
STATUTORY INSTRUMENTS

2008 No. 794

The Employment and Support Allowance Regulations 2008

PART 10

INCOME AND CAPITAL

CHAPTER 6

Other income

Calculation of income other than earnings

104.—(1) For the purposes of regulation 91 (calculation of earnings derived from employed earner's employment and income other than earnings) the income of a claimant which does not consist of earnings to be taken into account will, subject to paragraphs (2) to (7), be the claimant's gross income and any capital treated as income under regulation 105 (capital treated as income).

(2) There is to be disregarded from the calculation of a claimant's gross income under paragraph (1), any sum, where applicable, specified in Schedule 8.

(3) Where the payment of any benefit under the benefit Acts is subject to any deduction by way of recovery the amount to be taken into account under paragraph (1) is to be the gross amount payable.

(4) Paragraph (5) applies where—

- (a) a relevant payment has been made to a claimant in an academic year; and
- (b) that claimant abandons, or is dismissed from, that claimant's course of study before the payment to the claimant of the final instalment of the relevant payment.

(5) The amount of a relevant payment to be taken into account for the assessment period for the purposes of paragraph (1) in respect of a claimant to whom paragraph (4) applies, is to be calculated by applying the formula—

$$\frac{A - (B \times C)}{D}$$

where—

- A = the total amount of the relevant payment which that claimant would have received had that claimant remained a student until the last day of the academic term in which the person abandoned, or was dismissed from, the course, less any deduction under regulation 137(6) (treatment of student loans);
- B = the number of benefit weeks from the benefit week immediately following that which includes the first day of that academic year to the benefit week immediately before that which includes the day on which the claimant abandoned, or was dismissed from, that claimant's course;
- C = the weekly amount of the relevant payment, before the application of the £10 disregard, which would have been taken into account as income under regulation 137(3) had the claimant not abandoned or been dismissed from, the course and, in the case of a claimant

who was not entitled to an income-related allowance immediately before that claimant abandoned or was dismissed from the course, had that claimant, at that time, been entitled to an income-related allowance;

D = the number of benefit weeks in the assessment period.

(6) For the purposes of this paragraph and paragraphs (4) and (5)—

“academic year” and “student loan” have the same meanings as for the purposes of Chapter 10 of this Part;

“assessment period” means the period beginning with the benefit week which includes the day on which the claimant abandoned, or was dismissed from, the course and ending with the benefit week which includes the last day of the last quarter for which an instalment of the relevant payment was payable to that claimant;

“quarter” for the purposes of the definition of “assessment period” in relation to an academic year means a period in that year—

(a) beginning on 1st January and ending on 31st March;

(b) beginning on 1st April and ending on 30th June;

(c) beginning on 1st July and ending on 31st August; or

(d) beginning on 1st September and ending on 31st December;

“relevant payment” means either a student loan or an amount intended for the maintenance of dependants referred to in regulation 132(6) (calculation of grant income) or both.

(7) In the case of income to which regulation 91(4) (calculation of income of former students) applies, the amount of income to be taken into account for the purposes of paragraph (1) is to be the amount of that income calculated in accordance with regulation 94(7) (calculation of weekly amount of income) and on the basis that none of that income has been repaid.

(8) Subject to paragraph (9), for the avoidance of doubt there is to be included as income to be taken into account under paragraph (1)—

(a) any payment to which regulation 95(2) or 97(2) (payments not earnings) applies; or

(b) in the case of a claimant who is receiving support provided under section 95 or 98 of the Immigration and Asylum Act⁽¹⁾ including support provided by virtue of regulations made under Schedule 9 to that Act, the amount of such support provided in respect of essential living needs of the claimant and the claimant’s partner (if any) as is specified in regulations made under paragraph 3 of Schedule 8 to that Act.

(9) In the case of a claimant who is the partner of a person subject to immigration control and whose partner is receiving support provided under section 95 or 98 of the Immigration and Asylum Act including support provided by virtue of regulations made under Schedule 9 to that Act, there is not to be included as income to be taken into account under paragraph (1) the amount of support provided in respect of essential living needs of the partner of the claimant and the claimant’s dependants (if any) as is specified in regulations made under paragraph 3 of Schedule 8 to the Immigration and Asylum Act.

Capital treated as income

105.—(1) Capital which is payable by instalments which are outstanding on—

(a) the first day in respect of which an income-related allowance is payable or the date of the determination of the claim, whichever is earlier; or

(b) in the case of a supersession, the date of that supersession,

(1) Sections 95 and 98 and Schedule 9 were amended by the Nationality, Immigration and Asylum Act 2002 (c. 41), sections 44(1) and (6), 45(4)(a) and (b) and 50(1) and (2).

is to be treated as income if the aggregate of the instalments outstanding and the amount of the claimant's capital otherwise calculated in accordance with Chapter 7 of this Part exceeds £16,000.

(2) Any payment received under an annuity is to be treated as income.

(3) Any earnings to the extent that they are not a payment of income are to be treated as income.

(4) Any Career Development Loan paid pursuant to section 2 of the Employment and Training Act 1973(2) is to be treated as income.

(5) Where an agreement or court order provides that payments are to be made to the claimant in consequence of any personal injury to the claimant and that such payments are to be made, wholly or in part, by way of periodical payments, any such periodical payments received by the claimant (but not a payment which is treated as capital by virtue of this Part), are to be treated as income.

Notional income – deprivation and income on application

106.—(1) A claimant is to be treated as possessing income of which the claimant has deprived himself or herself for the purpose of securing entitlement to an employment and support allowance or increasing the amount of that allowance, or for the purpose of securing entitlement to, or increasing the amount of, income support or a jobseeker's allowance.

(2) Except in the case of—

(a) a discretionary trust;

(b) a trust derived from a payment made in consequence of a personal injury;

(c) an employment and support allowance;

(d) a jobseeker's allowance;

(e) working tax credit;

(f) child tax credit;

(g) a personal pension scheme, occupational pension scheme or a payment made by the Board of the Pension Protection Fund where the claimant is aged under 60;

(h) any sum to which paragraph 43(2)(a) of Schedule 9 (capital to be disregarded) applies which is administered in the way referred to in paragraph 43(1)(a) of that Schedule;

(i) any sum to which paragraph 44(a) of Schedule 9 refers; or

(j) rehabilitation allowance made under section 2 of the Employment and Training Act 1973,

income which would become available to the claimant upon application being made but which has not been acquired by the claimant is to be treated as possessed by the claimant but only from the date on which it could be expected to be acquired were an application made.

(3) A claimant who has attained the age of 60 is to be treated as possessing—

(a) the amount of any income from an occupational pension scheme, a personal pension scheme or the Board of the Pension Protection Fund—

(i) for which no claim has been made; and

(ii) to which the claimant might expect to be entitled if a claim for it were made;

(b) income from an occupational pension scheme which the claimant elected to defer,

but only from the date on which it could be expected to be acquired were an application for it to be made.

(4) This paragraph applies where a claimant aged not less than 60—

- (a) is entitled to money purchase benefits under an occupational pension scheme or a personal pension scheme;
- (b) fails to purchase an annuity with the funds available in that scheme; and
- (c) either—
 - (i) defers in whole or in part the payment of any income which would have been payable to the claimant by that claimant’s pension fund holder; or
 - (ii) fails to take any necessary action to secure that the whole of any income which would be payable to the person by that claimant’s pension fund holder upon the person applying for it, is so paid; or
 - (iii) income withdrawal is not available to the claimant under that scheme.

(5) Where paragraph (4) applies, the amount of any income foregone is to be treated as possessed by that claimant, but only from the date on which it could be expected to be acquired were an application for it to be made.

(6) The amount of any income foregone in a case where paragraph (4)(c)(i) or (ii) applies is to be the maximum amount of income which may be withdrawn from the fund and is to be determined by the Secretary of State who will take account of information provided by the pension fund holder in accordance with regulation 7(5) of the Social Security (Claims and Payments) Regulations 1987⁽³⁾.

(7) The amount of any income foregone in a case where paragraph (4)(c)(iii) applies is to be the income that the claimant could have received without purchasing an annuity had the funds held under the relevant occupational or personal pension scheme been held under a scheme where income withdrawal was available and is to be determined in the manner specified in paragraph (6).

(8) In paragraph (4), “money purchase benefits” has the meaning it has in section 181 of the Pension Schemes Act 1993⁽⁴⁾.

Notional income – income due to be paid or income paid to or in respect of a third party

107.—(1) Except in the case of a discretionary trust, or a trust derived from a payment made in consequence of a personal injury, any income which is due to be paid to the claimant but—

- (a) has not been paid to the claimant;
- (b) is not a payment prescribed in regulation 8 or 9 of the Social Security (Payments on Account, Overpayment and Recovery) Regulations 1988⁽⁵⁾ (duplication and prescribed payments or maintenance payments) and not made on or before the date prescribed in relation to it,

is, except for any amount to which paragraph (2) applies, to be treated as possessed by the claimant.

(2) This paragraph applies to—

- (a) an amount which is due to be paid to the claimant under an occupational pension scheme but which is not paid because the trustees or managers of the scheme have suspended or ceased payments due to an insufficiency of resources;
- (b) any amount by which a payment made to the claimant from an occupational pension scheme falls short of the payment to which the claimant was due under the scheme where the shortfall arises because the trustees or managers of the scheme have insufficient resources available to them to meet in full the scheme’s liabilities; or

⁽³⁾ S.I. 1987/1967, relevant amending instruments are S.I. 1999/2572 and S.I. 2003/492.

⁽⁴⁾ 1993 c. 48. The definition in section 181 was amended by S.I. 2005/2053.

⁽⁵⁾ S.I. 1988/664, the relevant amending instruments are S.I. 1991/387, S.I. 1991/2742, S.I. 1996/1345, S.I. 1999/2571, S.I. 1999/3178, S.I. 2000/1483, S.I. 2002/3019, S.I. 2003/492, S.I. 2005/337 and S.I. 2005/3476.

- (c) any earnings which are due to an employed earner on the termination of that employed earner's employment by reason of redundancy but which have not been paid to that employed earner.

(3) Any payment of income, other than a payment of income specified in paragraph (5), made to a third party in respect of a single claimant or the claimant's partner (but not a member of the third party's family) is to be treated—

- (a) in a case where that payment is derived from—
 - (i) a payment of any benefit under the benefit Acts;
 - (ii) a payment from the Armed Forces and Reserve Forces Compensation Scheme;
 - (iii) a war disablement pension, war widow's pension or war widower's pension; or
 - (iv) a pension payable to a person as a widow, widower or surviving civil partner under any power of Her Majesty otherwise than under an enactment to make provision about pensions for or in respect of persons who have been disabled or have died in consequence of service as members of the armed forces of the Crown,as possessed by that single claimant, if it is paid to the claimant or by the claimant's partner, if it is paid to the claimant's partner;
- (b) in a case where that payment is a payment of an occupational pension, a pension or other periodical payment made under a personal pension scheme or a payment made by the Board of the Pension Protection Fund, as possessed by that single claimant or, as the case may be, by the claimant's partner;
- (c) in any other case, as possessed by that single claimant or the claimant's partner to the extent that it is used for the food, ordinary clothing or footwear, household fuel, rent for which housing benefit is payable, or any housing costs to the extent that they are met under regulations 67(1)(c) or 68(1)(d) (housing costs), of that single claimant or, as the case may be, of the claimant's partner, or is used for any council tax or water charges for which that claimant or that partner is liable,

but, except where sub-paragraph (a) applies, this paragraph does not apply to any payment in kind to the third party.

(4) Any payment of income, other than a payment of income specified in paragraph (5), made to a single claimant or the claimant's partner in respect of a third party (but not in respect of another member of the claimant's family) is to be treated as possessed by that single claimant or, as the case may be, the claimant's partner, to the extent that it is kept or used by that claimant or used by or on behalf of the claimant's partner but, except where paragraph (3)(a) applies, this paragraph does not apply to any payment in kind to the third party.

(5) Paragraphs (3) and (4) do not apply in respect of a payment of income made—

- (a) under the Macfarlane Trust, the Macfarlane (Special Payments) Trust, the Macfarlane (Special Payments) (No. 2) Trust, the Fund, the Eileen Trust or the Independent Living Funds;
- (b) pursuant to section 19(1)(a) of the Coal Industry Act 1994⁽⁶⁾ (concessionary coal); or
- (c) pursuant to section 2 of the Employment and Training Act 1973 in respect of a person's participation—
 - (i) in an employment programme specified in regulation 75(1)(a)(ii) of the Jobseeker's Allowance Regulations⁽⁷⁾;
 - (ii) in a training scheme specified in regulation 75(1)(b)(ii) of those Regulations;

⁽⁶⁾ 1994 c. 27.

⁽⁷⁾ The relevant amending instrument is [S.I. 2002/2314](#).

- (iii) in the Intensive Activity Period specified in regulation 75(1)(a)(iv) of those Regulations⁽⁸⁾;
- (iv) in a qualifying course within the meaning specified in regulation 17A(7) of those Regulations⁽⁹⁾; or
- (d) under an occupational pension scheme, in respect of a pension or other periodical payment made under a personal pension scheme or a payment made by the Board of the Pension Protection Fund where—
 - (i) a bankruptcy order has been made in respect of the person in respect of whom the payment has been made or, in Scotland, the estate of that person is subject to sequestration or a judicial factor has been appointed on that person's estate under section 41 of the Solicitors (Scotland) Act 1980⁽¹⁰⁾;
 - (ii) the payment is made to the trustee in bankruptcy or any other person acting on behalf of the creditors; and
 - (iii) the person referred to in paragraph (i) and that person's partner (if any) does not possess, or is not treated as possessing, any other income apart from that payment.

(6) Where the claimant resides in a care home, an Abbeyfield Home or an independent hospital, or is temporarily absent from such a home or hospital, any payment made by a person other than the claimant or a member of the claimant's family in respect of some or all of the cost of maintaining the claimant or the claimant's partner in that home or hospital is to be treated as possessed by the claimant or the claimant's partner.

(7) In paragraph (2)(a) and (b) "resources" has the same meaning as in section 181(1) of the Pension Schemes Act 1993.

Notional income – other income

108.—(1) Where a claimant's earnings are not ascertainable at the time of the determination of the claim or of any revision or supersession the Secretary of State will treat the claimant as possessing such earnings as is reasonable in the circumstances of the case having regard to the number of hours worked and the earnings paid for comparable employment in the area.

(2) Where the amount of a subsistence allowance paid to a claimant in a benefit week is less than the amount of income-based jobseeker's allowance that claimant would have received in that benefit week had it been payable to the claimant, less 50p, the claimant is to be treated as possessing the amount which is equal to the amount of income-based jobseeker's allowance which the claimant would have received in that week, less 50p.

(3) Subject to paragraph (4), where—

- (a) a claimant performs a service for another person; and
- (b) that person makes no payment of earnings or pays less than that paid for a comparable employment in the area,

the Secretary of State is to treat the claimant as possessing such earnings (if any) as is reasonable for that employment unless the claimant satisfies the Secretary of State that the means of that person are insufficient for the person to pay, or to pay more, for the service.

(4) Paragraph (3) will not apply—

- (a) to a claimant who is engaged by a charitable or voluntary organisation or who is a volunteer if the Secretary of State is satisfied in any of those cases that it is reasonable for the claimant to provide the service free of charge;

⁽⁸⁾ The relevant amending instruments are [S.I. 2001/1029](#) and [S.I. 2007/1316](#).

⁽⁹⁾ Regulation 17A was inserted by [S.I. 1998/1274](#), regulation 4.

⁽¹⁰⁾ [1980 c. 46](#).

- (b) in a case where the service is performed in connection with—
 - (i) the claimant’s participation in an employment or training programme in accordance with regulation 19(1)(q) of the Jobseeker’s Allowance Regulations, other than where the service is performed in connection with the claimant’s participation in the Intensive Activity Period specified in regulation 75(1)(a)(iv) of those Regulations⁽¹¹⁾; or
 - (ii) the claimant’s or the claimant’s partner’s participation in an employment or training programme as defined in regulation 19(3) of those Regulations for which a training allowance is not payable or, where such an allowance is payable, it is payable for the sole purpose of reimbursement of travelling or meal expenses to the claimant or the claimant’s partner participating in that programme;
- (c) to a claimant who is engaged in work experience whilst participating in—
 - (i) the New Deal for Lone Parents; or
 - (ii) a scheme which has been approved by the Secretary of State as supporting the objectives of the New Deal for Lone Parents; or
- (d) to a claimant who is participating in a work placement approved in writing by the Secretary of State before the placement starts;
- (e) in sub-paragraph (d) “work placement” means practical work experience with an employer, which is neither paid nor undertaken in expectation of payment.

Notional income – calculation and interpretation

109.—(1) Where a claimant is treated as possessing any income under regulation 106 or 107 the foregoing provisions of this Part are to apply for the purposes of calculating the amount of that income as if a payment had actually been made and as if it were actual income which the claimant does possess.

(2) Where a claimant is treated as possessing any earnings under regulation 108(1) or (3) the foregoing provisions of this Part are to apply for the purposes of calculating the amount of those earnings as if a payment had actually been made and as if they were actual earnings which the claimant does possess except that paragraph (3) of regulation 96 (calculation of net earnings of employed earners) does not apply and the claimant’s net earnings are to be calculated by taking into account the earnings which the claimant is treated as possessing, less—

- (a) where the period over which those earnings are to be taken into account is a year or more, an amount in respect of income tax equivalent to an amount calculated by applying to those earnings the starting rate or, as the case may be, the starting rate and the basic rate of tax in the year of assessment less only the personal allowance to which the claimant is entitled under section 257(1) of the Income and Corporation Taxes Act 1988⁽¹²⁾ (personal allowance) as is appropriate to the claimant’s circumstances;
- (b) where if the period over which those earnings are to be taken into account is less than a year, the earnings to which the starting rate of tax is to be applied and the amount of the personal allowance deductible under this paragraph is to be calculated on a pro rata basis;
- (c) where the weekly amount of those earnings equals or exceeds the lower earnings limit, an amount representing primary Class 1 contributions under section 6(1)(a) of the Contributions and Benefits Act⁽¹³⁾, calculated by applying to those earnings the initial and main primary percentages in accordance with section 8(1)(a) and (b) of that Act⁽¹⁴⁾; and

⁽¹¹⁾ Regulation 75 was substituted by S.I. 1997/2863.

⁽¹²⁾ 1988 c. 1. Section 257 was substituted by the Finance Act 1988 (c. 39), section 33 and amended by the Income Tax Act 2007 (c. 3), section 1027 and Schedule 1, Part 1, paragraphs 1 and 29(1) and (2) and S.I. 2006/3241.

⁽¹³⁾ Section 6 was substituted by the Welfare Reform and Pensions Act 1999 (c. 30), section 73 and paragraph 2 of Schedule 9.

- (d) one-half of any sum payable by the claimant in respect of a pay period by way of a contribution towards an occupational or personal pension scheme.