24th April 2020

Dear Sirs,

1. Regarding the Coronavirus Job Retention Scheme (‘CJRS’)

Unite the Union (‘Unite’) is concerned by certain provisions of The Coronavirus Act 2020 Functions of Her Majesty’s Revenue and Customs (Coronavirus Job Retention Scheme) Direction (‘the Direction’):

- Paragraph 6.3 precludes employees who are entitled to Statutory Sick Pay (SSP) from being furloughed in certain circumstances.
- Paragraphs 8.5-8.6 reduce the wage indemnity employers can claim from the scheme by the amount of SSP (whether the employee is claiming SSP or not).

The provisions Unite is concerned about are contrary to legitimate expectations created by Guidance issued by Her Majesty’s Revenue and Customs (HMRC) in relation to the CJRS and
they particularly affect some of the most vulnerable members of society, such as those who are shielding because of serious underlying health conditions. Further, Unite considers that it is irrational and inconsistent with the powers in the Coronavirus Act 2020 for the Direction and the Guidance to depart from each other so widely. In forming the Direction there appears to have been a failure to have regard to the terms of the already published Guidance which was a necessarily relevant consideration.

Unite accepts and understands that the CJRS has been produced rapidly in response to circumstances of unprecedented difficulty. It therefore hopes and anticipates that the issues outlined in this letter may simply be accidental oversights and that the Government will quickly recognise and wish to remedy them.

However, the Government will understand that the same circumstances that demanded the rapid production of the CJRS demand urgent action on Unite’s part to protect the interests of its members. If the Government is unable to resolve them, Unite reserves the right to seek resolution through Judicial Review and this letter stands also as a letter before action.

2. The issue

Unite the Union

Unite the Union (‘Unite’) is an independent trade union with well in excess of one million members. It is Unite’s duty to act in the interests of its members including through judicial review where that is necessary to promote those interests.

Unite’s membership is diverse. It includes employees in all sectors of the economy. Its members are among the many millions who are deeply affected by the coronavirus pandemic, including economically. The CJRS and its detail is a matter of the utmost importance and concern to Unite and to its membership.

Unite has a particular interest and duty to ensure that the interests of its members who are most vulnerable to the pandemic - including those who are sick and those who have underlying health conditions that put them at risk of very serious coronavirus related disease - are protected.

In summary, Unite is concerned that:
- If the CJRS is operated in accordance with the Direction, it will exclude from its coverage many vulnerable employees among its membership who have a legitimate expectation, created by HMRC Guidance, of being included. Many will fall into hardship and poverty, or as the case may be for those already in hardship and poverty, more extreme versions of hardship and poverty.

- Further, if the CJRS is operated in accordance with the Direction, there will be an additional wage burden to employers in respect of employees entitled to SSP. That is also contrary to legitimate expectations created by HMRC Guidance. If the CJRS is operated in this way, this will reduce employers’ willingness to use the scheme in the case of employees entitled to SSP. The points in relation to hardship and poverty are repeated.

- Yet further, the very fact of divergence between the Direction of the Guidance will disincentivise employers from using the CJRS in relation to vulnerable employees whose cases are captured in the disparity between the Direction and the Guidance. The divergence creates risk and confusion. The points in relation to hardship and poverty are again repeated.

Background

On 20 March 2020, the Chancellor of the Exchequer, the Rt. Hon. Rishi Sunak, announced the Coronavirus Job Retention Scheme.¹

The legal basis of the scheme is s.76 Coronavirus Act 2020 which provides simply as follows:

76 HMRC functions

Her Majesty’s Revenue and Customs are to have such functions as the Treasury may direct in relation to coronavirus or coronavirus disease.

On 15 April 2020, the Chancellor issued the Direction to HMRC on behalf of the Treasury pursuant to ss.71 and 76 Coronavirus Act 2020. In the meantime, HMRC had already started issuing Guidance in relation to the CJRS. HMRC continued issuing Guidance subsequently.

HMRC’s Guidance includes the following:

On 26 March 2020, Guidance to employers was first issued (the ‘Employer Guidance’). This first version is referred to as ‘v.1’. The Employer Guidance was re-issued on 4 April (v.2), on 9 April (v.3), on 15 April (v.4), on 17 April (v.5), on 20 April (v.6) and on 23 April (v.7).  

On 26 March 2020, Guidance to employees was first issued (the ‘Employee Guidance’). This first version is referred to as ‘v.1’. The Employee Guidance was re-issued on 4 April (v.2), on 9 April (v.3), on 15 April (v.4) on 17 April (v.5) and on 23 April (v.6).

On 20 April 2020, the online portal for making claims against the Scheme opened.

The Direction, on the one hand, and HMRC Guidance on the other, make materially different provision in respect of the application and operation of the CJRS in the case of employees who are entitled to Statutory Sick Pay (SSP). That is so whether the employee who is entitled to SSP is claiming it or not.

There are two parts of the Direction which are impugned:

- Paragraph 6.3: the effect entitlement to SSP has on the right to furlough an employee. Furlough is defined at paragraph 6.1.

- Paragraphs 8.5 – 8.6: the effect of entitlement to SSP on the amount of wages that can be recovered from the CJRS. The employer’s indemnity from the scheme is defined at paragraph 8 and limited by paragraphs 8.5-8.6

**Paragraph 6.1: definition of furlough**

Paragraph 6.1 of the Direction defines furlough as follows:

| 6.1 An employee is a furloughed employee if-
| (a) the employee has been instructed by the employer to cease all work in relation to their employment,
| (b) the period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more, and
| (c) the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus |

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Paragraph 6.3: the effect entitlement to SSP has on the right to furlough an employee

At paragraph 6.3 special provision is made in relation to SSP as follows:

6.3 Where Statutory Sick Pay is payable or liable to be payable in respect of an employee (whether or not a claim to Statutory Sick Pay is made) at the time when the instruction in paragraph 6.1(a) is given (“original SSP”), the period described in paragraph 6.1(b) in respect of the employee does not begin until the original SSP has ended (but any subsequent entitlement to Statutory Sick Pay by virtue of the employee becoming unfit for work again after the original SSP has ended must be disregarded).

In short, the Direction provides that an employee cannot be furloughed at a moment in time when they are entitled to SSP. HMRC Guidance says the opposite. This has major implications for the coverage of the CJRS.

If the coverage is determined by the provisions of the Direction rather than by HMRC Guidance, all employees entitled to SSP are excluded from coverage at least for a period of time. This cohort includes some of the most vulnerable and in need of protection. As set out below, this is a wider group than may first appear. The exclusion from the CJRS will in some cases be for the entire duration of the scheme:

- By paragraph 12, the Direction provides that the CJRS will be in effect between 1 March 2020 and 31 May 2020. However, on 17 April 2020 the Chancellor announced that the scheme would be extended to the end of June 2020. We assume that the Direction will be amended accordingly in due course (please confirm);

- Employees are entitled to SSP for up to 28 weeks (see ss.155(4) and s.157(1) Social Security and Benefits Act 1992). Thus, whether the Direction is amended to extend the

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Len McCluskey
General Secretary

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- duration of the scheme or not, the maximum entitlement to SSP is greater than the
duration of the CJRS;

- Entitlement to SSP extends not only to those who are actually incapable of work by
reason of illness but also those who are deemed to be. The definitions of deemed
incapability for work, for the purposes of SSP, is provided at regulation 2(1)(c) and
schedule 1, Statutory Sick Pay (General) Regulations 1982 (as amended). By a series of
recent amendments that definition has been extended as part of the response to the
Covid-19 pandemic. It now additionally includes:

  a. Those who are self-isolating because they are suffering from coronavirus
     symptoms, however mild;
  b. Those who are self-isolating because they live with somebody who has
     coronavirus symptoms, however mild;
  c. Those who have been advised to shield because they are extremely vulnerable to
     serious illness by reason of underlying health conditions.

- The effect of paragraph 6.3 of the Direction is that a period of furlough cannot begin
whilst an employee is entitled to SSP. This means that, for instance, those who are
actually sick on a medium or long term basis (including those sick with coronavirus
disease) and those who are shielding or ought to be, cannot be furloughed.

- Note that the problem cannot (lawfully) be avoided by the employee / employer simply
re refraining from make a claim for SSP, because the language of paragraph 6.3 is clear that
the prohibition on furlough applies whether a claim for SSP is in fact made or not.

The consequences of this are severe:

- First, there is a substantial financial difference between SSP entitlement and furlough pay.
  SSP is currently set at £95.85 per week. By contrast pay under the CJRS is 80% of regular

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5 See: Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020 (SI 2020/287); Statutory Sick Pay (General) (Coronavirus Amendment) (No. 2) Regulations (SI 2020/304); Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations 2020 (SI 2020/374); Statutory Sick Pay (General) (Coronavirus Amendment) (No. 3) Regulations 2020 (SI 2020/427).
wages or salary capped at £2,500 per month. Thus, for many or most employees the
difference between SSP and furlough pay may make the difference between living in or
out of poverty. In the worst cases of those who already live in poverty, which are all too
common, furlough makes the difference between poverty and extreme poverty.

- Secondly, the prospects of being dismissed by reason of the coronavirus crisis increases
very significantly for those who cannot be furloughed. The CJRS is designed to
incentivise employers to furlough instead of dismissing employees who are not currently
needed by the business because of the current crisis. It creates this incentive by removing
some or all\(^6\) of the wage, National Insurance contribution and pension contribution costs
of employment. In many cases then, furloughed employees are virtually cost neutral to the
employer. By contrast, the consequence of paragraph 6.3 is that employees entitled to SSP
are an additional cost to the employer compared to others who are not entitled to SSP for
at least two reasons:

  - Although there is a separate scheme to cover the cost of SSP, it is very limited.
    Among the limitations of that scheme, it applies only in respect of two weeks of
    SSP out of a possible 28 weeks per employee. And it applies only to employers of
    fewer than 250 people.\(^7\)
  - Many employees have a right to enhanced sick-pay in addition to SSP. None of
    the cost of this can be recovered from the CJRS unless the employee is
    furloughed, which he cannot be whilst entitled to SSP.

- Thirdly, those who are actually sick, those who should be self-isolating and those who should
be shielding, are incentivised to hide this from their employer and attend work so as not to
appear as though they are entitled to SSP when the order to cease work pursuant to
paragraph 6.1 is, or might be, given. This risks not only such employees’ well-being, but
also risks unnecessarily spreading coronavirus and other illness. Employees may be driven
to act in this way if the alternative is exclusion from the CJRS and, in many cases,
consequential poverty for them and their families.

\(^6\) The CJRS does not require the employer to ‘top up’ wages although the employer may/may not have other
obligations to do so.

accessed on 21 April 2020.
Provisions of the HMRC Guidance

Unite is concerned not merely because of the effects outline above but also because they are contrary to the provisions of the Employer Guidance and the Employee Guidance. Firstly, all versions of those Guidance documents indicated that employees could be furloughed if they were shielding.

Secondly, since Employer Guidance v.3 and Employee Guidance v.3 (both published on 9 April 2020) all iterations of those Guidance documents have made clear that employees who are entitled to SSP (including those who are sick, self-isolating or shielding) can be furloughed.

Versions 3 – 7 of the Employer Guidance (which were published between the period 9 April 2020 – 20 April 2020) says as follows:

If your employee is self-isolating or on sick leave

If your employee is on sick leave or self-isolating as a result of Coronavirus, they’ll be able to get Statutory Sick Pay, subject to other eligibility conditions applying. The Coronavirus Job Retention Scheme is not intended for short-term absences from work due to sickness, and there is a 3 week minimum furlough period.

Short term illness/ self-isolation should not be a consideration in deciding whether to furlough an employee. If, however, employers want to furlough employees for business reasons and they are currently off sick, they are eligible to do so, as with other employees. In these cases, the employee should no longer receive sick pay and would be classified as a furloughed employee.

Employers are also entitled to furlough employees who are being shielded or off on long-term sick leave. It is up to employers to decide whether to furlough these employees. You can claim back from both the Coronavirus Job Retention Scheme and the SSP rebate scheme for the same employee but not for the same period of time. When an employee is on furlough, you can only reclaim expenditure through the Coronavirus Job Retention Scheme, and not the SSP rebate scheme. If a non-furloughed employee becomes ill, needs to self-isolate or be shielded, then you might qualify for the SSP rebate scheme, enabling you to claim up to two weeks of SSP per employee.

Shielding Employees

Employers who are unable to work because they are shielding in line with public health Guidance (or need to stay home with someone who is shielding) can be furloughed.

Versions 3 – 6 of the Employee Guidance (which were published between 9 April 2020 and 17 April 2020) say as follows:
If you’re on sick leave or self-isolating because of coronavirus (COVID-19), speak to your employer about whether you’re eligible to be furloughed – you should get Statutory Sick Pay (SSP) as a minimum while you are on sick leave or self isolating. Your employer can furlough you at any time - if they do, you will no longer receive sick pay, but should be treated as any other furloughed employee.

If you are shielding in line with public health Guidance or required to stay home due to an individual in your household shielding and are unable to work from home, then you should speak to your employer about whether they plan to place staff on furlough.

Thus, according to the said Guidance, a claim for, or an entitlement to, SSP does not preclude the employee from being furloughed. That is true even if the employee is entitled to SSP at the time the instruction to cease work is given.

The Guidance, then, created legitimate expectations that employees entitled to SSP could be furloughed under the terms of the CJRS. The Direction is contrary to those expectations.

**Paragraph 7: what the employer must pay the employee**

Paragraph 7 of the Direction deals with pay, and in particular what the employer must pay to the employee if the employer is to claim against the Scheme. The basic principle is that the employer must pay the employee at least 80% of regular wages or salary capped at £2,500 gross per month. This is set out in paragraph 7.1:

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7.1 Costs of employment meet the conditions in this paragraph if:
(a) they relate to the payment of earnings to an employee during a period in which the employee is furloughed, and
(b) the employee is being paid-
(i) £2500 or more per month (or, if the employee is paid daily or on some other periodic basis, the appropriate pro-rata), or
(ii) where the employee is being paid less than the amounts set out in paragraph 7.1(b)(i), the employee is being paid an amount equal to at least 80% of the employee's reference salary.
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It should be noted that there are no special provisions in respect of sickness or sick pay in paragraph 7. Thus it appears that the amount an employer must pay to an employee who is sick during a period of furlough is unchanged by the fact of the sickness. (As noted above, the Direction, by paragraph 6.3, allows employees who become sick whilst on furlough to remain on furlough. What it does not allow is employees to be initially furloughed whilst they are entitled to SSP.)
Paragraph 8: The effect of entitlement to SSP on the amount of wages that can be recovered from the CJRS

Paragraph 8 of the Direction then deals with reimbursement of the employer by the CJRS. The basic principle is that the employer is reimbursed the sums paid to the employee capped at the lower of 80% of gross pay and £2,500, plus certain pension and national insurance contributions. Paragraphs 8.1 – 8.2 provide this:

<table>
<thead>
<tr>
<th>Expenditure to be reimbursed</th>
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<tr>
<td>8.1 Subject as follows, on a claim by an employer for a payment under CJRS, the payment may reimburse-</td>
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<tr>
<td>(a) the gross amount of earnings paid or reasonably expected to be paid by the employer to an employee;</td>
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<tr>
<td>(b) any employer national insurance contributions liable to be paid by the employer arising from the payment of the gross amount;</td>
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<tr>
<td>(c) the amount allowable as a CJRS claimable pension contribution.</td>
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<tr>
<td>8.2 The amount to be paid to reimburse the gross amount of earnings must (subject to paragraph 8.6) not exceed the lower of-</td>
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<tr>
<td>(a) £2,500 per month, and</td>
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<tr>
<td>(b) the amount equal to 80% of the employee’s reference salary (see paragraphs 7.1 to 7.15).</td>
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However, the amount of reimbursement is reduced in certain circumstances, including by entitlement to SSP:

| 8.6 No claim under CJRS may include amounts of specified benefits payable or liable to be payable in respect of an employee (whether or not a claim to the relevant specified benefit is actually made) during the employee’s period of furlough and the gross amount of earnings falling for reimbursement as described in paragraph 8.2 must be correspondingly reduced. |
| 8.7 The specified benefits for the purposes of paragraph 8.6 are- |
| (a) Statutory Sick Pay pursuant to section 151 of SSCBA or section 147 of SSB(NI)A; […] |

Thus, according to the Direction, the amount which the employer is reimbursed if the employee is on sick leave is reduced by the amount of the benefit the employee is eligible for, such as SSP. That is so whether the benefit is actually claimed or not.
This is a problem because, unless the cost of SSP is recoverable by the employer through some other means, the sick employee is a cost, or additional cost, to the business and it ceases to be cost neutral to furlough him/her. However, as set out above, only employers with fewer than 250 employees can recover any SSP, and such employers can only recover a maximum of two out of a possible 28 weeks of SSP. Thus the SSP recovery scheme is so limited it does not provide anything close to a complete solution.

In short, by paragraphs 8.5 and 8.6, entitlement to SSP reduces the amount of the employer’s wage indemnity in respect of employees who have been furloughed and who become entitled to SSP. This creates an incentive for the employer to dismiss such employees.

The HMRC Guidance

The Employer Guidance v.7, provides as follows in relation to the wage indemnity:

*If you cannot maintain your current workforce because your operations have been severely affected by coronavirus (COVID-19), you can furlough employees and apply for a grant that covers 80% of their usual monthly wage costs, up to £2,500 a month, plus the associated Employer National Insurance contributions and pension contributions (up to the level of the minimum automatic enrolment employer pension contribution) on that subsidised furlough pay.*

Each preceding iteration of the Employer Guidance contained either precisely that provision or a provision that was not materially different to it.

None of the HMRC Guidance to date has said or implied that the employers’ wage indemnity would or could be reduced by the amount of Statutory Sick Pay in cases in which the furloughed employee is entitled to the same.

The HMRC Guidance has, then, created a legitimate expectation that the employers’ wage indemnity from the CJRS is not reduced by any entitlement to SSP.

3. Resolution

As noted, we anticipate that the matters that we raise in this letter have arisen inadvertently.

A satisfactory resolution would be for the Treasury to:
- Amend the Direction so that its provisions in relation to furloughing employees entitled to SSP are no less favourable than the provisions in respect of the same set out in v.3 – 6 of the Employer Guidance;
- Amend the Direction so that its provisions in relation to the employer’s wage indemnity in the case of employees who are entitled to SSP are no less favourable than the provisions in respect of the same set out in v.3 – 7 of the Employer Guidance;
- In the alternative, formally announce and undertake that the CJRS will be operated no less favourably in the above stated respects notwithstanding the terms of the Direction.

If the Government is not able to resolve matters swiftly and satisfactorily, Unite regrettably must reserve the right to judicially review the Direction. As a consequence, the remaining information set out below completes the information required for this letter to comply with Judicial Review Pre-action Protocol.

4. Grounds of review

(1) Paragraph 6.3 of the Direction is unlawful because:

a. It is contrary to the legitimate expectations created by the HMRC Guidance. That Guidance, which both pre- and post-dates the Direction has created a legitimate expectation in relation to the CJRS that employees can be furloughed even at a moment in time when they are entitled to SSP. That is so whether the employee is actually incapable of work or deemed to be incapable of work because he or she is self-isolating or is shielding. The Guidance included clear and unambiguous statements to those effects which were without qualification. It would be unfair to the point of being an abuse of power for either Respondent now to operate the CJRS in accordance with the impugned aspects of paragraph 6.3 of the Direction.

b. It departs, irrationally and presumably unintentionally, from published Guidance which both pre- and post-dates it.

c. The decision to Direct HMRC in the terms of paragraph 6.3 failed to take into account the terms of the HMRC Guidance which contradict it. That Guidance was intended to be, in fact was and will continue to be, acted upon by employers with a view to saving jobs by furloughing instead of making redundancies.

(2) Paragraphs 8.5 and 8.6 (in so far as they relate to SSP) are unlawful because:
a. They violate legitimate expectations created by HMRC Guidance. That Guidance, which both pre- and post-dates the Direction has created a legitimate expectation in relation to the CJRS that there is no reduction in the wage indemnity provided by the scheme arising merely because the employee is or becomes entitled to SSP. The Guidance included clear and unambiguous statements to those effects which were without qualification. It would be unfair to the point of being an abuse of power for either Respondent now to operate the CJRS in accordance with the impugned aspects of paragraph 8.5-8.6 of the Direction.
b. They depart, irrationally and presumably unintentionally, from published Guidance which both pre- and post-dates it.
c. The decision to Direct HMRC in the terms of paragraph 8.5-8.6 failed to take into account the terms of the HMRC Guidance which contradict it. That Guidance was intended to be, in fact was and will continue to be, acted upon by employers with a view to saving jobs by furloughing instead of making redundancies.

(3) Overall this inconsistency is ultra vires the powers given by the Coronavirus Act 2020.

(4) The CJRS engages Article 1 of the First Protocol of the European Convention of Human Rights. Contrary to Article 14 the impugned provisions are indirectly discriminatory to disabled, older and pregnant employees who are more likely to be entitled to SSP than others. Employees with those characteristics have unequal access to the CJRS and the same cannot be justified. The impugned provisions of the Direction are therefore contrary to s.6 Human Rights Act 1998.

5. ADR proposals

Unite the Union is open to discussing the matters set out in this letter whether openly or on a without prejudice basis. It is open to doing so whether in correspondence, at a virtual round table meeting, in a mediation or otherwise.
6. The details of any information sought

Please explain why the provisions of the Direction and HMRC Guidance are materially different in the provision that they make (1) in respect of furloughing employees who are entitled to SSP and (2) in respect of the wage indemnity issues identified above.

Did the Treasury have regard to Employer Guidance v.3/v.4 and Employee Guidance v.3/4 before deciding to direct HMRC in the terms of paragraph 6.3 and 8.5-8.6? If so what regard did it have and why did it consider it appropriate or necessary (if indeed it did) to direct HMRC in terms that departed from published HMRC Guidance.

Did HMRC have regard to the Direction when determining the terms of Employer Guidance v.3/v.4/v.5/v.6/v.7 and/or Employee Guidance v.3/v.4/v.5/v.6? If so, what regard did it have and why did it consider it appropriate or necessary (if indeed it did) to issue Guidance that departed from the Direction at paragraph 6.3 and 8.5-8.6?

Please confirm whether or not you currently anticipate amending the Direction and if so in what way.

7. Proposed reply date

Unite recognises the immense pressure on the Government at this time. It asks that this letter is acknowledged within 7 days and that in their response the proposed Defendants indicate when they will provide a definitive answer to this letter, and whether there is any further information needed from Unite.

Yours sincerely,

Howard Beckett, Assistant General Secretary
For and on behalf of Unite the Union