

2020 No. 814

EMPLOYMENT

The Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020

<i>Made</i>	- - - -	<i>29th July 2020</i>
<i>Laid before Parliament</i>		<i>30th July 2020</i>
<i>Coming into force</i>	- -	<i>31st July 2020</i>

The Secretary of State makes the following Regulations in exercise of the powers conferred by sections 228(4) and 236(5) of the Employment Rights Act 1996(a).

PART 1

Introductory

Citation and commencement

1. These Regulations may be cited as the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 and come into force on 31st July 2020.

Interpretation

2.—(1) In these Regulations—

“the Act” means the Employment Rights Act 1996;

“Coronavirus Job Retention Scheme” means the scheme of that name established by the first CJRS Direction, as modified by the second CJRS Direction and the third CJRS Direction(b);

“E” has the meaning given in regulation 3(1);

“the first CJRS Direction” means the Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction, given by the Treasury under sections 71 and 76 of the Coronavirus Act 2020(c) on 15th April 2020;

“flexibly-furloughed employee” has the meaning given in paragraph 10.1 to 10.3 of the Schedule to the third CJRS Direction(d);

(a) 1996 c. 18.

(b) Copies of the directions can be found at: <https://www.gov.uk/government/publications/treasury-direction-made-under-sections-71-and-76-of-the-coronavirus-act-2020>. Hard copies are available for inspection, free of charge, at the offices of HMRC at 10 South Colonnade, Canary Wharf, London E14 4PH.

(c) 2020 c. 7.

(d) The concept of a flexibly-furloughed employee is introduced by the Schedule to the third CJRS Direction, and only applies in relation to the period beginning with 1st July 2020 and ending with 31st October 2020.

“furloughed employee” has the meaning given in paragraph 6.1 to 6.12 of the Schedule to the second CJRS Direction, as modified by paragraph 4 of the Schedule to the third CJRS Direction;

“furloughed hours”, in relation to E, means those hours that E does not work as the result of an instruction given by their employer for the purposes of the Coronavirus Job Retention Scheme;

“the relevant date”, in relation to E—

- (a) means the calculation date^(a), in any case where—
 - (i) E’s working hours under their contract of employment changed, on or after the date on which E became furloughed but before the calculation date, and
 - (ii) at the time that change was made, its contractual effect was that the change in working hours was to continue when E ceased to be furloughed or flexibly-furloughed, and
- (b) in any other case, means the date immediately before the date on which E became furloughed;

“the second CJRS Direction” means the Coronavirus Act 2020 Functions of Her Majesty’s Revenue and Customs (Coronavirus Job Retention Scheme) Direction, given by the Treasury under sections 71 and 76 of the Coronavirus Act 2020 on 20th May 2020;

“the third CJRS Direction” means the Coronavirus Act 2020 Functions of Her Majesty’s Revenue and Customs (Coronavirus Job Retention Scheme) Direction, given by the Treasury under sections 71 and 76 of the Coronavirus Act 2020 on 25th June 2020.

(2) Except in this paragraph and paragraph (1), any reference in these Regulations to an employee who is, or has been, “furloughed” is to an employee who is, or has been, a furloughed employee or a flexibly-furloughed employee.

(3) For the purposes of these Regulations, where E becomes furloughed more than once, “the date on which E became furloughed” means the first date on which E became furloughed.

(4) For the purposes of these Regulations, any reference to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount.

PART 2

Calculation of a week’s pay

Calculation of a week’s pay in relation to furloughed employees

3.—(1) These Regulations prescribe the manner in which the amount of a week’s pay^(b) is to be calculated in the case of an employee who is, or has been, furloughed (“E”), subject to paragraph (2), where—

- (a) E is entitled pursuant to section 53 or 54 of the Act to be paid remuneration for a period of absence to look for employment or arrange training as a result of a notice of dismissal given on or after the date on which E became furloughed, for the calculation of that remuneration under Part 6 of the Act,
- (b) E is entitled to payment pursuant to section 88 or 89 of the Act as a result of a notice to terminate E’s contract of employment given on or after the date on which E became furloughed, for the calculation of that payment under Part 9 of the Act,
- (c) E is entitled pursuant to section 93 of the Act to be paid a sum as a result of a failure by their employer relating to the obligation to provide a written statement giving particulars

^(a) See sections 225(2) and 226 of the Act for the meaning of “the calculation date”.

^(b) See section 235(1) of the Act for the definition of a “week”.

of the reasons for E's dismissal, and the notice to terminate E's contract of employment was given or (if the dismissal was without notice) the date of termination was on or after the date on which E became furloughed, for the calculation of that sum under Part 9 of the Act,

- (d) E is entitled pursuant to section 117 of the Act to be paid an additional award of compensation as a result of a failure by their employer to comply with an order for reinstatement or re-engagement, and the notice to terminate E's contract of employment was given or (if the dismissal was without notice) the date of termination was on or after the date on which E became furloughed, for the calculation of that additional award under Part 10 of the Act,
- (e) E is entitled to an award of compensation for unfair dismissal calculated in accordance with sections 118 to 126 of the Act, and the notice to terminate E's contract of employment was given or (if the dismissal was without notice) the date of termination was on or after the date on which E became furloughed, for the calculation of that award under Part 10 of the Act,
- (f) E is entitled to a redundancy payment under Part 11 of the Act, and the notice to terminate E's contract of employment was given or (if the dismissal was without notice) the date of termination was on or after the date on which E became furloughed, for the calculation of that redundancy payment under Part 11 of the Act, and
- (g) E may be eligible for a redundancy payment in accordance with section 148 of the Act by reason of being laid off or kept on short-time on or after the date on which E became furloughed, for the assessment of whether E is to be taken to be kept on short-time for a week in accordance with section 147(2) of the Act.

(2) These Regulations only apply—

- (a) in a case where regulation 4 applies, where the calculation date is on or before 31st October 2020(a),
- (b) in a case where regulation 5, 6 or 8 applies, where the relevant period, within the meaning given in regulation 5, 6 or 8 (as the case may be), includes a week when E was furloughed.

(3) For the purposes of paragraph (1), "the date of termination" means the date on which termination of E's contract of employment takes effect.

Normal working hours and remuneration does not vary with the amount of work done

4.—(1) This regulation applies where E's remuneration fell within the description in section 221(2) of the Act (remuneration for employment in normal working hours which does not vary with the amount of work done) on the relevant date.

(2) The amount of a week's pay is the amount which is payable by the employer under E's contract of employment in force on the calculation date if E works throughout E's normal working hours in a week, and for these purposes—

- (a) E's normal working hours, in relation to any period during which E is furloughed, include E's furloughed hours, and
- (b) the amount which is payable, in relation to any period during which E is furloughed, is to be calculated disregarding any reduction in the amount payable as a result of E being furloughed.

(3) This regulation is subject to regulations 6, 9 and 10.

(a) By virtue of paragraph 40(a) of the Schedule to the third CJRS Direction, the last date in respect of which a claim under the Coronavirus Job Retention Scheme can be made is 31st October 2020.

Normal working hours and remuneration varies with the amount of work done

5.—(1) This regulation applies where E’s remuneration fell within the description in section 221(3) of the Act (remuneration for employment in normal working hours which varies with the amount of work done) on the relevant date.

(2) The amount of a week’s pay is the amount of remuneration for the number of normal working hours in a week, calculated at the average hourly rate of remuneration payable by the employer to E in respect of the relevant period.

(3) Where E is furloughed for any part of the relevant period—

- (a) E’s normal working hours in a week, in relation to that part of the relevant period, include E’s furloughed hours, and
- (b) for the purposes of the calculation of the average hourly rate of remuneration payable for the relevant period, the hourly rate of remuneration for that part of the relevant period is the hourly rate payable under E’s contract of employment in force on the calculation date, disregarding any reduction in the amount payable as a result of E being furloughed.

(4) For the purposes of this regulation, subject to regulation 7(3), the “relevant period” means the period of twelve weeks ending—

- (a) where the calculation date is the last day of a week, with that week,
- (b) otherwise, with the last complete week before the calculation date.

(5) This regulation is subject to regulations 6, 9 and 10.

Normal working hours and remuneration varies according to time of work

6.—(1) This regulation applies where E’s remuneration fell within the description in section 222(1) of the Act (remuneration for employment in normal working hours which varies according to time of work) on the relevant date.

(2) The amount of a week’s pay is the amount of remuneration for the average number of weekly normal working hours at the average hourly rate of remuneration, where—

- (a) the average number of weekly normal working hours is calculated by dividing the total number of E’s normal working hours during the relevant period by twelve, and
- (b) the average hourly rate of remuneration is the average hourly rate of remuneration payable by the employer to E in respect of the relevant period.

(3) Where E is furloughed for any part of the relevant period—

- (a) E’s normal working hours, in relation to that part of the relevant period, include E’s furloughed hours, and
- (b) for the purposes of the calculation of the average hourly rate of remuneration payable for the relevant period, the hourly rate of remuneration for that part of the relevant period is the hourly rate payable under E’s contract of employment in force on the calculation date, disregarding any reduction in the amount payable as a result of E being furloughed.

(4) For the purposes of this regulation, subject to regulation 7(3), the “relevant period” means the period of twelve weeks ending—

- (a) where the calculation date is the last day of a week, with that week,
- (b) otherwise, with the last complete week before the calculation date.

(5) This regulation is subject to regulations 9 and 10.

Calculation of the average hourly rate of remuneration

7.—(1) This regulation applies for the purposes of determining the average hourly rate of remuneration referred to in regulations 5 and 6.

(2) In relation to any part of the relevant period when E is not furloughed, only—

- (a) the hours when the E was working, and

(b) the remuneration payable for, or apportionable to, those hours, are taken into account.

(3) If the relevant period includes a week where—

(a) E is not furloughed, and

(b) no remuneration falling within paragraph (2)(b) was payable by the employer to E, remuneration in earlier weeks is taken into account so as to bring up to twelve the number of weeks of which account is taken.

(4) If, in determining the average hourly rate of remuneration in relation to any part of the relevant period when E is not furloughed—

(a) account is taken of remuneration payable for, or apportionable to, work done in hours other than normal working hours, and

(b) the amount of that remuneration was greater than it would have been if the work had been done in normal working hours (or, in a case within section 234(3) of the Act, in normal working hours falling within the number of hours without overtime),

that remuneration is taken into account as if the work had been done in such hours and the amount of that remuneration had been reduced accordingly.

No normal working hours

8.—(1) This regulation applies where E’s working hours fell within the description in section 224(1) of the Act (no normal working hours for employee under employee’s contract of employment) on the relevant date.

(2) The amount of a week’s pay is the amount of E’s average weekly remuneration in the relevant period.

(3) For the purposes of the calculation of E’s average weekly remuneration—

(a) subject to sub-paragraphs (c) and (d) the “relevant period” means the period of twelve weeks ending—

(i) where the calculation date is the last day of a week, with that week,

(ii) otherwise, with the last complete week before the calculation date,

(b) where E is furloughed for any part of the relevant period, the amount of E’s weekly remuneration attributable to being furloughed is the amount that would have been payable to E in accordance with the Coronavirus Job Retention Scheme if—

(i) the amount was calculated in relation to E’s reference salary,

(ii) for that purpose the full amount of E’s reference salary had been used, and

(iii) the Scheme cap did not apply,

(c) in relation to any part of the relevant period during which E is not furloughed, no account is to be taken of a week in which no remuneration was payable by the employer to E, and

(d) where sub-paragraph (c) applies, remuneration in earlier weeks, is to be taken into account so as to bring up to twelve the number of weeks of which account is taken.

(4) For the purposes of paragraph (3)(b)—

(a) “reference salary” has the meaning given in the Coronavirus Job Retention Scheme(a), and

(a) For an explanation of the relevant calculation of reference salary in relation to the period ending with 30th June 2020, see paragraph 7 of the Schedule to the second CJRS Direction (in particular paragraph 7.2); and in relation to the period beginning with 1st July 2020 and ending with 31st October 2020, see paragraphs 18, 19.1, and 20.1 of the Schedule to the third CJRS Direction.

(b) “Scheme cap” means the amount of £2,500 per month (or the appropriate pro-rata) specified in relation to qualifying costs in the Coronavirus Job Retention Scheme(a).

(5) This regulation is subject to regulations 9 and 10.

Maximum amount

9. The amount of a week’s pay calculated under this Part is subject to section 227(1) of the Act (maximum amount)(b).

New employments

10.—(1) In any case in which E has not been employed for a sufficient period to enable a calculation to be made under this Part, the amount of a week’s pay is the amount which fairly represents a week’s pay.

(2) In determining that amount, the employment tribunal—

(a) must apply as nearly as may be such of the preceding regulations in this Part as it considers appropriate, and

(b) may have regard to such of the considerations specified in section 228(3) of the Act as it thinks fit.

Supplementary

11.—(1) In determining under this Part—

(a) an average hourly rate of remuneration, or

(b) average weekly remuneration,

E’s work for a former employer within the period for which the average is to be taken is taken into account if, by virtue of Chapter 1 of Part 14 of the Act, a period of employment with the former employer counts as part of E’s continuous period of employment.

(2) Where account is taken of remuneration or other payments for a period which does not coincide with the periods for which the remuneration or other payments are calculated, the remuneration or other payments are apportioned in such manner as may be just.

Nadhim Zahawi

Parliamentary Under Secretary of State

Department for Business, Energy and Industrial Strategy

29th July 2020

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations set out how a week’s pay is to be calculated in the case of an employee who has been furloughed under the Coronavirus Job Retention Scheme, for the purposes of calculating:

a) any statutory remuneration for time off to look for employment or arrange training;

b) any statutory notice payment;

c) any statutory sum resulting from a failure to provide a written statement of reasons for dismissal;

(a) See, in particular, paragraph 7.1 of the Schedule to the second CJRS Direction and paragraph 16.5 of the Schedule to the third CJRS Direction.

(b) Section 227(1) was amended by paragraph 47 of Schedule 7 to the Employment Act 2002 (c. 22), paragraph 9 of Schedule 1 to the Apprenticeships, Skills, Children and Learning Act 2009 (c. 22), and by S.I. 2020/205.

- d) any statutory sum resulting from a failure to comply with an order for reinstatement or re-engagement;
- e) any statutory compensation for unfair dismissal; and
- f) any statutory redundancy payment,

to which in each case they are entitled. In such a case the Regulations also set out how a week's pay is to be calculated for the purpose of deciding whether an employee is taken to be on short-time for statutory purposes.

The Coronavirus Job Retention Scheme (the "CJRS") was established by the Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction, given by the Treasury under sections 71 and 76 of the Coronavirus Act 2020 on 15th April 2020.

Copies of that Direction, and two further directions given on 20th May and 25th June 2020 modifying the CJRS, can be found at: <https://www.gov.uk/government/publications/treasury-direction-made-under-sections-71-and-76-of-the-coronavirus-act-2020>. Hard copies are available for inspection, free of charge, at the offices of HMRC at 10 South Colonnade, Canary Wharf, London E14 4PH.

No impact assessment has been prepared for these Regulations.

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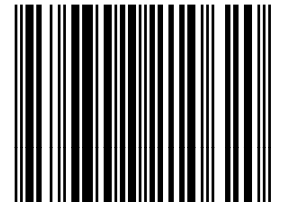
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