



Employment Protection (Consolidation) Act 1978

1978 CHAPTER 44

PART VII

INSOLVENCY OF EMPLOYER

121 Priority of certain debts on insolvency

- (1) An amount to which this section applies shall be treated for the purposes of—
- (a) section 33 of the Bankruptcy Act 1914 ;
 - (b) section 118 of the Bankruptcy (Scotland) Act 1913; and
 - (c) section 319 of the Companies Act 1948 ;
- as if it were wages payable by the employer to the employee in respect of the period for which it is payable.
- (2) This section applies to any amount owed by an employer to an employee in respect of—
- (a) a guarantee payment;
 - (b) remuneration on suspension on medical grounds under section 19;
 - (c) any payment for time off under section 27(3) or 31(3);
 - (d) remuneration under a protective award made under section 101 of the Employment Protection Act 1975.

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
 - (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,

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the Secretary of State shall, subject to the provisions of this section, pay the employee out of the Redundancy Fund the amount to which in the opinion of the Secretary of State the employee is entitled in respect of that debt.

- (2) In this section the " relevant date " in relation to a debt means the date on which the employer became insolvent or the date of the termination of the employee's employment, whichever is the later.
- (3) This section applies to the following debts: —
 - (a) any arrears of pay in respect of a period or periods not exceeding in the aggregate 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);
 - (c) any holiday pay in respect of a period or periods of holiday, not exceeding six weeks in all, to which the employee became entitled during the twelve months immediately preceding 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.
- (4) For the purposes of subsection (3)(a), any such amount as is referred to in section 121(2) shall be treated as if it were arrears of pay.
- (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 £100 in respect of any one week or, in respect of a shorter period, an amount bearing the same proportion to £100 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 section 34 of the Bankruptcy Act 1914 (preferential claims of apprentices and articed clerks), whether as originally enacted or as applied to the winding up of a company by section 317 of the Companies Act 1948.
- (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 or liquidator has been or is required to be appointed if it is admitted 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, 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 " liquidator " and " receiver " include the Official Receiver in his capacity as a provisional liquidator or interim receiver.

- (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.
- (11) Where—
- (a) a period of six months has elapsed since the application for a payment under this section was received by the Secretary of State, but no such payment has been made;
 - (b) the Secretary of State is satisfied that a payment under this section should be made; and
 - (c) it appears to the Secretary of State that there is likely to be further delay before he receives a statement about the debt in question, then, the Secretary of State may, if the applicant so requests or, if the Secretary of State thinks fit, without such a request, make a payment under this section, notwithstanding that no such statement has been received.

123 Payment of unpaid contributions to occupational pension scheme

- (1) If, on application made to him in writing by the persons competent to act in respect of an occupational pension scheme, the Secretary of State is satisfied that an employer has become insolvent and that at the time that he did so there remained unpaid relevant contributions falling to be paid by him to the scheme, the Secretary of State shall, subject to the provisions of this section, pay into the resources of the scheme out of the Redundancy Fund the sum which in his opinion is payable in respect of the unpaid relevant contributions.
- (2) In this section "relevant contributions" means contributions falling to be paid by an employer in accordance with an occupational pension scheme, either on his own account or on behalf of an employee; and for the purposes of this section a contribution of any amount shall not be treated as falling to be paid on behalf of an employee unless a sum equal to that amount has been deducted from the pay of the employee by way of a contribution from him.
- (3) The sum payable under this section in respect of unpaid contributions of an employer on his own account to an occupational pension scheme shall be the least of the following amounts—
- (a) the balance of relevant contributions remaining unpaid on the date when he became insolvent and payable by the employer on his own account to the scheme in respect of the twelve months immediately preceding that date;
 - (b) the amount certified by an actuary to be necessary for the purpose of meeting the liability of the scheme on dissolution to pay the benefits provided by the scheme to or in respect of the employees of the employer;
 - (c) an amount equal to ten per cent, of the total amount of remuneration paid or payable to those employees in respect of the twelve months immediately preceding the date on which the employer became insolvent.
- (4) For the purposes of subsection (3)(c), "remuneration" includes holiday pay, maternity pay and any such payment as is referred to in section 121(2).

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- (5) Any sum payable under this section in respect of unpaid contributions on behalf of an employee shall not exceed the amount deducted from the pay of the employee in respect of the employee's contributions to the occupational pension scheme during the twelve months immediately preceding the date on which the employer became insolvent.
- (6) The provisions of subsections (7) to (9) 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, 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 "liquidator" and "receiver" include the Official Receiver in his capacity as a provisional liquidator or interim receiver.
- (7) Subject to subsection (9), the Secretary of State shall not in such a case make any payment under this section in respect of unpaid relevant contributions until he has received a statement from the relevant officer of the amount of relevant contributions which appear to have been unpaid on the date on which the employer became insolvent 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.
- (8) Subject to subsection (9), an amount shall be taken to be payable, paid or deducted as mentioned in subsection (3)(a) or (c) or subsection (5), only if it is so certified by the relevant officer.
- (9) Where—
- (a) a period of six months has elapsed since the application for a payment under this section was received by the Secretary of State, but no such payment has been made;
 - (b) the Secretary of State is satisfied that a payment under this section should be made; and
 - (c) it appears to the Secretary of State that there is likely to be further delay before he receives a statement or certificate about the contributions in question,
- then, the Secretary of State may, if the applicants so request or, if the Secretary of State thinks fit, without such a request, make a payment under this section, notwithstanding that no such statement or certificate has been received.

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.
- (2) Any persons who are competent to act in respect of an occupational pension scheme and who have applied for a payment to be made under section 123 into the resources of the scheme 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 them,

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 him is less than the amount which should have been paid.
- (3) Where an industrial tribunal finds that the Secretary of State ought to make a payment under section 122 or 123, 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.

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.
- (2) There shall be included among the rights and remedies which become rights and remedies of the Secretary of State in accordance with subsection (1)(a) any right to be paid in priority to other creditors of the employer in accordance with—
- (a) section 33 of the Bankruptcy Act 1914;
 - (b) section 118 of the Bankruptcy (Scotland) Act 1913 ; and
 - (c) section 319 of the Companies Act 1948,
- and the Secretary of State shall be entitled to be so paid in priority to any other unsatisfied claim of the employee; and in computing for the purposes of any of those provisions any limit on the amount of sums to be so paid any sums paid to the Secretary of State shall be treated as if they had been paid to the employee.
- (3) Where in pursuance of section 123 the Secretary of State makes any payment into the resources of an occupational pension scheme in respect of any contributions to the scheme, any rights and remedies in respect of those contributions belonging to the persons competent to act in respect of the scheme shall, on the making of the payment, become rights and remedies of the Secretary of State.
- (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 the Redundancy Fund.

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 or 123 in respect of a debt owed, or contributions to an occupational pension scheme falling to be made, by an employer, the Secretary of State may require—
- (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

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- (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 £100.
- (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 £400.

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.—
 - (a) he becomes bankrupt or makes a composition or arrangement with his creditors or a receiving order is made against him;
 - (b) he has died and an order is made under section 130 of the Bankruptcy Act 1914 for the administration of his estate according to the law of bankruptcy, or by virtue of an order of the court his estate is being administered in accordance with rules set out in Part I of Schedule 1 to the Administration of Estates Act 1925; or
 - (c) where the employer is a company, a winding up 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.
- (2) For the purposes of sections 122 to 126, an employer shall be taken to be insolvent if, but only if, in Scotland.—
 - (a) an award of sequestration is made on his estate 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 163 of the Bankruptcy (Scotland) Act 1913 is required by that section to divide his insolvent estate among his creditors ; or
 - (c) where the employer is a company, a winding-up 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.
- (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 ;

" occupational pension scheme " means any scheme or arrangement which provides or is capable of providing, in relation to employees in any description of employment, benefits (in the form of pensions or otherwise) payable to or in respect of any such employees on the termination of their employment or on their death or retirement;

and any reference in those sections to the resources of such a scheme is a reference to the funds out of which the benefits provided by the scheme are from time to time payable.