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29 June 2020

Rt Hon Robert Buckland QC MP
Secretary of State and Lord Chancellor
Ministry of Justice
Queen Anne's Gate
London SW1H 9AJ

Dear Robert Buckland,

Registering employed prisoners under the Coronavirus Job Retention Scheme ("furlough scheme")

I welcome the recent positive steps by government to promote prisoners getting out to work. As you know, The Howard League has fought for many years to promote the notion of real work in prisons and supporting prisoners with employment to prepare for release. I am also pleased that your lawyers recently confirmed that prisoners who are employees can be part of the furlough scheme.

Unfortunately this was only clarified the day before the last day that applications were accepted (9 June 2020) and in response to a legal challenge brought by one of my lawyers. Since then, we have been contacted by a number of people in prison who were unable to take up the scheme due to the earlier, and erroneous, memorandum issued by the prison service stating it was not permissible.

I ask you to take steps to negotiate a grace period with the Treasury for prisoners who have been unable to participate in the scheme to date, as a result of this error.

The case brought by the Howard League

My lawyers brought the challenge on behalf of a young man who had been undertaking paid work in the community on release on temporary licence (ROTL). He was working full time for an external employer and paying tax, national insurance and victims' levy. In addition to signing the "Memorandum of Understanding" with the prison and placement provider, as specified by the ROTL Policy Framework, the young man had also signed an employment contract directly with his employer.

As lockdown measures were brought in across the prison system, all ROTL was halted. The young man received a letter from his employer stating that he would be furloughed. However, the prison informed him that prisoners were not eligible for the furlough scheme and this was a national decision based on the ROTL policy which states that prisoners are not employees of the companies they work for.

My lawyers challenged this and received confirmation from the Government Legal Department which responded on 9 June 2020 that there was no legal bar to him being furloughed after all. This meant that his employer was able to register him for the scheme at the very last minute.

Other people in a similar position

As the Government Legal Department's response came only 24 hours before the deadline for registering employees for the scheme, my lawyers asked the Government Legal Department to make a public statement on its website correcting the government's previous misstatement as soon as possible. On 10 June 2020, we were told this was not necessary, as they had contacted all prisons, and made specific contact with Governors of open establishments, to confirm that certain prisoners were eligible for furlough. It was said that prisons had been told to contact external placement providers as a matter of urgency and that the prison service had also contacted HMRC about this situation.

However, it is clear that the message did not reach enough people in time. Since 10 June 2020, the Howard League has been receiving numerous enquiries from prisoners and their families, as well as solicitors, about this issue. One person in an open prison says he is aware of around 25 other men in his prison in the same situation as the young man my lawyers represented except that their employers were not contacted in time.

A grace period for those affected and clarity to avoid future errors

I note that a grace period for registering an employee under the furlough scheme has been agreed for employees returning from maternity, shared parental, adoption, paternity or parental bereavement leave after 10 June.

In light of this, I ask that you negotiate a similar grace period with the Treasury for prisoners who have been unable to participate in the scheme as a result of the government's negligent misstatement. I hope that you agree that this would be a far more constructive approach than those affected having to resort to civil claims in relation to this matter.

I also ask that you amend the ROTL policy to reflect the correct legal position that prisoners can be employees of the companies they work for.

I look forward to your response.

Yours sincerely

Frances Crook

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