



# Employment Protection (Consolidation) Act 1978

## 1978 CHAPTER 44

### PART VII

#### INSOLVENCY OF EMPLOYER

<sup>F1</sup>121 .....

#### Textual Amendments

<sup>F1</sup> S. 121 repealed by *Insolvency Act 1985* (c. 65, SIF 66), s. 235, **Sch. 10 Pt. IV**

#### 122 Employee's rights on insolvency of employer.

(1) If on an application made to him in writing by an employee the Secretary of State is satisfied—

(a) that the employer of that employee has become insolvent; and

[<sup>F2</sup>(aa) that the employment of the employee has been terminated; and]

(b) that on the relevant date the employee was entitled to be paid the whole or part of any debt to which this section applies,

the Secretary of State shall, subject to the provisions of this section, pay the employee out of [<sup>F3</sup>the National Insurance Fund] the amount to which in the opinion of the Secretary of State the employee is entitled in respect of that debt.

[<sup>F4</sup>(2) In this section “the relevant date”—

(a) in relation to arrears of pay (not being remuneration under a protective award made under [<sup>F5</sup>section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992]) and to holiday pay, means the date on which the employer became insolvent;

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- (b) in relation to such an award and to a basic award of compensation for unfair dismissal, means whichever is the latest of—
- (i) the date on which the employer became insolvent;
  - (ii) the date of the termination of the employee's employment; and
  - (iii) the date on which the award was made;
- (c) in relation to any other debt to which this section applies, means whichever is the later of the dates mentioned in sub-paragraphs (i) and (ii) of paragraph (b).]
- (3) This section applies to the following debts:—
- [<sup>F6</sup>(a) any arrears of pay in respect of one or more (but not more than eight) weeks;]
  - (b) any amount which the employer is liable to pay the employee for the period of notice required by section 49(1) or (2) or for any failure of the employer to give the period of notice required by section 49(1);
  - [<sup>F7</sup>(c) any holiday pay—
    - (i) in respect of a period or periods of holiday not exceeding six weeks in all; and
    - (ii) to which the employee became entitled during the twelve months ending with the relevant date;]
    - (d) any basic award of compensation for unfair dismissal (within the meaning of section 72);
    - (e) any reasonable sum by way of reimbursement of the whole or part of any fee or premium paid by an apprentice or articed clerk.
- [<sup>F8</sup>(4) For the purposes of this section, the following amounts shall be treated as arrears of pay, namely—
- (a) a guarantee payment;
  - (b) remuneration on suspension on medical grounds under section 19;
  - (c) any payment for time off under [<sup>F9</sup>section 31(3) or 31A(4) or under section 169 of the Trade Union and Labour Relations (Consolidation) Act 1992];
  - (d) remuneration under a protective award made under [<sup>F10</sup>section 189 of that Act];
  - (e)]
- <sup>F11</sup>(5) The total amount payable to an employee in respect of any debt mentioned in subsection (3), where the amount of that debt is referable to a period of time, shall not exceed [<sup>F12</sup>£205.00] in respect of any one week or, in respect of a shorter period, an amount bearing the same proportion to [<sup>F12</sup>£205.00] as that shorter period bears to a week.
- (6) The Secretary of State may vary the limit referred to in subsection (5) after a review under section 148, by order made in accordance with that section.
- (7) A sum shall be taken to be reasonable for the purposes of subsection (3)(e) in a case where a trustee in bankruptcy or liquidator has been or is required to be appointed if it is admitted to be reasonable by the trustee in bankruptcy or liquidator under [<sup>F13</sup>section]<sup>F14</sup>[<sup>F14</sup>348 of the <sup>M1</sup> Insolvency Act 1986] (effect of bankruptcy on apprenticeships etc.), whether as originally enacted or as applied to the winding up of a company by rules under [<sup>F14</sup>section 411 of that Act].
- (8) Subsection (7) shall not apply to Scotland, but in Scotland a sum shall be taken to be reasonable for the purposes of subsection (3)(e) in a case where a trustee in bankruptcy

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or liquidator has been or is required to be appointed if it is <sup>F15</sup>accepted] by the trustee in bankruptcy or the liquidator for the purposes of the bankruptcy or winding up.

(9) The provisions of subsections (10) and (11) shall apply in a case where one of the following officers (hereafter in this section referred to as the “relevant officer”) has been or is required to be appointed in connection with the employer’s insolvency, that is to say, a trustee in bankruptcy, a liquidator, <sup>F16</sup>an administrator,] a receiver or manager, or a trustee under a composition or arrangement between the employer and his creditors or under a trust deed for his creditors executed by the employer; and in this subsection <sup>F17</sup>“trustee”, in relation to a composition or arrangement, includes the supervisor of a] <sup>F14</sup>voluntary arrangement proposed for the purposes of, and approved under, Part I or VIII of the Insolvency Act 1986].

(10) Subject to subsection (11), the Secretary of State shall not in such a case make any payment under this section in respect of any debt until he has received a statement from the relevant officer of the amount of that debt which appears to have been owed to the employee on the relevant date and to remain unpaid; and the relevant officer shall, on request by the Secretary of State, provide him, as soon as reasonably practicable, with such a statement.

<sup>F18</sup>(11) If the Secretary of State is satisfied that he does not require such a statement in order to determine the amount of the debt that was owed to the employee on the relevant date and remains unpaid, he may make a payment under this section in respect of the debt without having received such a statement.]

#### Textual Amendments

- F2** S. 122(1)(aa) inserted by [Insolvency Act 1985 \(c. 65, SIF 66\)](#), **s. 218(2)**
- F3** Words substituted by [Employment Act 1990 \(c. 38, SIF 43:5\)](#), s. 16(1), **Sch. 2 para. 1(4)**
- F4** S. 122(2) substituted by [Insolvency Act 1985 \(c. 65, SIF 66\)](#), **s. 218(3)**
- F5** Words in s. 122(2)(a) substituted (16.10.1992) by [Trade Union and Labour Relations \(Consolidation\) Act 1992 \(c. 52\)](#), ss. 300(2), 302, **Sch. 2 para. 18(2)**.
- F6** S. 122(3)(a) substituted by [Employment Act 1982 \(c. 46, SIF 43:5\)](#), **Sch. 3 para. 4(2)** with saving in S.I. 1982/1656, **Sch. 2**
- F7** S. 122(3)(c) substituted by [Employment Act 1982 \(c. 46, SIF 43:5\)](#), **Sch. 3 para. 4(3)** with saving in S.I. 1982/1656, **Sch. 2**
- F8** S. 122(4) substituted by [Insolvency Act 1985 \(c. 65, SIF 66\)](#), **s. 218(4)**
- F9** Words in s. 122(4)(c) substituted (16.10.1992) by [Trade Union and Labour Relations \(Consolidation\) Act 1992 \(c. 52\)](#), ss. 300(2), 302, **Sch. 2 para. 18(3)(a)**.
- F10** Words in s. 122(4)(d) substituted (16.10.1992) by [Trade Union and Labour Relations \(Consolidation\) Act 1992 \(c. 52\)](#), ss. 300(2), 302, **Sch. 2 para. 18(3)(b)**.
- F11** Words repealed by [Social Security Act 1986 \(c. 50, SIF 113:1\)](#), s. 86(2), **Sch. 11**
- F12** Words in s. 122(5) substituted (1.4.1992) by virtue of S.I. 1992/312, **art. 2** (with effect as specified in art. 3).
- F13** Words substituted by [Insolvency Act 1985 \(c. 65, SIF 66\)](#), **s. 218(5)**
- F14** Words substituted by [Insolvency Act 1986 \(c. 45, SIF 66\)](#), s. 439(2), **Sch. 14**
- F15** Word “accepted” substituted (S.) for “admitted” by [Bankruptcy \(Scotland\) Act 1985 \(c. 66, SIF 66\)](#), s. 75(1), **Sch. 7 para. 14(2)**
- F16** Words inserted by [Insolvency Act 1985 \(c. 65, SIF 66\)](#), **s. 218(6)(a)**
- F17** Words substituted by [Insolvency Act 1985 \(c. 65, SIF 66\)](#), **s. 218(6)(b)**
- F18** S. 122(11) substituted by [Employment Act 1989 \(c. 38, SIF 43:1\)](#), ss. 18(2), 29(6), **Sch. 9 para. 4(1)**

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**Modifications etc. (not altering text)**

- C1 S. 122 restricted by [Dock Work Act 1989 \(c. 13, SIF 43:5\)](#), s. 7(5), [Sch. 2 para. 7\(2\)](#)
- C2 S. 122 modified by [Dock Work Act 1989 \(c. 13, SIF 43:5\)](#), s. 7(5), [Sch. 2 para. 7\(2\)\(a\)](#)

**Marginal Citations**

- M1 [1986 c. 45](#)

<sup>F19</sup> **123** .....

**Textual Amendments**

- F19 S. 123 repealed (7.2.1994) by [1993 c. 48, s. 188, Sch. 5 Pt.I](#); S.I. 1994/86, [art. 2](#)

**124 Complaint to industrial tribunal.**

- (1) A person who has applied for a payment under section 122 may, within the period of three months beginning with the date on which the decision of the Secretary of State on that application was communicated to him or, if that is not reasonably practicable, within such further period as is reasonable, present a complaint to an industrial tribunal that—
  - (a) the Secretary of State has failed to make any such payment; or
  - (b) any such payment made by the Secretary of State is less than the amount which should have been paid.

<sup>F20</sup> (2) .....

- (3) Where an industrial tribunal finds that the Secretary of State ought to make a payment under section 122 <sup>F21</sup> . . . , it shall make a declaration to that effect and shall also declare the amount of any such payment which it finds the Secretary of State ought to make.

**Textual Amendments**

- F20 S. 124(2) repealed (7.2.1994) by [1993 c. 48, s. 188, Sch. 5 Pt.I](#); S.I. 1994/86, [art. 2](#)
- F21 Words in s. 124(3) repealed (7.2.1994) by [1993 c. 48, s. 188, Sch. 5 Pt.I](#); S.I. 1994/86, [art. 2](#)

**125 Transfer to Secretary of State of rights and remedies.**

- (1) Where, in pursuance of section 122, the Secretary of State makes any payment to an employee in respect of any debt to which that section applies—
  - (a) any rights and remedies of the employee in respect of that debt (or, if the Secretary of State has paid only part of it, in respect of that part) shall, on the making of the payment, become rights and remedies of the Secretary of State; and
  - (b) any decision of an industrial tribunal requiring an employer to pay that debt to the employee shall have the effect that the debt or, as the case may be, that part of it which the Secretary of State has paid, is to be paid to the Secretary of State.

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[<sup>F22</sup>(2) Where a debt or any part of a debt in respect of which the Secretary of State has made a payment in pursuance of section 122 constitutes—

- (a) a preferential debt within the meaning of the Insolvency Act 1986 for the purposes of any provision of that Act (including any such provision as applied by any order made under that Act) or any provision of the Companies Act 1985; or
- (b) a preferred debt within the meaning of the Bankruptcy (Scotland) Act 1985 for the purposes of any provision of that Act (including any such provision as applied by section 11A of the Judicial Factors (Scotland) Act 1889),

then, without prejudice to the generality of subsection (1) above, there shall be included among the rights and remedies which become rights and remedies of the Secretary of State in accordance with that subsection any right arising under any such provision by reason of the status of the debt or that part of it as a preferential or preferred debt.

(2A) In computing for the purposes of any provision mentioned in subsection (2)(a) or (b) above the aggregate amount payable in priority to other creditors of the employer in respect of—

- (a) any claim of the Secretary of State to be so paid by virtue of subsection (2) above; and
- (b) any claim by the employee to be so paid made in his own right,

any claim falling within paragraph (a) above shall be treated as if it were a claim of the employee; but the Secretary of State shall be entitled, as against the employee, to be so paid in respect of any such claim of his (up to the full amount of the claim) before any payment is made to the employee in respect of any claim falling within paragraph (b) above.]

<sup>F23</sup>(3) .....

<sup>F23</sup>(3A) .....

<sup>F23</sup>(3B) .....

(4) Any sum recovered by the Secretary of State in exercising any right or pursuing any remedy which is his by virtue of this section shall be paid into [<sup>F24</sup>the National Insurance Fund].

**Textual Amendments**

**F22** S. 125(2)(2A) substituted (with saving) for s. 125(2), by [Employment Act 1989 \(c. 38, SIF 43:1\)](#), ss. 19(1), 29(6), [Sch. 9 paras. 4\(1\), 5](#)

**F23** S. 125(3)-(3B) repealed (7.2.1994) by 1993 c. 48, s. 188, [Sch. 5 Pt.I](#); S.I. 1994/86, [art. 2](#)

**F24** Words substituted by [Employment Act 1990 \(c. 38, SIF 43:5\)](#), s. 16(1), [Sch. 2 para. 1\(4\)](#)

**126 Power of Secretary of State to obtain information in connection with applications.**

(1) Where an application is made to the Secretary of State under section 122 [<sup>F25</sup>or 123] in respect of a debt owed, <sup>F25</sup> . . . , by an employer, the Secretary of State may require—

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- (a) the employer to provide him with such information as the Secretary of State may reasonably require for the purpose of determining whether the application is well-founded; and
  - (b) any person having the custody or control of any relevant records or other documents to produce for examination on behalf of the Secretary of State any such document in that person's custody or under his control which is of such a description as the Secretary of State may require.
- (2) Any such requirement shall be made by notice in writing given to the person on whom the requirement is imposed and may be varied or revoked by a subsequent notice so given.
- (3) If a person refuses or wilfully neglects to furnish any information or produce any document which he has been required to furnish or produce by a notice under this section he shall be liable on summary conviction to a fine not exceeding [<sup>F26</sup>level 3 on the standard scale].
- (4) If a person, in purporting to comply with a requirement of a notice under this section, knowingly or recklessly makes any false statement he shall be liable on summary conviction to a fine not exceeding [<sup>F26</sup>level 5 on the standard scale].

#### Textual Amendments

**F25** Words in s. 126(1) repealed (7.2.1994) by 1993 c. 48, s. 188, **Sch. 5 Pt.I**; S.I. 1994/86, **art. 2**

**F26** Words substituted by virtue of **Criminal Justice Act 1982 (c. 48, SIF 39:1)**, **ss. 38, 46** and **Criminal Procedure (Scotland) Act 1972 (c. 21, SIF 39:1)**, **ss. 289F, 289G** (as inserted by **Criminal Justice Act 1982 (c. 48, SIF 39:1)**, **s. 54**)

#### 127 Interpretation of ss. 122 to 126.

- (1) For the purposes of sections 122 to 126, an employer shall be taken to be insolvent if, but only if, in England and Wales,—
- [<sup>F27</sup>(a) he has been adjudged bankrupt or has made a composition or arrangement with his creditors;
  - (b) he has died and his estate falls to be administered in accordance with an order under section [<sup>F28</sup>421 of the Insolvency Act 1986]; or]
  - (c) where the employer is a company, a winding up order [<sup>F29</sup>or an administration order] is made or a resolution for voluntary winding up is passed with respect to it, or a receiver or manager of its undertaking is duly appointed, or possession is taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge [<sup>F29</sup>or a [<sup>F28</sup>voluntary arrangement proposed for the purposes of Part I of the Insolvency Act 1986 is approved under that Part]].
- (2) For the purposes of sections 122 to 126, an employer shall be taken to be insolvent if, but only if, in Scotland,—
- (a) [<sup>F30</sup>sequestration of his estate is awarded] or he executes a trust deed for his creditors or enters into a composition contract;
  - (b) he has died and a judicial factor appointed under section [<sup>F31</sup>11A of the Judicial Factors (Scotland) Act 1889] is required by that section to divide his insolvent estate among his creditors; or

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- (c) where the employer is a company, a winding-up order [<sup>F29</sup>or an administration order] is made or a resolution for voluntary winding up is passed with respect to it or a receiver of its undertaking is duly appointed [<sup>F29</sup>or a [<sup>F28</sup>voluntary arrangement proposed for the purposes of Part I of the Insolvency Act 1986 is approved under that Part ]].
- (3) In sections 122 to 126—
- “holiday pay” means—
- (a) pay in respect of a holiday actually taken; or
- (b) any accrued holiday pay which under the employee’s contract of employment would in the ordinary course have become payable to him in respect of the period of a holiday if his employment with the employer had continued until he became entitled to a holiday;

F32  
. . .

#### Textual Amendments

- F27** S. 127(1)(a)(b) substituted by [Insolvency Act 1985 \(c. 65, SIF 66\)](#), s. 235(1), **Sch. 8 Pt. I para. 31(5)(a)**
- F28** Words substituted by [Insolvency Act 1986 \(c. 45, SIF 66\)](#), s. 439(2), **Sch. 14**
- F29** Words inserted by [Insolvency Act 1985 \(c. 65, SIF 66\)](#), s. 235, **Sch. 8 Pt. I para. 31(5)(b)**
- F30** Words substituted by [Employment Act 1989 \(c. 38, SIF 43:1\)](#), **s. 29(3)**, (6), Sch. 6 para. 23, Sch. 9 para. 4(1)
- F31** Words in s. 127(2)(b) substituted (S.) by [Bankruptcy \(Scotland\) Act 1985 \(c. 66, SIF 66\)](#), s. 75(1), **Sch. 7 para. 14(4)**
- F32** S. 127(3): definition of 'occupational pension scheme' and the words following it repealed (7.2.1994) by 1993 c. 48, s. 188, **Sch. 5 Pt. I**; S.I. 1994/86, **art. 2**

**Status:**

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