

**The gaps in the government's
coronavirus income protection plans**

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**A Briefing Note to Andy McDonald MP, Shadow Secretary of State
for Employment Rights and Protections
on
The gaps in the government’s coronavirus income protection plans
(5th edition 18 April 2020)**

**By
Lord Hendy QC**

This Note was intended as a supplement to the briefing published by the then Shadow Chancellor and his team on 28 March, *Protecting People In and Out of Work*. It expands some of the points made by the present Shadow Chancellor to the Chancellor in her letter of 9 April 2020.¹ The Note is intended to point out some of the gaps in coverage of income protection in the schemes established by the government. It is not intended to be and is not to be regarded as legal advice. This Note will be updated from time to time. It does not deal with Universal Credit or Job Seekers’ Allowance which is covered in the *Briefing Note on Coronavirus and Social Security*, 3 April 2020, prepared by the then Shadow Secretary of State for DWP, Margaret Greenwood MP.

It cannot be doubted that these schemes are to be welcomed in the face of the consequences of coronavirus but there are gaps in coverage that will leave several million people facing destitution or Universal Credit. The shadow cabinet under Sir Keir Starmer are pressing the case for the necessary measures to plug the gaps.

There are essentially three regimes to consider. Several of the cross-headings (such as ‘agency workers’ and ‘carers’) are dealt with under the heading of more than one scheme.

I

Statutory Sick Pay is a longstanding statutory scheme. It is confined to employees.² Entitlement has now been widened³ to make SSP payable from day one and is available not only to those who are at home self-isolating with

symptoms of coronavirus but also to self-isolators who live in the household of a person with symptoms of coronavirus. The problems with SSP are these:

Low level of pay

1. At £94.25 per week (£95.85 pw from 6 April 2020), SSP is so low that it cannot sustain a single person let alone a family for a week. The sum of £95.85 pw is lower even than the lower earnings limit for eligibility, £118 pw. It is less than 30% of the £331.36 which a 38 hour a week over-25-year-old earner would receive for a week's work if paid the NWM/NLW (£8.72 ph from 1 April 2020). It is only 18.7% of current average weekly earnings of £512 per week (excluding bonuses).⁴ That means that for family breadwinners advised to self-isolate, with or without symptoms, there is a powerful incentive to continue to work normally, in disregard of the advice of Public Health England, thereby posing a risk to fellow workers and to members of the public with whom they come into contact.

Lower Income Limit

2. Those who earn less than £118 per week are excluded altogether from claiming SSP. Low though this level of earnings is, there are 2 million workers who earn less and are therefore excluded.

Limited duration

3. SSP in coronavirus cases is of very limited duration. There are 7 days entitlement if the person has the symptoms of coronavirus; 14 days for a carer for someone with the illness (with the possibility of up to a further 7 days if the carer develops the disease). After that entitlement to SSP in respect of coronavirus appears to be exhausted, though SSP is normally available for up to six months. It may be that many coronavirus cases are resolved quickly and the sufferer and carer are free from the risk of infecting others after 7 or 14 days but the unfortunate case of the Prime Minister shows there are cases where the need for self-isolation persists after these arbitrary time limits have been exhausted. There will be no SSP for such cases.

At-risk workers

4. There is no SSP for those who are advised to self-isolate because they are in an at-risk category though showing no signs of the disease and not in the family of someone with the disease. This is a considerable section of the population. And though many will not be in work, a significant proportion will be, even amongst the over 70s.

Employees only

5. Only 'employees' are entitled to SSP. The 5 million self-employed and 'limb (b)' workers (i.e. those working for someone but not under a contract of employment and the person for whom they are working is not the client or customer of their business - e.g. Uber drivers) are therefore excluded.⁵ Nor will they normally be eligible for the 'furlough scheme' considered in the next section, though many will have a claim under the Self-Employed Income Support Scheme discussed later. But this scheme too has gaps (described below) which will mean that many self-employed workers will fall outside the scope of all three schemes.

ZHC workers

6. It is unclear how far, if at all, SSP is available to the nearly 1 million workers with a zero hours contract who are not working at the time they have to self-isolate and are not offered work on subsequent self-isolating days - as they almost certainly will not be after announcing that they are self-isolating.

Agency workers

7. Likewise, it is not clear how far SSP is available to agency workers of whom there are about 1 million. Though agencies have a role in finding work for the self-employed, those referred to as 'agency workers' are not usually self-employed but are PAYE employees⁶ - but almost invariably only for the period in respect of which they are offered work and accept it. They are 'casuals', under a contract of employment for as long as the work lasts. There is no contract of employment in respect of a period in which the agency (or end-user) is not under a duty to provide work to the worker. So agency workers who are not working for anyone at the point at which they have to self-isolate and are not offered work on subsequent

self-isolating days will be excluded from the right to claim SSP. It is likely that a worker who tells her agency (or end-user) that she is self-isolating will not be offered any further work until she announces she is fit and free from infection again.

Carers

8. SSP is not available to those who must take time off work to care for people who are not sick with coronavirus but need care and can no longer be cared for because their schools, nurseries, sheltered workshops, community centres, care homes or other institutions have closed or have restricted attendance. The number of such carers is not known but there were 4.73 million children in state funded primary schools in England alone in January 2019 (thus leaving out of account those in nursery schools, special schools, those in secondary education who nonetheless need care during the day, adults needing care, and the position in Wales, Scotland, and Northern Ireland).

Unemployed workers

9. 1.2 million claims for Universal Credit have been made in the last three weeks. Hundreds of thousands of workers will be sacked in coming weeks. Though (if they meet the qualifying criteria) they may have a claim for a redundancy payment or unfair dismissal discussed below, they will have no claim for SSP.

II

The Coronavirus Job Retention Scheme (the ‘furlough’ scheme)

The legislative basis for this Scheme appears to be a Direction by HM Treasury to HMRC given under powers conferred by sections 71 and 76 of the Coronavirus Act 2020. The Direction is dated 15 April 2020. References to the ‘Scheme’ is to this scheme; references to government guidance is to the *Guidance: Claim for your employees’ wages through the Coronavirus Job Retention Scheme*.⁷

A ‘furloughed employee’ is one kept on the books as an employee but given leave of absence from work for at least three weeks. The outline of the furlough scheme has received much publicity and some (excellent) legal analysis.⁸

It is a temporary scheme open to all UK employers in respect of the period of four months from 1 March (presumably, 28 June 2020).⁹ It may be extended. It is designed to support employers whose operations have been severely affected by coronavirus.

Employers of workers on PAYE may claim 80% of the ‘usual monthly wage’ costs (up to £2,500 a month) of ‘furloughed employees’ (employees on a leave of absence) plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage. Employers (i.e. any UK organisation with employees including: businesses, charities, recruitment agencies where workers are paid through PAYE, public authorities, and employers in administration) can use this scheme anytime during this period. As to companies in administration, employees have ‘super priority’ to be paid furlough moneys received from the government in respect of their wages.¹⁰

Perhaps the most striking feature of the Scheme for the Labour Parliamentarian is that the decision whether to use it or not is entirely a matter for the employer. The workers whose livelihoods may depend on the decision have no say in it whatsoever.

Apprentices can be furloughed. They can continue to train whilst furloughed but must be paid at least the Apprenticeship Minimum Wage, NLW or NMW whilst training.¹¹

Nannies can be furloughed provided they are paid through PAYE and were on the payroll and included in the employer’s Real Time Information return¹² to HMRC on or before 19 March 2020.

Public sector bodies and organisations receiving public funding specifically to provide services in response to coronavirus are ‘expected’ by the government to pay full wages though they are eligible for the furlough scheme.¹³ It remains to be seen to what extent the government ‘expectation is met.’

The scheme is, of course, to be welcomed in reimbursing 80% of basic wage costs to employers which ‘furlough’ their employees, i.e. retain them on the books but send them home with no work. However, it has a number of deficits. It has been suggested, however, that only half of employers are likely to deploy the scheme.¹⁴

Delay in making payments

1. The scheme is not yet available and claims will not be able to be submitted (to HMRC) until at least 20 April 2020 and no payments will be made until after 30 April. Many employers will have been unable to sustain even 80% of the wage bill until then and will have dismissed their workforce (see below). Though the government is facilitating banks making loans to businesses during the crisis, stories abound of banks requiring personal guarantees and imposing unfair rates of interest.¹⁵ Even if money is borrowed easily and at a negligible rate of interest many businesses will not wish to take out a loan to cover payments of wages during a period during which, by definition, they are not receiving the revenue to pay for it. If employers hold back paying wages (in virtually every case a breach of contract) until they receive the government grant, many workers will be forced to turn to Universal Credit to survive, since only a third of all households have the financial reserves to cope with an emergency and household debt was no less than 98% of disposable household income (with a higher rate of debt-to-income ratio for lower earners) before the impact of coronavirus.¹⁶ Delay in this scheme is thus a major defect which is already leading to large scale dismissals and lay-offs without pay (contrary to the government’s expressed intention).
2. Though entitlement under the Scheme allows claims to be backdated to 1 March, for many workers (and businesses) the scheme’s announcement came too late: the workers had already been dismissed and the business folded. Indeed, in the 9 days to 25 March there were over 500,000 new claims for Universal Credit.¹⁷ By 2 April it was reported that there had been over 950,000 new claims in the previous fortnight. By 9 April it was reported that there had been 1.2 million claims in the previous three weeks.
3. The scheme does permit employees who were made redundant since 28 February 2020 to be furloughed if they are rehired by their employer (see

below) but there cannot be many employers who have re-hired in these circumstances.

Level of pay

4. The Scheme provides for payment by reference to a 'month's wages' If the employee has been employed for a full twelve months prior to the claim, this is the higher of either: the same month's earning from the previous year or average monthly earnings from the 2019-20 tax year (if employed for less than a year, an average of monthly earnings since starting work). This is a different measure to the established criteria of 'a week's pay' in ss.220–227 Employment Rights Act 1996 which is used for most other statutory employment law purposes. Why that familiar measure has not been used is not immediately apparent.
5. What the scheme does make clear is that a month's wage is basic and will not reflect commission, bonus or tips. Yet the income of many workers is significantly reliant on bonus, commission or tips. The extent can be seen from the fact that the average weekly take home pay (£512 pw in January 2020) without commission or bonus is increased by 6-7% on average (i.e. by around £33) by reason of bonus and commission.
6. The 80% of wages payable may take workers below the National Minimum Wage level if it were apportioned to their normal working hours. The scheme permits this.
7. The low level of the maximum sum payable, set at £2,500 pcm compares unfavourably with other western European countries, e.g. the €6,827 payable in France. £2,500 per month is only £577 pw, which is only £65 more than the national average wage (without commission or bonus). Many claimants, previously earning more than the average wage, will therefore lose considerably more than 20% of their previous earnings.

Employees only

8. As is the case for SSP, only 'employees' may be reimbursed wages under the scheme. The 5 million self-employed or 'limb (b)' workers¹⁸ (i.e. those working for someone but not under a contract of employment and where the person for whom they are working is not the client or customer of their business - e.g. Uber drivers) therefore appear to be excluded from this scheme. However, the recent guidance states that '*Where Limb (b)*

Workers are paid through PAYE, they can be furloughed and receive support through this scheme.’ It is hard to visualise a limb (b) worker being paid through PAYE since, by definition, a limb (b) worker is not an employee. Obviously, the government believes that there are some. But it must be a very few individuals – for most limb (b) workers the only benefit they get from their inferior status is the tax advantage of being self-employed; they are denied most of the rights of the employee such as unfair dismissal etc.

9. As noted above, many will have a claim under the Self-Employed Income Support Scheme discussed later. But this scheme too has gaps (described below) which will mean that many self-employed workers will fall outside the scope of all three schemes.

Recent starters

10. Not all employees are covered by the Scheme. There is a cut-off date of 19 March after which claims will not be entertained. The requirement is that the employer must have made a ‘Real Time Information’ return to HMRC (under Schedule A1 to the PAYE Regs) in respect of the relevant worker. This is usually made at time the employer runs its payroll. To qualify, the return has to have been made in respect of the worker on or before 19 March.¹⁹ So it is not just a question of showing that the employee started employment before that date, she must also have been included on the employer’s Real Time Information return by that date.²⁰
11. Employees hired after the date of the employer’s last Real Time Information return made on or before 19 March 2020 cannot be furloughed and no claim may be made for their wages under the scheme. However, by 19 March there were likely to have been few businesses (apart from Amazon) recruiting.
12. As an exception, there are complex provisions to permit claims in respect of workers transferred from one PAYE employer to another,²¹ including under the TUPE regulations.²²

ZHC workers

13. The scheme publicity specifically says that zero hours contract workers are covered but it is not clear how this is to be achieved. In normal times ZHC workers are kept on the books even if they are not offered any work.

Many employers will doubtless assert that there is no work to offer the ZHC workers during the period the employer is furloughing other staff. If so, it is unlikely that the employer will claim (or the government pay) 80% of average earnings for the ZHC workers whom it will be said have lost nothing since they are offered no work. So, the government's claim that ZHC workers are covered by the scheme may be theoretically true but in practice worthless. As noted above, there are nearly 1 million workers with a zero hours contract.

Agency workers

14. The scheme publicity also specifically says that agency workers are covered. As with ZHC workers this may be theoretically true; as noted above, most agency workers are not self-employed but are PAYE employees. But most agency workers are employees only for the period in respect of which they are offered work and accept it. They are often 'casuals', under a contract of employment for as long as the work lasts. There is no contract of employment in respect of a period in which the agency (or end-user) is not under a duty to provide work to the worker. So only the most beneficent of employers (agency or end-user) will claim and pay to agency workers the 80% of wages on offer under the scheme – it will be, as for ZHC workers, cheaper and simpler (and lawful) simply not to offer them work whilst not needed. As noted, there are about 1 million agency workers.²³

Fixed term contract workers

15. The guidance states: '*employees on fixed term contracts can be furloughed. Their contracts can be renewed or extended during the furlough period without breaking the terms of the scheme.*' Once a fixed term employee's contract ends and is not extended or renewed the furlough scheme will cease to apply. For most fixed term contract workers it seems likely that the employer will, at the end of the term, rely on the fact that it is no longer liable for any wages and neither renew or extend it in order to send the worker home and claim reimbursement of 80% of her wages.

Carers

16. This is a significant gap. According to the guidance, the furlough scheme is available to carers: *‘Employees who are unable to work because they have caring responsibilities resulting from coronavirus (COVID-19) can be furloughed. For example, employees that need to look after children can be furloughed.’* They must have been *‘placed on unpaid leave after 28 February’*.
17. The problem is that it is not compulsory for an employer to put an eligible worker on furlough. The choice is not the worker’s but wholly that of the employer. It is conceivable that some generous employers will ‘furlough’ those workers who are taking time off work to care for people who need care and can no longer be cared for because their schools, nurseries, sheltered workshops, community centres, care homes or other institutions have closed or have restricted attendance. Other employers will, unless there is some contractual term requiring full pay for the absence, simply give them unpaid leave of absence to attend to family matters and not put them on furlough.
18. As noted above under the sub-heading ‘carers’ in relation to SSP, this category is a very large number of people.

Those on SSP

19. The Guidance has recently changed and now permits the employer to choose whether to put sick employees on furlough or on SSP but not both.
20. It adds: *‘Employees who are shielding in line with public health guidance can be placed on furlough.’* This is a reference to the most vulnerable to infection who are recommended to be confined to home for 12 weeks.²⁴ Once SSP has ended there appears no reason why a worker who is otherwise eligible should not be put on furlough.

Partial furlough?

21. The scheme only applies to employees who are sent home and do no work for the employer at all: Para 6.1 of the Scheme requires that *‘the employee has been instructed by the employer to cease all work in relation to their employment’*, and that *‘the period for which the employee has ceased (or*

will have ceased) all work for the employer is 21 calendar days or more, the instruction having been given by reason of circumstances arising as a result of coronavirus or coronavirus disease. The employee is not permitted to work for a person connected with the employer or work indirectly for the employer. Previous publicity stated: *'If an employee is working, but on reduced hours, or for reduced pay, they will not be eligible for this scheme'*. The only exception is workers undertaking training whilst furloughed, who then must be paid at least the NLW/NMW for the time spent training, and even if this is more than the 80% of their wage, that will be subsidised.

22. So, apart from this, the scheme excludes those who are put on reduced hours (whether at home or at work). This is likely to be a considerable number of people because businesses hit by coronavirus but which do not go into liquidation are bound to need at least some work to be done to maintain the books and premises and to attend to bills etc. Company directors are, however, exempted in relation to fulfilment of statutory obligations 'relating to the filing of company accounts or provision of other information relating to the administration of the director's company'.
23. The scheme does not prevent a furloughed worker from undertaking voluntary work, working for charity or, indeed, working for a different employer, although such a worker must check their existing contract of employment to ensure that they are not in breach by, for example, working for a competitor, if that is prohibited.
24. It has been suggested that furloughed workers may be encouraged to provide some of the (unpaid) person-power needed in other sectors such as care (British Airways cabin crew have been suggested for this) or the proposed 'land army' (to fill in for seasonal workers from overseas). This may be permissible but, so far, there has been no conscription or compulsion.
25. Where an employer chooses to reduce the hours of a worker instead of putting her on furlough or making her redundant, the scheme will not apply. However, the worker will be entitled to a 'guarantee payment' under ss.28-35 Employment Rights Act 1996. These provisions are complicated and not well known, primarily because of their lack of value:

such payments are capped at £29 a day for a maximum of five days in any three-month period.

No right to reduce pay

26. Unless there is some particular provision in the contract of employment, there is no general implied right to reduce workers' pay (whether to 80% of average wages, or at all), no right to reduce hours, and no right to put workers on 'furlough'. Indeed, such an imposition, if unilateral (though many workers may agree to the change as a least-worse option), is likely to constitute a breach of contract²⁵ entitling the worker to claim for wrongful deductions from wages in breach of contract. Indeed, depending on the scale of the reduction, it may constitute a fundamental breach of contract amounting to a dismissal which will entitle workers to claim unfair dismissal.
27. In the face of this risk, many employers will bite the bullet and simply dismiss all or some of the workforce. The latter will be entitled to the notice specified in their contracts of employment or the minimum statutory notice²⁶ and they may be entitled to claim unfair dismissal, though the employer is likely to assert that the dismissal was fair and reasonable in the economic circumstances as discussed above.
28. Another alternative is for an employer to dismiss the workforce and offer them re-employment on different (invariably, worse) terms, or to defer the offer of re-employment until it is seen whether and how business picks up again later in the year. This tactic risks unfair dismissal claims but as noted above, employers may seek to defeat claims by claiming that there was no dismissal in reliance on the legal doctrine of 'frustration' or claim that, if dismissed, it was not unfair because it was reasonable to dismiss in all the circumstances.

Collective agreement

29. The scheme advocates that '*employers should discuss with their staff and make any changes to the employment contract by agreement*'. But there is no obligation to do so and given the collapse of collective bargaining (82% of workers covered in 1979 down to 23% today), workers, in most cases, are effectively denied any democratic input into the employers' choice of unilateral responses to the situation, though the outcomes so

profoundly affect workers' ability to earn a living and provide for their families. The absence of any requirement of social dialogue in this extraordinary situation is a really striking deficit that says everything about the disrespect in which workers and trade unions are held by the government.

30. The duty to consult the union(s) (or employee representatives if no recognised union) if more than 20 redundancies are in prospect, remains.²⁷ But that obligation is confined to redundancies - not changes to terms and conditions or decisions about furloughing.

Parental leave

31. Guidance has now been provided to workers on maternity or parental leave or pay.²⁸
32. If the contract of employment provides for '*enhanced (earnings related) contractual pay to women on Maternity Leave, this is included as wage costs*' the scheme says that this is claimable and that '*the same principles apply where your employee qualifies for contractual adoption, paternity or shared parental pay.*'

Unemployed workers

33. Hundreds of thousands of workers have been sacked because of coronavirus. It goes without saying that whilst unemployed, they are not eligible for SSP, the furlough scheme or the SEISS (below). And they will find that not only do they have to face the long-established problems of Universal Credit but also they are in competition for attention with well over a million other claimants. The failure to provide any additional cushion to those who lose their jobs because of the pandemic seems particularly harsh.

Workers dismissed and re-employed

34. The scheme permits employees who have been made redundant (or otherwise terminated) on or after 28 February 2020 to be re-employed (even after 19 March) and put on furlough.²⁹ But the worker must have been included in the employers Real Time Information return³⁰ to HMRC on or before 28 February.

35. In reality, it is not likely that many employers, having disposed of workers because of the impact of coronavirus, will be rehiring in order to be reimbursed 80% of the cost of wages of workers who must not carry out any work for them.
36. Those who are re-employed by the same employer will have a gap in service and, if a week or more, may well find their continuity of employment has been lost (ss.210-212 Employment Rights Act 1996). In consequence, on re-employment they may have lost important statutory rights (such as unfair dismissal) which depend upon a qualifying period of continuous employment. There appears no reason why this situation could not be remedied by amending legislation to make good the scheme's support for re-hiring.

III

Self-employed Income Support Scheme

This scheme (SEISS) does not appear to be underpinned by legislation. Such detail as there is must be found in government guidance.³¹ It is intended to be a direct payment by government (through the HMRC) to the self-employed and employed members of partnerships who can show that they have lost trading/partnership trading profits due to coronavirus. 80% of profits will be paid for up to three months, capped at £2,500 pcm. The amount will be calculated on the last three years tax returns (or less years if less tax returns are available).³² To qualify, a claimant must have filed a tax return for 2018-19, have traded in 2019-20, be trading when applying (or would be trading but for coronavirus), and intend to continue to trade in the tax year 2020-21. SEISS is only available to those who can show that their profits were less than £50,000 in 2018-19 or, if not, were less than an average of £50,000 across 2016-17, 2017-18, and 2018-19. It is only available to those who can show that more than half of their taxable income comes from self-employment. Payment will be made in a single one-off payment in June 2020.

SEISS has a number of drawbacks.

Delay in making payments

1. For those who are entitled to SEISS, nothing will be paid to them for nearly three months until an unknown date in June. The most recent Guidance says that those eligible will be contacted in mid-May. That is a long time to wait to know if the worker is to receive an income stream from this source. According to the Institute for Fiscal Studies, 25% of self-employed people earning less than £50,000 a year do not have enough liquid assets (between themselves and any partner) to cover three months' lost earnings, and 15% do not have enough to cover a single month.³³
2. Some may be able to secure loans from the funds the government has made available to banks but interest rates well above the minimal Bank of England rate and stringent tests for eligibility have already excluded many self-employed from this route.
3. In consequence, many, nominally entitled to SEISS, will go bust by payment day and be claiming Universal Credit, no longer able to fulfil the condition that they intend to continue to trade in 2020-21. This delay, longer even than that under the furlough scheme, seems designed to put self-employed workers out of business.

Starters in self-employment

4. SEISS offers nothing to those in their first year of self-employment, notwithstanding that they will be able to complete their first tax return for 2019-20 by the time that payment under SEISS is to be made. This seems illogical.
5. It might particularly be thought unfair that, in contrast, those who, regardless of coronavirus, planned to run their business down in 2019-20 (perhaps to retire) may be able to claim more in SEISS on the basis of past profits than they planned to earn over the next three months.
6. The scheme will also provide nothing to those who started business in the last three years and have not yet made a profit.

Low recent earnings equals low SEISS payment

7. Those who only made a modest profit in the last three years – for whatever reason, including paying off start-up costs – will necessarily receive only a corresponding low payment. This may be notwithstanding

that they were, but for the coronavirus pandemic, on course to make a decent profit this year.

8. That category will include those whose profits dipped because they took a significant amount of time out in the previous year or years - whether to have a baby, to study, to care for others, by reason of illness or otherwise.

More than half income from self-employment

9. Those whose income from self-employment is less than half their total income will receive nothing. Examples include: the TV technician who is starting up in self-employment but still earns more from her part-time job as an employee; the cleaner who has two jobs, one as an employee and a less well paid one where the employer requires her to be self-employed; or the scaffolder who was employed for nine months of the tax year and when that job finished, after a period of unemployment, took another as self-employed.
10. Those with two jobs who are lucky enough to find that they earn a bit more from self-employment than from other sources of income may find that they are wholly reliant on SEISS to cover that part of their income that comes from self-employment. This would be the case if their other income comes from employment and they are an agency worker or a ZHC contract worker. This is because, as we have seen, the employer may prefer to offer no work to such workers rather than furlough them from their employed job.

Cut-off and no taper

11. Those who made, in the last tax year, a profit of one penny less than the cut-off of £50,000 will receive full payment, those who made a penny more will receive nothing. A tapering entitlement would have been fairer.

Post box companies

12. Many who regard themselves as self-employed work through a self-owned company, a 'personal service company'.³⁴ This is often to comply with a requirement imposed by the 'employer' who provides the worker with the work (often because the employer refuses to deal with individuals in case they acquire employment rights). In this situation the

owner of the company is usually an employee of it. They are not therefore self-employed and not therefore entitled under SEISS.

13. It is said that HMRC is advising them to write to themselves and furlough themselves. That might be possible in some cases but their receipts under the furlough scheme will be based on their wages not on the profits of their company. Many workers in this artificial situation may give themselves modest wages and take a significant part of their earnings by way of dividend from the profits of their companies. They will then be entitled only to a low 'furlough' payment and no SEISS payment. Furthermore, if a one-person company continues to work by (for example) seeking other sources of work or merely by maintaining the administration of the company (beyond a director's statutory duties – see below), she will, as we have seen, lose all entitlement under the furlough scheme.
14. Directors of companies who are employees are eligible under the furlough scheme (above). Some directors are, however, not employees and are not salaried but take earnings in the form of dividends. They may well not be employees (and do not pay tax via PAYE) but neither are they self-employed. They may slip through both nets therefore. It has been suggested that there are about 2 million in this category.³⁵ Independent legal advice will be required to consider individual circumstances.
15. The guidance states: *'Where furloughed directors need to carry out particular duties to fulfil the statutory obligations they owe to their company, they may do so provided they do no more than would reasonably be judged necessary for that purpose, for instance, they should not do work of a kind they would carry out in normal circumstances to generate commercial revenue or provide services to or on behalf of their company. This also applies to salaried individuals who are directors of their own personal service company.'*

Carers

16. Self-employed people taking time off to care for others because of coronavirus are unlikely to be in a position to receive income from SEISS while off work caring for others, even if their previous earnings justify it, since they are unlikely to be able to show their income has diminished because of coronavirus. It might be possible, however, to show that the

downturn in trade due to coronavirus gave the worker free time which she was able to use to care for others.

Agency and ZHC workers

17. As noted, agency and ZHC workers are not usually self-employed. If they are then they will be entitled to claim SEISS and, if they have a good earnings record, may be beneficiaries in a situation when they would otherwise be earning nothing.

Unemployed workers

18. Self-employed workers who have ceased trading and given up the prospect of keeping going, will have no claim for SEISS. They will join the swollen ranks of the unemployed and compete with the million plus other claims for Universal Credit made in the last three weeks.

IV

Other matters

There are some other issues to mention which affect workers entitlements in the period of this pandemic.

Pensions

1. This note does not deal with the fraught and complex issue of the protection of pensions. The furlough scheme does make some provision for pension contribution.

Holiday entitlement

2. The **Working Time (Coronavirus) (Amendment) Regulations 2020** allows holiday entitlement which cannot be taken to be carried forward to the next year.

A measure the government could have taken

3. It should be noted that s. 64, Employment Rights Act provides that, on certain triggering conditions, an employee who is suspended from work by his employer on medical grounds is entitled to be paid by his employer remuneration while he is so suspended for a period not exceeding twenty-six weeks. All that is necessary for the triggering conditions would be for

the Secretary of State to designate ss. 2-4 Health and Safety at Work Act as the basis for requiring the Health and Safety Executive to publish a Code of Practice under those sections requiring or advising employers to suspend workers where government advice in relation to coronavirus was that they should self-isolate and not attend work. The government has elected not to use this obvious machinery.

18 April 2020

Endnotes

- ¹ <https://labour.org.uk/wp-content/uploads/2020/04/Follow-up-Letter-to-Chancellor-09.04.20.pdf?bblinkid=216299354&bbemailid=20804848&bbejrid=1452465807>.
- ² And is primarily governed by the Social Security Contributions and Benefits Act 1992 (amended by the Coronavirus Act 2020).
- ³ By the Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations 2020.
- ⁴ ONS, Average weekly earnings in Great Britain: March 2020, <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetype/s/bulletins/averageweeklyearningsingreatbritain/march2020>.
- ⁵ S.230(3)(b) Employment Rights Act 1996. The publicity for the furlough scheme suggests that some limb (b) workers are employees but this appears doubtful.
- ⁶ By s.44 Income Tax (Earnings and Pensions) Act 2003 they are treated for tax purposes as employed by their agency and pay tax by PAYE.
- ⁷ HMRC, *Guidance: Claim for your employees' wages through the Coronavirus Job Retention Scheme*, updated 17 April 2020 at <https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>. This guidance was first published on 26 March and updated on 4, 9, 15 and 17 April.
- ⁸ See the excellent: M Ford and A Bogg, *Legislating in Times of Crisis: The Coronavirus Job Retention Scheme*, UK Labour Law Blog, 23 March 2020, at <https://uklabourlawblog.com/2020/03/23/legislating-in-times-of-crisis-the-coronavirus-job-retention-scheme-by-alan-bogg-and-michael-ford/> and M Ford and A Bogg, *Not Legislating in a Crisis? The Coronavirus Job Retention Scheme, Part 2*, UK Labour Law Blog, 31 March 2020 at <https://uklabourlawblog.com/2020/03/31/not-legislating-in-a-crisis-the-coronavirus-job-retention-scheme-part-2-by-michael-ford-and-alan-bogg/>.
- ⁹ The period was extended from 3 months to 4 months on 17 April 2020 in order to avoid larger employers having to give 45 day collective redundancy notices to take effect on 31 May.
- ¹⁰ *In the matter of Carluccio's Ltd (In Administration)* (2020) [2020] EWHC 886 (Ch), 13 April 2020.
- ¹¹ See *Coronavirus (COVID-19): guidance for apprentices, employers, training providers, end-point assessment organisations and external quality assurance providers*, 6 April 2020 at <https://www.gov.uk/government/publications/coronavirus-covid-19-apprenticeship-programme-response/coronavirus-covid-19-guidance-for-apprentices-employers-training-providers-end-point-assessment-organisations-and-external-quality-assurance-pro>.
- ¹² See under 'Recent Recruits' in this Note, a few pages later.
- ¹³ See: HMRC, *Guidance: Claim for your employees' wages through the Coronavirus Job Retention Scheme*, updated 17 April 2020 at <https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>. This guidance was first published on 26 March and updated on 4, 9, 15 and 17 April.
- ¹⁴ Financial Times, 1 April 2020.
- ¹⁵ By 8 April only about one in ten of businesses had received approval for loans under the Coronavirus Business Interruption Loan Scheme: FT, 9 April 2020. Professor Prem Sikka has pointed out that the many of the banks accredited to distribute these loans have been found guilty of unethical and corrupt practices and subjected to massive fines, see P Sikka, 31 March 2020, 'Asking banks to distribute money to businesses is like asking Dracula to distribute blood', Left Foot Forward, at <https://leftfootforward.org/2020/03/prem-sikka-asking-banks-to-distribute-money-to-businesses-is-like-asking-dracula-to-distribute-blood/>.
- ¹⁶ J Ahmed and K Henahan, 'An outstanding balance? Inequalities in the use – and burden – of consumer credit in the use- and burden – of consumer credit in the UK', Resolution Foundation, January 2020 at <https://www.resolutionfoundation.org/app/uploads/2020/01/An-outstanding-balance.pdf>.
- ¹⁷ Guardian 26 March 2020: 'Universal credit: 'almost impossible' to complete claim as more than 500,000 apply': <https://www.theguardian.com/world/2020/mar/26/universal-credit-claims-almost-impossible-as-more-than-500000-apply>.
- ¹⁸ S.230(3)(b) Employment Rights Act 1996.

¹⁹ Paragraph 5(a)(i) read with para 13.1(a).

²⁰ An employer who did a monthly payroll on, say 18 March, could claim in respect of an employee included in the Real Time Return for 18 March but who started as far back as 19 February.

²¹ See paragraphs 9 and 10 of the Scheme.

²² Transfer of Undertakings (Protection of Employment) Regulations 2006.

²³ Agency workers who are contingent workers for government should see 'Cabinet Guidance notes on Payments to Suppliers for Contingent Workers impacted by COVID-19', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877221/PPN02_20-Contingent-Workers-Impacted-by-Covid-19-2.pdf.

²⁴ See: *Guidance on shielding and protecting people defined on medical grounds as extremely vulnerable from COVID-19*, updated 17 April 2020 at <https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19#what-is-shielding>.

²⁵ See the discussion in *In the matter of Carluccio's Ltd (In Administration)* (2020) [2020] EWHC 886 (Ch), 13 April 2020.

²⁶ In s.86 Employment Rights Act 1996.

²⁷ S.188 Trade Union and Labour Relations (Consolidation) Act 1992.

²⁸ *Maternity Pay and Leave* at <https://www.gov.uk/maternity-pay-leave>.

²⁹ HMRC, *Guidance: Claim for your employees' wages through the Coronavirus Job Retention Scheme*, updated 17 April 2020 at <https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>. This guidance was first published on 26 March and updated on 4, 9, 15 and 17 April.

³⁰ See under 'Recent Starters' above.

³¹ See *Guidance: Claim a grant through the coronavirus (COVID-19) Self-employment Income Support Scheme*, 14 April 2020, at <https://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme> and <https://www.gov.uk/government/news/chancellor-gives-support-to-millions-of-self-employed-individuals>.

³² More information is available at *Guidance: How HMRC works out total income and trading profits for the Self-employment Income Support Scheme* at <https://www.gov.uk/guidance/how-hmrc-works-out-total-income-and-trading-profits-for-the-self-employment-income-support-scheme>.

³³ S Adam, H Miller and T Waters, *Income protection for the self-employed and employees during the coronavirus crisis*, Institute for Fiscal Studies, 2 April 2020 at <https://www.ifs.org.uk/publications/14786>; full report at <https://www.ifs.org.uk/uploads/publications/bns/BN277-Income-protection-self-employed-and-employees-coronavirus-crisis.pdf>.

³⁴ Those with a personal service company who are contingent workers for government should see 'Cabinet Guidance notes on Payments to Suppliers for Contingent Workers impacted by COVID-19', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877221/PPN02_20-Contingent-Workers-Impacted-by-Covid-19-2.pdf.

³⁵ A bounds, G Parker, 'UK minister seeks ways to extend bailout to owner-directors', *Financial Times*, 16 April 2020 at <https://www.ft.com/content/ea701129-4aa9-4899-81b2-5a7990b8bdeb?desktop=true&segmentId=7c8f09b9-9b61-4fbb-9430-9208a9e233c8#myft.notification:daily-email:content>.