13 May 2020, for those unable to work from home. At the same time people were advised to avoid public transport and with schools still closed this raised many questions for workers about what returning to work means in practice. In this briefing for trade unions and workers we seek to answer some common questions.

Can workers who are currently working from home still be allowed to work from home?

The short answer is yes. The Health Protection (Coronavirus Restrictions) Regulations (England) which came into force on 26 March 2020 are still in force, as amended. These provide that it is an offence for a person to leave their home without 'reasonable excuse'. Going to work is only a 'reasonable excuse' if that work cannot reasonably be done from home.

Government guidance for employers and businesses states, "All employees should be encouraged to work from home **unless it is impossible** (our emphasis) for them to do so." The FAQ's on what people can and cannot do state that "…employers should make every effort to support working from home, including by providing suitable IT and equipment…This will apply to many different types of businesses, particularly those whose workers typically would have worked in offices or online."

For those working in Scotland, Wales and Northern Ireland the main message is to stay home and as such workers in those countries should continue to work from home if they can do or otherwise remain on furlough.

I have been on furlough and my employer is now insisting that I return to work. Do I have to attend?

If the work you do cannot reasonably be done from home your employer can require you to attend work provided it is safe to do so. Where the workplace has a recognised trade union there may be a furlough agreement in place which provides for workers to be given notice of a return to work. In any event, your employer must ensure that it is safe for employers to return to work.

If, however, the work you do can be done from home your employer should make every effort to support you to work from home.

Workers who are clinically extremely vulnerable to coronavirus (COVID-19) and those who are self-isolating in accordance with public health advice are not required to return to the workplace.

You are also not required to work if you work in the non-essential retail sector which remains closed. These are:

- pubs, cinemas, theatres and nightclubs
- clothing and electronics stores; hair, beauty and nail salons; and outdoor and indoor markets (not selling food)
- libraries, community centres, and youth centres
- indoor and outdoor leisure facilities such as bowling alleys, gyms, arcades and soft play facilities

Some hotels may be open for the exclusive use of those who live in them permanently, those who are unable to return home and critical workers where they need to for work

What duties apply to employers to enable workers to return to work?

Regardless of any pandemic employers are under a duty to ensure "so far as is reasonably practicable" the health, safety and welfare at work of all their employees. This includes providing a safe system of work and the provision of such information and training and supervision as is necessary to ensure the health and safety at work of employees.

The duty on employers is not just limited to employees. It also applies to workers, including contract workers, as well as clients, customers and visitors to the workplace.

Employers are required to carry out a "suitable and sufficient" risk assessment to identify the risks to the health and safety and take "reasonably practicable" steps to eliminate or reduce that risk.

Employers must consult employees and health and safety representatives in good time on health and safety matters including what the risks at work are, the steps taken to manage and control those risks and how information and training will be provided.

The duties referred to above are set out in the Health and Safety at Work Act 1974 and various other health and safety legislation. An employer also has a common law duty of care, breach of which will amount to a breach of contract.

As part of its 'back to work' strategy on 11 May 2020, the Government published 'COVID-19 Secure' sector guidance requiring employers to carry out specific "suitable and sufficient" risk assessments into the risks to their workers' health and safety from coronavirus (COVID-19) and take "reasonably practicable" steps to eliminate or reduce that risk. These risk assessments must be published on the employer's website where the employer employs more than 50 people.

The Guidances cover:

i) Construction & other outdoor work
ii) Factories, plants & warehouse
iii) Labs & research facilities
iv) Offices & contact centres
v) Working in other people's homes
vi) Restaurants offering takeaways and delivery
vii) Shops and branches
viii) Vehicles (for people working in or from vehicles)

The Guidances set out practical steps for businesses to take to make workplaces safe and which should be taken before workers return to the workplace (see our advice here). It focuses on five key points, which should be implemented as soon as it is practical:

- Work from home if you can;
- Carry out a coronavirus (COVID-19) risk assessment, in consultation with workers or trade unions;
- Maintain two metres social distancing, wherever possible;
- Where people cannot be two metres apart, manage transmission risk; and
- Reinforcing cleaning processes.

Whether an employer has met the duty to ensure health and safety of its workers will depend on the particular workplace including sectors for which there currently is no specific guidance such as the care sector.

A breach of the Health and Safety at Work Act is a criminal offence. A failure to ensure the health, safety and welfare of workers in the workplace will amount to a breach of the common law duty of care and may be negligent.

Do employers have to apply the two-metre social distancing rule in the workplace?

The short answer is yes. The 'COVID-19 Secure' guidelines for the eight sectors make clear that employers should re-design workspaces to maintain two-metre distances between people by such measures as, staggering start times, creating one way walk-throughs, opening more entrances and exits, or changing seating layouts in break rooms.

Where the two-metre social distancing rule cannot be followed in full, in relation to a particular activity, your employer should first consider whether that activity needs to continue for the business to operate. If it does, the employer should then take all the mitigating actions possible to reduce the risk of transmission between staff. The suggested mitigating actions include:

- Increasing the frequency of hand washing and surface cleaning.
- Keeping the activity time involved as short as possible.
- Using screens or barriers to separate people from each other.
- Using back-to-back or side-to-side working (rather than face-to-face) whenever possible.
- Reducing the number of people each person has contact with by using ‘fixed teams or partnering’ (so each person works with only a few others).
- If people must work face-to-face for a sustained period with more than a small group of fixed partners, the employer will need to assess whether the activity can safely go ahead.

An employer has a legal duty to consult with workers and elected health and safety representative in good time on health and safety matters including what the risks at work are, the steps taken to prevent and control those risks and how information and training will be provided. The key message repeated by government is that no one is obliged to work in an unsafe work environment. Anyone who has concerns about their safety should raise this with a health and safety representative or, if not if possible, in writing.

Am I required to wash my work clothes at home?

If “work clothes” is a reference to protective clothing it is likely that this will amount to personal protective equipment. In that case, responsibility for cleaning rests with your employer. Regulation 7(1) of the Personal Protective Equipment Regulations (PPE) 1992 provides that, “Every employer shall ensure that any personal protective equipment provided to his employees is maintained (including replaced or cleaned as appropriate) in an efficient state, in efficient working order and in good repair.”

The employer is also required to provide appropriate accommodation to store protective equipment when it is not being used (Regulation 8 of the PPE Regulations 1992) and 'suitable and sufficient facilities' for changing clothes including where the person is wearing special clothing for the purposes of work (Regulation 24 of Workplace, Health Safety and Welfare Regulations (WHSW) 1992.

Where the worker is wearing their own clothes, the employer should carry out a risk assessment and assess the risk of transmission of coronavirus (COVID-19) if the worker travels home in their own clothes or into work in any required ‘uniform’. Suitable preventative measures must be put in place such as those that apply for PPE.

Does the employer have to provide a face mask for those returning to the workplace?

This will depend on where the employee works and if other preventative measures are in place and then there is the vexed question as to whether they are effective in preventing or reducing the risk of transmission of coronavirus (COVID-19).

The ‘COVID-19 Secure’ guidelines make a distinction between high quality respiratory masks, which are regarded as PPE, and face coverings which are not regarded as PPE. The lack of available PPE in clinical settings which has been the subject of widespread public debate has no doubt influenced government policy which has resulted in the ‘COVID-19 Secure’ guidelines stating that PPE for coronavirus (COVID-19) risks is only appropriate for clinical settings and that, “Unless you are in a situation where the risk of COVID-19 transmission is very high, your risk assessment should reflect the fact that the role of PPE in providing additional protection is extremely limited.” The guidance states that using face masks is no substitute for taking other ways of managing risk, including minimising contact, using fixed teams and partnering for close-up work, as well as increased hand and surface washing. The guidance states, “These other measures remain the best ways of managing risk in the workplace and government would therefore not expect to see employers relying on face coverings as risk management for the purpose of their health and safety assessments.”

However, where workers are working in close proximity in poorly ventilated workspaces, face coverings (which evidence suggests does not protect the worker) will not be appropriate in reducing risk and PPE may be the only protection that is appropriate. In that case it must be fit for purpose in reducing the risk of transmission which means that it must be suitable for the work, fit, control the risk of infection, be maintained and replaced where appropriate and employees must be trained in its use. .

The guidance states that, despite the government’s ambivalence towards them, where a worker chooses to wear a face covering, they should not be disciplined for doing so.

Do those who are clinically extremely vulnerable have to go into the workplace?

The short answer is no. Public health guidance on shielding states that those who are clinically extremely vulnerable are strongly advised to stay at home at all times and avoid any face-to-face contact.

Where those who are clinically extremely vulnerable are willing and able to carry on working they should be allowed to do so from home if the work can be carried out at home. A person who is clinically extremely vulnerable is likely to be disabled as defined in the Equality Act 2010 on the basis that they have a physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day to day activities. Therefore if the work cannot be carried out at home the employer should consider transferring them to another job which might be capable of being done at home or, if this is not reasonable, allow the disabled worker to remain at home on full pay. An employer who subjects a disabled worker to a detriment or dismissal because of the need to shield due to disability is likely to have treated the worker unfavourably for a reason arising in consequence of disability. Although an employer has a defence to a

claim on this ground if the discrimination is justified, where there has been a failure to make a reasonable adjustment it is unlikely that a justification defence will succeed.

An employer is also under a duty to make a reasonable adjustment where a disabled worker is put at a substantial disadvantage by a provision, criterion or practice. A reasonable adjustment could include allowing the worker to work from home, allocating them duties which could be done from home, seeking alternative work which would allow them to work from home or suspending them on health and safety grounds with full pay. Where the clinically extremely vulnerable person is not well enough to be able to return to work they should be paid sick pay in accordance with their contract of employment.

Public Health guidance recommends those shielding to do so until at least 30 June 2020; employer and employers should make an adjustment to their policies so that the absence does not trigger capability procedures during the time the clinically extremely vulnerable are shielding otherwise they could be at greater risk of being dismissed which is likely to amount to discrimination arising from disability.

Do those who are clinically vulnerable (as opposed to clinically extremely vulnerable) have to return to the workplace?

The government's guidance on staying alert and safe (social distancing) recommends that those who are clinically vulnerable people (in short those over 70 or under 70 with an underlying condition and those who are pregnant) should stay at home 'as much as possible'. It also advises they should take particular care if they do go out and should minimise contact with others.

Those who are clinically vulnerable should continue to work from home where it is possible for them to do so and employers should support workers so that they can continue to do so. If the work cannot be done from home then, as for all other workers, the employer should carry out a risk assessment **before** they return to work.

As employers are legally required to provide employees with specific information about health and safety risks and the measures to prevent and protect against those risks, the employer should also discuss the risks and preventative measures that they have put in place with the worker and health and safety representatives before the worker returns to work. If this has not happened, the worker should speak to their union health and safety representative in the first instance.

Workers who are clinically vulnerable may also be disabled and, in that case, the employer should ensure they are not placed at a particular disadvantage by putting reasonable adjustments in place such as reallocating duties so that they can work from home.

Employers have a statutory duty to carry out a risk assessment for pregnant women and if the risk cannot be avoided the employer should alter working conditions or hours of work and if this would not reduce the risk or if it is not possible for the employer to reduce working hours or alter working conditions, the pregnant woman should be suspended on full pay in order to avoid the risk.

What should an employee do if they do not feel it is safe to return to work?

They should raise their specific concerns with any elected health and safety representative who can raise them with the employer. Employees (but not workers) have a right not to be subjected to a detriment or dismissal if they refuse to return to work because they reasonably believe that there is serious and imminent danger to health and safety in circumstances where the employee could not reasonably be expected to avert the danger. Similar protection applies in those circumstances if the worker takes 'appropriate steps to protect themselves'. While employees are required to draw the employer's attention to the serious and imminent danger this can be achieved via the union representative.

Where an employee claims protection for 'taking appropriate steps to protect themselves, whether those steps were 'appropriate' will be judged by reference to all the circumstances, including the employee's knowledge, and the employer may have a defence if it can show that the employee acted negligently. An employer has a defence if it can show that the risk of exposure to coronavirus (COVID-19) is likely to amount to a serious risk.

Whether it is reasonable for the employee to leave the workplace will depend on the extent to which the employer has assessed risks and followed government guidance, whether any further safeguards such as PPE can be provided or other mitigation measures can be taken, as well as the vulnerability of the employee or those with whom they live (e.g. if they are living with or responsible for caring for a clinically vulnerable or clinically extremely vulnerable person).

Where a worker is caring for someone who is clinically extremely vulnerable can they be required to return to work?

If the worker is currently working from home, they should be allowed to continue to do so. If they are not able to work from home, they should follow the advice above if they do not feel it is safe to return to work.

Can an employee refuse to work if they can only travel to work by public transport?

Where an employee reasonably believes that their travel to work on public transport places them or others in serious and imminent danger, in the latter case by carrying the virus into the workplace, the employer should assess the risk. In consultation with the

worker and the elected health and safety representative, the employer should consider what steps can be taken to reduce the risk. This could include allocating tasks to the worker which can be done from home or making alternative travel arrangements.

What if employees cannot return to work at the workplace because of childcare commitments?

According to the Prime Minister when delivering the government's recovery strategy on Monday 11 May 2020 the lack of available childcare is "a barrier to returning to work" and "employers will agree with that." Unfortunately, we are seeing many examples of employers insisting that workers return to work despite the fact that schools and nurseries remain closed.

Employees should first check their contract of employment including any collective agreements, works rules or staff handbooks to see if they provide for paid compassionate leave or paid emergency leave. Employees have a right to take a reasonable amount of time off during working hours to make arrangements for the provision of care for a dependant who is ill or injured or because of unexpected disruption or termination of arrangements for childcare. Although the right to time off for dependants applies from day one of employment it is unpaid and generally it only applies where the need is unexpected. It is arguable that that right applies in the immediate circumstances given that the government's announcement gave workers very short notice that were being encouraged to return to work.

Employees who have one year's continuous service and parental responsibility for a child under the age of 18 are entitled to 18 week's parental leave. This is again unpaid unless there is provision in the contract for some or all of it to paid.

Where employees have been working from home successfully for the last few months managing both work and caring responsibilities, they should remind the employer that the government policy is to continue to allow those who can do so to work from home where possible and that the return to work only applies where it is not possible to do so.

Those employees who cannot work from home and who have to return to the workplace in order to carry out their duties, should seek the assistance of their trade union to negotiate a resolution. This could include being put on furlough although there is a risk that the employer could, under the provisions of the Coronavirus Job Retention Scheme (CJRS), limit it to 80 per cent of wage costs (up to a maximum of £2,500 per month).

Employees with 26 weeks continuous service have a right to request flexible working however employers can refuse a request for one or more of eight business reasons. A valid business reason for refusal of a request may be more difficult to establish now that employers are having to develop more flexible working practices to ensure social distancing. And a refusal may amount to unlawful discrimination because of sex where a request is refused on the basis that a requirement to return to work full time or on a rigid

time regime which puts women (who tend to be responsible for childcare) at a particular disadvantage when compared with men.

Note that where a statutory flexible working request is granted this would ordinarily result in a permanent change to the contract. However, there is nothing to prevent the employer and employee agreeing a temporary change in the contract. Any temporary arrangements should be carefully and precisely defined in any agreement.

Can employers impose changes to shift patterns?

It is important to check the contract of employment first as this should set out the hours of work and any terms and conditions relating to normal hours of work.

Where the contract only sets out the minimum hours of work (as opposed to specific shift patterns), the employer may be able to change the shift pattern provided that the employee is not being asked to work more than the minimum hours required under the contract. Where the contract sets out the maximum hours of work (as opposed to specific shift patterns), the employer may be able to change the shift pattern provided that the employee is not being asked to work more than the maximum hours required under the contract.

However, employers must provide workers with notice of the change and ensure that there is the required rest break between shifts as provided for in the Working Time Regulations 1998 (WTR). In particular, the WTR 1998 provides that a worker is entitled to an uninterrupted rest break of 11 hours in each 24 hour period and an uninterrupted rest break of 24 hours in each seven day period (or alternatively two uninterrupted rest breaks of 24 hours in a 14 day period or one uninterrupted rest break of 48 hours in a 14 day period).

Where the shift pattern is changed to such an extent that it makes it impossible for the employee to fulfil their obligations under the contract, it is likely that the employer is acting in breach of the implied term of trust and confidence and the employee's trade union representative should lodge a grievance on the ground that the employer has acted in breach of contract.

Where the shift pattern is a term of the contract of employment, any change must be agreed by the parties to that contract. The employer should as a first step consult with employees and trade unions about their proposals for change including the likely impact that the change will have on them and what the alternatives are.

What can workers do if the employer introduces changes to start and finish times?

Hours of work should normally be set out in the contract of employment. The contract may also include a clause which provides that the hours of work are subject to the

needs of the business. On the face of it, this flexibility gives the employer scope for changing the start and finish times. However, a change to start and finish times could be discriminatory if for example the change may put women perhaps responsible for home schooling their children or with other caring responsibilities at a particular disadvantage. Any change may also put disabled workers at a particular disadvantage in which case the employer will need to consider reasonable adjustments.

Before making any changes to start and finish times the employer should consult with workers and their representatives explaining the reason for the change, the impact this is likely to have on employees even if the change is temporary and consider any alternatives. Employers may choose to seek volunteers first and give a time limit the temporary change is intended to be effective for.

Any temporary changes should be recorded in writing preferably as part of a collective agreement and make clear that the change is time limited, for example by providing that the start and finish time will revert back to the position as at [a date prior to the change] on [a specific date]. This is important because otherwise if workers continue to work on those start and finish time beyond the temporary period, the change could be held to be permanent. Any agreement should not simply be “subject to review” as reviews have a habit of never taking place and temporary changes treated as a permanent change may be harder to challenge later.
Where the employer imposes a change to start and finish times which makes it difficult for a worker to attend the workplace and which is discriminatory, the worker should inform their union representative as soon as possible and lodge a grievance.

What can an employee do if the employer proposes to reduce hours of work?

Any change to terms and conditions must be agreed between the parties and the employer is at risk of acting in breach of contract if it imposes the change. To avoid this, employers usually seek the agreement of employees and you should speak to your union representative for advice.

If agreement cannot be reached the employer may dismiss you and then re-engage you on the new contract. The employer will be required to serve notice under the contract. A failure to give notice will amount to a wrongful dismissal.

The reason for dismissal where there is a reduction in hours is likely to fall within the definition of redundancy where the reduction in hours means that workers are no longer working full time but are now working part time since there is a reduction in work of a particular kind. The issue is as to whether a job on reduced hours amounts to suitable alternative employment will depend on the amount of reduction in hours and pay.

Where the employer proposes to dismiss and re-engage 20 or more employees at one establishment on new contracts, they are obliged to consult collectively with the

appropriate representatives of the affected employees (which will be the trade union where a union is recognised, or elected representatives if the union is not recognised or if no employees are elected representatives with the employees themselves). The consultation is required to begin 'in good time', and in any event at least 45 days before the first of the dismissals takes effect where the employer proposes to dismiss and re-engage 100 or more employees, or 30 days where less than a 100 employees are to be dismissed. Consultation must be meaningful and cover ways of avoiding dismissals, reducing the number of those to be dismissed and mitigating the consequences of dismissals. The best way of preserving employment rights in this situation is for the employees to take a collective position to resist the change. Mass dismissals can be costly and result in reputational damage for the employer.

The employer is proposing to reduce pay by 20 per cent in order to avoid redundancies, can they do this?

A substantial pay cut such as this will amount to a breach of contract if imposed unilaterally by the employer, entitling employees to pursue a claim for damages. Unilateral imposition of such a fundamental change is also likely to be regarded as a termination of the contract of employment such that an employee can bring a claim for unfair dismissal. The employer is likely to argue that the reason for the dismissal was some other substantial reason and the issue will be whether the employer acted reasonably when dismissing for that reason.

Whether an employer acted reasonably will depend on whether the employees were warned and consulted, if the employer has evidence that there is a sound reason for the change, the impact on employees and whether there was an alternative. In the current situation, the employers are likely to say and be able to show and evidence that if the pay cut is not accepted there will be redundancies or that employees will need to be furloughed. Again, it is important for workers to work together collectively to develop a collective response so that individual workers are not singled out. Where the employer proposes to dismiss 20 or more employees, the employer will be obliged to consult collectively with the appropriate representatives in good time and before the first of the dismissals take effect. See the answer to the question about a reduction in hours.

Can my employer reduce my holiday entitlement?

An employer cannot reduce a worker's entitlement to holiday below the statutory minimum of 5.6 weeks paid holiday. Where the employer reduces contractual holiday above the statutory minimum this will amount to a breach of contract. In most cases the employer will first seek the agreement of the employee and if agreement cannot be reached, the employer may seek to issue notice of dismissal and re-engagement on a new contract of employment with the new terms. The employer must identify a reason for dismissal and is likely to argue that the reason is some other substantial reason (SOSR) namely for a sound business reason. The employer must provide evidence of the business reason and act reasonably including warning and consulting employees

and considering alternatives such as introducing a flexible benefits package. The employer must also act generally in a fair and reasonable way and that wouldn't be the case if the reduction in holiday entitlement only applies to a section of the workforce but not say to managerial grades.

Can an employer give notice of redundancy while I am on furlough?

The employee's guidance states that an employer can still make an employee redundant while on furlough. However, employers should be reminded that the purpose of the CJRS is to protect jobs and businesses which have been severely affected by coronavirus (COVID-19). The scheme has also now been extended in its current form until August and will continue albeit in a (as yet unspecified) different form from August until October 2020.

Some have argued that serving notice of redundancy when employers still have access to the CJRS could amount to a breach of the implied term of trust and confidence and where an employee is given notice of redundancy they should speak to their union representative.

An employer is required to act reasonably when selecting employees for redundancy, this includes warning and consulting employees, applying a fair selection process and considering suitable alternative employment. Where the employer proposes to dismiss for redundancy 20 or more employees at one establishment, the employer is obliged to consult the appropriate representatives (which will be the union where the union is recognised or an elected representative if no union is recognised).

If my employer gives notice of redundancy while on furlough what am I entitled to be paid?

Employees with at least one month's service are entitled to statutory notice of one week per year of service subject to a maximum of 12 weeks. This must be paid at the employee's normal rate of pay i.e. the pay they received prior to being furloughed. Where an employee's contract provides that notice is one week more than the statutory entitlement, the employee is entitled to notice pay based on their contract of employment.

Where the contract has been varied to provide for the employee to be furloughed then the agreement will need to be considered carefully. Where the furlough agreement does not change the period of contractual notice and is silent on the amount of notice pay, it is arguable that the furlough agreement, being intended to keep the employee in employment was for a different purpose and, as such, does not apply when calculating notice pay where the reason they are leaving is as a result of the effects of coronavirus (COVID-19) and the employee should be entitled to notice pay at their pre-furlough contractual rate of pay.

Can I be made to take annual leave while I am on furlough?

The government guidance on holiday entitlement states, "If an employer requires a worker to take holiday while on furlough, the employer should consider whether any restrictions the worker is under, such as the need to socially distance or self-isolate, would prevent the worker from resting."

The fundamental purpose of holiday is "to ensure that workers receive time off work to rest and recover and enjoy leisure facilities." Workers on sick leave cannot be required to take holiday while they are sick because the purpose of sick leave is to enable the worker to recover from illness. Those who are shielding or clinically vulnerable are in a comparable position and should not be made to take holiday during furlough. A worker in this position should make clear to their employer that they object to being required to take holiday because they will not be able to enjoy a period of relaxation and leisure and contact their union representative for advice.

Can an employer test an employee for coronavirus (COVID-19) in the workplace?

There is nothing which prevents an employer from testing for coronavirus (COVID-19) in the workplace however this will involve processing sensitive personal data and the employer will be required to comply with the Data Protection Act 2019. The Information Commissioners Office (ICO) have published guidance for employers on the implications for an employee's privacy and what steps the employer should take.

What can employees do if they do not believe they have received the correct wages when on furlough?

They should first check with their employer how their wages have been calculated. The Treasury Direction provides that an employer can claim a grant for 80 per cent of wage costs up to a maximum of £2,500 per month. The wage cost includes non- discretionary payments - essentially those payments an employee is entitled to under their contract of employment, any agreement (which includes a collective agreement) or other understanding - such as overtime and commission but which is not a benefit or a discretionary payment such as a bonus. For employees who have normal working hours (a so-called 'fixed rate employee') the pay will be based on the salary they were paid in the last pay day before they were furloughed.

For those whose pay varies according to the hours they work, the employer can choose whichever is the higher of the average monthly (or daily or other appropriate pro-rata) amount paid to the employee for the period comprising the tax year 2019-20 (or if less the period of employment) before the period of furlough began and the actual amount paid to the employee in the corresponding calendar period in the previous year.

It is for the employer to make the claim to HMRC and the guidance for employers on the CJRS states that “HMRC cannot provide your employees with details of claims you make on their behalf”. It asks employers to keep employees informed and “answer any questions they may have”.

The ‘How to work out 80 per cent of employees’ wages under the CJRS’ guide says that “HMRC will not decline or seek repayment of any grant based solely on the particular choice of pay calculation, as long as a reasonable choice of approach is made.” (our emphasis). Guidance for employees states that “HMRC will not be able to provide information about individual applications”.

Where there is a dispute about how the sums have been calculated the legal options for the employee may be limited. This is because s. 13 (4) of the Employment Rights Act 1996 provides that a claim for unlawful deduction from wages cannot be made where there has been an error of computation. However if the employer has paid the worker less than they have claimed this will amount to an unlawful deduction from wages in which case a claim can be made to the employment tribunal. An employee in this position should seek the assistance of their trade union representative and lodge a grievance for the monies owed.