

Advice NI Briefing Paper

Redundancy:
Debts owed to you
by your employer:
How to claim them from
the Government

December 2020

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Introduction

Despite the recent extension to the furlough scheme, Advice NI is concerned that, sadly, many businesses may find themselves unable to continue trading, or may need to reduce their staffing levels: As a result, many employees may face a redundancy situation.

This Briefing Paper has been prepared with the aim of assisting advisers, and indeed the general public, to understand:

- the scope, and the limits, of Government's role in making payments, to ex-employees, in respect of debts which are owed to them by their former employers;
- and the process by which relevant applications, to Government, should be pursued.

Summary

This paper:

- Explains the role of Government in acting as the “statutory guarantor” (the guarantor in respect of certain debts which are owed to employees by their former employer).
- It lists some of the types of debt which are within the scope of that guarantor role
- In respect of each of those listed debts, it specifies some of the preconditions which must be satisfied if an ex-employee is going to make a successful application (to Government), in respect of that particular debt.
- In respect of several of the listed debts, it identifies the basis upon which the amount of entitlement (in respect of that particular debt) is calculated.
- It also explains the relevant applications and appeals processes.

This paper is intended for general guidance only. It should not be assumed that it constitutes a comprehensive, up-to-date, or entirely accurate statement of all of the relevant legal provisions.

What is the “statutory guarantor” role?

In relation to debts owed to ex-employees by their former employers, the Department for the Economy (“the Department”) is the “statutory guarantor”

- in certain circumstances
- in respect of some types of debts

The Redundancy Payments Service Northern Ireland (“the RPS”) is a section of the Department. On behalf of the Department, it carries out the statutory guarantor role.

The Department’s statutory guarantor role is best explained by using the following analogy.

You are a motorist. You have comprehensive car insurance. Somebody negligently runs into the back of your vehicle and causes damage to it.

- You do not need to get that other motorist to pay you for the cost of the repairs. Your insurer will pay for the cost.
- Once the insurer makes that payment, you have lost the right to sue that other motorist, and your insurer (instead of you) acquires the right to sue him/her.

In relation to any employer’s debt which is within the scope of the statutory guarantee, the situation is similar to the situation which has been described in the last paragraph above:

1. You do not need to recover the debt from the employer.
2. The Department pays you in respect of that debt.
3. When the Department has made that payment to you, you cease to have any entitlement to recover (from the employer) the amount of that payment.
4. Instead, the Department now has the right to recover that debt from the employer

The relevant legislation

Details relating to the statutory guarantee legislative provisions are set out in Annex A below.

Which debts?

All of the following types of debt are potentially within the scope of the statutory guarantee:

1. wages,
2. holiday pay,
3. statutory “notice pay” and
4. redundancy pay.

In respect of each of those types of debt, there are specific preconditions, which apply to that particular type of debt; in each instance, those particular preconditions have to be satisfied if that particular debt is to be actually within the scope of the guarantee.

Those preconditions are listed in the next section below.

Preconditions for actual entitlement

In respect of each particular debt, the relevant preconditions (the preconditions for actual entitlement in respect of that particular debt) are separately listed below.

Wages

In respect of wages, there are three significant preconditions for actual entitlement:

1. The employer must have become “formally insolvent”. (See below.).
2. The employee’s employment must have terminated.
3. The debt must have been due at the time when that formal insolvency began.

Holiday pay

In respect of holiday pay, there are four significant preconditions for actual entitlement. The first three of those preconditions are identical to the entitlement preconditions which apply in respect of wages. The four preconditions are as follows:

1. The employer must have become “formally insolvent”. (See below.).
2. The employee’s employment must have terminated.
3. The debt must have been due at the time when that formal insolvency began.
4. The applicant must have become entitled to the relevant holiday pay during the twelve months ending with the date of the formal insolvency (as distinct from becoming so entitled on some earlier date).

Notice pay

In respect of notice pay, there are two significant preconditions of entitlement, which are identical to two of the entitlement-preconditions which apply in respect of wages and holiday pay. Those two preconditions are as follows:

1. The employer must have become “formally insolvent”. (See below.)
2. The employee’s employment must have terminated.

Redundancy pay

Redundancy pay is within the scope of the statutory guarantee even if the employer has not become formally insolvent.

However, the Department cannot make a payment (in its statutory guarantee role) in respect of a past entitlement to a redundancy payment: At the time of the application to the Department, the applicant must currently be entitled to the redundancy payment.

An employee who was entitled to a redundancy payment at the time of his/her dismissal may cease to be so entitled unless, during the period of six months beginning with the date of dismissal, he/she has made a written claim, to the employer, for that payment.

A note along the following lines, would probably constitute an adequate written claim (of the type which is referred to above), for the purpose of preventing the extinction of an existing redundancy pay entitlement:

“I was employed by you until [Insert date of dismissal here], when I was made redundant.

I now claim my redundancy payment.

[Insert Date of the note here]

[Sign here. Or, if the claim is being made by email, specify your forename and surname here]”

Any such note would of course have to be given or sent to the employer, within the specified six-month period.

What is “formal insolvency”?

For the purposes of this paper, an employer is treated as being “formally insolvent” only if that employer is “insolvent” within the meaning of the statutory guarantee legislation

According to any dictionary definition, an employer is “insolvent” if that employer has insufficient funds to pay all the debts which that employer owes.

However, for the purposes of the statutory guarantee legislation, the term “insolvent” has a more restricted meaning.

For the latter purposes, the definitions of insolvency are provided in Articles 201 and 228 of the Employment Rights (Northern Ireland) Order 1996. Those Articles include very detailed and lengthy definitions.

However, the definitions (in those Articles) which are mainly relevant are those which are set out below.

1. If the employer is a single individual, he/she will be “insolvent” if he/she
 - has been adjudged bankrupt or
 - is the subject of an Individual Voluntary Arrangement.

2. If the employer is an unincorporated partnership, that employer will be “insolvent” if one of the following applies to all of the partners:

- He/she has been adjudged bankrupt or
 - he/she is the subject of an Individual Voluntary Arrangement.
3. If the employer is a limited company, it will be “insolvent” in any of the following situations:
- A winding up order has been made in respect of the company or
 - the company has been the subject of a voluntary winding up resolution or
 - the company has gone into administration or
 - it is the subject of a Corporate Voluntary Arrangement.

Redundancy payment application if the employer is not “formally insolvent”

“Formal insolvency”, for present purposes, is defined above.

If the employer is not formally insolvent, the Department will usually decline to make a (redundancy pay) payment to the applicant unless and until he/she has obtained an industrial tribunal decision, against the ex-employer, in respect of redundancy pay.

Accordingly, in such situations:

- the applicant will have to pursue industrial tribunal proceedings (in respect of redundancy pay) against the employer
- will have to obtain an industrial tribunal decision (in respect of redundancy pay) against the employer
- but won't need to take enforcement action (in respect of that decision) against the employer

How much?

How much should an applicant expect to receive from the Department?

The weekly pay limit

The “weekly pay limit” applies in respect of wages, holiday pay, notice pay and redundancy pay.

In each of those contexts, a week's wages is deemed to be the lesser of the following:

- the amount of the applicant's actual weekly pay entitlement or
- the relevant statutory weekly pay limit.

The relevant statutory weekly pay limit is currently £560 per week.

How much wages?

The Department should make a payment in respect of any pay arrears, up to a limit of eight week's pay.

Within that context, pay is calculated on the basis of gross pay, but Departmental payments are subject to a 20% reduction (on the assumption that, if the employer had paid the money, income tax would have been deducted from it).

How much holiday pay?

Departmental payments in respect of holiday pay are subject to the following limit: The holiday pay must be in respect of a period (or periods) which does not (or do not) exceed an overall period of six weeks.

Within that same context, holiday pay is calculated on the basis of gross pay, but Departmental payments are subject to a 20% reduction (on the assumption that, if the employer had paid the money, income tax would have been deducted from it).

How much "notice pay"?

Pay due in respect of the notice period required by Article 118 of the Employment Rights (Northern Ireland) Order 1996 ("the ERO"), or money due because of a failure to provide such notice, are debts which are within the scope of the statutory guarantee.

Article 118 of the ERO confers an entitlement upon an employee to receive a specified period of advance notice of the intended termination of his/her employment. That stipulated period of notice varies, according to an employee's length of service:

- An employee is entitled to one week's notice if he/she has been employed for more than a month and for less than two years.
- He/she is entitled to one week's notice for every year of service if he/she was employed for more than two years and less than twelve years.
- He/she is entitled to twelve weeks' notice if he/she was employed for twelve years or more.

The effect of Article 118 is that, if the notice required by that Article is not provided

to an employee, he/she is entitled to be paid, by the employer, the amount of financial loss (if any) which he/she has sustained because of that lack of notice.

That entitlement (pursuant to Article 118) is usually referred to as a “notice pay” debt.

However, in reality, at least in relation to people who are dismissed without due notice, that entitlement is not an entitlement to receive notice pay. Instead, it is merely an entitlement to be compensated for any financial loss which is the result of a failure to provide the specified due notice.

Accordingly, in the context of an application to the Department (in its statutory guarantor role) for “notice pay”, an applicant is entitled only to receive the amount of any financial loss which he/she has sustained as a result of the failure to provide the stipulated period of notice. That sum is calculated in the following manner:

1. You start with the net pay (after tax and national insurance deductions) which the particular applicant would have received from the employer if he/she had still been employed by the employer during the notice period.
2. From that amount, you deduct each of the following:
 - The net amount of any pay which the applicant received, from some new job, in respect of work during the notice period.
 - The net amount of any social security payment which the applicant received in respect of the notice period.

How much redundancy pay?

A ready reckoner, for calculating the amount of any redundancy pay entitlement, is available on the website of the Labour Relations Agency.

An ex-employee is not entitled to redundancy pay unless he/she was employed for at least two years.

The amount of any redundancy pay entitlement is calculated mainly on the basis of the following three elements:

- the amount of a week’s pay,
- the length of service and
- the employee’s age during each year of service.

The applications process

Applications to the Department (in its role as the statutory guarantor) are made to the Redundancy Payments Service Northern Ireland (“the RPS”), using the applications form which is available on the RPS website.

Appeals to an industrial tribunal

The Department will issue a written decision in relation to any application for payment (under the statutory guarantee) in respect of

- wages
- holiday pay
- notice pay and/or
- redundancy pay

Appeals against a refusal (or refusals)

If the application, in relation to any of those debts, is refused, the applicant can appeal, to an industrial tribunal, against that refusal.

Appeal in respect of amount/s

If, in relation to any of those debts, the amount paid by the Department is less than the amount to which the applicant considers to be correct, he/she can appeal to an industrial tribunal in respect of the amount.

The appeal process

When a tribunal is considering any such appeal (either in relation to a refusal or in relation to the amount allowed), it is not merely reviewing the adequacy, or otherwise, of the Department’s decision-making process. Instead, in that situation, the tribunal is the new decision-maker: The tribunal make the relevant decision based on all the information which has become available to the tribunal by the time of the appeal hearing (regardless of whether or not the relevant information had been, or could have been, made available to the Department at the time the Department made its decision).

Whatever decision is arrived during an appeal will replace the Department’s earlier decision.

The appeals legislation

Appeals in respect of redundancy pay applications are made under Article 205 of the Employment Rights (Northern Ireland) Order 1996 (“the ERO”).

Appeals in relation to wages, holiday pay and/or notice pay applications are made under Article 233 of the ERO.

The appeals time limits

There is no time-limit for making an appeal in relation to an application in respect of a redundancy pay debt.

There is a time-limit for making an appeal in relation to an application in respect of wages, holiday pay and/or notice pay

In respect of each of those three types of debt, the primary time-limit is three months from the date on which the applicant was notified of the Department’s decision.

ANNEX A

WHERE TO FIND THE RELEVANT STATUTORY PROVISIONS

Northern Ireland’s (employment) statutory guarantee legislation is contained in the following two parts of the Employment Rights (Northern Ireland) Order 1996 (“the ERO”):

1. Chapter VI (of Part XII) of the ERO. (Part XII is entitled “Redundancy payments etc.” and Chapter VI of that Part is entitled “Payments by the Department”.)
2. Part XIV of the ERO. (Part XIV is entitled “Insolvency of employers”.)

ANNEX B

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