EXPLANATORY MEMORANDUM TO

The Employment Rights (Northern Ireland) Order 1996 (Coronavirus, Calculation of a Week's Pay) (Amendment) Regulations (Northern Ireland) 2020

SR 2020 No. 281

1. Introduction

1.1. This Explanatory Memorandum has been prepared by the Department for the Economy to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.

1.2. The Statutory Rule is made under Article 24(4) of the Employment Rights (Northern Ireland) Order 1996 and is subject to the negative resolution procedure.

2. Purpose

2.1. This Statutory Rule amends regulations 2 and 3 of the Employment Rights (Northern Ireland) Order 1996 (Coronavirus, Calculation of a Week's Pay) Regulations (Northern Ireland) 2020 ("the principal regulations"). It makes amendments to the principal regulations made necessary by the extension of the Coronavirus Job Retention Scheme (CJRS) until 31 March 2021. The principal regulations assumed, when made on 13th August 2020, that the CJRS would end on 31 October 2020 as was then envisaged.

2.2. The Statutory Rule ensures that, consistent with the principal regulations as originally made, various statutory entitlements based on a week's pay and connected with termination of employment, are not reduced as a result of an employee being furloughed under the Coronavirus Job Retention Scheme (CJRS). The entitlements are redundancy pay; notice pay; compensation for unfair dismissal; a payment resulting from a failure to provide a written statement of reasons for dismissal; a payment resulting from a failure to comply with an order for reinstatement or re-engagement; and remuneration for time off to look for employment or arrange training.

2.3. The Statutory Rule also extends the effect of the principal regulations regarding 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.

2.4. Chapter 4 of Part 1 of the Employment Rights (Northern Ireland) Order 1996 (the Order) deals with the calculation of "a week's pay" for the purposes of the Order. This calculation is relevant to a number of statutory entitlements for employees, including redundancy pay and notice pay. The entitlements to which this statutory rule is relevant are referred to in paragraphs 2.2 and 2.3 above.

2.5. The calculation of a week's pay under Chapter 4 of Part 1 differs for different categories of employees, including whether the employee has normal working hours (as to which, see Article 5 of the Order). There are four categories of employee and the position may be summarised briefly below.

2.6. In the case of employees with normal working hours whose remuneration does not vary with the amount of work done, the amount of a week's pay is the amount payable by the employer under the contract of employment in force at the calculation date if the employee works throughout their normal working hours in a week (Article 17(2) of the Order).

2.7. In the case of employees with normal working hours whose remuneration does vary with the amount of work done (for example a piece or output worker), the amount of a week's pay is the remuneration for the normal working hours in a week calculated (broadly speaking) at the average hourly rate of remuneration payable by the employer in respect of the twelve weeks ending with the calculation date. Where there are weeks when no remuneration was payable, those weeks are left out of account and earlier weeks are brought in to bring the total to twelve (Article 17(3) and 19 of the Order).

2.8. In the case of employees whose normal working hours differ from week to week or over a longer period (for example a rota worker), the amount of a week's pay is the remuneration for the average number of weekly normal working hours at the average hourly rate of remuneration payable by the employer. In each case the average is calculated (broadly speaking) in respect of the twelve weeks ending with the calculation date. Where there are weeks when no remuneration was payable, those weeks are left out of account and earlier weeks are brought in to bring the total to twelve (Articles 18 and 19 of the Order).

2.9. In the case of employees without normal working hours, the amount of a week's pay is the average weekly remuneration in respect of the twelve weeks ending (broadly speaking) with the calculation date. Where there are weeks when no remuneration was payable, those weeks are left out of account and earlier weeks are brought in to bring the total to twelve (Article 20 of the Order).

2.10. The calculation date differs according to which of the various statutory entitlements is under consideration (Articles 21 and 22 of the Order). This Statutory Rule does not make different provision for the calculation date.

2.11. Each of Articles 17, 18, and 20 is subject to Articles 23 and 24 of the Order.

2.12. Article 23 provides for a maximum amount of a week's pay for certain of the statutory entitlements.

2.13. Article 24 (4) allows the Department by regulations to provide that, in specified cases, a week's pay is to be calculated in such manner as may be so prescribed.

3. Background

3.1. The principal regulations ensured that various statutory entitlements based on a week's pay and connected with termination of employment were not reduced as a result of an employee being furloughed under the CJRS.

3.2. At the time the principal regulations were made, it was envisaged that the CJRS would end on 31 October 2020. Without this Statutory Rule being

made and coming into operation, there is a gap in the protection for employees provided by the principal regulations.

3.3. This Statutory Rule addresses that position by amending the definition of the CJRS (in regulation 2 of the principal regulations) by reference to any (existing or future) directions given by the Treasury under sections 71 and 76 of the Coronavirus Act 2020 which provide for claims to be made in respect of employees in relation to any period ending on or before 31 March 2021. Other consequential amendments are made to some other definitions in regulation 2 of the principal regulations.

3.4. Similarly, the Statutory Rule amends regulation 3(2)(a) of the principal regulations so that the regulations will apply (in the case of employees with normal working hours whose remuneration does not vary with the amount of work done) where the calculation date is on or before 31 March 2021. The intention of the statutory rule is therefore to amend the principal regulations so that they protect furloughed employees in relation to all periods of furlough until 31 March 2021.

3.5. The latest direction in relation to the CJRS given by the Treasury on 13 November 2020 extends the period of the scheme up to 31 March 2021. However, the detailed provisions in the Schedule to that direction relate to the period to 31 January 2021. The direction also states that there will be a further direction relating to the period after 31 January 2021, which the Treasury has said will follow a review. Any amendments to be made by the Treasury in any further direction resulting from that review will of course be guided by the state of the coronavirus crisis and of the UK economy and not by anything relating to the principal regulations or this statuory rule.

3.6. As the CJRS will extend until 31 March 2021, it is the Department's intention that the principal regulations, as amended by this Statutory Rule, will continue to provide protection for furloughed employees and to respond to the scope of the CJRS following any review by the Treasury in January.

3.7. For convenience, the following paragraphs explain the policy background to the principal regulations in substantially the same way as the explanation given in the Explanatory Memorandum to the principal regulations

3.8. The statutory scheme for the calculation of a week's pay in the Order is complex and did not anticipate a furlough scheme such as the CJRS. There is some uncertainty as to how a week's pay should be calculated in the case of employees who have been furloughed (in full or in part) under the CJRS and whose employment is subsequently terminated. In some cases, their statutory entitlements might be reduced by having received lower remuneration while furloughed than if they had been working normally in the period leading up to termination.

3.9. Neither this Statutory Rule or the principal regulations affect any entitlements of employees who have not been furloughed under the CJRS. The broad policy objectives of the principal regulations are to provide greater certainty in the calculation of a week's pay and to ensure that

furloughed employees do not lose out (as regards certain statutory entitlements which relate to termination of employment) by having been furloughed if their employment is terminated while, or shortly after having been, furloughed under the CJRS. Those statutory entitlements all arise under the Order and are related to termination of employment (see regulations 3(1) of the principal regulations). The policy objectives are consistent with the intent of the Order, which consolidates earlier enactments conferring employment rights on employees and other workers

3.10. While the CJRS is a UK-wide scheme which is administered by HMRC, it interacts with Northern Ireland employment law and it is necessary to legislate to provide clarity.

3.11. As of 18 October 2020, 9.6 million jobs have been furloughed, with 1.2 million employers furloughing. In total, £41.4 billion has been claimed through the CJRS up to that date. Some employees who have been furloughed are at risk of having their employment terminated. There has been significant public and media interest in the CJRS, with a particular focus on redundancies. There have been calls on the Government to provide clarity for employers and employees in respect of how to calculate statutory redundancy and notice pay for employees who have been furloughed.

3.12. The principal regulations, as amended by this Statutory Rule, make different provision for each of the four categories of employee referred to in section 2 of this explanatory memorandum. They are summarised as follows: • entitlement pursuant to Article 81 or 82 Order to be paid remuneration for a period of absence to look for employment or arrange training having been given notice of dismissal;

- entitlement to payment pursuant to Article 120 or 121 of the Order as a result of a notice to terminate employment;
- entitlement pursuant to Article 125 of the Order to be paid a sum as a result of a failure by the employer relating to the obligation to provide a written statement giving particulars of the reasons for dismissal;
- entitlement pursuant to Article 151 of the Order to be paid an additional award of compensation as a result of a failure by the employer to comply with an order for reinstatement or re-engagement;
- entitlement to an award of compensation for unfair dismissal calculated in accordance with Articles 152 to 160 of the Order;
- entitlement to a redundancy payment under Part 12 of the Order; and
- potential eligibility for a redundancy payment in accordance with Article 183 of the Order by reason of being laid off or kept on short-time.

3.13. For the purposes of the entitlements summarised in paragraph 3.12 above, the principal regulations, as amended by this Statutory Rule, create a special scheme for the calculation of a week's pay in the case of employees who are or have been furloughed under the CJRS. The scheme's effect is temporary and will cease to apply when the relevant statutory entitlements are no longer affected by an employee being or having been furloughed (see regulation 3(2) of the principal regulations).

3.14. Regulations 4(1), 5(1), 6(1) and 8(1) of the principal regulations address which of those four categories employees fall into for the purposes of the

Statutory Rule. That categorisation is, as a starting point, based on the period immediately before the employee was first furloughed, in order to clarify that categorisation is not affected merely by the employee being furloughed. However, an exception is made where the employer and employee have agreed a more permanent contractual change in working hours, intended to endure beyond the employee's furlough arrangements. In that case, categorisation is tested at the calculation date (under Articles 21 and 22 of the Order).

3.15. The first three categories of employee, all of whom have normal working hours, are addressed respectively in regulations 4, 5 and 6 of the principal regulations, which are informed respectively and in particular by Articles 17(2), 17(3) and 18 of the Order. Regulation 7 is supplementary to regulations 5 and 6 and is informed by Article 19 of the Order. The overall objectives of the principal regulations, as amended by this Statutory Rule, are that, for the calculation of a week's pay, the employee's furloughed hours are treated as if they were normal working hours and the remuneration related to those furloughed hours is treated as if they had been worked, ignoring any reduction which was made because the employee was furloughed. For example, if in a particular week an employer had agreed to pay a fully furloughed employee at 80 per cent of their normal remuneration (which would be in accordance with the CJRS), it would be necessary to increase that remuneration by 25 per cent for the purpose of the calculation of a week's pay under these regulations, to bring that remuneration back to 100 per cent of the norm for that employee.

3.16. The fourth category of employee is addressed in regulation 8 of the principal regulations, as amended by this Statutory Rule, which is informed by Article 20 of the Order. Here a slightly different approach is taken (though with a similar overall objective) because there are no normal working hours which can be treated as if they had been worked. The remuneration which the employee receives in relation to any period when they were furloughed is calculated based on the reference salary which is used under the CJRS to calculate the employee's remuneration (and which, under the rules of the CJRS, is in turn informed by the employee's earlier remuneration during 2019 – 20). For the purposes of regulation 8, the full reference salary is to be used, rather than any reduced amount (for example, 80 per cent) which the employer may have agreed to pay the employee in accordance with the CJRS. Further, if the applicable cap under the CJRS of £2,500 per month limited the employee's remuneration in accordance with the CJRS, then this is disapplied for the purposes of regulation 8. The overall objective is that employee's remuneration for a particular week is, for the calculation of a week's pay, similar to the remuneration that the employee would have received if working and not furloughed.

3.17. In the case of each category of employee, remuneration for "actual" work is treated in the normal way.

3.18. Overall, therefore, the principal regulations, as amended by this Statutory Rule, seek to ensure, for the benefit of furloughed employees whose employment is terminated, that the calculation of statutory entitlements

relating to termination is based on their normal pay, rather than their furlough pay. This is in line with the policy intent of the Order.

4. Consultation

4.1. Due to the need to respond rapidly to the coronavirus situation, there has not been a formal consultation.

5. Equality Impact

5.1. It is not anticipated that there will be any equality implications. This Statutory Rule is intended to ensure that workers on the CJRS who are made redundant do not see reductions in any entitlements as a result of being on the Scheme. It is intended as a targeted piece of legislation aimed at ensuring the protection of existing employment rights.

6. Regulatory Impact

6.1. An Impact Assessment has not been prepared for this Statutory Rule as this is urgent legislation. The number of potential redundancies that may arise from employees currently furloughed is highly uncertain, with the mechanisms for costs to arise described in section 7.

7. Financial Implications

7.1. The legislation aims to ensure relevant payments are not at risk of reducing through an employee receiving lower pay on furlough under the CJRS. Therefore, businesses will generally be facing similar costs relating to termination that they face in relation to employees who are not furloughed under the CJRS. Any cost on business, charities or voluntary bodies will be dependent on the number of redundancies (of relevant furloughed employees) that occur,

7.2. While the Office for Budget Responsibility estimate that between 10% to 20% of furloughed workers could be made redundant, the exact amount is currently unknown and there is considerable uncertainty with any estimate.

7.3. There will be small familiarisation costs incurred by employers, with implementation costs estimated to be in the low hundreds of millions(throughout the United Kingdom) covering the period when the CJRS was introduced to its extension until 31 March 2021. Any implementation costs will arise from businesses having to pay redundancy pay and notice pay not based on the lower pay received while on furlough.

7.4. There is no impact on the public sector as the vast majority of the public sector are not able to use the CJRS.

7.5. Where an employer becomes insolvent, employees may seek to recover redundancy related payments via the Redundancy Payment Service, which will make payments in adherence to the principal regulations and this Statutory Rule

8. Section 24 of the Northern Ireland Act 1998

8.1. This Statutory Rule complies with the provisions of section 24 of the Northern Ireland Act 1998.

9. EU Implications

9.1. Not applicable.

10. Parity or Replicatory Measure

10.1. This Statutory Rule replicates the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) (Amendment) Regulations 2020 which apply to England, Scotland and Wales and came into force on 18 November 2020.

11. Additional Information

11.1. This Statutory Rule comes into operation on the day after it is made, breaching the convention that rules subject to negative resolution should not come into operation until a minimum of 21 calendar days after laying.

11.2. When the principal regulations were made, it was envisaged that the CJRS would extend until 31 October 2020. The principal regulations defined the CJRS by reference to the three directions then given by the Treasury under sections 71 and 76 of the Coronavirus Act 2020. On 31 October 2020 and 5 November 2020, the Government made announcements that the CJRS would be extended until 31 March 2021 and on 13 November 2020 the Treasury gave a further direction under sections 71and 76.

11.3. Until this Statutory Rule comes into operation, there is a gap in the protections provided for employees under the principal regulations. A number of concepts in the principal regulations, such as the meaning of a "furloughed" employee, were defined by reference to the CJRS as first constituted and which was intended to end on 31 October 2020. Furthermore, regulation 3(2)(a) of the principal regulations provided that the regulations did not apply, in the case of an employee with normal working hours and whose remuneration does not vary with the amount of work done, where the calculation date (as defined in Articles 21 and 22of the Employment Rights (Northern Ireland) Order 1996) was after 31 October 2020.

11.4. It is necessary to close this gap in protection by bringing this Statutory Rule into force as soon as possible. If there were a significant gap between laying and commencement, some employers could be incentivised to bring forward redundancies on potentially less generous terms within that period. This would undermine the policy intent of the principal regulations by potentially significantly reducing the number of employees who are protected by the Statutory Rule and by the principal regulations.

11.5. The Department regrets the breach of the 21 day rule but believes this is necessary to ensure that as many employees as possible benefit from the Statutory Rule. The economic shock arising from the coronavirus pandemic has seen an increased number of employees at risk of redundancy. Bringing the Statutory Rule into operation urgently will protect more employees from the risk of reduced payments related to their termination than if the 21-day rule was observed.