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New “Week’s Pay” Regulations Get an A for Aspiration, E for Execution (UK)

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Meet E. He is the poor soul at the heart of this week’s new statutory instrument concerning the rights of employees who are dismissed on or after furlough.

E is anxious that if he is dismissed while on furlough or soon after he comes off it, then his reduced earnings over that period will prejudice his statutory entitlements. So he should be grateful for the new Regulations issued today, the does-what-it-says-on-the-tin *Employment Rights Act 1996 (Coronavirus, Calculation of a Week’s Pay) Regulations 2020*. These provide at considerable length and complexity that where the calculation of E’s “week’s pay” for statutory purposes is dented by his reduced earnings through being on furlough, that calculation is to be re-done based on his pre-furlough remuneration. This is obviously primarily relevant to those whose weekly earnings while on furlough were less than the current statutory cap of £538 per week and were not topped up by the employer to their usual rate. All quite sensible in principle, preventing employers from making redundancies on the cheap by taking advantage of the furlough scheme.

But this very worthy objective is then tragically holed below the waterline by the drafting of the new Regulations. Reg 3(1)(b) includes in that protection any sums paid to E in respect of his statutory minimum notice entitlement under Sections 88 and 89 ERA 1996, while Reg 3(1)(e) says that it also includes an award of compensation for unfair dismissal “*calculated in accordance with Sections 118 to 126 ERA*”. If you are not squeamish about close-ups of open wounds, these two repay a closer look.

Under Section 86, E is entitled to notice to terminate his employment of at least one week per year of service. His contractual entitlement may be longer than this, but not shorter. Paraphrased, Sections 88 and 89 say that if for any reason E is not being paid in full during that notice period (e.g. because he is on furlough), he is nonetheless entitled to his full pay in respect of that statutory minimum period. The unspoken assumption is then that he would get only the furlough rate for any excess of contractual notice entitlement over the statutory period.

By bringing entitlements under Sections 88 and 89 into these new Regulations, the Government is seeking to reinforce that employees’ statutory notice period pay should be calculated on their actual normal weekly pay, not their “new normal” furlough pay. But Reg 9 makes all the week’s pay recalculations required by the Regulations subject to the £538 cap. The effect of that (if it were

deliberate, which clearly it is not) would be to limit pay in lieu of the statutory part of E's notice period to £538 per week. In the vast majority of cases this will be less not only than E's normal salary but even also his furlough salary (at £2,500 per month E would be on £577 per week).

The statutory minimum notice scheme has had until now no connection at all with the capped week's pay definition, nor should it. So the proper approach to this is to calculate notice pay for at least the statutory minimum part of the notice period (see below) on the pre-furlough remuneration, but not subject to the statutory cap, whatever the Regulations may say.

What if E is found unfairly dismissed? His basic award is properly adjusted by these Regulations to the lower of £538 and his pre-furlough weekly pay. But Regulation 3(1)(e) extends this amended calculation to Section 124 ERA. Therein lies the compensatory award which is capped, as we know, as the lower of the statutory limit in force from time to time (currently £88,519) and "52 multiplied by a week's pay of the person concerned". That has never previously been subject to the statutory cap. But if "week's pay" is now subject to that £538 cap as the new Regulations say, that means that the most poor E can be awarded by way of compensation for his unfair dismissal is now just under £28,000, while his non-furloughed colleagues sit pretty on a multiple of their full week's pay. Again, there is no chance at all that this was the Government's intention and so the inclusion of the compensatory award in these Regulations should be ignored too.

It is quite clear that even by the vaultingly clumsy standards of legislative draftsmanship evident in the Guidance, Directions and Regulations around Covid-19, this latest statutory instrument is an outstanding piece of work. How can these points not have been spotted? What were they thinking?

Side note: for reasons which I have never seen explained, there is an exception to the rule that the employee should get his full pay for the statutory part of his notice entitlement. Under Section 87(4), E is not entitled to his normal pay for those weeks if his contractual notice entitlement is a week or more longer than the statutory period. Under those circumstances, he gets the reduced rate for the whole period. Do these new Regulations affect this?

We think not at law, but take the view that an employer's seeking to exploit this quirk will now be even more unattractive ER-wise than it was pre-furlough. The clear message from Government has been that employers should not take advantage of reduced pay rates to dismiss cheaply, and your employees will consequently consider themselves entitled to their full pay in respect of their full contractual notice, even if that is legally not always strictly correct.

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