

DMG Chapter 49: Earnings of employed earners

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Earnings of employed earners - Employment & Support Allowances

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Introduction

49001 This Chapter deals with the calculation and treatment of payments made to employed earners. These will usually be earnings paid by an employer, but may sometimes be other types of payment.

49002 How payments made to employees may affect a claim for ESA will depend on whether

1. the claimant is in receipt of ESA(Cont), ESA(IR) or both
2. the work is continuing
3. the work has ended.

49003 The earnings of an employed earner are income¹. The calculation of this income can affect entitlement to ESA(IR) because it is a condition of entitlement to ESA(IR) that income does not exceed the claimant's applicable amount². The level of earnings from work performed by the claimant will also determine whether the work is within the PWK limits³. DMG Chapter 41 gives guidance on what constitutes PWK.

1 ESA Regs, reg 91(1); 2 WR Act 07, Sch 1, para 6(1)(a); 3 ESA Regs, reg 45(2), (3), (4) & 88

49004 ESA(Cont) has no condition of entitlement based on income and so earnings are not taken into account. However, where a claimant who is entitled to ESA(Cont) is working then the guidance in this chapter should be used along with the guidance in Chapters 41 and 48 to decide the level of earnings¹. The level of earnings will then determine whether the work is within the PWK limits².

1 ESA Regs, reg 88; 2 reg 45(2), (3) & (4)

49005 Guidance for ESA(IR) on the calculation and treatment of payments made on termination of employment is given in DMG 49500 - 49652. Guidance on payments made under employment

protection legislation is in DMG 49300 - 49469.

Meaning of claimant

49006 Claimant means¹ a person who has claimed ESA.

1 WR Act 07, s 24(1)

ESA(Cont)

49007 It is only the amount of a claimant's own earnings that may affect entitlement to ESA(Cont) on the grounds of whether the level of earnings is within the PWK limits¹. The earnings of a claimant's partner cannot affect entitlement to ESA(Cont).

1 WR Act 07, Sch 2, para 10 & ESA Regs, reg 45(2), (3) & (4)

ESA(IR)

49008 Earnings of the claimant or any partner may be taken into account for the calculation of income for ESA(IR). The earnings of the claimant's partner are treated as being the income of the claimant¹. With regards to ESA(IR) it may well be the case that the claimant is not working due to illness or a medical condition but that their partner

1. is working **or**

2. has recently finished work **or**

3. is engaged in training.

Where that is the case, the guidance on earnings for ESA(IR) will apply to the partner².

1 WR Act 07, Sch 1, para 6(2); 2 ESA Regs 83(1)

49009 When a person satisfies the conditions and is in receipt of MIRO (see DMG 20530 et seq), any earnings for the period of MIRO are to be disregarded in full¹.

1 ESA Regs, Sch 7, para 13

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Meaning of employed earner

49013 The term employed earner means¹ a person who is gainfully employed in GB

1. under a contract of service **or**

2. in an office (including an elective office) with general earnings².

1 ESA Regs, reg 2(1); SS CB Act 92, s 2(1)(a); 2 Income Tax (Earnings and Pensions) Act 2003, s 7(3)

49014 Employed earners who are gainfully employed under a contract of service include employees who work for a wage or salary.

49015 The phrase “in an office” includes directors of limited companies, clergy, LA councillors, MPs and sub-postmasters and mistresses. General earnings include any wage, salary, fee, gratuity, profit or incidental benefit¹.

1 Income Tax (Earnings and Pensions) Act 2003, s 7(3) & s 62

Meaning of earnings

49016 Earnings means any pay or profit derived from employment¹ and includes

1. bonus or commission² (see DMG 49059)

2. PILOR³ (see DMG 49113)

3. PILON⁴ and certain compensation payments made by the employer because the employment has

ended (see DMG 49500 et seq)

4. holiday pay (see DMG 49075), but not where it is payable more than four weeks after the employment ended, or was interrupted⁵

5. retainers⁶ (see DMG 49118)

6. payment made by the employer for expenses which are **not** wholly, exclusively and necessarily incurred in the performance of the duties of the employment⁷, including any payment made by the employer for

6.1 the employee's travelling expenses between home and work (but see DMG 49081 et seq for councillors)⁸ **or**

6.2 any expenses that the employee may have for the care of a family member while the employee is at work⁹ (see DMG 49108)

7. awards of compensation under employment law¹⁰ (see DMG 49300 et seq)

8. payments such as guarantee payments and payments due to suspension from employment on medical or maternity grounds¹¹ (see DMG 49314 et seq and 49411 et seq)

9. certain payments which are treated as earnings for social security purposes¹²

10. amounts of compensation paid on the termination of employment¹³ (see DMG 49622 et seq)

11. any payment made by a non-cash voucher that has been taken into account as earnings for the purposes of working out the amount of social security contributions to deduct¹⁴ (see DMG 49130).

This list is not exhaustive. See DMG 49046 - 49132 for more examples of what are and what are not earnings.

1 ESA Regs, reg 95(1); 2 reg 95(1)(a); 3 reg 95(1)(b); 4 reg 95(1)(c); 5 reg 95(1)(d); 6 reg 95(1)(e);
7 reg 95(1)(f); 8 reg 95(1)(f)(i); 9 reg 95(1)(f)(ii); 10 reg 95(1)(g); 11 reg 95(1)(h); 12 reg 95(1)(i);
13 reg 95(1)(j); 14 reg 95(1)(k)

49017 [\[See DMG Memo 08/20\]](#) Earnings do not include

1. payments in kind¹ (see DMG 49111)

2. periodic payments made because employment has ended through redundancy²

3. payments made for periods when an employee is on maternity leave, ordinary and additional paternity

leave, adoption leave, shared parental leave or is away from work due to illness³ (see DMG 49166)

4. payments by an employer for expenses wholly, exclusively and necessarily incurred in the performance of the employment⁴ (see DMG 49108)

5. payments of occupational pension⁵

6. redundancy payments⁶ (see DMG 49506)

7. any lump sum payments received under the Iron and Steel Re-adaption Benefits Scheme⁷

8. any payment of expenses paid to the claimant as a result of participating as a service user⁸ (see DMG 49119).

1 ESA Regs, reg 95(2)(a); 2 reg 95(1)(b); 3 reg 95(2)(b); 4 reg 95(2)(c); 5 reg 95(2)(d);

6 ER Act 96, s 135; 7 ESA Regs, reg 95(2)(e); 8 reg 95(2)(f)

Meaning of derived from

49018 The words “derived from” mean having their origins in¹. Payments made for past or present employment should be treated as earnings, unless they are excluded under DMG 49017. Work out the period for which earnings are to be taken into account before deciding the claim (see DMG Chapter 48).

1 R(SB) 21/86

Meaning of gross earnings

49019 Gross earnings means the amount of earnings

1. after the deduction of expenses wholly, exclusively and necessarily incurred in the performance of the employment¹ (see DMG 49036) **but**

2. before any authorized deductions are made by the employer. These may include

2.1 income tax

2.2 pensions contributions

2.3 NI contributions (previously called SS contributions)

2.4 TU subscriptions

2.5 payments under a court order

2.6 recovery of any debt.

Note: Where an overpayment of wages is being recovered by means of deductions from the earnings to be taken into account, the DM should not include the amount being recovered to repay the overpayment as part of the gross amount of those earnings².

1 R(FC) 1/90 & R(IS) 16/93; 2 R(TC) 2/03

Meaning of pay period

49020 A pay period is the period for which the employee is, or expects to be, normally paid¹. This might be a week, a fortnight, four weeks, a month, or any other period.

1 ESA Regs, reg 2(1)

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Deductions from gross earnings

49026 The earnings of an employed earner which fall to be taken into account are the claimant's net earnings¹.

1 ESA Regs, reg 96(1)

49027 Net earnings are gross earnings less¹

1. income tax **and**

2. Class 1 NI contributions **and**

3. half of any sum paid by the employee, towards an occupational or personal pension scheme.

1 ESA Regs, reg 96(3)

Income tax

49028 Deduct from gross earnings any income tax deducted by the employer.

Note: From 2016, Scotland has been able to set its own rate of Income Tax. Please see appendix 1 to DMG Chapter 50 for more information.

NI contributions

49029 NI contributions are often called SS Contributions or NI Conts. Reduce gross earnings by any Class 1 contribution deducted by the employer.

Occupational pension scheme deductions or personal pension scheme payments

49030 Deduct from the employee's gross earnings for a normal pay period one half of any amount which

- 1.** a person pays into an occupational pension scheme for that period **or**
- 2.** is deducted by the employer from a payment of earnings as a contribution to an occupational pension scheme for that period **or**
- 3.** a person contributes towards a personal pension scheme for that period.

Example

Patricia earns £50 a week and is paid weekly. She pays £26 a month into a personal pension scheme. Her normal pay period is a week. Her pension contribution is changed into a weekly figure ($£26 \times 12 \div 52 = £6$ pw) and half of this weekly figure ($£6 \div 2 = £3$) is deducted from her gross weekly earnings ($£50 - £3 = £47$).

49031 Occupational pension schemes¹ are arrangements by which an employer provides benefits for employees based on service. The benefits may be provided by the employer or through a pension provider. Benefits are

- 1.** normally in the form of a pension, all or part of which may be taken as a lump sum
- 2.** payable on death or retirement.

1 ESA Regs, reg 2(1); PS Act 93, s 1

49032 - 49033

49034 Personal pension schemes¹ are

- 1.** a scheme under certain pension and taxation legislation² **or**
- 2.** an annuity contract or trust scheme under certain taxation legislation³.

They provide benefits independently of any employer (although an employer may still make contributions to such a scheme). Benefits are payable as annuities which may provide lump sum and pension payments payable on death or retirement.

1 ESA Regs, reg 2(1); 2 PS Act 93, s 1; Income and Corporation Taxes Act 1988, Chapter 4 of Part 14 & Finance Act 2004, Sch 36, para 1(1)(g); 3 Income and Corporations Taxes Act 1988, s 620 or s 621; Finance Act 2004, Sch 36, para 1(1)(f) & Income & Corporation Taxes Act 1988, s 622(3)

49035 Where a person pays contributions into both an occupational and a personal pension scheme, the deduction from gross earnings should be one half of the total payments made for the pay period¹.

1 R(FC) 1/90

Expenses not reimbursed by employer

49036 An expense that is not repaid to an employee by the employer should be deducted from earnings if it is incurred in the performance of the duties of the employment and is wholly, exclusively and necessarily incurred¹.

1 R(IS) 16/93

49037 Examples of expenses for which deductions may be made under DMG 49036 are

1. equipment, tools and stationery
2. overalls and specialist clothing
3. telephone calls made entirely for work purposes
4. travelling costs between different work places and any accommodation costs involved.

49038 The expense must be incurred in direct connection with the employer's trade or business¹. If there is some element of private use, for example telephone bills, that part of the bill for business use should be allowed (see DMG Chapter 50). Any decision by HMRC on the apportionment of expenses may be taken into account as evidence. If there is no doubt, that decision can normally be followed².

1 Davies v. Gwaun Cae Gurwen Colliery (1924) 2 K8 651; Borley v. Ockended (1925) 2 K8 325; 2 R(IS) 16/93

49039 An expense that is in the employee's own interest or benefit, or which merely enables the employee to go to work, would not satisfy the test in 49036. Child minding expenses¹, and the cost of travel to a single place of work, are examples of expenses that would not satisfy the test.

1 R(FC) 1/90

49040 See DMG 49077 and DMG 49081 if the claimant or partner is a Justice of the Peace or a councillor. See DMG 49108 for more guidance on the general question of expenses.

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Introduction

49046 The law¹ gives some examples of what earnings can include (see DMG 49016). But, there are other payments that count as earnings. Guidance on other types of earnings paid during a period of employment is in DMG 49050 - 49131.

1 ESA Regs, reg 95(1)

Employment ended

49047 Some payments are made to employees because their employment has ended. How these payments affect ESA(IR) will depend on whether

1. the work was P/T
2. the work was remunerative.

49048 Guidance on the treatment of payments made because employment has ended is given in DMG 49500 et seq.

49049 Payments made as a result of employment ending do not affect ESA(Cont).

Accommodation provided by employer

49050 The value of free accommodation provided by an employer, for example to a housekeeper or caretaker, should be ignored. Where no other payment is made to the employee, or any payment being made seems too low, the DM should consider whether to treat the claimant as having earnings or greater earnings under the notional earnings rule (see DMG 49193 et seq). The notional earning rule can only apply to ESA(IR) recipients and their partners.

Actors and entertainers

49051 DMs must consider claims from actors and other entertainers in the same way as any other claimants. Each case must be decided on its own merits. The DM should decide whether a claimant's earnings are from employment as an employed earner or employment as a S/E earner (see DMG 50007 et seq for the meaning S/E earner).

49052 In general, because of the nature of an actor's or entertainer's employment, the DM may find that their earnings are from employment as a S/E earner. However, it is possible for an entertainer whose general pattern of employment is that of a S/E earner, to have periods of employment as an employed earner at the same time as his overall self-employment.

49053 The fact that an actor or entertainer has periods of employment during which class 1 NI

contributions are payable is not conclusive when deciding whether that employment is as an employed earner. It is for the DM deciding the claim to ESA to decide whether earnings are from employment as an employed earner or from self-employment. Where an entertainer whose general pattern of employment is that of a S/E earner contends that certain engagements were as an employed earner and that class 1 contributions were paid it will be for the DM to decide whether the claimant was employed under a contract of service as an employed earner or otherwise.

Example 1

Laura is an actress and her partner is in receipt of ESA(IR). Laura's acting engagements are sporadic, and she is not currently working due to a broken leg. She continues to look for work and remains on her agent's books. She has been booked for some future engagements, but nothing substantial, and has not worked for several weeks. She says that she could find more substantial acting work at any time, that being the nature of work. In the year prior to the current claim, Laura has had a number of engagements in advertising and the theatre as well as three separate, short term, engagements with the BBC to appear in three separate dramatic productions. Her most substantial earnings were derived from these engagements with the BBC. She states that she was actually employed by the BBC under a contract of service and says that the fact that she paid class 1 contributions supports this contention. As such she argues that her earnings from the BBC should not be included when working out her earnings from self-employment. The DM

- 1.** decides that the claimant is gainfully employed as a S/E earner (see DMG 50022 - 50026)
- 2.** considers the terms under which the claimant was engaged by the BBC and decides that as she was engaged to perform a specific role on particular occasions for a fixed fee, she was employed under a contract for services as a self-employed earner and not under a contract of service as an employed earner. Therefore the earnings from the BBC fell to be taken into account with her other earnings from self-employment
- 3.** decides that the sporadic nature of the employment is the normal pattern of the business and calculates her average weekly earnings over the preceding year.

Example 2

Craig is a dancer. He is unable to work due to a serious illness. He states that he is usually S/E, carrying out one-off engagements in the theatre. However, unusually, he was engaged by a dance company for a fixed 26 weeks period during the previous year. He contends that during this period he was engaged as an employed earner, employed under a contract of service, and paid class 1 contributions.

The DM decides that Craig's employment with the dance company was under a contract of service for the 26 weeks when he was engaged by the dance company, and as such the earnings from that employment are not included in the calculation of the claimant's earnings as a S/E earner.

Advance of earnings or loans

49054 Earnings should be taken into account from the date they are treated as paid¹. This is based on when they are due to be paid (see DMG Chapter 48). If they are paid before the due date, treat any amount paid as capital for ESA(IR) until the due date arrives. Then take the amount properly due into account as normal from that date. Any other loan made by the employer should also be treated as capital for ESA(IR)².

1 ESA Regs, reg 91 & 93(1); 2 reg 112(5) & Sch 8, para 36

Example

Cameron is in receipt of ESA(IR). His wife earns £50 a week which is due to be paid every 4th Friday. She was last paid £200 on 8 November. On 18 November, she gets an advance of £100 from her employer. The £100 is treated as capital. The full £200 due to be paid on 6 December is then taken into account (6 December to 2 January = 4 weeks x £50).

49055 - 49058

Bonus or commission

49059 Payments of bonus or commission should be treated as earnings. DMG Chapter 48 contains guidance on the period over which they should be taken into account.

Broadcasting and publication fees

49060 Fees and royalties should be treated as earnings for ESA(IR), no matter how often or infrequently they are paid. They can be from employment or self-employment (see DMG Chapter 50) and include payments for

1. taking part in radio or television plays, commercials and documentaries
2. repeat showings of plays, commercials and documentaries
3. interviews with press reporters
4. published items.

Cash in lieu of concessionary coal

49061 Employees of British Coal who live in property where solid fuel cannot be used, may receive a cash payment instead of an agreed amount of coal (concessionary coal). Payments made instead of it should be treated as earnings for ESA(IR)¹.

Directors of limited companies

49062 A limited company, of whatever size, is separate from its employees and shareholders¹. This means that the profits of the company do not belong to the directors. A director of a limited company is an office holder in the company, and is an employed earner.

1 R(SB) 57/83

Establishing a director's income

49063 The income of a director can include

1. payments for services as a director or any other employment with the company
2. share dividend
3. debenture interest.

Payments as a director or other employee

49064 Directors have no legal right to receive payment for their services as a director, but can still be voted payment. Or they may be entitled to payments under the company's Articles of Association. Any payments voted to a director or to which they are so entitled should be taken into account as earnings.

49065 A director may also be employed by the company for another reason, for example as a sales manager. Such a person has a contract of employment with the company and is entitled to a salary. Any salary should be taken into account as earnings.

49066 If a director in a small company does no other work in it, the services provided will be limited and the amount of payment expected will be small. If the director also does other work in the company, then more payment will be expected.

49067 Many small companies operate with only two directors, for example the claimant and partner. Such companies normally obtain contracts and pay employees a salary for work done. Any earnings paid to the claimant will usually be for work done as an employee of the company.

49068 Directors may leave earnings that they are entitled to in a company bank account. If the director is free to draw on the account at any time, the money is actual income. It should be taken into account as actual earnings for ESA(IR). If it is not paid to the director, or the director cannot draw it out of the account, it is a debt due. This should be taken into account for ESA(IR) as income due but not paid¹.

49069 If a director of a small company is not voted any payment, the DM should consider whether the director should be treated as having earnings (see DMG 49193 et seq). In doing so, the DM should consider whether the company can afford to pay the director.

Share dividend

49070 Share dividend is income from capital and should be treated as capital for ESA(IR) but only from the date it is normally due to be credited to the claimant's account¹.

1 ESA Regs, reg 112(4)

Debenture interest

49071 Directors may have debentures in a company. Debentures are a type of loan capital. Debenture holders are entitled to a fixed rate of interest. The interest is payable whether the company makes a profit or not. If a director has made a loan to a company, the interest payments should be treated as capital for ESA(IR)¹. If any of the loan itself is repaid, the amount repaid is a repayment of capital.

1 ESA Regs, reg 112(4)

49072 - 49074

Holiday pay

49075 Any holiday pay that is payable within four weeks of the date employment ended, or was interrupted, should be treated as earnings for ESA(IR)¹. If it is payable more than four weeks after the employment has ended, or been interrupted, it should be treated as capital for ESA(IR)². Guidance on the effects of holiday pay paid on termination of employment is given in DMG 49616.

1 ESA Regs, reg 95(1)(d); 2 reg 112(3)

Income tax refunds

49076 Earnings of employed earners are taxed under the PAYE scheme by direct deduction from wages or salary. Any refunds of income tax should be treated as capital for ESA(IR)¹.

1 ESA Regs, reg 112(2)

Justices of the Peace - ESA(IR)

49077 Those who are employed as magistrates are referred to as District Judges (Magistrates' Court) and were previously known as stipendiary magistrates. In connection with their duties lay Justices of the Peace, sometimes known as volunteer magistrates may receive

1. travel allowances¹

2. subsistence²

3. financial loss allowances³.

1 Courts Act 2003, s 15(1)(a); 2 s 15(1)(b); 3 s 15(1)(c)

Travel allowances

49078 Travel allowances incurred wholly, exclusively and necessarily in the performance of the lay Justice of the Peace's duties should be disregarded in full for ESA(IR)¹.

1 ESA Regs, reg 95(2)(c) & Sch 8, para 3

Subsistence

49079 Payments of subsistence should be disregarded in full for ESA(IR)¹.

1 ESA Regs, reg 95(2)(c) & Sch 8, para 3

Financial loss allowances

49080 Financial loss allowances are paid to compensate lay Justices of the Peace for specific losses and other expenses that they incur. Allowances are paid for

1. loss of earnings - these should be treated as pay in lieu of remuneration¹ (see DMG 49113)

2. loss of SS benefits - these should be treated as income other than earnings

3. other expenses that are incurred wholly, exclusively and necessarily in the performance of the Justices of the Peace's duties - these should be disregarded in full.

1 ESA Regs, reg 95(1)(b)

Councillors - ESA(IR)

49081 Councillors are¹

1. in England and Wales, a member of

1.1 a London borough council **or**

1.2 a county council **or**

1.3 a district council **or**

1.4 a parish or community council **or**

1.5 the Common Council of the City of London **or**

1.6 the Council of the Isles of Scilly

2. in Scotland, a member of a council for a local government area².

1 ESA Regs, reg 2(1); 2 Local Government etc (Scotland) Act 1994, s 2

Note: For the treatment of allowances and expenses for councillors and ESA(Cont) see DMG Chapter 44.

49082 Councillors are elected office holders and are employed earners¹. The official duties and responsibilities of a councillor will vary from LA to LA. Each LA must draw up a scheme² for payment of allowances to councillors. This will give information on the official duties of its councillors and the allowances paid for those duties. The official duties may include attendance at

1. a meeting of the authority **and**

2. a sub-committee of the authority **and**

3. a meeting for any other body to which the authority makes appointments **and**

4. other meetings authorized by the authority.

1 R(IS) 6/92; 2 Local Authorities (Members' Allowances) (England) Regulations 2003, reg 4 & Local Authorities (Allowances for Members) (Wales) Regulations 2007, reg 5

49083 The allowances paid for official duties may include

1. basic allowance

2. special responsibilities allowance

3. childcare and dependent carers' allowance

4. travel and subsistence allowances.

Expenses incurred in the performance of the councillor's duties may be deducted from the allowances that are paid (see DMG 49091 et seq).

Basic allowance and special responsibilities allowance

49084 The basic allowance is paid at a flat rate and can be paid in a lump sum or by instalments. The basic allowance is earnings and is payable to all councillors

1. for the time they devote to their work **and**

2. to cover costs for which no other payment is made, for example, the use of a councillor's home and telephone. The amount actually used for expenses will vary in each case.

Councillors with significant extra responsibilities, for example the leader of a council, can receive an additional special responsibilities allowance. The amount, and how it is paid, is decided by the LA, but it will usually be paid quarterly. It should be treated as earnings.

49085 - 49088

Scotland

49089 In Scotland there are four grades of LA councillors¹. The level of remuneration paid to a councillor depends on their grade and the banding of the LA. In addition councillors are entitled to mileage allowance for travel². There is no entitlement to any other allowance but councillors are entitled to reimbursement of certain expenses subject to a maximum rate³. The Civic Head of the Council may be entitled to reimbursement of additional receipted expenditure⁴. Certain elements of the councillors' remuneration and expenses are taxable and subject to NI contributions as an employed earner.

1 Local Governance (Scotland) Act 2004 (Remuneration) Regulations 2007, reg 4;

2 Local Government (Allowances and Expenses) (Scotland) Regulations 2007, reg 5; 3 reg 4; 4 reg 3

Childcare and dependent carers' allowance

49090 LAs may pay a childcare and dependent carers' allowance to those councillors who incur expenditure for the care of their children or dependent relatives whilst undertaking various duties as a councillor. It should be treated as earnings¹.

1 ESA Regs, reg 95(1)(f)

Expenses

49091 The DM should disregard any reimbursement to the councillor by the LA, for expenses that were wholly, exclusively and necessarily incurred in the performance of the councillor's duties¹, for example travel and subsistence allowances². If the LA cannot say how much of any payment is for expenses, ask the councillor for details. Evidence from the councillor should normally be accepted. If the councillor has an income tax assessment, take this into account.

1 ESA Regs, reg 95(2)(c); 2 R(IS) 6/92

49092 After expenses in DMG 49091 have been disregarded, the DM should deduct any expenses that are wholly, exclusively and necessarily incurred in the performance of the councillor's duties that are not reimbursed to them by the LA (see DMG 49036). The councillor must justify the amount of each

expense, and the amount of expense incurred should be no more than necessary to satisfy the minimum acceptable standard from someone in the councillor's position.

Example

Sophie attends three school summer fairs, in her capacity as a LA councillor. At each one she donates a small gift for a raffle. She provides evidence of her allowance for the month of July, and claims the amount she spent on the gifts as an expense. The DM decides that such an expense is no more than the necessary minimum from a person in the claimant's position, and decides that the expense was wholly, exclusively and necessarily incurred in the performance of her duties as a councillor.

49093 The DM should

1. add together all of the allowances that are paid **and**
2. deduct any expenses that are wholly, exclusively and necessarily incurred in the performance of the councillor's **official** duties¹.

1 ESA Regs, reg 95(2)(c); R(IS) 16/93

49094 For the purposes of DMG 49092, if the expenses are wholly, necessarily and exclusively incurred in the performance of **constituency work**, those expenses should only be deducted from the basic allowance. This is because this allowance is paid to every councillor and not for any specific duties.

49095 Postage and stationery expenses that arise from the role of being a councillor rather than official duties should only be deducted from the basic allowance.

49096 Secretarial expenses should only be deducted from the basic allowance.

49097 Dependants' care costs cannot be deducted as an expense. This is because they are expenses incurred in order to enable councillors to perform their duties rather than necessary for the performance of them.

49098 Clothing and footwear expenses wholly, exclusively and necessarily incurred in the performance of a councillor's duties should be deducted from the basic allowance. The amount of expense incurred in any week cannot always be calculated only by reference to the price paid in any week. A longer term view may be necessary to establish the actual expenditure incurred. This may involve determining or estimating how much of the use was, is or will be council use rather than private or other use. DMs may need to apply averages and estimates over a period to calculate a weekly deduction.

49099 Travelling expenses should be disregarded from the basic allowance unless they are covered by the travel allowance which is already disregarded (see DMG 49091). This is different to the normal treatment of travelling expenses (see DMG 49039). When councillors travel from home to the council office or any other work place, for example surgeries, and governor's meetings it is not just travelling to work it is part of the work itself.

49100 Subscriptions to trade unions or other political or professional bodies such as the Association of Labour Councillors should be deducted from the basic allowance.

49101 - 49104

49105 Additional costs incurred because of the use of the home as an office, for example heating and lighting should be deducted as an expense from the basic allowance (see DMG 49038). The DM should establish what proportion of the total household bill can be regarded as arising from the councillor's work. Unless the DM is considering a past period, the cost of expenses such as heating and lighting may not

be known until some time in the future. In these circumstances an estimated figure should be agreed with the claimant taking account of any relevant evidence.

49106 Pension contributions are not an expense. But, one half of any sum paid by the councillor towards an occupational or personal pension can be deducted from the gross earnings (see DMG 49027 and DMG 49030).

Payments not claimed

49107 Councillors are entitled to allowances whether they are claimed or not¹. If a councillor has not been paid an allowance and payment could be expected, the DM should consider taking notional income into account² if ESA(IR) is in payment (see DMG Chapter 51).

1 R(S) 6/86; 2 ESA Regs, reg 106(2)

Treatment of expenses

49108 Payments made by an employer for expenses which **are not** wholly, exclusively and necessarily incurred in the performance of the duties of the employment are earnings¹. These can include

1. payments for travelling expenses between home and work
2. expenses for the care of a member of the claimant's family
3. school fees for a claimant's child
4. child care costs.

1 ESA Regs, reg 95(1)(f)

49109 Payments made by an employer for expenses which are wholly, exclusively and necessarily incurred in the performance of the duties of the employment are not earnings¹. They are treated as income other than earnings but are fully disregarded². These can include

1. payments made for travelling expenses and overnight accommodation so that the employee can attend a meeting

2. a mileage allowance to run a car for business purposes.

1 ESA Regs, reg 95(2)(c); R(FIS) 4/85; 2 ESA Regs, Sch 8, para 3

49110 An employer may pay for an expense from which the employee gets some private benefit. If so, divide the payment into private and business use. The part of the payment for private use is earnings¹. The rest, which is for business use, is wholly, exclusively and necessarily incurred, and is not earnings.

1 R(IS) 16/93

Example

Winston uses his own private telephone for work purposes. His employer pays the standing and rental charges for the telephone and 50% of the calls. This is because Winston also uses the phone for personal calls, and 50% of the calls made are personal. The DM decides that 50% of the amount paid by the employer for the standing and rental charges is an expense wholly, exclusively and necessarily incurred. The remaining 50% is for Winston's personal use and so is earnings. The amount paid by the employer for calls is wholly, exclusively and necessarily incurred and is not earnings.

Payments in kind

49111 A payment in kind, for example free accommodation, should not be treated as earnings¹. Where wages are paid at a reduced rate because of the payment in kind, consider whether notional earnings should be applied (see DMG 49193 et seq).

1 ESA Regs, reg 95(2)(a)

49112 Payments in kind do not include any payment by non-cash voucher if it has been taken into account as earnings of an employed earner (see DMG 49130).

Payments in lieu of remuneration

49113 Payments made in lieu of remuneration are paid in place of a person's normal wages or salary. Payments made to Justices of the Peace and LA councillors for loss of earnings are examples of such payments. Employment Tribunal compensation awards for a past employment and awards made under sex and race discrimination law can also be PILORs. Payments made in lieu of remuneration are earnings¹.

1 ESA Regs, reg 95(1)(b); R(SB) 21/86

49114 - 49117

Retainers

49118 Retainers¹ are payments made for a period when no actual work is done, for example to employees of school meals services during the school holidays. These should be treated as earnings.

Retainer payments² include

1. statutory guarantee payments **and**
2. payments made where the claimant has been suspended on medical or maternity grounds.

These payments should not be disregarded.

1 ESA Regs, reg 95(1)(e); 2 Sch 7, paras 1 & 2

Service User Groups

49119 Payments other than expenses received for participating as a service user (see DMG 51270) should be treated as earnings for ESA(IR)¹ and be attributed in the usual way with the appropriate weekly disregards. DMs will also need to consider whether the remunerative work rule applies (see DMG Chapter 41).

1 ESA Regs, reg 95(1)

Example

Jenny is in receipt of ESA(IR). She is involved in a tenants association which discusses LA housing issues. In return for attending the meetings, Jenny receives £20 from the LA. The DM decides that the payment is a payment of earnings and falls to be taken into account when calculating Jenny's entitlement to ESA(IR). The payment is subject to the normal weekly earnings disregards.

Single status payments

49120 A payment which is made to compensate a person for past pay inequalities has to be taken into account if that person or their partner is entitled to ESA(IR). These payments are sometimes called "single status payments" but may be called something else. These payments are earnings¹.

1 ESA Regs, reg 95(1); Minter v. Kingston Upon Hull City Council [2011] Civ 1155

Example

Andrew is in receipt of ESA(IR). His partner works part-time for the local council and she has been offered a payment by her employer to redress historical pay inequalities between female and male employees. The employer offers Andrew's partner a payment of £7,200. This is paid to her with her salary and the DM treats it as a payment of earnings.

Special occupations

49121 Some occupations are known as special occupations. These are

1. auxiliary coastguards for coastal rescue activities
2. in Scotland a P/T firefighter employed by the Scottish Fire and Rescue Service¹
3. in England and Wales, a P/T firefighter employed by a fire and rescue authority under relevant legislation²
4. P/T work crewing or launching a lifeboat
5. members of the reserve forces³ (see Appendix 1 to this Chapter).

1 Fire (Scotland) Act 2005, s 1A; 2 Fire and Rescue Services Act 2004;
3 SS (Contributions) Regs 2001, Sch 6, Part 1

49122 People in special occupations may receive a bounty payment for their services. If a bounty is paid at intervals of at least one year, it should be treated as capital¹. If it is paid more often than once a year, for example quarterly, it should be treated as earnings. The period for which the bounty is payable is of no relevance.

1 ESA Regs, reg 112(1)

Auxiliary coastguards

49123 Payments received for watch keeping duties should be treated as earnings. Payments for expenses of coastal rescue activities should also be treated as earnings, unless they were wholly, exclusively and necessarily incurred in the performance of the coastguard's duties (see DMG 49017).

Part-time members of a fire brigade

49124 Payments for drills, services or retaining fees, should be treated as earnings. Payments for expenses should also be treated as earnings if they were not wholly, exclusively and necessarily incurred in the performance of the duties (see DMG 49017).

Part-time crewing or launching of a lifeboat

49125 Treat payments for drills, services or retaining fees, as earnings. Payments for expenses should also be treated as earnings, unless they are wholly, exclusively and necessarily incurred in the performance of the duties (see DMG 49017).

Reservists

49126 Members of the Army Reserve or Royal Navy/Royal Air Force volunteer forces may receive a

training expenses allowance, paid at a flat rate. The allowance is for meals and other incidental expenses while on duty. It is not for expenses wholly, exclusively and necessarily incurred in the performance of the duties and should be treated as earnings.

49127 Payments for travelling expenses between the volunteer's home and place of duty, for example the drill hall, are also not wholly, exclusively and necessarily incurred. Such payments should be treated as earnings¹.

1 ESA Regs, reg 95(1)(f)(i)

49128 Treat other payments, for example drill night pay, as earnings, unless they are for an item wholly, exclusively and necessarily incurred in the performance of the duties (see DMG 49017).

Tips

49129 Tips are expected in some jobs, for example hairdressers, waiters and bar staff. They may be made because of the services rendered by the employee in the course of the employment. The average weekly amount of any such tips received should be included in the calculation of earnings. Do not include tips made as gifts on grounds that are personal to the recipient and unconnected with the employment.

Vouchers and child care cheques

49130 An employee may receive vouchers instead of, or as well as, earnings. These can include

1. luncheon vouchers
2. child care vouchers
3. child care cheques.

49131 Earnings of an employed earner include the amount for any payment made by a non-cash voucher that has been taken into account as earnings for the purposes of working out the amount of NI contributions to deduct¹.

Note: The amount taken into account as earnings for NI purposes may be equal, or be more or less than, the face value of the voucher.

1 ESA Regs, reg 95(1)(k)

49132 Payments in kind are not normally taken into account as earnings of an employed earner. Payments in kind do not include any non-cash voucher if it has been taken into account as earnings of an employed earner¹ (see DMG 49130 above).

1 ESA Regs, reg 95(3)

Earnings disregards - ESA(IR) 49141 - 49175

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Application to claimant and partner

49141 Net earnings should be taken into account for ESA(IR) less any disregard¹. The amount of disregard will depend on

1. whether the earnings are from PWK and the type of PWK
2. who the earnings belong to.

1 ESA Regs, reg 96(2) & Sch 7

49142 The income of each member of a couple is worked out separately in ESA(IR). It is then treated as belonging to the claimant¹. This means that earnings of the claimant's partner can affect the award of ESA(IR).

1 WR Act 07, Sch 1, para 6(2)

49143 Disregards may apply to the claimant and partner, with an overall maximum limit set for the couple. Where more than one disregard applies, the couple is normally entitled to only one disregard. This will usually be the highest one.

49144 The exception to this rule is where amounts can be disregarded as in DMG 49166 - 49169. In such a case, those amounts may be disregarded in addition to the normal maximum set for the family.

Permitted work - claimant only working

49145 Where the claimant is undertaking PWK or exempt work (see DMG Chapter 41) then the earnings from that work are disregarded for ESA(IR) if the earnings limits for that type of PWK are not exceeded¹. See DMG Chapter 41 for guidance on the types of PWK and the PWK limits.

1 ESA Regs, Sch 7, para 5

Work with weekly earnings of £20 or less

49146 Up to £20 is disregarded for any PWK where the claimant's weekly earnings are £20 or less¹. This is known as PWLL.

1 ESA Regs, Sch 7, para 5; reg 45(2)

Supported permitted work

49147 Earnings of up to 16 x NMW¹ are disregarded for supported permitted work² which is

- 1.** part of a treatment programme and is done under medical supervision while the person doing it is an in-patient, or is regularly attending as an out-patient, of a hospital or similar institution **or**
- 2.** supervised by a person employed by a public or local authority or voluntary organisation engaged in the provision or procurement of work for persons who have disabilities.

1 ESA Regs, Sch 7, para 5; 2 reg 45(3)

Permitted work higher limit

49148 Earnings of up to 16 x NMW¹ are disregarded for specified work which is work done under the rules for PWHL (see DMG 41211 et seq) where²

- 1.** the work is for less than 16 hours per week **and**
- 2.** the weekly earnings do not exceed 16 x NMW **and**
- 3.** the work is performed during a 52 week period beginning on the first day on which the work is done, provided that
 - 3.1** the claimant has not previously performed specified work **or**
 - 3.2** since the beginning of the last period of specified work, the claimant has ceased to be entitled

to

3.2.a ESA or

3.2.b credits on the grounds of LCW

for a continuous period exceeding 12 weeks or

3.3 52 weeks or more have passed since the claimant previously performed specified work.

1 ESA Regs, Sch 7, para 5; 2 reg 45(4)

Note: Paragraph 3 does not apply to PWK carried out after 3.4.17. See DMG 49149 - 49150 for PWK carried out after 3.4.17.

49149 **From 3.4.17**

1. PWHL and PWK (LCWRA) are combined into one type of PWK, referred to as permitted work (PW)¹
and

2. The period of specified work no longer applies²

1 SS(EW & HA)(Amdt) Regs. reg 2(a) &

3(a); 2 reg 2(b) & (c) & 3(b) & (c)

49150

1. Where a claimant is already serving a period of specified work which ends after 3.4.17, there is no restriction on the period for which they can undertake PW.

2. Where a claimant has completed a period of specified work, there is no requirement for a break in PW before the claimant can undertake PW again.

49151 - 49152

Permitted work - claimant's partner also working

49153 Up to £20 of the partner's earnings from work can be disregarded where

1. the claimant is undertaking

1.1 PWLL with weekly earnings less than £20¹ (see DMG 41196) **or**

1.2 SPW² (see DMG 41197 et seq) **or**

1.3 PW³ (DMG 41211 et seq) **or**

2. the claimant's earnings from the PWK are below the earnings limit for that category of work.

1 ESA Regs, Sch 7, para 6(a); 2 Sch 7, para 6(b); 3 Sch 7, para 6(b);

49154 The amount of the partner's earnings disregarded will depend upon how far below the PWK limits that the claimant's earnings are. The maximum that can be disregarded from the partner's earnings is £20 per week.

Example 1

Jonah is in receipt of ESA(IR). He works 2 hours a week doing some gardening and he is paid £10 a week. These earnings are below the £20 PWK limit. His partner, Susan, works as a classroom assistant and earns £50 a week. The DM disregards £10 of Susan's earnings.

Example 2

Winona is in receipt of ESA(IR). She is undertaking work which is supervised by a voluntary organisation and she earns £60 a week. These earnings are below the PWK limits for that category of work. Her partner, Noah, works in a shop and earns £50 a week. The DM disregards £20 of Noah's earnings.

Other work

49155 A weekly disregard of £20¹ applies where the claimant is undertaking work

1. as a councillor²

2. as a DLA advisory board member or as a member of a FtT with a disability qualification (see DMG 41155 et seq)³

3. during an emergency to protect another person or to prevent serious damage to property or livestock⁴

4. done whilst receiving assistance in pursuing self-employed earner's employment under certain legislation⁵.

1 ESA Regs, Sch 7, para 7(1) & para 7(2); 2 reg 40(2)(a); 3 reg 40(2)(b); 4 reg 40(2)(e); 5 reg, 45(5)

49156 A weekly disregard of £20¹ applies where the claimant's partner is performing work

1. as a childminder²
2. on the self-employment route³
3. in a special occupation⁴ (see DMG 49121 for what a special occupation is)
4. as a councillor⁵
5. as a disabled worker⁶ (see DMG 41511)
6. whilst

6.1 involved in a trade dispute which prevents entitlement to JSA **or**

6.2 would otherwise be entitled to IS following a return to work after a trade dispute⁷

7. and would be entitled to IS as a carer⁸ (see DMG Chapter 20)

8. whilst

8.1 in employment **and**

8.2 living in or temporarily absent from a care home, Abbeyfield Home or an independent hospital
and

8.3 requires personal care by reason of old age, disablement, past or present dependence on alcohol or drugs, past or present mental illness or a terminal illness⁹.

Note: See DMG 51194 for the meaning of independent hospital.

1 ESA Regs, Sch 7, para 7(2); 2 reg 43(1)(a); 3 reg 43(1)(d); 4 reg 43(1)(e); 5 reg 43(1)(f); 6 reg 43(2)(a);
7 reg 43(2)(b); 8 reg 43(2)(c); 9 reg 43(2)(d)

Work as a DLA advisory board or first tier tribunal member and permitted work

49157 Where the claimant is working as a DLA advisory board or FtT member and is also performing PWK, up to £20¹ a week can be disregarded from the earnings where that work is

1. below the £20 weekly limit if the work is PWLL (see DMG 49146) **or**
2. below the relevant limit if the work is SPW or PWHL (see DMG 49147 - 49148).

The amount of earnings disregarded will depend upon how far below the PWK limits the earnings are.

The maximum that can be disregarded each week is £20.

1 ESA Regs, Sch 7, para 7(3)

Example 1

Natalie is a DLA advisory board member and is paid £50 a week. She also earns £10 a week helping in her friend's business. The DM can disregard all of Natalie's earnings from helping her friend and £10 of the earnings from being a DLA advisory board member.

Example 2

Imran is a FtT member earning £70 a week. He also performs PWHL earning £60 a week. The DM can disregard all of the earnings from the PWHL and £20 of the work from being a FtT member.

Partner performing part-time work

49158 A weekly disregard of £20 applies where the claimant's partner is in work which isn't remunerative work (see DMG Chapter 41) and the claimant is not performing PWK¹.

1 ESA Regs, Sch 7, para 7(4)

49159 Where DMG 49141 - 49146 applies to a claimant then the disregards can only apply to the claimant's partner if the claimant's earnings are less than £20 a week. The maximum that can be disregarded from the partner's earnings is £20 a week¹.

1 ESA Regs, Sch 7, para 7(1)

Reservists

49160 In addition to the disregard described at DMG 49156, a disregard applies to the partner of an ESA(IR) claimant in respect of their attendance at annual continuous training as a member of the reserve forces. DMG 48073 provides guidance on the period of attribution for these payments.

49161 Any earnings in respect of attendance at annual continuous training, in aggregate with any other income that the claimant may have, are disregarded which exceed

1. the claimant's applicable amount **less**

2. ten pence¹.

1 ESA Regs, Sch 7, para 11A(1) & (2)

Example

Jane is entitled to ESA(IR) and her benefit week begins on a Tuesday. On 30.11.12 Jane's partner receives a payment of £532 from the Army in respect of the time he spent away training at camp. Jane's partner was at camp for 15 days from 3.11.12 to 17.11.12. Jane's applicable amount for ESA(IR) is £105.95.

The DM decides that the payment in respect of time spent at camp:

- 1.** is taken into account, subject to the appropriate disregards
- 2.** is to be treated as paid on 27.11.12 because that is the first day of the benefit week in which it is received
- 3.** is attributed for a period of 14 days because it is payment specifically in respect of duties performed at a camp lasting in excess of 14 days. It is therefore taken into account from 27.11.12 to 10.12.12
- 4.** the weekly amount of the payment is determined to be £248.26 ($£532 \times 7 / 15$)
- 5.** for the weeks ending 3.12.12 and 10.12.12 only £105.85 of the earnings are taken into account. This is because this is the amount of Janet's applicable amount less 10 pence.

Janet's ESA(IR) resumes at its normal rate of £105.95 from 11.12.12.

49162

49163 Members of the territorial or reserve forces (see Appendix 1 to this Chapter) may stop getting ESA(IR) because of that employment. Earnings may then be due for a period when the claimant was not entitled to benefit.

49164 Take any such earnings into account as normal, if the reason ESA(IR) stops is because¹

- 1.** the claimant's earnings were more than the prescribed amount **or**
- 2.** the claimant's income was more than the applicable amount.

1 ESA Regs, Sch 7, para 12

49165 If ESA(IR) stops for any other reason, disregard any earnings due for the period when the claimant was not entitled¹.

1 ESA Regs, Sch 7, para 12

Earnings paid for employment which has been interrupted

49166 Disregard earnings from employment that has been interrupted¹, for example by a period of sickness. SSP, SMP, Paternity Pay and Statutory Adoption Pay are examples of other payments that might be made. SSP, SMP, Paternity Pay, Shared Parental Pay and Statutory Adoption Pay should be

taken into account as income (see DMG Chapter 51).

1 ESA Regs, Sch 7, para 1(1)(b)

49167 This disregard does not include

1. retainers¹ including

1.1 statutory guarantee payments **and**

1.2 payments made where the claimant has been suspended on medical or maternity grounds

2. earnings where the claimant has been suspended from employment.

1 ESA Regs, Sch 7, paras 1 & 2

Earnings payable outside United Kingdom

49168 Earnings may be payable in a country outside the UK. If they cannot be transferred to the UK, disregard them for as long as their transfer is prevented¹.

1 ESA Regs, Sch 7, para 9

Earnings paid in a foreign currency

49169 Where earnings are paid in a foreign currency, disregard any amount charged for changing them into sterling, for example banking charges and commission payments¹.

1 ESA Regs, Sch 7, para 10

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General

49176 Employment and training schemes are funded out of public funds by the Young People's Learning Agency for England, the Chief Executive of Education and Skills Funding or by or on behalf of the Secretary of State for Education and Skills, Scottish Enterprise, the Highlands and Islands Enterprise, Skills Development Scotland or the Welsh Ministers. Where a person is on such a scheme, establish whether they are

1. employees

1.1 in remunerative work **or**

1.2 in P/T work **or**

2. trainees.

Employees

49177 Employees get a wage from their employer. Treat the wage as earnings. If the work is remunerative there will be no entitlement to ESA(IR). If the work is P/T, take the net earnings into account, less any disregard (see DMG 49141 et seq).

Trainees

49178 Trainees get a training allowance with no income tax or NI contributions deducted¹. Treat these allowances as other income and take them into account in full² except for

1. travelling expenses repaid to the trainee unless the same expenses have already been disregarded as student income (see DMG Chapter 51)³

2. living away from home allowance (see DMG Chapter 51)

3. training premium (see DMG Chapter 51)

4. childminding costs paid direct to the childminder⁴ (see DMG Chapter 51)

5. training bonus⁵ (see DMG Chapter 52)

6. discretionary payments made under Employment and Training Law intended to meet or help meet the special needs of a person undertaking a qualifying course⁶.

1 ESA Regs, reg 2(1); 2 reg 104(1); 3 Sch 8, para 15; 4 reg 107(3); 5 Sch 9, para 32;

6 Sch 8, para 15; E & T Act 1973, s 2

49179 - 49182

Work based learning - Skill Build and Training for Work (Wales and Scotland)

49183 Work Based Learning (TfW in Scotland and WBL - SB in Wales) is a voluntary scheme for the long term unemployed in Scotland and Wales. It is provided by Scottish Enterprise, the Highlands and Islands Enterprise, Skills Development Scotland or the Welsh Ministers¹. Schemes may be known locally by a name other than Work Based Learning. Local Jobcentre Plus offices can confirm whether a particular scheme is Work Based Learning.

1 TfW (Miscellaneous Provisions) Order 1995

49184 There are two groups who are treated differently depending on whether a training allowance is payable

- 1.** those receiving or eligible to receive a training allowance, who are treated as trainees
- 2.** those receiving or entitled to receive remuneration from the employer providing the training facilities who are treated as employees.

Employment rehabilitation programmes

49185 Employment rehabilitation programmes are for adults who, because of illness, injury or disability, may need help to improve their employment prospects. Courses can last up to six months and are also known as Work Choice.

49186 People taking part in employment rehabilitation programmes are trainees. Treat any payments in the same way as a training allowance. Payments can include

- 1.** an allowance for attending the course
- 2.** travelling expenses

3. an allowance for midday meals.

Work Based Training for Young People and Modern Apprenticeships

49187 WBTfYP (Skillseeker's in Scotland) and Modern Apprenticeships provide training for young people who

- 1.** have reached the minimum school leaving age
- 2.** are not attending school or college F/T as a pupil or student
- 3.** are not in higher education
- 4.** are not in custody as prisoners or on remand
- 5.** are not overseas nationals subject to

5.1 employment restrictions **or**

5.2 a time limit on their stay in GB (other than a refugee or asylum seeker) **and**

- 6.** are not benefiting from any other Government scheme (for example work based learning).

49188 Young people on WBTfYP (Skillseeker's in Scotland) and Modern Apprenticeships can be employees or trainees with wages or training allowances. Employee status is more common on Modern Apprenticeships. Courses may vary in length and typically may be around two years on WBTfYP or three on Modern Apprenticeships. See DMG Chapter 34 for further details.

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Notional earnings 49193 - 49299

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Notional earnings - general

49193 Notional earnings are earnings that a person does not actually have, but is treated as having. For

1. claimants in receipt of ESA(IR), notional earnings of

1.1 the claimant **or**

1.2 any partner

are taken into account as if they were actual earnings¹ (but see DMG 49145 et seq where that notional income is PWK)

2. claimants in receipt of ESA(Cont), notional earnings are

2.1 not deducted from the amount of ESA(Cont) payable **but**

do count when determining whether the claimant has breached either of the PWK limits².

1 ESA Regs, reg 109(2); 2 reg 88

49194 The DM should treat the claimant or partner as having notional earnings where¹

1. they perform a service for another person **and**

2. that person

2.1 makes no payment of earnings **or**

2.2 pays less than the rate paid for a comparable employment in the area.

The rate for comparable employment in the area is a question of fact and must be based on evidence. It should not be assumed to be the NMW. If the notional income rules are satisfied the DM must take into account at least the NMW rate relevant to the claimant, unless one of the situations in DMG 49197 applies.

Note: If it is the claimant who is working then the DM will need to consider the guidance in DMG Chapter 42 with regard to LCW.

1 ESA Regs, reg 108(3)

49195 The NMW provides that in most cases workers will be paid at least a standard hourly rate, dependent on their age and whether they are receiving accredited training.

49196 Not all the money paid to a worker counts for the purposes of the NMW. Also the hours for which NMW should be paid depends on the type of work the worker is doing.

Note: If DMs are unable to decide whether the NMW applies or to calculate the NMW for a particular claimant further guidance should be sought from DMA (Leeds).

49197 The DM should not take notional earnings into account where the claimant or the claimant's partner

1. satisfies the DM that the means of the person for whom the service is performed, are not enough to pay, or to pay more for the service¹ **or**

2. is engaged by a charitable or voluntary organization or is a volunteer and the DM is satisfied that it is reasonable for the services to be provided free of charge² **or**

3. provides a service under an employment or training programme if

3.1 no training allowance is payable to the claimant or the claimant's partner for the programme **or**

3.2 where such an allowance is payable it is for the sole purpose of reimbursement of travelling or meal expenses to the person participating in the programme³

4. is engaged in work experience in

4.1 the NDLPs **or**

4.2 a scheme approved by the Secretary of State as supporting the objectives of the NDLPs⁴.

1 ESA Regs, reg 108(3); 2 reg 108(4)(a); 3 reg 108(4)(b); 4 reg 108(4)(c)

49198 The DM should not take notional earnings into account where the claimant is participating in a work placement approved by the Secretary of State (or a person providing services to the Secretary of State) before the placement commences¹ and for which the claimant receives no payment.

1 ESA Regs, reg 108(4)(d) & (e)

49199 In DMG 49198 “work placement” means¹ work which

1. is practical work experience **and**

2. is not performed in expectation of payment.

1 ESA Regs, reg 108(4)(e)

Remunerative work

49200 Where a service is being performed, consider whether the remunerative work exclusion applies for ESA(IR).

Meaning of voluntary organization

49201 Voluntary organization means¹ a body that is not a

1. public authority **or**

2. LA.

whose activities are not carried out for profit.

1 ESA Regs, reg 2(1)

Meaning of “person”

49202 The meaning of “person” as used in DMG 49194 **1.** and **2.** includes¹

1. a limited company

2. a corporate body

3. an individual.

Performance of a service

49206 A service performed for another person benefits that person. That benefit may be in not having to employ someone else to do the work. It might also be in getting extra work done at little, or no, cost.

49207 A service may be performed even where there is a close family relationship¹, for example mother and son. In such cases there may be no formal arrangement. The person for whom the service is performed is referred to as the employer in DMG 49252.

1 R(SB) 3/92

Details of the service performed

49208 There may be a low rate of payment, or no payment at all being made for the service. If so, compare it with other employment by finding out

- 1.** who is benefiting from the service
- 2.** why it is being provided
- 3.** when it is being provided (for example, during the day, night, or both)
- 4.** where it is provided
- 5.** who suggested that it be provided
- 6.** what duties are involved
- 7.** how many hours each day, or week, are spent on those duties.

When earnings are not to be treated as paid

49209 Do not treat the claimant as having earnings where

- 1.** the claimant

1.1 works for a charitable or voluntary organization, for example Attend (formerly the League of Hospital Friends) **or**

1.2 is a volunteer **and**

- 2.** it is reasonable for the service to be provided free of charge.

Meaning of volunteer

49210 Volunteers¹ in this context are people who often have no connection to any charitable or voluntary organization. They perform, of their own free will, a service for another person. They do so without any legal obligation and expect no payment.

1 R(IS) 12/92

49211 A person may hope or expect to be paid for their services at a later date. If payment is to be made for work currently being done, the person is not a volunteer. If payment is to be for work done at a future date, the person may still be a volunteer.

Example

Sinead starts unpaid work for the Church of England Children's Society in January. On 1st March she becomes a paid employee for the society as a permanent F/T fundraiser. The voluntary work she did in January and February was not done in expectation of payment. During that time she was a volunteer.

Time exchange schemes

49212 Participation in a time-exchange scheme is not voluntary work, but as the nature of the scheme is not to make any payment in cash, it is treated in the same way as voluntary work as far as the effect on ESA(IR) is concerned. The hours worked by the claimant/partner are "banked" with the scheme and can be exchanged for the same amount of time from another member who will provide their skills to the claimant. Exceptionally where expenses are reimbursed they should be treated as other income (see DMG Chapter 51).

Is it reasonable

49213 There is no definition of reasonable. The question should be considered based on the evidence before the DM in each case¹. No exhaustive list can be given of relevant factors but they may include matters such as

1. whether the person providing the services is getting anything in return (for example, training)
2. the length of time for which the services have been offered (the shorter the period, the more reasonable it may be)
3. claimants are expected to do their best to avoid dependency on benefits. They should seek paid work wherever possible.

Note: Whether it is reasonable for the employer to pay is not relevant here. The important point is whether it is reasonable for the claimant to provide the services free of charge.

1 R(IS) 12/92

Carers

49218 The claimant or partner may be caring for a sick or disabled relative. In such a situation it is often reasonable for the services to be provided free of charge. In considering this the DM should take account of all the relevant circumstances. In particular the DM should take into account matters such as

1. the general background of the way in which the claimant came to be caring for the relative
2. what options would be available if they stopped providing the care
3. the nature and frequency of the care provided
4. the expectations of the family members concerned
5. their housing arrangements
6. whether the person gave up work to look after the relative.

49219 The DM may consider that it is **not** reasonable for the services to be provided free of charge. The question of notional earnings may then need to be considered. The DM should take into account matters such as

1. the means of the person cared for
2. whether they have talked about their financial relationship, and if so, what the results were
3. what would happen if the claimant made a charge for the care.

Note: Whether it is reasonable for the employer to pay is not relevant here. The important point is whether it is reasonable for the service to be provided free of charge.

Example 1

Timothy is aged 45. He lives with and looks after his elderly disabled father. His father's only income is RP and AA. Timothy is an only child and he gave up work to look after his father. Timothy is a volunteer in looking after his father. It is reasonable for him to provide his services free of charge.

Example 2

Julie lives with and looks after her disabled cousin. Her cousin gets a large weekly income from a trust fund. Julie did not give up a job to look after her cousin. The family did not expect that she should be responsible for looking after her cousin. It is not reasonable for Julie to provide her services free of charge.

Fine Payment Work - England and Wales

49220 Fine payment work has been introduced for people who are genuinely unable to pay their fine. Claimants are allowed to do unpaid work in the voluntary sector as an alternative. When the work is done the fine is regarded as paid. A fines officer works out the number of hours the offender is required to work to discharge the fine. The offender is allowed to reduce the number of hours he is required to work by paying part of the fine.

49221 Offenders who are genuinely unable to pay their fine will be able to work off their fine at a fixed rate¹. In these circumstances notional income should not be applied as offenders are not depriving themselves of income. They do not have the opportunity to be paid for the work they are doing, it is done to comply with a court order. Offenders cannot be said to be performing a service when they are complying with a court order.

1 The Discharge of Fines by Unpaid Work (Prescribed Hourly Sum)
Regulations 2004 (S.I. 2004 No. 2196), reg 2

Supervised Attendance Orders - Scotland

49222 These orders¹ are similar to fine payment work in England and Wales. They provide a community-based alternative to imprisonment for failure to pay a fine, substituting the unpaid portion of a fine for a period of constructive activity which is organised by the social work department.

1 Criminal Procedure (Scotland) Act 1995, s 235 - 237 & Sch 7

49223 The period of these orders can vary between 10 and 100 hours. The activity undertaken often includes elements of social education, financial management and unpaid work. The granting of these orders discharges the fine¹.

1 Criminal Procedure (Scotland) Act 1995, s 235(6)

Calculation of gross notional earnings

49224 The maximum amount of notional earnings that can be taken into account is

1. the market rate for comparable employment in the area **or**
2. the means of the person to pay for the service

whichever is the lower. However the DM should take into account at least the NMW rate relevant to the claimant or partner.

Meaning of in the area

49225 In the area means the normal travel to work area. When considering this point, take account of

where the claimant or partner lives and works.

Comparable employment

49226 It is not identical or equivalent employment that has to be identified, but comparable employment. Work of a different type can be comparable if the skills and experience needed are similar to those being used.

49227 Work of the same type will usually be comparable. But it may not always be paid at the same rate. Rates of pay can be affected by the employee's

1. skills

2. age

3. seniority

4. experience.

49228 Do not assume that the highest rate paid is the normal rate for the job. If the amounts paid vary, compare the available evidence with the pay and requirements of the claimant's job.

49229 - 49232

Payments in kind

49233 Payments in kind are not earnings¹. Payments in kind should not be taken into account when looking at whether a person is paid, or paid less, than the rate for comparable employment².

1 ESA Regs, reg 95(2)(a); 2 R(IS) 2/98

Example

Bella works as a shop assistant for ten hours per week. She receives payment of £7 in cash and goods to the value of £35 each week. The goods to the value of £35 are payment in kind and are disregarded. The DM considers what the market rate for the job is and calculates notional earnings at £42 per week. He decides it is reasonable to deduct the £7 cash payment from the notional earnings and takes £35 per week into account.

Are earnings to be treated as paid

49234 Consider whether it is reasonable to treat earnings as paid by taking into account

1. whether the employer

1.1 pays less than the going rate for similar employment in the area **or**

1.2 makes no payment **and**

2. a reasonable rate of pay for the job they are doing.

Reasonable rates of pay

49235 The rate paid for comparable employment in the area is a question of fact. It should not be assumed to be the NMW. If earnings are not immediately ascertainable, the DM treats the claimant as possessing earnings that are reasonable in the circumstances¹. The DM must treat the claimant as possessing at least the NMW rate that is relevant to them.

1 ESA Regs, reg 108(1)

49236 The parts of the job which would normally attract earnings, or more earnings, should be identified. Ignore hours spent under training or supervision, unless the cost is outweighed by the work performed.

Can the person afford to pay

49237 The claimant may say that the employer is unable to pay. If this is the case, the claimant must submit evidence, so that the DM can consider the question. This could be

1. in the case of a S/E trader, the accounts, bank statements and details of trading turnover **or**

2. in the case of an individual, details of that person's resources and outgoings.

49238 Where the service is for a person, take account of that person's actual means. This is not the amount by which their income would exceed a notional benefit level¹. It is the amount of money that they actually have available to them.

1 R(SB) 3/92

49239 The DM should consider what is reasonable in each case. Where the employer is getting JSA(IB), ESA(IR) or IS they will not normally have the means to pay. But this general rule may not always apply, for example, where the "employer" gets benefits, or other payments, to pay for their personal care.

Amount to be taken into account

49240 After determining the gross amount of notional earnings, deduct any actual earnings paid. Actual earnings should be calculated in the normal way.

49241 From the resulting figure, make notional deductions for

1. income tax **and**

2. Class 1 NI contributions **and**

3. half of any sum payable by the claimant towards an occupational or personal pension scheme¹.

1 ESA Regs, reg 109(2)

49242 - 49245

Deduction for notional income tax

49246 Calculate the notional income tax to be deducted¹ as in DMG Chapter 50.

1 ESA Regs, reg 109(2)(a) & (b)

Deduction for notional NI contribution

49247 The deduction depends on the claimant's circumstances. Employed earners between 16 and pension age have to pay NI contributions. This is subject to the amount of their earnings. Contributions are payable at a standard rate between a lower and upper earnings limit¹ (see DMG Chapter 50 Appendix 2).

1 ESA Regs, reg 109(2)(c)

49248 Some married women can pay NI contributions at a reduced rate. These are women who

- 1.** had chosen to pay the reduced rate before 12.5.77 **and**
- 2.** were married before 6.4.77 **and**
- 3.** have continued to renew their certificate of election.

49249 The right to pay reduced rate contributions ends if the woman

- 1.** gets divorced or her marriage is annulled **or**
- 2.** becomes a widow, and has not become entitled to WB **or**
- 3.** loses her right to WB for a reason other than remarrying **or**
- 4.** has had no earnings on which Class 1 contributions are payable and has not been S/E in any two consecutive tax years since 5.4.78.

49250 Standard rate deductions should be made unless there is a current certificate of election.

Deduction for notional payments to an occupational or personal pension scheme

49251 Calculate the deduction for notional payments to an occupation or personal pension scheme as in

DMG 49030¹.

1 ESA Regs, reg 109(2)(d)

Onus of proof

49252 In general, the burden of proof rests on the DM¹. But that is not always the case. The onus of proving that the employer does not have the means to pay falls on the claimant. The DM then considers what reasonable amount of notional earnings should be taken into account.

1 R(SB) 13/86

49253 - 49299

Employment protection legislation - ESA(IR) 49300 - 49499

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Introduction

49300 When working out periods of continuous employment (in order to work out legislative rights that are dependant on the total length of employment with a particular employer) no distinction is made between part-time and full-time service¹. Periods in either type of work count when working out periods of continuous employment.

1 ER Act 96, s 211, 212(1) & 212(3)

49301 The effect of payments or awards made under employment protection legislation on ESA(IR) depends on

1. what type of payment is involved
2. when the payment was due to be made
3. whether the payment has actually been made
4. which benefit has been claimed.

Types of payments

49302 There are many different types of payments and awards including

1. statutory guarantee payments (see DMG 49314)
2. guarantee payments under a collective agreement or wages order (see DMG 49335)
3. remuneration while suspended from work on medical or maternity grounds (see DMG 49411)
4. awards made by an Employment Tribunal or Employment Appeal Tribunal for unfair dismissal (see DMG 49421)

5. interim relief pending determination of a claim for unfair dismissal (see DMG 49425)
6. remuneration under a protective award (see DMG 49441)
7. statutory redundancy payments (see DMG 49506)
8. payments for certain time off work (see DMG 49453).

Treatment of payments - general

49303 Most payments under employment protection legislation should be treated as earnings¹ for ESA(IR) (see DMG 49016 et seq). Take them into account in the normal way.

1 ESA Regs, reg 95(1)

49304 Statutory redundancy payments¹ are the exception to this general rule. They should be ignored as income but taken into account as capital for ESA(IR). Included at Appendix 4 to this Chapter is a table showing how the amount of statutory redundancy payable is calculated.

1 ESA Regs, reg 95(1)

When payments are due to be paid

49305 A payment is due to be paid when it is due and owing. But notional income rules allow for earnings which are due on termination of employment because of redundancy, but which have not been paid¹, to be ignored for ESA(IR) purposes. A payment is no longer due if the right to enforce payment of it is lost.

1 ESA Regs, reg 107(2)(c)

49306 Employers sometimes appeal against Employment Tribunal decisions awarding payments. Until the appeal is decided, entitlement to any award will be in doubt. Any payment will not be due to be paid until the employer's appeal is decided.

49307 Employers and employees sometimes agree a settlement after an Employment Tribunal has made an award. Any settlement varies the award made. The award itself is due and owing until the agreement has been carried out. It is then replaced by the agreement and is no longer due to be paid.

49308 A complaint may be settled before the Employment Tribunal gives a decision. Any payments made are payments on termination of employment.

49309 - 49313

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General

49314 Some employees working short time or who are laid off can get statutory guarantee payments. These are payable when an employer is unable to provide work¹. Bad weather or a drop in business are examples of when this might happen. Statutory guarantee payments cannot be paid for any day after employment has terminated.

1 ER Act 96, s 28

49315 Payments are made for days on which the employee would normally be required to work. Those days are fixed in the contract of employment. A fresh contract can be drawn up by agreement between the employer and employee.

49316 A contract may provide for work only on certain days of the week. The employee normally has to work on those days but not on other days. Statutory guarantee payments are only payable for the days the employee is contracted to work.

Employees who do not qualify

49317 Statutory guarantee payments are not payable to employees who

1. usually work outside GB under their contracts of employment
2. have not been continuously employed by their employer for at least one month¹

3. have no normal working hours fixed by a contract of employment², for example some insurance agents and sales representatives

4. are engaged in share fishing and paid only by a share of the profits or earnings of a fishing boat³

5. are members of the police service and armed forces⁴.

Note: Most employees on off-shore oil and gas rigs in British sectors of the Continental Shelf are entitled to payments.

1 s 29(1); 2 s 28(1); 3 s 199(2); 4 s 200(1) & 192(2)

49318 Statutory guarantee payments are also not payable if the Secretary of State has made an exemption order¹ (see DMG 49369 and Appendix 5 to this Chapter).

Note: The exemption order is made by the Secretary of State responsible for employment legislation.

1 s 35

Calculation

49319 Statutory guarantee payments¹ can be paid for the number of days that an individual is normally contracted to work in a week (up to a maximum of five days per week²) in any period of three months³. Thus if an employee is contracted to work three days per week he can only claim for three days in any three month period, or if he works for six days per week he can only claim for five days in any three month period. Limits on their amount and extent may be varied by order of the Secretary of State⁴. Whether those limits are revised or superseded each year depends on whether the retail prices index for September is higher (or lower) than the index for the previous September⁵. See Appendix 3 to this Chapter for details of the amounts payable.

1 ER Act 96, s 30; 2 s 31(3)-(5); 3 s 31(2); 4 s 31(7) & Employment Relations Act 1999 s 34; 5 s 34

Employees not entitled

49320 An employee is not entitled to a guarantee payment if

1. there is no work because employees of the same or an associated employer¹ are involved in

1.1 a strike **or**

1.2 a lock out **or**

1.3 other industrial action **or**

2. an employer's offer of suitable alternative work has been unreasonably refused by the employee² **or**
3. reasonable requirements imposed by the employer to ensure that the employee's services are available have not been met³.

1 ER Act 96, s 29(3); 2 s 29(4); 3 s 29(5)

Payments not made by employer

49321 Guarantee payments may not have been paid for the first five workless days in a three month period. The employee and employer should be asked to state the reason. If they say that it is because a condition is not satisfied, the DM should normally accept that statement.

49322 The reason given may seem unlikely. For example, the condition quoted may not be one that would stop payment being due (see DMG 49317). Or there may be no good reason given. The DM should make a determination based on the available evidence.

Complaints to a tribunal

49323 Employees may complain to an Employment Tribunal that they have not received all the payments that they should have¹. If this is confirmed the employer will be ordered to pay any amount owing². Settlements can also be reached by conciliation or arbitration.

1 ER Act 96, s 34(1); 2 s 34(3)

49324 Where such a complaint is outstanding the DM cannot determine whether an employee is due to be paid statutory guarantee payments. That question can only be decided by

- Employment Tribunals
- an Employment Appeal Tribunal
- the Court of Appeal
- the Court of Session (in Scotland).

49325 It may be a long time before a decision is made on an employee's complaint. Do not wait until the tribunal's decision is known before deciding the claim. The DM can allow the claim then revise the award once a decision is made.

Effect of statutory guarantee payments

49326 The period over which a payment is taken into account depends on the date it is due to be paid¹. That date is not always clear. It may not be the date they are actually paid.

49327 A decision can only be made when all the evidence is available. The DM should find out

1. when any payments are due to be paid **and**

2. how many days are to be paid **and**

3. when the payments will actually be paid.

49328 In cases of doubt the DM should contact the employer. The employer may be making a guarantee payment, or may say that one is due. That evidence should normally be accepted. The claimant's own evidence can also be accepted. Any decision by a tribunal must always be accepted.

49329 Statutory guarantee payments are payable only for the first five days of lay off in a three month period. They cannot be paid for any other days. Payments for other days will usually be because of a collective agreement or wages order (see DMG 49335 et seq).

49330 Statutory guarantee payments are a form of retainer. They should be taken into account as earnings¹ for ESA(IR) purposes.

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Introduction

49335 Some employers have agreements with their employees for when there is a shortage of work. These collective agreements guarantee employees

1. a minimum payment of wages **or**

2. a minimum amount of work **or**

3. both.

49336 There may be enough work available so that employees can work, or earn, as much as is guaranteed. The agreement may not then be applied. But employees will still have the benefit of it. Their position will be the same as if it had been applied¹.

1 R(U) 23/55

49337 National agreements are sometimes made for an industry¹. They do not always cover all the workers in that industry. Some employers may not be associated with the agreement. Others may have their own local agreements which are different.

1 TULR (C) Act 92, s 178(1)

Terms of an agreement

49338 Employees may have to place their services at the employer's disposal. They may have to be available and willing to work for the employer. This can be for some or all of the working days in the week.

49339 What an employee must do will often be set out in the agreement. The employer's guarantee will also be in the agreement. Consider both when looking at an agreement.

49340 An agreement may not always say what the employee must do. If wages are guaranteed, the employee's services are assumed to be at the employer's disposal on every working day¹. If work is

guaranteed, the employee's services are assumed to be at the employer's disposal for the guaranteed period.

1 R(U) 21/56 (T)

49341 An agreement may be subject to a separate arrangement between the parties involved. Take this into account when deciding the effects of the agreement¹.

1 R(U) 21/56 (T)

49342 Agreements are not affected by changes in the hours or days to be worked. This is so even if part of the time worked is outside the normal hours or days¹.

1 R(U) 1/75

Changes to agreements

49343 Changes to agreements cannot be made until they are known to the employer and employees. They will then usually be jointly agreed and adopted. Make sure that up to date evidence of any agreement is obtained.

49344 Employers may follow an agreement that they are not a party to. In such cases there may be a delay in learning of any changes made. There may also be a delay in carrying out those changes¹.

1 R(U) 40/56

49345 Employers may make backdated payments, because of a change to an agreement. The DM will need to find out when those payments were due to be paid. Employers will usually be able to give this information.

49346 - 49350

Whether agreement effective

49351 An agreement may be legally enforceable. If it is not followed, court action can be taken. This is the case where

- 1.** the agreement includes a written statement that the parties intend it to be a legally enforceable contract¹ **or**
- 2.** the terms of the agreement are part of an individual's terms of employment. They then gain legal effect by being part of the contract between employer and employee incorporated either expressly or by inference.

49352 Agreements remain effective even if employers do not exercise their rights under them. For example, employers may waive their rights to an employee's services. The DM should take this into account when considering the employee's availability.

49353 An employer may not fulfil the terms of a guarantee. Even so, the employee remains under the obligation imposed by the agreement. Such a situation does not usually last long. It may be ended by

- 1.** the employer being persuaded to fulfil the guarantee **or**
- 2.** the agreement being properly suspended **or**
- 3.** the employment being terminated.

49354 Once employment ends a guarantee agreement can no longer apply. If an employee is later re-employed an agreement may start to apply again. The agreement may take account of an employee's previous period of employment.

Suspension of agreement

49355 If an agreement is properly suspended it stops being effective. Some agreements provide for automatic suspension, for example where production is affected by an industrial dispute. The suspension period will usually be the same as the stoppage of work.

49356 Production may be affected by other forms of protest, for example, a political protest. Whether this leads to an automatic suspension will depend on the wording of the agreement. If it refers simply to an industrial dispute there will be no automatic suspension.

49357 Agreements may be suspended by employers and trade unions acting together. Written statements will then be made confirming the suspension and giving the date from which the suspension applies. This must be a current or future date. Agreements cannot be suspended for a past period.

49358 A suspension can be applied part-way through a working week. It will remove employees obligations for days on or after the date it applies. It will not remove them for any day before.

49359 The suspension of any agreement may apply to

- 1.** an individual employee **or**
- 2.** a group of employees **or**
- 3.** the employees of one employer in a federation of employers.

49360 Employees may say that an agreement no longer applies to them. The DM should ask for details

of the suspension. Employers will usually be able to supply these.

49361 An employer may act alone and suspend a guarantee without the agreement of employees. Employees may then accept the change in their terms of employment by continuing to work under the new terms. See DMG 49343 if the employees do not accept the change.

49362 Some agreements set out the circumstances in which they can be revived after being suspended. The date from which this will be effective will depend on the terms of the agreement.

49363 - 49368

Exemption orders

49369 Where there is a collective agreement in force, the Secretary of State can make an exemption order¹. This order stops employees from being entitled to statutory guarantee payments (DMG 49314 et seq). Appendix 5 lists employers who are subject to such orders.

1 ER Act 96, s 35

49370 An exemption order may be made where the agreement allows employees to

1. have access to independent arbitration and adjudication **or**
2. appeal to an industrial tribunal.

Application of exemption orders

49371 An order only applies where an employer is a party to the agreement. This can be as a single employer or as a member of an organization. The exemption order gives details of all parties to the agreement.

49372 An order cannot apply where employers follow the agreement but are not party to it. In such a case employees will not be affected by an exemption order. They will be able to get statutory guarantee payments.

49373 Employees are not entitled to payments where a collective agreement is suspended. If an exemption order has been made they will also not be entitled to statutory guarantee payments. This is because the exemption order continues to apply until it is revoked.

Payment of wages guaranteed

49374 Employees may be entitled to guaranteed payments of wages. These are not statutory guarantee payments and are not usually paid at the same time.

49375 A guaranteed payment of wages is only payable if the employee is covered by an agreement. An

employee is covered if the

- 1.** agreement is in force **and**
- 2.** employer is a party to it **and**
- 3.** employee is within its terms **and**
- 4.** employment has not been terminated.

Note: Employees are within the terms of an agreement where they are the type of employee defined and have served any qualifying period required.

49376 In national agreements the guarantee week is usually the pay week quoted in the agreement. Employers who use a different pay week have a locally agreed variation to those agreements. The week used will be the employee's normal pay week.

49377 If a payment is guaranteed for a working week the payment covers the whole of that week. This is so regardless of how the amount is decided. The phrase "during working hours" used in this context means every working day.

Calculation

49378 The amount to be paid under an agreement is usually

- 1.** a part of a normal week's wage **or**
- 2.** equivalent to payment for a set number of hours at the basic rate.

49379 - 49382

Effect of guaranteed wages payments

49383 Before determining the effect of guaranteed wages payments the DM should find out

- 1.** whether a current collective agreement applies to the employee
- 2.** whether a payment of wages is payable under the terms of any such agreement
- 3.** when any payment is due to be paid
- 4.** the amount that is due to be paid
- 5.** whether an exemption order has been made.

49384 Any guaranteed payment of wages due to be paid should be treated as earnings¹ for ESA(IR).

Work guaranteed

49385 Some employees are guaranteed employment for a limited number of days or hours each week.

49386 If employers cannot provide guaranteed work, payments may have to be made instead. Details of guarantees should be in the agreement.

49387 An agreement which guarantees employment for a full working week should be clear. An agreement for an unlimited period should also be clear. Other agreements may not be so easily understood. For example, the agreement may use vague terms which are not defined.

49388 Employees usually have to be available and willing to work **for their employer** for a guaranteed period. They have to place their services at the disposal of the employer for that period. The phrase "during working hours" in this context means that guaranteed period.

49389 The guaranteed period may be shown in terms of days, shifts or hours. Employment may be guaranteed for a limited number of

1. days or

2. hours or

3. weeks.

49390 If employment is guaranteed

1. for set days or shifts, the employee should work those days or shifts

2. for a number of hours, the employer can say when the employee should work. This may be on some or all of the working days in the week.

49391 Employers usually let employees know when they are not needed for work. This does not remove the obligation imposed by the agreement. It also does not alter the terms of any agreement¹.

1 R(U) 2/58

49392 Employees may work for the full number of days in some weeks but not in others. Any unworked days may be identified by comparing the weeks worked.

Example

Louis is guaranteed two days work a week. He must be available and willing to work for his employer on

those days. In alternate weeks he works two days, Monday and Tuesday. In the other weeks he only works one day, Tuesday. In the one day weeks, Monday is the other day on which he has an obligation to his employer¹.

1 R(U) 22/56 (T)

49393 It may not be possible to identify a day on which the employee should have worked. Take the day as being the last "unworked working day" in the guarantee week. That is a day on which the employee would work in a standard working week.

49394 - 49396

Short time working instead of redundancy

49397 Approved short time is sometimes worked as an alternative to redundancy. Some agreements allow the guarantee to be reduced when this happens. The reduction depends on the terms of the agreement but is usually

- 1.** a percentage reduction, based on the reduction of the normal working week by the short time **or**
- 2.** the amount of time lost.

Ask to see a copy of the agreement if there is any doubt.

49398 A decision to work short time instead of redundancy cannot affect a past period. It will usually be made before the beginning of the pay week. Those affected will be told before the beginning of that week.

49399 A decision can also be made part way through a pay week. Even so it can only have effect from a current or future date. If work is lost because of an emergency it cannot be decided later that it was short time. During such an emergency the normal guarantee will apply.

Approved short time

49400 Short time working usually means the loss of one or more complete days of work. In a standard five day week, each day lost is one fifth of that week. A five day guarantee would then be reduced by one fifth for each day lost.

Example 1

Wendy has a standard five day working week, Monday to Friday. The guarantee is for five days. Because of approved short time working, she only works Wednesday to Friday. Her standard working week has reduced by two fifths (40%). The guarantee is also reduced by 40%, to three days.

Example 2

Campbell has a five day working week. The guarantee only covers four of those days. Short time working of four days is introduced. His guarantee reduces by the amount of time lost. It is reduced by one day to three days.

Night workers

49401 Night workers usually work for a standard number of shifts. Where that number is reduced because of short time working, any guarantee will reduce by an equal amount.

Effect of holidays

49402 Holidays during short time working are treated in the same way as holidays during normal working. They remain holidays even when they fall on days when the employee may not be working.

49403 Guarantee agreements may have details of what should happen in weeks when there are holidays. The guarantee period may simply be reduced by the number of days of holiday. Or it may be reduced by the same percentage as the normal working week is reduced.

Example

Jimmy has a five day working week, Monday to Friday, but is now on short time. The guarantee is for four days a week. If he is on holiday in a pay week, the guarantee will reduce by the same percentage as his working week.

He works Monday to Wednesday, does not work Thursday, and is on holiday on Friday. His normal working week is reduced by the holiday from five days to four. The period of the guarantee is also reduced by one fifth (20%) from four days to $3\frac{1}{4}$ days.

49404 A holiday may fall on a day in the reduced guarantee period. If so, it has the effect of further reducing that period by a day. If it falls on a day that would not be covered by the guarantee it has no further effect.

Effect of guaranteed work

49405 Whenever work is guaranteed, consider whether the remunerative work exclusion applies.

49406 - 49410

Suspension from work on medical or maternity grounds 49411 - 49420

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General

49411 Employees may be suspended from work under certain health and safety law. This can be on medical or maternity grounds¹. Employees may be entitled to be paid while they are suspended². Any payments due are earnings for ESA(IR)³. Take them into account in the normal way.

1 ER Act 96, s 64 & s 66; 2 s 64(1) & s 68(1); 3 ESA Regs, reg 95(1)

Employees not entitled to be paid

49412 Employees lose the right to be paid if they unreasonably refuse the employer's offer of suitable alternative work. This applies whatever the reason for the suspension¹.

1 ER Act 96, s 65(4)(a), s 68(2), s 66

49413 Employees who are suspended on medical grounds also lose the right to be paid if they¹

1. are incapable of work due to sickness **or**
2. do not meet their employer's reasonable requirements ensuring that their services are available.

1 ER Act 96, s 65(3) & (4)(b)

Calculation of pay

49414 Employees suspended on

1. maternity grounds can be paid for as long as they are suspended¹
2. medical grounds have a limit to the payment period. This is a maximum of 26 weeks².

The amount payable in either case is a normal week's pay for each week of the suspension³.

1 ER Act 96, s 68(1), s 66; 2 s 64(1); 3 s 69(1)

Complaints to a tribunal

49415 Employees may complain to a tribunal that they have not received their full entitlement¹. If this is confirmed the employer will be ordered to pay any amount owing. That amount is not due to be paid until the question has been decided by the tribunal.

1 ER Act 96, s 64, 68 & 70

49416 - 49420

Compensation for unfair dismissal 49421 - 49440

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Introduction

49421 Employees have the right to complain¹ to an Employment Tribunal if they think that their dismissal was unfair. If this is confirmed the tribunal can

1. make an order for reinstatement or re-engagement² **or**

2. award compensation

2.1 when no such order is made³ **or**

2.2 if such an order is made but its terms are not fully met by the employer⁴.

1 ER Act 96, s 111; 2 s 113, 114, 115 & 116(1-4); 3 s 112(4); 4 s 117, 118 & 111

49422 Under an order for reinstatement, employees should be treated as if they had not been dismissed. All rights and privileges must be returned to them. This includes payment of any arrears they would have had but for the dismissal.

49423 Under an order for re-engagement employees should be re-employed in a similar job to that which they lost. The terms will be set out in the order. These can include the payment of any arrears that they would otherwise have had.

49424 It may be a long time before the tribunal make their decision. Do not wait until then before deciding the claim. The DM can revise the award once the decision is made.

Interim relief

49425 Some employees can apply to the tribunal for interim relief while waiting for a decision. This can only happen where the reason for the dismissal is connected with

1. TU membership or activities¹ **or**
2. the status or activities of employee representatives (redundancy and business transfers)² **or**
3. health and safety at work matters³.

1 TULR (C) Act 92, s 161-166; 2 ER Act 96 s 128-132; 3 s 128 - 132

Amount of awards

49426 An award of compensation can be made up of

1. a basic award, based on age and length of service¹. (equal to the statutory redundancy payment to which the employee would have been entitled had they been dismissed for redundancy) **and**
2. an amount to compensate for any loss suffered because of the dismissal².

1 ER Act 96, s 118(1)(a) & 119; TULR (C) Act 92, s 156; 2 ER Act 96, s 118(1)(b) & 123

49427 The amount awarded may be reduced to take account of

1. wages that might have been earned if the employee had properly looked for other work after being dismissed¹ **or**
2. the employee's conduct **or**
3. work which the employee may be expected to get at a lower wage than was earned in the former job **or**
4. any redundancy payment that the employee was paid **or**
5. any payment awarded under Sex Discrimination or Race Relations law².

Note: This list is not exhaustive.

1 R(U) 6/85; 2 ER Act 96, s 126

49428 - 49430

49431 Under certain recoupment law¹, the award can also be adjusted to take account of the amount of benefit received over the relevant period. This amount is then recovered from the former employer by the DM (see DMG Chapter 09). But this only applies to formal awards and where the employee has claimed or had been granted ESA, JSA or IS.

1 Employment Protection (Recoupment of JSA and IS) Regs 1996

49432 Recoupment law does not always apply, for example where the award is made under Sex Discrimination or Race Relations law. Even so, the tribunal will normally reduce the award by the amount of benefit paid for the period of the award. In such cases it is unlikely that action will be taken to recover the amount of any benefit overpaid.

Period of awards

49433 The period of the award may be cut, for example where expected weekly wages are more than was paid in the former job. An Employment Tribunal will usually give details in its decision when this happens. The period covered by the award should also be given.

49434 If the period is not clearly stated, or there is any doubt, make a decision based on the available evidence. It may be possible to work out what was intended from the text of the decision. Only do this where there is clear evidence of the tribunal's intention.

Example

Ishaq earns £200 a week as a machinist. On 7.10.08, he is sacked by his employer and complains to a tribunal. On 3.2.09, the tribunal decide that he was unfairly dismissed and award him £2000 compensation. The award is from 7.10.08 and has not been reduced for any reason. There are no details given of what period the award covers. The DM decides that it was clearly intended to be for 10 weeks ($10 \times £200 = £2,000$) from 7.10.08.

49435 Always make sure that the amount and period of an award are known. The most reliable source of such information is the Employment Tribunal. Employees should also be able to give these details.

Effect of awards

49436 Awards of compensation should be treated as earnings¹. Take them into account from the date that they are treated as paid². This does not include payments to compensate for the loss of the job itself (rather than for loss of earnings) or for injury to feelings. Such payments should be treated as capital.

1 ESA Regs, reg 95(1)(g); 2 reg 93(1)

Protective awards 49441 - 49452

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Introduction

49441 Employers must consult their employees' representatives in good time about certain redundancy proposals¹. Those representatives may be

1. elected by the employees **or**
2. representatives of a recognized TU.

1 TULR (C) Act 92, s 188

49442 Employers who mean to dismiss at least 20 employees within 90 days or less must start to consult at least

1. 90 days before the first dismissal, if they mean to dismiss 100 or more employees **or**
2. 30 days before the first dismissal, if they mean to dismiss 20 - 99 employees.

49443 Employee representatives can complain to a tribunal if an employer does not correctly follow the rules. The Employment Tribunal can then make a protective award if the complaint is confirmed.

Terms of an award

49444 Under a protective award employers must make payments to any employees who have been made redundant. They must also pay any who have not been dismissed but whose representatives should have been consulted. The payments must be made for a protected period, which begins with the earlier of

1. the date on which the first of the dismissals takes effect **or**
2. the date of the award.

49445 The period will last for as long as the tribunal decide is reasonable in the circumstances. It cannot last for more than

1. 90 days, if 100 or more employees are to be made redundant within 90 days **or**

2. 30 days, if 20-99 employees are to be made redundant within 90 days.

Payments not made by employer

49446 Employers may not pay all that they should do under a protective award. Employees can then complain to an Employment Tribunal¹. If the complaint is confirmed the employer will be ordered to pay any amount owing.

1 TULR (C) Act 92, s 192

Protective award not applied for

49447 There may be cases where the

1. employer has not followed the rules **and**

2. employee representative has not complained to an Employment Tribunal **and**

3. employer has paid the redundant employees in lieu of consultation.

A payment in lieu of consultation is a payment in lieu of remuneration and falls within the definition of earnings¹.

1 ESA Regs, reg 95(1)(b)

Effect of payments

49448 Payments made under a protective award are earnings¹. They should be taken into account in the normal way.

1 ESA Regs, reg 95(1)(i)

49449 - 49452

Time off work provisions 49453 - 49499

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General

49453 Under employment protection law, employees may be allowed time off during normal working hours

1. for duties as a TU or elected employee representative¹
2. for TU activities²
3. for public duties³
4. to look for work or make arrangements for training⁴
5. for antenatal care⁵
6. for occupational pension scheme trustees⁶
7. to make arrangements for dependants⁷
8. to undertake study or training if they are a young person⁸.

1 ER Act 96, s 61; 2 TULR(C) Act 92, s 170; 3 ER Act 96, s 50; 4 s 52; 5 s 55; 6 s 58; 7 s 57A; 8 s 63A

49454 Employees may be entitled to be paid while they are taking this time off. Any payments due are earnings¹. Take them into account in the normal way.

1 ESA Regs, reg 95(1)

49455 - 49466

Complaints to an Employment Tribunal

49467 Employees may complain to a tribunal that they have not been allowed to take time off¹. If this is confirmed the tribunal may make an award of compensation. The amount will be what the tribunal considers fair in the circumstances, taking into account any loss suffered.

1 TULR (C) Act 92, s 168(4) & 170(4); ER Act 96, s 51(1), 54(1), 57, 57B(1), 60(1)(a), 63(1)(a), 63C(1)(a)

49468 Employees may also complain that they have not received their full entitlement to payment¹. If this is confirmed the employer will be ordered to pay the amount that the tribunal finds is due.

1 TULR (C) Act 92, s 169(5) & 172(3); ER Act 96, s 54(1)(b), 57(1)(b), 60(1)(b), 63(1)(b), 63C(1)(b)

49469 A DM cannot decide whether an employee is due to be paid. That question can only be decided by the tribunal. Any amount awarded by the tribunal is not due to be paid until the question has been decided. It should not be taken into account until then.

49470 - 49499

Payments on termination of employment and ESA(IR) 49500 - 49999

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Introduction

49500 Employees may be entitled to certain payments on termination of employment, that is, when their employment ends. Payments for the termination of the employment are made because the employment has ended¹. They are not paid for any other reason. They would not be paid but for the employment ending. These payments may affect entitlement to ESA(IR). These payments do not affect ESA(Cont).

Note: The DM should consider payments on termination of employment in every case where there is evidence that employment has terminated. This applies even if the employment ended some time before the date of claim.

1 R(U) 4/92

49501 The effects of these payments on ESA(IR) depends on

1. what type of payment is involved
2. when the payment is due to be made
3. whether there is an unworked or waived period of notice
4. whether the work that has ended was remunerative or P/T (Appendix 6 to this chapter provides guidance)
5. when the work ended.

49502 Guidance on how payments affect ESA(IR) is in DMG 49606 - 49652.

Types of payments

49503 There are many different types of payments that might be made. These include

1. payments due for any period before the employment ended (see DMG 49504)
2. holiday pay (see DMG 49505)
3. PILON
4. refunds of occupational pension contributions
5. pension lump sums
6. payments, remuneration or awards made under employment protection and trade union law (see DMG 49300 et seq)
7. payments in kind (see DMG 49509)
8. income tax refunds (see DMG 49076)
9. compensation payments (see DMG 49622)
10. statutory redundancy payments (see DMG 49506).

Payments for period before employment ended

49504 When employment ends payments may be due for the employed period, for services already rendered. They are owed under the contract of employment and are due because of the employment itself, not because of the termination. Such payments include

1. final earnings
2. wages held in hand
3. commission.

Holiday pay

49505 Most employees are entitled to be paid while they are on holiday. When their employment ends they may not have taken all the paid holiday they could have had. They will then receive a payment of holiday pay instead.

Statutory redundancy payments

49506 Employees who have been continuously employed for two years may be entitled to statutory redundancy payments if they are

1. dismissed by reason of redundancy¹ **or**

2. laid off or kept on short time for more than a set number of weeks².

1 ER Act 96, s 135(1)(a); 2 s 135(1)(b) & 148(1)

49507 Not all employees are entitled to statutory redundancy payments, for example members of the armed forces and civil servants. Redundancy type payments may be paid to these employees, for example ex gratia payments and “golden handshakes”. Such payments are not **statutory** payments.

49508 Statutory redundancy pay is based on¹ the

1. length of continuous employment

2. age of the employee

3. amount of a week’s pay (see Appendix 2 to this Chapter for the maximum amount that can be used).

Note: Appendix 4 to this Chapter shows how many weeks pay employees are entitled to.

1 ER Act 96, s 162

Payments in kind

49509 A payment in kind is payment by something other than money. This can be in many forms including

1. goods, for example food or clothes

2. vouchers, for example childcare or gift vouchers, but not if the amount of any voucher has been taken into account as earnings of an employed earner (see DMG 49130)

3. free accommodation.

Employment never existed

49510 For employment to have ended, it must first have existed. A payment on termination of employment can be made only where a job has ended. Any payments made for other reasons are not payments on termination of employment.

Example 1

Kirsty is offered a job in a shop. The offer is then cancelled before she can start work. The shop owner pays Kirsty £30 to make up for cancelling the offer. The £30 is paid because of the cancellation. It is not paid because the job ended. It is a payment of capital.

Example 2

Wladislaw is due to start work in a shop on 21 October. On 14 October the shop owner gives him a £30 advance of wages. On 17 October Wladislaw decides that he no longer wants the job and does not start work. The £30 advance is not paid because the job ended. It is a type of loan. It was meant to last for one week and is a payment of income.

49511 - 49514

Payments not received

49515 Notional income rules allow for earnings which are due on termination of employment as a result of redundancy, but which have not been paid, to be ignored for ESA purposes¹.

1 ESA Regs, reg 107(2)(c)

49516 Any benefit which would not have been paid if the claimant had received the earnings due to him at the right time will be recovered when those earnings are paid.

49517 In the case of insolvent employers, benefits paid will be deducted from the amount awarded by the Redundancy Payments Service (RPS).

Note: In all other cases benefit paid will be recovered under existing procedures.

Delay in payment

49518 A payment is due when it is legally due and owing. Any delay in its actual payment does not affect that due date.

Employer withholds payment

49519 Employers may not pay the full amount that is due. They may for example make a reduction to pay for cash shortages that the employee is responsible for. Take the full amount due into account if

- 1.** it is a term of the contract that this action can be taken and there is no dispute about the shortage **or**
- 2.** the employee agrees to the employer's action **or**
- 3.** the money was originally paid to the employee, before being paid to the employer.

49520 If there is any doubt or dispute about the reduction, ask for full details. The DM should then take all available evidence into account when deciding the amount due.

Example 1

Jack is due to be paid £500 compensation when his employment ends. He is responsible under his

contract of employment for any cash shortages. He agrees with his employer that there is a shortage of £100. The employer deducts this amount from the payment due to him and Jack is paid £400. The full amount of £500 is taken into account.

Example 2

Vera is due to be paid £600 compensation when her employment ends. Her employer deducts £100 for a cash shortage that he says is her responsibility. Vera is not responsible for shortages under her contract. She did not agree that the deduction could be made and is disputing the alleged liability. Only the £500 actually paid is taken into account.

Uncashed cheques

49521 A cheque does not form part of a person's actual resources until it has been cleared through the banking system. The question of notional resources may need to be considered where a claimant receives a cheque which

- 1.** the claimant is refusing to cash **or**
- 2.** has been returned by the claimant to the employer.

49522 - 49526

Whether employment has terminated 49527 - 49605

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49527 Employees may be temporarily away from work because

1. of a recognized, customary, or other holiday **or**
2. time off has been allowed under employment protection law (see DMG 49453).

49528 Employees who are away from work temporarily may continue to be employed. Their employment is not terminated.

Recognized, customary or other holidays

49529 Employment will not have terminated if a claimant is absent because of a holiday, or an absence authorised by the employer.

49530 When considering if an absence from work is because of a holiday, DMs should¹

1. have regard to the reality of the situation **and**
2. consider the claimant's contractual entitlement to holidays **and**
3. only treat as a holiday the weeks of the holiday for which the claimant is actually paid.

49531 An employee will generally be entitled to four weeks annual leave under the relevant legislation¹. DMs should assume that the claimant is entitled to four weeks paid annual leave unless there is evidence of entitlement to more than four weeks.

1 The Working Time Regulations 1998

Meaning of terminated

49532 Terminated is not defined in the legislation. It should be given its ordinary meaning¹. Termination of employment should also be given its ordinary meaning.

1 R(U) 7/68(T); R(U) 8/68(T)

49533 When a contract of employment is terminated, the employment under it is also terminated. This happens as soon as rights and obligations under the contract end¹. Whether there is any intention of resuming the employment is not relevant.

1 R(U) 7/68(T)

49534 A decision may be made to terminate a contract from a future date. It is the date of termination and not the date of the decision that is relevant.

49535 There is a distinction between the contract itself and any employment under it¹. A contract may continue during a period when the person employed under it does no work. It may also continue when the person employed is not expected to work, for example

1. when there is a temporary lay-off **or**
2. during a period of holiday (even if wages are not paid for the holiday).

1 R(U) 8/68(T)

49536 - 49540

49541 Whether a contract has terminated is a question of fact to be decided on the available evidence. Employers may say that an employment has been terminated. That does not necessarily mean that it has terminated. Employment cannot be terminated without employees being given notice of that fact¹. Notice cannot be given retrospectively.

1 Brown v. Southall & Knight (1980) ICR 617

Example

Russell is on 2 weeks paid holiday from work. On Friday his employer sends him a letter stating that his employment will end on Saturday. Russell is entitled to one week's notice. He is abroad and does not get

the letter until Monday. The employment does not end until Monday, when Russell gets the letter and has a reasonable opportunity to read it.

49542 It should usually be accepted that a contract has terminated

- 1.** when due notice of termination has been given, received and has expired **or**
- 2.** if a payment in lieu of notice has been made (except for in the example at DMG 49541) **or**
- 3.** at the end of an engagement which was for a fixed period.

Contract terminated immediately before period of absence from work

49543 DMs should decide that an employee is still in employment where the contract of employment

- 1.** is still current **or**
- 2.** ends at the beginning of what would be a period of absence even if the contract continued and it is expected that the employee will return to that employment after the absence because

2.1 there is an express agreement (written or verbal) **or**

2.2 it is reasonable to assume that a long standing practice of re-employment will continue.

Employment suspended

49544 Employees may be temporarily laid off when there is no work. In such cases the contract of employment may not be terminated. Employment may be simply suspended.

49545 During a period of suspension the situation may change. It may become clear that the contract has terminated. The employment should then be regarded as terminated from the date the contract ends.

Employment resumed

49546 People may still be employed, under a continuing or running contract, where

- 1.** they were expected to resume their employment on a later fixed date **and**
- 2.** they return to that employment as arranged **and**
- 3.** there is no evidence of any fresh arrangement for their re-appointment.

49547 The number of times this may have happened should be taken into account¹. For example, a person may have resumed their employment many times without the need for re-appointment. This would suggest that they are employed under a running contract.

Example 1

Jean is working P/T as a music teacher. She was originally employed for a fixed period of one term in 1998. She continued teaching at the school for many years without having to be re-appointed.

At the end of the summer term in 2008, she received no formal notification of discharge or re-employment. Early in the summer holidays the understanding between her and her employer was that she would resume next term. There was no evidence of any fresh arrangement for re-appointment.

It was decided that she was employed under a running contract. During the 2008 summer holiday her employment was merely suspended, not terminated¹.

1 R(U) 8/68 (T)

Example 2

Angus is a printer's warehouseman employed on a basis known in the trade as "casual". His union allocates him to one of a number of employers for night shift work, one night at a time.

After a night's work he receives his pay for that night and his P45 is handed back to him. He does not know whether he will work for the same employer, or at all, on the next night. It is decided that at the end of each night's work the employment is terminated¹.

1 R(U) 7/68(T)

49548 People may be employed under a series of fixed term contracts. Under employment protection law¹ these people may be regarded as being in continuous employment. For example, when redundancy and unfair dismissal is being considered. Such a decision is only for the purposes of the employment protection legislation. It is not relevant for ESA purposes. It should not influence the DM in determining whether employment has terminated.

1 ER Act 96

49549 - 49552

Teachers

49553 Teachers and lecturers may not be permanent members of school or college staff. In all such cases ask to see the contract of employment and examine

- 1.** the provisions about the period of appointment **and**
- 2.** any requirement for notice to terminate the employment.

49554 The period of the appointment may not have been given. If notice is needed to terminate the employment, find out whether notice was given. If it was, find out how and when it was given. If there is no satisfactory evidence that proper notice was given, the contract may not have been terminated.

49555 The terms of the employment may not be in the contract itself. They may be set out in some other document. For example, an LEA's "Conditions of Employment and Tenure of Teacher". Ask for a copy of the relevant document.

49556 The claimant or employer may say that no written contract of employment was issued. Ask for a copy of the letter of appointment and any other letters about the terms of the appointment.

49557 Most teachers who are not permanent members of staff fall into one of two groups. This is usually the case for those working in LEA schools. The groups are

- 1.** sessional or temporary teachers, employed for a fixed period, normally of an academic term or year
- 2.** supply, casual, or occasional teachers, employed to cover for the absences of others.

Sessional or temporary teachers

49558 Contracts and letters of appointment are usually clear when the employment is for a fixed period. The fixed period will be quoted and will usually be for academic terms or years.

49559 A fresh contract or letter of appointment may be issued at the start of any later period. In such a case there is a series of agreements¹. Employment is terminated at the end of each period.

1 R(U) 8/68

49560 Teachers may continue employment after the end of the first fixed period. Their periods of employment may be separated only by school holidays. If there is no evidence of re-appointment it may be that their employment is continuous. Their separate periods of employment could be a continuation of the first appointment period.

49561 Consider the terms of the original appointment carefully. Find out exactly how and when it was agreed that the employment would resume. Make sure that all the facts are obtained before making a decision.

49562 - 49565

Supply teachers

49566 Supply teachers have their names on an LEA list of teachers who

- 1.** are willing to take employment at short notice **and**
- 2.** may be offered employment as and when vacancies arise due to absences (usually through sickness).

49567 Employment may be offered on a day to day basis, for example when it is not known how long an absentee will be off work. It may also be offered for an indefinite or set period, for example, to cover maternity leave.

49568 When supply teachers are added to the list, they may be sent a letter advising them of that fact. They may also be advised of what might happen, for example, that employment may be offered as and when vacancies arise. Any such written notification is not a contract of employment.

49569 The letter places no obligation on the LEA to offer employment. The teacher is not obliged to accept any vacancies offered¹. When there is a vacancy the teacher is contacted, by telephone or in writing, and offered employment.

1 R(U) 2/87

49570 A written contract may not always be issued. For example, where the period of employment offered is short. Such employment terminates as soon as the duties for the period covered by the offer are finished¹.

1 R(U) 2/87

49571 The period of employment offered may include a school holiday. For example, it may be for an open or a closed period that stretches over a holiday. To decide whether employment continues during the holiday, the DM should find out

1. what provision was made for terminating the appointment **and**
2. whether there was a definite agreement about what would happen after the holiday. For example, was it agreed that employment would continue at the start of the next term (or half term) or because it is reasonable to assume that a longstanding practice of re-employment will continue¹.

1 R(JSA) 5/03

Whether a supply teacher's employment has terminated during a school closure

49572 It is likely that a supply teacher's employment will have terminated where¹

1. the period of employment ends immediately before a school holiday **and**
2. there is no definite agreement about whether the claimant will be returning to the employment at the start of the following term **and**
3. the claimant has no established cycle of work which includes school holidays.

1 R(JSA) 5/03

Maternity leave and absence

49577 Under employment law¹, all pregnant employees have the right to at least 26 weeks **ordinary maternity leave**, regardless of their length of service. Additional maternity leave may also be taken².

1 ER Act 96, s 71; 2 s 73; Maternity & Parental Leave etc 1999, SI 1999 No. 3312

49578 In both type of cases, employees should generally return to

1. their original employer (or successor)
2. the same job
3. on terms and conditions no less favourable than those which applied before the absence.

49579 Employees entitled to 26 weeks ordinary maternity leave must return to work at the end of that period. Additional maternity leave will start immediately after ordinary maternity leave and continue for up to a further 26 weeks.

49580 Employees continue to be employed during the 26 week ordinary maternity leave period. It counts towards the employee's period of continuous employment for

- seniority
- pension rights
- other personal length of service payments, for example pay increments.

49581 There is no statutory requirement for employment to continue for any period of additional maternity leave. But it is likely to continue unless it has been ended by agreement, resignation or dismissal.

49582 There may be no contractual provisions that apply to the additional maternity leave. The periods of employment before and after that period will then join together as if they are continuous.

Suspension on maternity grounds

49583 Some employees may be suspended from work on maternity grounds. This can happen if there is a health and safety risk to new or expectant mothers that cannot be removed. Such employees are normally entitled to be paid while they are suspended.

49584 Employees continue to be employed during the maternity suspension period. It counts towards the period of continuous employment for

- seniority
- pension rights
- other personal length of service payments, for example pay increments.

49585 - 49588

Claim within 29 weeks of childbirth

49589 A woman may make a claim within 29 weeks of having given birth. That claim may include a period which would have been a holiday but for the maternity leave. Find out whether she has any contractual right to return to work in addition to her statutory right.

49590 The contract may not have continued during the 29 week period. For example, the woman may have to be re-appointed or re-employed rather than simply resume her duties.

49591 Employment should then normally be regarded as terminated on the last day for which wages or salary was paid. This is so even though the employer has a statutory duty to re-employ the woman if she exercises her right to return.

Adoption leave

49592 Adoption leave¹ means a period of absence from work on ordinary or additional adoption leave under relevant legislation².

1 PA Regs, reg 2(1) & 3; ESA Regs, reg 2(1); 2 ER Act 1996, s 75A & 75B

49593 Employees who adopt a child under the age of 18 have the right to 26 weeks ordinary adoption leave¹. A further 26 weeks of additional adoption leave will also be available².

1 PA Regs, reg 18(1); 2 reg 20(2)

49594 Employees continue to be entitled to their normal terms and conditions of employment during the 26 weeks of ordinary adoption leave and during the 26 weeks additional adoption leave¹.

1 PA Regs, reg 19

49595 Following a period of adoption leave, employees have the right to return to the same job¹.

1 PA Regs, reg 26

Paternity leave

49596 Paternity leave¹ means a period of absence from work on leave following the birth or adoption of

a child under relevant legislation². It is available to employed parents who

- 1.** have or expect to have parental responsibility for a new child **and**
- 2.** are the biological father of the child or are the mother's husband or partner **and**
- 3.** have completed at least 26 weeks continuous service with their employer up to and including the 15th week before the baby is due **and**
- 4.** have told their employer of their intention to take leave by the end of the 15th week before the expected week of the child's birth.

1 ESA Regs, reg 2(1); 2 ER Act 1996, s 80A & 80B

49597

Agreement not to work notice

49598 Many employees are entitled to notice before their employment is ended. Their employment does not terminate until that notice period ends where they

- 1.** are given the full period of notice that they are entitled to **and**
- 2.** do not have to work that notice **and**
- 3.** get their normal salary for the notice period.

This is sometimes called gardening leave.

49599 - 49605

Payments on termination of employment 49606 - 49999

[General](#) 49606 - 49607

[Meaning of remunerative work](#) 49608

[Payments in lieu of remuneration](#) 49609 - 49611

[Payments in lieu of notice](#) 49612 - 49615

[Holiday pay](#) 49616 - 49621

[Payments of compensation](#) 49622 - 49632

[Entitlement to notice](#) 49633 - 49646

[Payments for period before employment ended](#) 49647 - 49652

[Statutory redundancy payments](#) 49653 - 49999

General

49606 Employees may be entitled to certain payments when their employment ends. These include

1. payments in lieu of remuneration (see DMG 49609)
2. payments in lieu of notice (see DMG 49612)
3. holiday pay (see DMG 49616)
4. payments of compensation (see DMG 49622)
5. payments due for any period before the employment ended (see DMG 49647)
6. statutory redundancy payments (see DMG 49653)
7. income tax refunds (see DMG 49076).

49607 How such payments affect a claim for ESA(IR) depends on

1. what type of payment is involved
2. when the payment is due to be made

3. whether there is an unworked or waived period of notice
4. whether the work that has ended was remunerative or P/T
5. when the work ended.

Meaning of remunerative work

49608 In this guidance remunerative work has the same meaning as in Income Support¹. This means work for which payment is made, or which is done in expectation of payment

1. in which a person is engaged for not less than

1.1 16 hours a week **or**

1.2 16 hours a week on average where the hours of work fluctuate **or**

2. in which any partner of the claimant is engaged for not less than

2.1 24 hours a week **or**

2.2. 24 hours a week on average where the hours of work fluctuate.

1 ESA Regs, Sch 7, para 14; IS (Gen) Regs, reg 5(1) & (1A)

Where the hours of work are below the remunerative work levels then this is referred to as part-time work. Appendix 6 to this Chapter provides further guidance.

Payments in lieu of remuneration

49609 Payments in lieu of remuneration are paid in place of a person's normal wages or salary. How they affect a claim for ESA(IR) depends on whether the work that has ended was remunerative or P/T.

Remunerative work

49610 Where the employment was remunerative PILOR should be disregarded¹.

1 ESA Regs, Sch 7, para 1(1)(a)

Part-time work

49611 The employment that ended may have been P/T, that is **not** remunerative. If it ended **on or after** the date of entitlement the PILOR should be treated as earnings and taken into account in the normal way. If it ended **before** the date of entitlement the PILOR should be disregarded¹.

1 ESA Regs, Sch 7, para 4

Payments in lieu of notice

49612 Employees are normally entitled to notice before their employment is ended. But employers may not always give them full notice. Employees are then entitled to PILON instead. For ESA(IR), such payments are earnings¹.

1 ESA Regs, reg 95(1)(c)

49613 How PILON affects a claim for ESA depends on whether the work that ended was remunerative or P/T.

Remunerative work

49614 Where the employment was remunerative the PILON should be disregarded¹.

1 ESA Regs, Sch 7, para 1(1)(a)

Part-time work

49615 The employment that ended may have been P/T, that is **not** remunerative. If it ended **on or after** the date of entitlement the PILON should be treated as earnings and taken into account in the normal way. If it ended **before** the date of entitlement the PILON should be disregarded¹.

1 ESA Regs, Sch 7, para 2

Holiday pay

Employment terminated

49616 If holiday pay is payable more than four weeks after the employment terminated it should be treated as capital¹.

1 ESA Regs, reg 95(1)(d) & 112(3)

Remunerative work

49617 Where the employment was remunerative the holiday pay should be disregarded¹. However if employment was suspended earnings should be taken into account in the normal way.

1 ESA Regs, Sch 7, para 1(1)(a)

Part-time work

49618 The employment that ended may have been P/T, that is **not** remunerative. If it ended **on or after** the date of entitlement the holiday pay should be treated as earnings and taken into account in the normal way. This means that ESA(IR) may be reduced for the appropriate period. If it ended **before** the

date of entitlement the holiday pay should be disregarded¹.

1 ESA Regs, Sch 7, para 2(1)(a)

Employment interrupted

49619 Holiday pay payable more than four weeks of the employment was interrupted should be treated as capital¹. How it affects a claim for ESA(IR) depends on whether the work that has ended was remunerative or P/T.

1 ESA Regs, reg 95(1)(d)

Remunerative work

49620 Where employment is interrupted before the first day of entitlement all holiday pay is disregarded¹ unless the employment has been suspended.

1 ESA Regs, Sch 7, para 1(1)(b)

Part-time work

49621 If part-time employment is interrupted **on or after** the first day of entitlement then holiday pay is taken into account in the normal way but any holiday pay payable more than four weeks after the interruption should be treated as capital. If part-time employment is suspended all earnings should be taken into account in the normal way¹.

1 ESA Regs, Sch 7, para 2(2)

Payments of compensation

Meaning of compensation

49622 A payment is compensation only if

1. it is made for or on the termination of employment **and**

2. claimants have

2.1 not received any PILON which they are due **or**

2.2 only received part of the PILON they are due **or**

2.3 not received any or all of the PILON they are due because they have waived their right to it¹.

A payment made for or on the termination of employment is not compensation if claimants have worked all their notice and been paid for it or if they have received all the PILON they are due.

49623 Payments of compensation do not include¹

- 1.** any bonus or commission (see DMG 49059)
- 2.** PILOR, except any periodic sums paid because employment has ended through redundancy
- 3.** PILON
- 4.** holiday pay
- 5.** retainers (see DMG 49118)
- 6.** payments for expenses which are not wholly, exclusively and necessarily incurred in the performance of the duties of the employment (see DMG 49108)
- 7.** awards made under employment and trade union law, including any award of compensation (see DMG 49300 et seq)
- 8.** payments in kind (see DMG 49111 and 49509)
- 9.** payments for a period when the claimant is on maternity or sick leave (see DMG 49166)
- 10.** payments for expenses wholly, exclusively and necessarily incurred in the performance of the employment (see DMG 49108)
- 11.** any occupational pension
- 12.** statutory redundancy payments (and payments made in lieu of statutory redundancy payments) (see DMG 49653 - 49654)
- 13.** refunds of contributions to which the claimant is entitled under an occupational pension scheme
- 14.** compensation payable under certain education law²
- 15.** any lump sum payments received under the Iron and Steel Re-adaption Benefits Scheme.

1 ESA Regs, reg 95(4); 2 Education Reform Act 1988, s 173 & 178(3) & (4)

Example

Julia claims ESA because she is ill. She was also made redundant and is entitled to four weeks notice. She did not work any notice because her job ended on the day her employer gave her notice. Her employer says her final wages included

1. three weeks holiday pay
2. a payment for statutory redundancy
3. an ex gratia payment.

The employer did not pay her any PILON because Julia waived her right to it.

The DM decides the ex gratia payment is compensation because Julia waived her right to the four weeks notice she was entitled to. Holiday pay and the payment for statutory redundancy are not compensation.

Effect of payments of compensation

49624 The effect of payments of compensation on ESA(IR) depends on whether the

1. work which has ended was P/T or remunerative (see DMG 49625 and 49632) **and**
2. payment of compensation is earnings¹ (see DMG 49625 and 49632) **and**
3. payment of compensation which is earnings overlaps with other kinds of earnings (see DMG Chapter 48)².

1 ESA Regs, reg 95(1)(j); 2 reg 91(5)

Part-time work

49625 Claimants are in P/T work if they work and are not treated as being in remunerative work¹ (see Appendix 6 for guidance on the remunerative work rules). All the payment of compensation is earnings to be taken into account if the work ended **on or after** the first day of entitlement to ESA².

1 ESA Regs, reg 95(4) & 91(9); 2 reg 95(1)(j)

49626 The period for which the payment of compensation is taken into account is one week¹. This period begins on the date on which the compensation is treated as paid² (see DMG Chapter 48).

1 ESA Regs, reg 91(8); 2 reg 93(1)

49627 - 49630

49631 Where the P/T work ended **before** the first day of entitlement then the payment of compensation is disregarded¹.

1 ESA Regs, Sch 7, para 2

Remunerative work

49632 If a person was in remunerative work then the payment of compensation is disregarded¹.

1 ESA Regs, Sch 7, para 1(1)(a)

Entitlement to notice

Statutory right to minimum period

49633 Employment protection law gives most employees the right to a minimum period of notice¹. The exceptions are

1. crew members on ships registered in the UK, employed under crew agreements approved by the Secretary of State for Transport²
2. crown servants and members of the armed forces³
3. employees who have broken their contract of employment.

Note: Most employees on offshore oil and gas platforms in British sectors of the Continental Shelf are entitled to notice.

1 ER Act 96, s 86; 2 s 199; 3 s 191 & s 192

49634 Employees must have been continuously¹ employed for one month or more before being entitled to minimum notice² under statute. The amount of notice they should get depends on how long they have been employed. They should be given at least

1. one week's notice, if they have been continuously employed for one month or more but less than two years
2. one week's notice for each year of employment, if they have been continuously employed for between two and twelve years
3. twelve weeks notice if they have been continuously employed for twelve years or more.

1 ER Act 96, part 14; 2 s 86

49635 Employees who have been continuously employed for four weeks or more should give their employers at least one week's notice¹. This does not increase with longer service.

1 ER Act 96, s 86

49636 Fixed term employees on a determinate fixed term contract have the end date of their contract notified to them at the start of their contract, and those on project work have the same right to

legislative notice as other employees.

Contractual entitlement

49637 The period of notice due under a contract is usually stated in the contract. But that period may be extended by agreement between the employer and employee, for example by a redundancy agreement. The period of notice agreed then becomes the period due under the contract.

49638 If there is evidence that this may have happened, for example, if the employer pays more PILON than was due under the written contract, ask to see a copy of the agreement. If there is no written agreement, ask to see any other evidence of the change.

49639 Contractual entitlement is affected if the agreement gives the employee a legal right to a longer period. In such a case, the employee is contractually entitled to the longer period. If the agreement simply provides for more compensation than would otherwise be due, contractual entitlement is not affected.

49640 The period of notice due may not be stated in writing. If so, ask the employer and employee whether it was agreed verbally. If it was and they agree on the period due, that period will be the period due by contract.

49641 There may be no written or verbal contract. Under common law a reasonable period of notice is an implied term of a contract of employment¹. The DM should consider what is reasonable taking account of all the circumstances and the custom in the type of employment.

1 R(U) 37/53; R(U) 4/56; R(U) 10/58; R(U) 10/64; R(U) 5/74

49642 - 49645

49646 The DM should note that

- 1.** employees may be paid PILON at the same rate as their earnings. The period might then be considered to be the period implied under their contracts
- 2.** the higher an employee's rate of pay and status, the longer the period of notice should be
- 3.** an employee's length of service and status can be compared with other employees whose contractual entitlement is known.

Example

Ross has been continuously employed for 15½ years by Arnolds Ltd up to him being made redundant. Under his contract of employment he is entitled to two weeks notice. He did not work any period of notice on being made redundant or receive PILON.

The DM determines that the specified period is twelve weeks because

1. by statute Ross was entitled to twelve weeks notice as he had been continuously employed by Arnolds Ltd for 15½ years and this is longer than the period of notice he was due to under his contract of employment

2. Ross has not worked any period of notice or received PILON.

Note: The DM now has to consider the period using the set formula to determine if the specified period is shorter than the period using the set formula.

Payments for period before employment ended

49647 Pay may have accrued in the period before the employment ended, for example final earnings or wages held in hand. How it affects a claim for ESA(IR) depends on whether the work that has ended was remunerative or P/T.

Remunerative work

49648 If the work was remunerative, earnings due for the period of that employment should normally be disregarded¹. This includes any payments held in hand by the employer when the employment ends. It does not include any

1. retainers² including

1.1 statutory guarantee payments **and**

1.2 payments made where the claimant has been suspended on medical or maternity grounds **or**

2. awards made under employment protection or trade union law (including “out of court” settlements).

These payments should not be disregarded.

1 ESA Regs, Sch 7, para 1(1)(a); 2 Sch 7, para 1 & 2

Partner’s earnings on retirement

49649 Any earnings paid or due to be paid to the claimant’s partner should be disregarded where¹

1. the partner was engaged in remunerative work as an employed earner (or would have been if the employment had been in GB) **and**

2. the partner is entitled to RP or SP on retirement **and**

3. the earnings were paid or due to be paid because of the partners retirement **and**

4. the only reason the partner is not entitled to

4.1 RP is that the contribution conditions are not satisfied (RP) **or**

4.2. SP is that they do not have the minimum number of qualifying years.

1 ESA Regs, Sch 7, para 3, 3A

Part-time work

49650 The work that ends may have been P/T. If it ended **on or after** the date of entitlement take any earnings into account in the normal way.

49651 If it ended **before** the date of entitlement disregard all earnings with the exception of retainers¹. Retainers should be taken into account in the normal way (see DMG 49648).

1 ESA Regs, Sch 7, para 2(1)

49652 The employment will not have ended where

1. the contract of employment is still current **or**

2. the contract of employment comes to an end before the beginning of a period of absence and it is expected that the claimant or partner will resume employment after the period of absence because

2.1 there is some express arrangement that employment will resume **or**

2.2 it is reasonable to assume that a long standing practice of re-employment will continue.

Note: For further guidance on whether employment has terminated, see DMG 49527 - 49598.

Statutory redundancy payments

49653 Employees may receive statutory redundancy payments on termination of their employment. Such payments should be taken into account as capital.

49654 Some employees may not receive statutory redundancy payments that they are entitled to. Redundancy **type** payments, for example severance payments may be paid instead. In these circumstances only an amount of such a payment up to the level of the employee's actual entitlement to a statutory redundancy payment is treated as capital.

49655 - 49999

Appendix 1 - Reserve forces

Territorial or reserve forces prescribed in SS (Contributions) Regs 2001, Sch 6, Part I.

Royal Naval Reserve

Royal Marines Reserve

Army Reserve

Royal Fleet Reserve

Territorial Army

Royal Air Force Reserve

Royal Auxiliary Air Force

Royal Irish Regiment (to the extent that its members are not members of the regular naval, military or air forces of the Crown)

Appendix 2 - Maximum weekly amount

[\[See DMG Memo 5/25\]](#) Payable under section 227 of the Employment Rights Act 1996.

£

From 1.10.09 380

From 1.2.11 400

From 1.2.12 430

From 1.2.13 450

From 6.4.14 464

From 6.4.15 475

From 6.4.16 479

From 6.4.17 489

From 6.4.18 508

From 6.4.19 525

From 6.4.20 538

From 6.4.21 544

From 11.4.22 571

From 10.4.23 643

From 8.4.24 700

Appendix 3 - Statutory guarantee payments

[\[See DMG Memo 5/25\]](#) Amount payable to employees under section 31 of the Employment Rights Act 1996.

£

From 1.2.10	21.20 per day
From 1.2.11	22.20 per day
From 1.2.12	23.50 per day
From 1.2.13	24.20 per day
From 6.4.14	25.00 per day
From 6.4.15	26.00 per day
From 6.4.16	26.00 per day
From 6.4.17	27.00 per day
From 6.4.18	28.00 per day
From 6.4.19	29.00 per day
From 6.4.20	30.00 per day
From 6.4.21	30.00 per day
From 11.4.22	31.00 per day
From 10.4.23	35.00 per day
From 8.4.24	38.00 per day

Appendix 4 - Statutory redundancy payments

Calculation of amount

Redundancy pay under section 135 of the Employment Rights Act 1996.

1. the length of time an employee was continuously employed **and**
2. the age of the employee **and**
3. the amount of a week's pay.

The table on the next page shows how many weeks' pay employees are entitled to.

To use the table, read off the employee's age and number of complete years service.

Note: The maximum number of years that can be used is 20.

The table will then show how many weeks pay the employee is entitled to.

The table starts at age 20, because no one below this age can get a redundancy payment.

Periods of employment before age 18 do not count.

Reduction in amount

The amount awarded is reduced where the employee is aged between 64 and 65. The reduction is $\frac{1}{12}$ for each complete month by which their age exceeds 64.

[illegible]

24	2	2½	3	3½	4	4	4	4	-										
25	2	3	3½	4	4½	5	5	5	5	-									
26	2	3	4	4½	5	5½	6	6	6	6	-								
27	2	3	4	5	5½	6	6½	7	7	7	7	-							
28	2	3	4	5	6	6½	7	7½	8	8	8	8	-						
29	2	3	4	5	6	7	7½	8	8½	9	9	9	9	-					
30	2	3	4	5	6	7	8	8½	9	9½	10	10	10	10	-				
31	2	3	4	5	6	7	8	9	9½	10	10½	11	11	11	11	-			
32	2	3	4	5	6	7	8	9	10	10½	11	11½	12	12	12	12	-		
33	2	3	4	5	6	7	8	9	10	11	11½	12	12½	13	13	13	13	-	
34	2	3	4	5	6	7	8	9	10	11	12	12½	13	13½	14	14	14	14	-
35	2	3	4	5	6	7	8	9	10	11	12	13	13½	14	14½	15	15	15	15
36	2	3	4	5	6	7	8	9	10	11	12	13	14	14½	15	15½	16	16	16
37	2	3	4	5	6	7	8	9	10	11	12	13	14	15	15½	16	16½	17	17
38	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	16½	17	17½	18
39	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	17½	18	18½
40	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	18½	19
41	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	19½
42	2½	3½	4½	5½	6½	7½	8½	9½	10½	11½	12½	13½	14½	15½	16½	17½	18½	19½	20½
43	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
44	3	4½	5½	6½	7½	8½	9½	10½	11½	12½	13½	14½	15½	16½	17½	18½	19½	20½	21½

45	3	4½	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22
46	3	4½	6	7½	8½	9½	10½	11½	12½	13½	14½	15½	16½	17½	18½	19½	20½	21½	22½
47	3	4½	6	7½	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23
48	3	4½	6	7½	9	10½	11½	12½	13½	14½	15½	16½	17½	18½	19½	20½	21½	22½	23½
49	3	4½	6	7½	9	10½	12	13	14	15	16	17	18	19	20	21	22	23	24
50	3	4½	6	7½	9	10½	12	13½	14½	15½	16½	17½	18½	19½	20½	21½	22½	23½	24½
51	3	4½	6	7½	9	10½	12	13½	15	16	17	18	19	20	21	22	23	24	25
52	3	4½	6	7½	9	10½	12	13½	15	16½	17½	18½	19½	20½	21½	22½	23½	24½	25½
53	3	4½	6	7½	9	10½	12	13½	15	16½	18	19	20	21	22	23	24	25	26
54	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	20½	21½	22½	23½	24½	25½	26½
55	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	21	22	23	24	25	26	27
56	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	21	22½	23½	24½	25½	26½	27½
57	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	21	22½	24	25	26	27	28
58	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	21	22½	24	25½	26½	27½	28½
59	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	21	22½	24	25½	27	28	29
60	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	21	22½	24	25½	27	28½	29½
61	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	21	22½	24	25½	27	28½	30
62	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	21	22½	24	25½	27	28½	30
63	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	21	22½	24	25½	27	28½	30
64	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	21	22½	24	25½	27	28½	30

Appendix 5 - Exemptions granted from statutory guarantee payments

Employers covered by National Agreements for the following industries

Civil engineering construction

Demolition and dismantling (from 2.2.77)

British footwear manufacturing industry (from 4.7.77)

National Council for the steeplejack and lightning conductor engineering industries (from 1.8.77)

Paper making and board making industry (from 15.8.77)

Smiths Food Group factories at Paulsgrove, Stockport, Great Yarmouth and Fleetwood (from 5.9.77)

Cut Sole associates (from 8.9.77)

Fibreboard Packing Case (from 18.10.77)

Refractory Construction Industry (from 1.11.77)

Multiwall Sack manufacturing industry (from 4.11.77)

Tudor Food Products (from 11.1.78)

British Carton Association (from 14.3.78)

Henry Wiggin and Co Ltd (from 19.4.78)

National Joint Council for Workshops for the Blind (from 27.6.78)

Card Clothing industry (from 13.7.78)

Motor vehicle retail and repair industry (from 14.12.78)

The Contractors Plant Association (from 23.2.81)

Wire and wire ropes industries (from 12.9.87)

Rowntree Mackintosh Confectionery Ltd (from 6.9.89)

Airflow Streamlines plc (from 18.12.89)

G and G Kynock plc (from 21.5.90)

Bridon Ropes (from 27.12.90)

National Joint Council for Building Industries (from 1.7.94)

Building and Allied Trade Joint Industries Council (from 29.9.89)

Appendix 6 - The Income Support remunerative work rule

The meaning of remunerative work for the ESA(IR) earnings disregards.

1 For the purposes of the earnings disregards in ESA(IR), the term remunerative work has the same basic meaning as in Income Support¹. DMs should note that this is only for calculating the appropriate earnings disregards and should not be confused with the ESA(IR) conditions of entitlement guidance in DMG Chapter 41.

1 ESA Regs, Sch 7, para 14

Introduction

2 Remunerative work is¹ work for which payment is made, or which is done in expectation of payment and

1. in which the person is engaged for not less than

1.1 16 hours a week **or**

1.2 16 hours a week on average where the hours of work fluctuate.

2. in which any partner of the claimant is engaged for not less than

2.1 24 hours a week **or**

2.2. 24 hours a week on average where the hours of work fluctuate.

Note: Work which isn't remunerative work is known as part-time employment².

1 IS (Gen) Regs, reg 5(1) & (1A); 2 ESA Regs, Sch 7, para 14

Does the person have employment

3 DMs should decide that a person is not in remunerative work if they do not have any employment and are between jobs. DMs will need to decide whether employment has ended if someone has been engaged in remunerative work.

4 DMs should decide that a person is still in employment and not between jobs if

1. the contract of employment (which can be written or verbal) is still current **or**

2. the contract of employment ends at the beginning of what would be a period of absence even if the contract continued (e.g. a school holiday) and it is expected that the person will return to employment after that period because

2.1 there is an express agreement (written or verbal) **or**

2.2 it is reasonable to assume that a long standing practice of re-employment will continue.

Off-shore oil workers

5 Off-shore oil workers may be employed on an ad-hoc basis. They may be contracted by companies to perform work for a specific period with no obligations on either party to provide work or to accept offers of work.

6 It is a question of fact for the DM whether the work is continuing or not. The DM will need to consider, amongst other things, whether there is a continuing relationship between the person and the employer. Frequent resumption of work with the same employer may be an indication that work is continuing (see paragraph 4 **2.2**).

Example

Dennis works for an oil company as a welder on oil rigs. He does not have a recognizable pattern of work as the company request his services on an irregular basis and he is not guaranteed a specific amount of work in any period. The DM has to decide whether Dennis is in remunerative work at a time when he is not working. On looking at the facts of Dennis' past work for the company, the DM is satisfied that there has been a continuing provision of employment that has been accepted by Dennis, and that it averages 16 hours or more a week. The DM decides that there is a continuing relationship and that Dennis continues to be in remunerative work during periods when he is on-shore and not physically working nor being paid.

Treated as in or not in remunerative work

7 A person engaged in remunerative work may be **treated** as **not** being in remunerative work (see paragraph 136 et seq)¹. Also, there are circumstances in which a person who is **not actually** in remunerative work may be **treated** as engaged in remunerative work² (see paragraphs 126 et seq).

1 IS (Gen) Regs, reg 5, para (3A) & reg 6; 2 reg 5, para (3)

Work done for payment or in expectation of payment

8 Whether or not a person is in remunerative work is a question of fact rather than legal interpretation. The DM should look at all the relevant facts in each case. Regard work as remunerative if

- 1.** payment is made for it **or**
- 2.** it is done in expectation of payment¹.

Remunerative does not mean profitable (see para 11).

Payment in kind

9 “Payment” includes payment in kind provided it is made in return for work done. It does not matter that the definition of earnings excludes any payment in kind.

Example 1

Thomas is given free meals and accommodation in a guest house run by a friend. Whilst there he does several chores so that average hours are in excess of 16 a week. The meals and accommodation are not given in return for work done. Thomas is not in remunerative work.

Example 2

Gordon is given free meals and accommodation in a guest house run by a friend in return for doing various chores amounting to more than 16 hours of work a week. Gordon is in remunerative work.

Expectation of payment

10 Work “done in expectation of payment” means more than a mere hope that payment will be made at a future date¹. There should be a realistic expectation of payment. An established author writing a book in his field has a realistic expectation of payment. A person who is not an established author and has no agreement for publication does not have a realistic expectation of payment.

1 R(IS) 1/93

Self-employed earners

11 A person providing a service for payment is engaged in remunerative work regardless of profit or loss. There can be an expectation of payment derived from profit but it must be a realistic expectation of payment for work being done at the

time. The DM need not make detailed forecasts of profitability. Where a person is involved in a commercial activity it is likely that this is remunerative work. It is for that person to show that they are working for nothing and explain why¹.

1 CA, CAO v Ellis (R(IS) 22/95)

Sale of goods

12 Payment received from the sale of goods is not necessarily payment for work. Payment is made for the goods not for the work of the salesman. But where a person is paid commission on sales, the commission itself is payment for work.

Note: Also that payment may be derived from takings.

Business start up

13 An allowance payable under certain schemes to assist people to become S/E is not payment for work¹.

Note: That the former name of business start up scheme no longer applies generally and schemes are likely to have local names. See DMG Chapter 21 for further guidance.

1 CA, CAO v. Smith

14 Drawings from any business to meet living expenses, in cash or in kind, will be payment for work except where the drawings are from business capital.

Example

Annie and her husband run a grocery shop at a loss. The business is for sale. They are living on the stock and money taken from the till. If that money was banked it would merely reduce the business overdraft. The couple are living off the capital of the business and are therefore not working for payment or in expectation of payment.

Company directors

15 A director of a limited company is an office holder and will usually be an employee of the company. The current or future receipts of the business are not payment to the director¹. A director can own or be a shareholder in the company and receive payment or have a realistic expectation of payment in that capacity. It is possible for an office-holding director to also have a contract for service with the company and thus be a S/E earner. In such cases paragraph 11 applies.

1 R(IS) 5/95

16 - 20

Establishing hours of work

Introduction

21 Establish the weekly total of hours worked. Normally, only hours for which payment is made or expected count for remunerative work purposes. These are not necessarily the same as hours of attendance. For example, if a person works additional hours without pay and without expectation of payment the extra hours would not count. See paragraph 42 for guidance on teachers.

Counting the hours

Flexible working schemes

22 Most people in paid employment are required to work, and are paid for, the same number of hours each week. Flexible working hours does not affect this.

Overtime

23 Overtime for which payment is made or expected counts towards the weekly total.

Night duty

24 Any time spent on night duty in addition to normal daytime duties counts towards the total hours worked if payment is made or expected for that night duty. This applies even if

1. payment made or expected is less than for normal daytime duties
2. the time on the night duty is spent sleeping.

Example

Edward makes a claim for ESA. His partner, Michelle, works in a care home. Her daytime working is 16 hours a week. Michelle is also contracted for night duty of 20 hours a week. For her night duty, Michelle receives a retainer which is paid at a lower hourly rate than for her daytime work. If she is called upon to deal with an emergency she is paid at the daytime rate. She is not required to perform any duties unless there is an emergency so she sleeps in the bedroom provided for her. The DM decides that Michelle is in remunerative work.

Evidence of hours

25 Accept a statement from the person or the employer about the number of hours worked unless it is unclear or there is reason to doubt it. Make further enquiries where necessary. If it becomes necessary to examine the contract of employment note that it will not usually specify overtime hours. Where appropriate, add these to the number of contracted hours.

Company directors

26 A director of a limited company is an office holder and in that role may have only limited duties to carry out. However, where a director also has a contract for service with the company and is a S/E earner follow the guidance at paragraph 28 to establish any additional hours worked.

Musicians

27 Practising is not remunerative work unless the practice is necessary to do the work the person is engaged in.

Example 1

A musician teaches at a school for six hours a week. He also practices his instrument for 14 hours a week in order to maintain his skill as a musician. He is not engaged in remunerative work.

Example 2

A musician is engaged to perform music. The performances last for twelve hours a week. She practices the performances for ten hours a week. She is engaged in remunerative work.

Self-employed

28 Include all the hours necessary to run the business, for example, time spent in

1. trips to wholesalers and retailers
2. visits to potential customers
3. advertising or canvassing
4. cleaning the business premises
5. cleaning and maintaining items used in the business, for example a taxi or driving school car
6. providing estimates
7. book-keeping
8. research work, for example where the person is a writer.

29 Where a S/E person is running a business which is

1. building up **or**
2. winding down

it may be appropriate to re-determine the remunerative work issue week by week until hours of work reach a consistent level.

30 Accept a statement from the person about the number of hours worked unless there is reason for doubt. Where there is doubt, make a decision on the basis of all the available evidence.

Example

Peter, a window cleaner in good health and with all the necessary window cleaning equipment claims to have worked 15 hours a week during a period of fine weather. His accounts book revealed that he operated a long-standing window cleaning round with an average of ten customers per day, five days a week. He agreed that it took him about 30 minutes to clean each house plus an hours travelling in total

between houses. Based on this evidence the DM concluded that he worked six hours a day, five days a week, a total of 30 hours a week.

31 If a S/E person has been doing undisclosed work or working more hours than is claimed, the DM must determine on the probable number of hours worked. Consider all the available evidence, including any reports of what times of day and for how many days the person was observed working.

32 - 41

Teachers

42 The conditions of employment of most LA schoolteachers, except headteachers, are laid down in an Order¹ or Agreement². They have a contractual duty to spend whatever time is necessary to carry out their professional duties effectively in non-teaching activities such as

1. preparing and planning lessons and timetables
2. assessing and reporting on pupils
3. helping to administer and organize the school
4. advising pupils and ensuring their discipline, health and safety
5. discussing pupils' progress with parents.

Time spent in these activities should be counted. This list is not exhaustive. If the DM is unsure whether a teacher is obliged to do a particular activity, consult the Order or Agreement.

1 Education (School Teachers Pay and Conditions of Service) Order;

2 "Scottish Negotiating Committee for Teachers" conditions of service

43 Before either the Order or Agreement came into force, teachers were generally required by their contracts to carry out the duties now laid down¹. Members of the teaching profession not covered by the Order or Agreement (for example higher education lecturers and teachers in private schools) have similar obligations unless their contract provides that

1. they are not required to do such work **or**
2. any such work is included in the hours of work laid down in the contract.

1 Sim v Rotherham Metropolitan Borough Council [1986] 3WLR 851; R(U) 5/88

44 In most cases the contract of employment will not state the amount of time to be spent in duties other than actual teaching. Accept the person's own evidence if it seems reasonable. If a person states that the time spent on non-teaching duties is anything up to one third of the time spent teaching, accept

this without question.

45 It may be reasonable to accept a larger proportion than a third depending on the

1. teacher's experience
2. subjects being taught
3. method of teaching
4. amount of homework to be marked
5. number of pupils.

In these cases ask the person to provide a detailed list of non-teaching duties. If there is still doubt the employer may be able to provide evidence.

46 The amount of non-teaching work may vary from week to week. For example, a teacher may need to spend more time marking examination papers or writing reports at certain times of the year.

Paid breaks

47 Paid breaks do not count when establishing the hours of remunerative work.

48 - 57

Calculating average hours

58 If the person is engaged in work where the hours fluctuate, calculate the average weekly hours¹.

1 IS (Gen) Regs, reg 5(2)

Identifying a recognizable cycle

59 See if there is any pattern of work over a period of time. This is known as a recognizable cycle. A recognizable cycle is a recurring round of events where the end of a cycle marks the beginning of the next cycle¹.

1 NS v SSWP (IS) [2015] UKUT 0423 (AAC)

Example 1

week 1 X hours

week 2 Y hours

week 3 X hours

week 4X hours

week 5Y hours

week 6X hours

There is a recognizable cycle of three weeks (weeks 1 to 3 repeated in weeks 4 to 6).

Example 2

month 1^A
hours

month 2B hours

month 3^A
hours

month 4B hours

There is a recognizable cycle of two months.

Example 3

week 1 X hours

week 2X hours

week 3Y hours

week 4W hours

week 5V hours

There is no recognizable cycle.

Note: A cycle may include weeks in which no work is done¹.

1 IS (Gen) Regs, reg 5(2)(b)(i)

Permanent or indefinite contract

60 A recognizable cycle of work can exist at the outset of employment. This would happen where a person has a permanent or indefinite contract that expressly provides for a cycle. The contract may expressly provide for periods of work and periods of no work, for example, school holidays for school ancillary workers are usually periods of no work.

Example

Julia works as a school clerk under an indefinite contract that provides for work during school terms and no work during school holidays. The DM decides that Julia's contract establishes a cycle from its outset.

Fixed term contracts and casual workers

61 A cycle may be established after one or two years where a person is employed under a succession of fixed term contracts or on a casual basis (perhaps with no contract)¹. DMs should decide each case on its facts. The DM will need to consider whether two complete cycles would be necessary if one year had not been sufficient to establish a cycle, e.g. in the case of relief cover or occasional work. DMs should also consider whether there is a mutual expectation between the person and the employer that work will resume after a period of no work.

1 R(JSA) 5/02

Example

Bill is a catering assistant at a secondary school. He has been working on a casual basis for just over a year. He does not work for the Christmas holiday but says that he has been asked to return to work after the holidays. Bill tells the DM that he expects to return to work as he did the previous January. The DM decides that Bill has established a recognizable cycle of work and that it has not been broken. Bill is in remunerative work because on average he works 16 hours or more a week.

Extra work

62 A person may have a contract for work that specifies when they will and won't be expected to work. If they work any additional hours during a holiday period, either for their usual employer or another employer, it does not mean that the contract does not establish a cycle¹.

1 R(JSA) 5/02

Example

Celeste is employed as a shop assistant by a students union. The terms of her employment contract are "Monday to Friday, 8.15 am to 1.15 pm term time only".

Celeste agrees to do extra work stocktaking during the first week of the summer holidays. The DM is asked to decide whether she is in remunerative work on the day after she finishes the extra work. The DM decides that Celeste's contract establishes a cycle from the outset of the work, and that the cycle

has not been broken by the extra hours of work done during the holiday period.

Probation

63 A recognizable cycle of work can exist from the outset of the contract even if there is an initial period of probation.

Example

Harry is employed at a secondary school for 37 hours a week for 38 weeks a year as a workshop technician. His contract of employment, subject to a six month probationary period, specifies that he is expected to work during term times and not during school holidays. The DM decides that he is in a recognizable cycle from the outset of the contract and, on average, works 16 hours or more a week. He is in remunerative work.

64 - 69

Recognizable cycle established

70 Where there is a recognizable cycle calculate the average hours over one complete cycle¹. Include, where the cycle involves periods when the person does no work, those periods, but disregard any other absences.

1 IS (Gen) Regs, reg 5(2)(b)(i)

Periods when a person does not work

71 Periods when a person does not work can fall into the following categories

1. periods of absence because of sickness, maternity leave, shared parental leave, paternity leave or adoption leave
2. periods of unauthorized absence “without good cause”
3. periods of no work (other than holidays) during which someone is not working because work is not provided by the employer
4. periods during which someone can be properly regarded as on holiday.

Note: For the calculation of hours to determine remunerative work see paragraph 79.

Sickness, maternity leave, paternity leave, adoption leave and periods of unauthorised absence

72 When someone is absent from work due to sickness, maternity leave, paternity leave shared parental leave or adoption leave (see paragraph 136) the DM should decide that they are not in remunerative work during such absences¹. When someone has a period of absence without good cause

the DM should treat such an absence in the same way as proper holidays² (see paragraph 79).

1 IS (Gen) Regs, reg 5(3A); 2 reg 5(3)

Holidays or periods of no work

73 The DM should decide that all people (including teaching staff) should only be regarded as being on holiday for the weeks of holiday for which they are paid¹. These can be ascertained from the contract of employment (which will usually be in writing but can be verbal). The fact that pay is

1. spread over a year in equal instalments **and**
2. enhanced to take account of a lack of holiday entitlement

should not be taken into account when deciding whether someone has paid holidays.

1 R(JSA) 5/03

74 From 1.10.98 legislation was introduced to give most workers a right to paid holidays. A worker is usually entitled to four weeks paid holiday in any leave year beginning after 23.11.99¹.

1 Working Time Regulations 1998 No. 1833

Calculating the number of hours for which a person is engaged in work

75 If the DM has decided that a person is still in employment (see paragraphs 2 - 4) (and they are not absent from work due to sickness, maternity leave, paternity leave or adoptive leave) they will need to calculate the number of hours for which the person is engaged in work.

76 If the person works the same number of hours each week when not on holiday then that is the number of hours worked in each week.

77 If the person's hours of work fluctuate, the DM should take an average

1. as per paragraph 88 if there is no cycle of work **or**
2. as per paragraph 79 if there is a cycle of work.

78

Calculating the average hours

79 Legislation¹ requires that in cycle cases where the hours of work fluctuate the average should be calculated by taking into account periods in which the person does not work but disregarding other absences. DMs should only deduct periods of holiday, absences without good cause, sickness, maternity leave, paternity leave and adoption leave from the number of weeks in the cycle before dividing the

result into the total number of hours worked in the cycle². Periods of no work should not be deducted. Put another way, it is only periods of holiday, absences without good cause, sickness, maternity leave, paternity leave and adoption leave which are “other absences to be disregarded”.

1 IS (Gen) Regs, reg 5(2)(b)(i); 2 R(JSA) 5/03

80

Yearly cycle with school holidays or similar vacations

81 Where a person has a contract of employment (written, verbal or implied) which continues throughout the year, whether or not payment is made for any part of the holidays, there is a recognizable cycle of one year. Where a person with such a contract works at a school, educational establishment or any other place of employment where there are school holidays or similar vacations, the DM should divide the total number of hours worked during the year by 52 weeks less any weeks of “other absence”.¹

1 R(JSA) 5/03

Ancillary school workers

82 Ancillary school workers are members of the non-teaching staff of schools and other educational establishments. Where such workers have a yearly cycle of work during term-time only follow the guidance at paragraph 81. Examples of ancillary school workers include

1. school meals services employees
2. domestic staff
3. clerical staff (such as secretaries and clerks)
4. laboratory workers
5. nursing assistants
6. school bus drivers.

83 - 87

No recognizable cycle established

Estimating future hours

88 Where

1. a person has just started work or is about to start work **or**

2. the hours of work have just changed or are about to change and the change does not form part of the normal pattern of work **or**
3. because of absences from work a recognizable cycle has not been established

estimate the hours or the average hours the person is **expected** to work in a week¹.

1 IS (Gen) Regs, reg 5(2)(a)

89 Average the estimated hours over a period long enough to cover the expected pattern of work¹. Consider the case where there is sufficient evidence to average the actual hours worked.

1 R(IS) 8/95

Averaging past hours

90 Where the person has been in work before the date of claim and there is no recognizable cycle but the weekly hours of work fluctuate then calculate average weekly hours over

1. the five weeks immediately before the date of claim¹ **or**
2. a longer or shorter period immediately before the date of claim if the five week period in **1.** does not give a fair average.

“Immediately before” in this context means the end of the last complete week before the date of claim.

1 IS (Gen) Regs, reg 5(2)(b)(ii)

91 Include in the calculation at paragraph 90 any periods of non-working within the normal pattern of employment (rest periods)¹. Do not include periods of non-working after the employment has ended.

1 R(IS) 12/95

92 Examples of circumstances in which it may not be appropriate to use the five week period in paragraph 90 **1.** are where the

1. five weeks contain a period of absence which distorts the average **or**
2. five weeks do not show the person’s normal pattern of working hours, for example they include a short period of overtime which is not typical, or reduced hours because of unusual slackness in the business **or**
3. person is paid at intervals of longer than a week.

In either of the circumstances in **1.** or **2.** a period of less than five weeks as in paragraph 90 **2.** might give a fairer result. Extending the period beyond the last five weeks would still include the distortions so in these circumstances estimate future hours as in paragraph 88.

93 If the DM bases a weekly average of hours over a period of more or less than five weeks, as in paragraph 90 **2.**, the alternative period must still be a period immediately before the date of claim.

It should be either

- 1.** more than the five week period in paragraph 90 **1.**, in which case it will include those five weeks **or**
- 2.** less than the five week period in paragraph 90 **1.**, in which case it will be a part of those five weeks immediately before the date of claim.

94 The approaches outlined in paragraph 88 and paragraph 90 are alternatives. There is no provision for the DM to calculate an average of weekly hours over a past period of actual work and a future period of expected work.

Short-time workers

95 Employers experiencing a fall in business may put their employees on short-time working. This can be

- 1.** a reduction in hours worked each day **or**
- 2.** no work on certain days of the week **or**
- 3.** work restricted to certain weeks, for example week on, week off.

Follow the guidance in paragraphs 88 - 89 and estimate future hours¹ at the start of short-time working until average hours over a past period can be calculated². Periods of no work should be included in the average.

1 IS Gen (Regs), reg 5(2)(a); R(IS) 8/95; 2 IS (Gen) Regs, reg 5(2)(b)(i) & (ii)

96 - 106

Changes to the normal hours

107 Once the normal hours of work have been established, a person may work different hours for a period falling outside the normal pattern of working. Where this happens determine whether the change

- 1.** represents a new pattern of working hours. If so, re-calculate the hours of work and supersede the decision as necessary **or**

2. represents a short-term change in the normal pattern. If so, identify the period in which abnormal hours are worked and supersede the decision based on the remunerative work for that period **or**

3. means that the period over which average hours were calculated needs to be extended to include the period of change. For example, where an ice-cream seller's hours of work increase during a spell of hot weather and the DM decides that the previous calculation of average hours was based on an unrepresentative period. In such a case recalculate average hours over

3.1 the cycle of work if there is now a recognizable cycle¹ **or**

3.2 the five week period or other more suitable period immediately before the date of application for supersession if there is no recognizable cycle².

1 IS (Gen) Regs, reg 5 (2)(b)(i); 2 reg 5(2)(b)(ii)

Seasonal workers

108 The normal remunerative work rules apply to S/E seasonal workers.

109 - 110

Averaging the hours

111 Calculate average hours of a seasonal worker over

1. if there is a recognizable cycle - one complete cycle of work (this will usually be one year where a business continues to operate throughout the year). Include periods in which the person does no work, but exclude other absences such as holidays or sickness¹ **or**

2. if there is no recognizable cycle - over the five week period, or other more suitable period, immediately before the date of claim, the date of decision or the date of application for supersession².

Include in the calculation time spent on all activities connected with the business.

1 IS (Gen) Regs, reg 5(2)(b)(i); 2 reg 5(2)(b)(ii)

Agency and casual workers

112 The normal remunerative work rules apply to claimants who find employment through agencies or are employed on a casual basis. Whether the employment is ongoing is relevant.

113 Where the employment ends after each period of work, periods of unemployment should not be included in the calculation of average hours.

114 Where employment is ongoing, periods when the person does no work should be included in the calculation of average hours.

115 - 125

People treated as in remunerative work

Introduction

126 People can be treated as in remunerative work even though they are absent from remunerative work¹. However see paragraph 136 et seq for details of when this rule does not apply².

1 IS (Gen) Regs, reg 5(3); 2 reg 5(3A)

127 Treat people as in remunerative work for any period during which they are¹

1. absent without good cause **or**
2. absent by reason of a recognized, customary or other holiday.

1 IS (Gen) Regs, reg 5(3)

Absent without good cause

128 “Good cause” is for the DM to determine. The onus is on the claimant to show that good cause exists. Whether or not the employer has authorized the absence may be an indication of good cause but is not conclusive. Taking days off work for no apparent reason is not good cause. Examples of good cause include where the absence is due to

1. bereavement or sudden serious illness in the family **or**
2. a disaster at home **or**
3. suspension from work, whether or not on full pay **or**
4. a requirement to attend court.

Recognized, customary or other holiday

129 A person should be treated as in remunerative work for any period of absence because of a recognized, customary or other holiday¹. This is the case even if there is no permanent contract of employment. But this will not apply where the

1. absence is not a holiday (see paragraph 73) **or**

2. work is not remunerative as in paragraph 1 et seq **or**
3. person goes on holiday after employment ends.

See DMG Chapter 20 for guidance on what is a recognized, customary or other holiday.

1 IS (Gen) Regs, reg 5(3)

130 - 135

People treated as not in remunerative work

Leave or absence from work

136 A person shall be treated as not being in remunerative work¹ on any day on which they are

1. on maternity leave **or**
2. on paternity leave **or**
3. on adoption leave **or**
4. on shared parental leave **or**
5. absent from work because of illness.

1 IS (Gen) Regs, reg 5(3A)

Meaning of ordinary paternity leave

137 Ordinary paternity leave means¹ a period of absence from work on leave in accordance with legislation².

1 IS (Gen) Regs, reg 2(1); 2 ER Act 1996, s 80A & 80B

Meaning of additional paternity leave

138 Additional paternity leave means¹ a period of absence from work on leave following the birth or adoption of a child under relevant legislation². The period of absence cannot exceed 26 weeks.

1 IS (Gen) Regs, reg 2(1); 2 ER Act 1996, s 80AA & 80BB

139 - 142

Meaning of adoption leave

143 Adoption leave means¹ a period of absence from work on ordinary or additional adoption leave in accordance with legislation².

1 IS (Gen) Regs, reg 2(1); 2 ER Act 1996, s 75A or 75B

Categories of people at work but treated as not in remunerative work

144 In certain circumstances a person who is in remunerative work should be treated as not being in remunerative work. These are where the person is

1. engaged in childminding in the childminder's home¹ **or**
2. engaged by a charity or voluntary organization or is a volunteer² **or**
3. engaged on a training scheme³ **or**
4. receiving assistance under the S/E route⁴ **or**
5. engaged in specific occupations⁵ **or**
6. performing duties as a councillor⁶ **or**
7. engaged as a foster parent or in providing respite care⁷ **or**
8. engaged in an activity which attracts a sports award⁸.

Where a person has an additional occupation the remunerative work rules apply in the normal way to the additional occupation.

*1 IS (Gen) Regs, reg 6(1)(b); 2 reg 6(1)(c); 3 reg 6(1)(d); 4 reg 6(1)(dd); 5 reg 6(1)(h); 6 reg 6(1)(j);
7 reg 6(1)(k); 8 reg 6(1)(m)*

145 In addition, there are other circumstances where a person should be treated as not being in remunerative work, **regardless** of the type of work undertaken. These are where the person is

1. disabled¹ **or**
2. affected by a TD² **or**
3. caring for another person³ (IS only) **or**
4. living in a care home, an Abbeyfield Home or an independent hospital⁴ **or**

5. in receipt of IS by way of MIRO⁵.

1 IS (Gen) Regs, reg 6(4)(a); 2 reg 6(4)(b); 3 reg 6(4)(c); Sch 1B, para 4; 4 reg 6(4)(d); 5 reg 6(5) & 6(6)

Childminders

146 People who are childminders are treated as not being in remunerative work as long as the childminding is done in their home¹. If the childminding is done in the employer's home the hours worked will count towards the remunerative work exclusion.

1 IS (Gen) Regs, reg 6(1)(b)

Charity or voluntary workers and volunteers

147 People are treated as not being in remunerative work where they are engaged by a charity or voluntary organisation or are volunteers **and**

1. the only payment

1.1 received **or**

1.2 due to be paid

is for expenses incurred **and**

2. they receive no remuneration or profit **and**

3. they are not treated as having notional earnings¹ (see DMG 26195 and 28389 - 28391).

1 IS (Gen) Regs, reg 6(1)(c) & Sch 9, para 2

Meaning of voluntary organisation

148 A voluntary organisation is a body, other than a public authority or LA, whose activities are not carried out for profit¹.

1 IS (Gen) Regs, reg 2(1)

Meaning of volunteer

149 A volunteer is a person who without any legal obligation performs a service for another person without expectation of payment¹.

Engaged on a training scheme

150 Treat people as not being in remunerative work where they are on a training scheme for which a training allowance (see DMG 20008 - 20009) is being paid (this includes WBLA where payments are treated as training allowances)¹.

1 IS (Gen) Regs, reg 6(1)(d)

Note: For people in the S/E route of the ND for lone parents see DMG 14410.

People receiving assistance under the self-employed route

151 People are treated as not being in remunerative work where they are receiving assistance under the S/E route¹ (see DMG 14001).

1 IS (Gen) Regs, reg 6(1)(dd)

Meaning of self-employed route

152 For the meaning of S/E route see DMG 14000.

Engaged in specific occupations

153 People are treated as not being in remunerative work where they are

- 1.** A P/T member of a fire brigade¹ who
 - 1.1** in Scotland is a part-time firefighter employed by the Scottish Fire and Rescue Service² and
 - 1.2** in England, and Wales a P/T firefighter employed by a fire and rescue authority under relevant legislation³ **or**
- 2.** auxiliary coastguards for coastal rescue activities⁴ **or**
- 3.** working P/T in the manning or launching of a lifeboat⁵ **or**
- 4.** members of a reserve force⁶.

*1 IS (Gen) Regs, reg 6(1)(h) & Sch 8, para 7(1)(aa) & (ab); 2 Fire (Scotland) Act 2005, s 1A;
3 Fire and Rescue Services Act 2004; 4 IS (Gen) Regs, reg 6(1)(h) & Sch 8, para 7(1)(b);
5 reg 6(1)(h) & Sch 8, para 7(1)(c); 6 reg 6(1)(h) & Sch 8, para 7(1)(d)*

Councillors

154 People who perform duties as a councillor are treated as not being in remunerative work¹.

1 IS (Gen) Regs, reg 6(1)(j)

Meaning of councillor

155 Councillors are

- 1.** in England and Wales, a member of
 - 1.1** a London Borough council **or**
 - 1.2** a county or county borough council **or**
 - 1.3** a district council **or**
 - 1.4** a parish or community council **or**
 - 1.5** the Common Council of the City of London **or**
 - 1.6** the Council of the Isles of Scilly.
- 2.** In Scotland, a member of a council for a local government area¹.

1 Local Government etc (Scotland) Act 1994, s 2

156

Foster parents and people providing respite care

Foster parents

157 People who receive payments from

- 1.** a LA **or**
- 2.** a voluntary organisation **or**
- 3.** in Scotland, a care authority

for fostering a child or young person are treated as not being in remunerative work¹.

1 IS (Gen) Regs, reg 6(1)(k) & Sch 9, para 26

People providing respite care

158 People who provide respite care are treated as not being in remunerative work¹ if

1. the person requiring care is being cared for in the claimant's home **and**
2. the person requiring care is not normally a member of the claimant's household **and**
3. the only payments received are specified payments² from a
 - 3.1 HA or
 - 3.2 LA **or**
 - 3.3 voluntary organization **or**
 - 3.4 a primary care trust **or**
 - 3.5 the person concerned under specified legislation³.

1 IS (Gen) Regs, reg 6(1)(k); 2 Sch 9, para 27; 3 NA Act, s 26(3A)

Sports awards

159 People are treated as not being in remunerative work¹ if

1. they are engaged in an activity for which a sports award has been or is to be made² **and**
2. no other payment is made or expected to be made to them in respect of the activity³.

1 IS (Gen) Regs, reg 6(1)(m); 2 reg 6(1)(m)(i); 3 reg 6(1)(m)(ii)

Meaning of sports award

160 A sports award¹ is an award made by one of the Sports Councils named in National Lottery law² and out of sums allocated under that law.

1 IS (Gen) Regs, reg 2(1); 2 National Lottery etc. Act 1993, s 23(2)

Disabled workers

161 People are treated as not being in remunerative work where they are mentally or physically disabled¹ and as a result of that disability

1. earn 75 per cent or less of what a person without that disability working the same number of hours would reasonably be expected to earn² **or**

2. work 75 per cent or less of the hours that a person without that disability would reasonably be expected to do in the same work or in a similar job in the area³.

1 IS (Gen) Regs, reg 6(4)(a); 2 reg 6(4)(a)(i); 3 reg 6(4)(a)(ii)

162 The person's own evidence of reduced earnings or hours should normally be accepted. However, if necessary, DMs should obtain further evidence for comparison purposes. This may include information from private employment agencies, social services departments or charities for the disabled.

People affected by a trade dispute

163 Where the claimant or partner is involved in a TD and they are treated as not being in remunerative work because

1. the seven day exclusion period (see DMG 20396)
 - 1.1 does not apply **or**
 - 1.2 no longer applies **and**
2. the payments listed at DMG 20439 are not or no longer taken into account
they are treated as not being in remunerative work¹.

1 IS (Gen) Regs, reg 6(4)(b)

164

Caring for another person

165 People are treated as not being in remunerative work where they are¹

1. regularly and substantially engaged in caring for another person and that person
 - 1.1 is in receipt of "AA" or the care component of DLA at the highest or middle rate² **or**
 - 1.2 has claimed "AA" or DLA **or**
 - 1.3 has
 - 1.3.a made an advance claim for **and**
 - 1.3.b an award of **and**
 - 1.3.c not completed the qualifying period for

“AA” or the care component of DLA at the highest or middle rate³ **or**

1.4 has

1.4.a made an advance claim for **and**

1.4.b an award of **and**

1.4.c completed the qualifying period for

“AA” or the care component of DLA at the highest or middle rate and the award is in payment **or**

2. both entitled to and in receipt of CA⁴ and caring for another person.

Note: See DMG 20117 - 20119 for guidance on deciding whether or not a person is regularly and substantially caring for another person.

*1 IS (Gen) Regs, reg 6(4)(c) & Sch 1B, para 4; 2 SS CB Act 92, s 72(3); 3 s 65(6)(a); SS (C&P) Regs, reg 13A;
4 SS CB Act 92, s 70*

166 Where paragraph 165 **1.2** applies people are treated as not in remunerative work until the earlier of¹

1. the date the claim for “AA” or DLA is decided **or**

2. 26 weeks from the date of claim for “AA” or DLA.

1 IS (Gen) Regs, Sch 1B, para 4(a)(ii) & (iii)

People living in a care home, Abbeyfield Home or an independent hospital

167 People who

1. are in employment **and**

2. live in certain types of accommodation

are treated as not being in remunerative work¹.

1 IS (Gen) Regs, reg 6(4)(d)

168 Paragraph 167 applies only to a person who

1. lives in (whether permanently or temporarily) or is temporarily absent from

1.1 a care home **or**

1.2 an Abbeyfield Home **or**

1.3 an independent hospital **and**

2. requires personal care because of

2.1 old age **or**

2.2 disablement **or**

2.3 past or present dependence on alcohol or drugs **or**

2.4 past or present mental disorder **or**

2.5 a terminal illness.

Note: See DMG 51194 for the meaning of independent hospital.

Mortgage interest run-on

169 People may be entitled to IS in respect of mortgage or loan interest MIRO after they start remunerative work if the

1. remunerative work is expected to last for not less than five weeks **and**

2. people were, for a continuous period of 26 weeks immediately before the day on which they started this work, entitled to and in receipt of JSA(IB) or IS **and**

3. people had, on the day before starting this work, included in the applicable amount, an amount in respect of mortgage or loan interest **and**

4. people remain liable to make payments on the loan¹.

People who satisfy these conditions are treated as not being in remunerative work for the first four weeks of that work².

1 IS (Gen) Regs, reg 6(5); 2 reg 6(6)(a)

170 When determining the length of time benefit has been in payment, any periods of MIRO will not be treated as part of the 26 week qualifying period¹.

The content of the examples in this document (including use of imagery) is for illustrative purposes only

