

BEIS Issues New Law to Protect Furloughed Employees' Entitlements on Termination – Fails Wretchedly

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Without any prior warning, the Department for Business, Energy & Industrial Strategy [announced](#) yesterday that it was bringing in a new law to ensure furloughed employees receive statutory redundancy pay and other statutory entitlements based on their normal wages, rather than any reduced furlough rate. A little less than half a day later, the Statutory Instrument enacting the law was published [\(here\)](#) and it will be in force from today, 31 July.

Announcing the new arrival, proud parent Business Secretary Alok Sharma said "we urge employers to do everything they can to avoid making redundancies, but where this is unavoidable it is important that employees receive the payments they are rightly entitled to". The new law aims to "ensure furloughed workers are not short-changed if they are ever made redundant – providing some reassurance for workers and their families during this challenging time". It does this by fiddling with the definition of a "week's pay", this being the basic building block of those entitlements, to ensure that various statutory payments which employees might be entitled to on redundancy are calculated based on a week's pay of their **pre**-furlough wage even though that is not the one applicable to them when they are dismissed. In other words, dear voters, employers do not get to dismiss employees "on the cheap" merely because they were furloughed.

A "week's pay" is defined in new Reg 9 very clearly, and in some respects very clearly wrongly, as subject to the usual statutory cap, currently £538. This has repercussions which were quite clearly not intended. We are getting used to coronavirus legislation on the hoof now. At least these Regulations weren't issued via Twitter, although sadly by reason of the obvious errors in them (see below) we think that their lifespan will probably more suit Snapchat. This SI may well have been drafted and enacted at short notice (even though it addresses questions which it has been entirely obvious would arise right from when the CJRS was first floated months ago). However, one can't help but think that it could still easily have been made much simpler and, without putting too fine a point on it, better.

The amendments to the week's pay definition covers not only statutory redundancy pay, but also:

- statutory notice pay (i.e. an employee's right to minimum notice of (broadly) one week for each year of continuous employment thereafter up to a maximum of 12 weeks after 12 years' service or more);
- the right for paid time off to look for work or to arrange training;
- any ET award for failure to provide written reasons for dismissal;
- any additional compensation an employee receives where their employer has failed to comply with an order for reinstatement or re-engagement;
- compensation for unfair dismissal under ss118-126 ERA (*really?* – see below);
- where an employee becomes entitled to a statutory redundancy payment having being laid off or kept on short-time working beyond the statutory thresholds

In all these cases you now calculate a week's pay as if on the pre-furlough earnings, either the flat salary where it did not vary with time or output or, where it did, in broad terms by an average of those earnings over the 12 weeks before the employee was furloughed. All quite sensible, though it takes many many lines of text to get there.

There is potentially a rather large mistake in the drafting, however. As above, Reg 9 states that the calculation in relation to **all** of the payments listed above is subject to the cap on a week's pay (currently £538). This makes complete sense in relation to statutory redundancy pay, the written reasons award and the other payments where the statutory capped week's pay is used. But it absolutely doesn't in relation to notice pay and unfair dismissal compensation, where it isn't.

Take the 4 month notice period of an employee with 12 years' service on £100,000. In normal times he could expect £33000 in respect of his notice period. His statutory notice period is 12 weeks so by these Regs as currently drafted his notice entitlement becomes 12x £538 and he walks away with something under £6500, no doubt deeply unimpressed. These Regulations have confused week (meaning a period of time) with week's pay (meaning a sum of money). The statutory notice entitlements are about duration, not cash.

But the real cracker is in relation to unfair dismissal compensation. The UD **basic** award is a ratchet off the statutory capped figure, so that makes sense. But that is dealt with in sections 118 to 122 ERA 1996 and these new Regs expressly include also sections 123-126. Of them, only section 124 mentions a week's pay at all. This deals with the calculation of the UD **compensatory** award, which is the lower of the set ceiling (currently £88,519) and "*52 multiplied by a week's pay of the person concerned*". Until today, that week's pay was not caught by the statutory cap. If that week's pay is now covered by these new Regs, as they say expressly that it is, then it seems to us that the Government has just unilaterally and wholly unthinkingly reduced the maximum compensatory award for furloughed employees to slightly under £28,000.

There is no chance at all that it meant these consequences for notice pay and compensation so do please ignore it – what is most regrettable in this is that no-one in Government tasked with making law to affect what may be millions of people facing redundancy was able to do them the courtesy of reading properly the very Regulations designed to protect them. Very poor show, BEIS.

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