

Redundancy and Insolvency

**A guide for insolvency practitioners to
employees' rights on the
insolvency of their employer**

2005 (Eighth Edition)



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The Insolvency Service

The DTI drives our ambition of 'prosperity for all' by working to create the best environment for business success in the UK. We help people and companies become more productive by promoting enterprise, innovation and creativity.

We champion UK business at home and abroad. We invest heavily in world-class science and technology. We protect the rights of working people and consumers. And we stand up for fair and open markets in the UK, Europe and the world.

The Insolvency Service, as an Executive Agency of the DTI, has a major role to play in supporting this objective. We do this by ensuring that financial failure is dealt with fairly and effectively, thereby encouraging enterprise and deterring fraud and misconduct.

Foreword

The Insolvency Service has revised this booklet for the guidance of insolvency practitioners (IPs) in dealing with claims under the insolvency provisions of the Employment Rights Act 1996.

It is not intended to be a complete or authoritative statement of the law; only the courts can provide that. Further advice is available from our **Redundancy Payments Offices (RPOs)** listed in appendix 2. If in doubt, you should seek your own independent legal advice.

The Secretary of State for Trade and Industry is responsible for making payments from the National Insurance (NI) Fund under the insolvency provisions of the 1996 Act. Our RPOs carry out this function on behalf of the Secretary of State, operating to the standards published in the Insolvency Service Charter. These standards focus on the speed and accuracy of payments and on responding promptly and courteously to enquiries. They are set out on the following website <http://www.insolvency.gov.uk/information/guidanceleaflets/charter/charter.html>

As an IP, you have specific responsibilities under the 1996 Act. These are different from, though closely related to, your statutory duties under insolvency legislation in the administration of the affairs of insolvent employers and the assessment of claims of creditors, including employees. You play a vital role in the system.

Close co-operation between IPs and RPOs is essential for the system to operate effectively.

RPO managers are happy to talk to you about any problems, whether on specific cases or general procedures, and may be able to help with training IP staff new to this work. Although the insolvency provisions in the 1996 Act have been in place since 1975 there have been several developments since then - including some since the last edition of this booklet was published. These include the following issues:

- Whether book debts are the subject of a fixed or floating charge under the "Brumark" decision. The Crown departments' position is set out in more detail in paragraph 99.
- From 1 April 2003 the IP loan scheme, under which loans were made to employees for arrears of pay and holiday pay, ceased to exist.
- The repeal of section 189(4) of the 1996 Act, under which the Secretary of State was entitled to be paid preferential debts in priority to employees (the so-called "super preference") no longer applies where the date of insolvency is on or after 15 September 2003 - see paragraphs 86-93 for more details.
- The House of Lords found that the RPD is entitled to Crown set-off - see paragraphs 83-85 and Appendix 7 for more details.

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Section 1

Scope of the provisions

Outline

1. Under part 12 of the 1996 Act, RPOs pay certain entitlements (within limits) owed to former employees of insolvent companies. This legislation, which implements the EU Insolvency Directive 80/987/EEC, guarantees a basic minimum payment to employees of insolvent employers, as they would otherwise have to wait some considerable time for payment, or get no payment, as creditors in the insolvency proceedings. Outstanding contractual debts remain listed in insolvency and may become payable only if the sale of a company's assets realises enough money. Employees may also be entitled to redundancy pay under the separate provisions of part 11 of the 1996 Act. After they have secured this pay, the employees' rights and remedies in respect of these debts transfer to the Secretary of State. The claims for basic minimum payment and redundancy payment (but not for pensions) are paid direct by the RPO to the employees.

2. Employees must claim directly to you, as the IP, for debts that fall outside the scope of section 184 of the Employment Rights Act 1996. The RPO has no involvement in such payments. Similarly, if a director's claim for wages etc. is not paid from the NI Fund, you may admit the claim directly in the insolvency.

Definition of insolvency

3. The insolvency provisions of the 1996 Act apply only when an employer has become **legally insolvent as defined in section 183 of the 1996 Act**. The RPO has no discretion to make insolvency payments in any other circumstances. The table in appendix 1 shows the categories of insolvency included in the statutory definition and the dates when each becomes effective under the 1996 Act.

An insolvency practitioner

4. As an IP (referred to in the 1996 Act as a 'relevant officer'), you are the person appointed to deal with an employer's insolvency, that is:

- a trustee in bankruptcy or, in Scotland, a permanent or interim trustee;
- a liquidator;
- an administrator;
- a receiver or manager;
- a trustee under a composition or arrangement between an employer and his or her creditors, including the supervisor of a voluntary arrangement proposed for the purposes of, and approved under, the Insolvency Act 1986;
- a supervisor of a Company Voluntary Arrangement;
- a trustee under a trust deed executed by an employer for his or her creditors;
- the Official Receiver acting as provisional liquidator or interim receiver.

5. You have specific responsibilities towards creditors (including, where appropriate, employees) under insolvency legislation. You also have a statutory responsibility under Section 187 of the 1996 Act to provide the Secretary of State on request, as soon as is reasonably practicable, a statement of the amount of any unpaid debt owed by the insolvent employer to any employee who is seeking payment from the Secretary of State.

6. Responsibility for making payments under the 1996 Act rests with the Secretary of State. Acceptance of debts in an insolvency lies with you, the IP. The RPO must be satisfied of the insolvent employer's liability for payment before it will pay a claim. It will not automatically pay even if you are prepared to admit the claim in the insolvency or have agreed the amount or status of the claim with the employee.

People excluded from the provisions

7. Certain categories of workers are excluded from the insolvency provisions of the 1996 Act. These are:

- self-employed;
- share fishermen;
- merchant seamen;
- employees who normally work outside the UK, unless they have enough connection with the UK to bring themselves within the scope of the ERA. This will involve consideration of, amongst other things, the employee's contract of employment, and where the employee was paid, taxed and received any benefits. Employees who do not qualify to be paid from the NI Fund may be paid directly from the insolvency.

People covered by the provisions

8. To qualify for insolvency payments, an applicant must be an employee as defined by the 1996 Act. The term "employee" means an individual who has entered into or works (or worked) under a contract of employment. The Act defines a contract of employment as "a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing".

9. People who are partners of a business or engaged as independent contractors or freelance agents, and others who work under contracts for services (as opposed to contracts of service) are not covered by the term "employee".

10. Whether or not someone is an employee is a matter of law and fact. The main factors considered significant in determining employee status are:

- if the individual has a written contract of employment, whether it is consistent with a contract of service;
- the degree of control exercised by the employer over work done by the worker (master/servant relationship);
- how the work was done;
- whether the worker was considered to be part of the business, in the sense that the work done by the worker formed an integral part of it rather than simply provided a service for it;
- whether the worker's involvement included a share of the profits or a risk of loss;
- whether the work was done on the worker's own account or for the employer.

Claimants whose employee status may be in doubt

11. The most common atypical workers encountered are:

- company directors;
- sub-contractors;
- agency workers.

12. If there is doubt, or a dispute, you should consult the RPO for its opinion, as ultimately the decision whether or not to pay a claim under the 1996 Act rests with the Secretary of State subject to any ruling by an employment tribunal or court. If you cannot agree with the RPO on the employee status of an individual, the matter will be referred to an employment tribunal to determine. You may be called as a witness to the hearing. For guidance on the above categories where problems have arisen in the past, see Appendix 5.

Death of an employee or employer

13. Sections 206 and 207 of the 1996 Act set out employees' rights if the employee or employer dies. In either case, action under the insolvency provisions can be begun or continued by (or against) the deceased's personal representative.

Debts payable under the 1996 Act

14. The following debts can be paid where the employer has become insolvent and the employee's contract of employment has been terminated:

- arrears of pay for one or more, but not more than 8 weeks (certain statutory payments are treated as arrears of pay for these purposes);
- holiday pay for up to 6 weeks in all during the 12 months ending on the date of the insolvency;
- payment for notice given, or for an employer's failure to give proper notice, for the period required by section 86 of the 1996 Act;
- a basic award of compensation for unfair dismissal made by an employment tribunal;
- reasonable repayment of any fee or premium paid by an apprentice or articed clerk.

15. All but the last of these debts are subject to a limit on the amount that can be paid in relation to any one week. This limit is reviewed annually.

Arrears of pay

16. The RPO will pay arrears of pay owing from any one or more weeks up to a maximum of 8 weeks. Periods of less than a week from different weeks cannot be totalled to make a single week; they must be treated as separate weeks for the purpose of counting towards the 8-week maximum. The weeks for which arrears are claimed need not be the latest weeks of employment, nor need they be consecutive. They may fall at any time before the appropriate date (see paragraph 40) and should be the 8 weeks that are financially most beneficial to the employee. ("Week" for these purposes is defined in section 235(1) of the 1996 Act.)

17. There is a limit on how much can be paid in respect of any one week for these purposes. The limit is reviewed annually and at the time of printing stands at £280. You can find information on the limits at any one time at: <http://www.dti.gov.uk/er/pay/limits-pl827.htm>

18. The limit applies to the gross debt, before deduction of tax, ERNIC etc. It must, where appropriate, be applied proportionately to part weeks. Arrears of pay may include the following:

- unpaid wages (or unpaid portions of wages), overtime, bonuses and commission, provided that these were contractually payable and that they relate to a specific period of time;
- amounts deducted for union dues but not paid over - these must be paid to the employee, not to the union;

- certain statutory payments to which the employee is entitled, such as:
 - payments for time off in specified circumstances;
 - remuneration where the employee is suspended on medical or maternity grounds;
 - payment under a protective award made by a tribunal;
 - guaranteed payments for temporary lay-off.

19. If a claim comprises more than one of these elements, you should bear in mind that the limit applies to the total claim for a particular week, not to individual elements of it. You can find detailed guidance on the calculation of a week's pay and the application of the weekly limit in appendix 3.

Holiday pay

20. The RPO will pay any holiday pay owing, up to a maximum of 6 weeks, provided the employee became entitled to it during the 12 months ending with the appropriate date (see paragraph 40). Holiday pay includes pay for holidays already taken and holidays accrued but not yet taken.

21. The limit on the amount payable in respect of any one week applies in all cases and must be apportioned as necessary (see Appendix 3).

Compensatory notice pay

22. The RPO can pay the amount, subject to the statutory limits, which the employer was liable to pay the employee for the minimum period of notice required by section 86 of the 1996 Act or for his failure to give that period of notice. The statutory minimum periods of notice are:

- one week for employees continuously employed for one month or more but less than two years;
- one week for each year of continuous employment of two years or more but less than 12 years;
- 2 weeks for 12 or more years of continuous employment.

23. Employees who work under fixed-term contracts that specify the duration of employment may not require any notice of termination. No right to notice is imported into such contracts by section 86 of the 1996 Act. However, if a fixed-term contract does allow early termination where the employer gives notice, section 86 may apply. You can find more detailed guidance to the notice provisions at: <http://www.dti.gov.uk/er/individual/reasons-pl707.htm>

24. If an employer gave an employee notice but, because of the insolvency, the employment actually terminated before the notice period expired, the periods before and after the termination should be dealt with differently. An employee's notice period starts the day after he or she is given notice. If no notice is given it starts the day after he or she is dismissed. If the employee worked all or part of the notice period but was not paid for it, the claim is paid as wages and will be subject to tax and national insurance, however, **the period does not count toward the limit of 8 weeks' arrears of pay**. The IP should make this quite clear on the RP14. Pay for the balance of the period that relates entirely to the period after termination should be claimed as notice pay; it should be assessed and paid as damages for breach of contract. Please ensure that the RPO is notified of any such cases in writing.

25. An employer who fails to give the minimum statutory notice is liable to pay damages for wrongful dismissal. Such damages are subject to mitigation, as is an employee's entitlement to

notice pay under the insolvency provisions. Income received by the employee will be offset against any notice pay due from the insolvent employer. The employee must take all reasonable steps after the dismissal to minimise his or her loss by finding another job or by claiming the statutory benefits to which they may be entitled. If an employee has failed to take these steps during the notice period, the RPO may reduce the amount of the notice payment.

26. If an employee gives notice of termination to the employer and is then dismissed before the end of the notice period, you should ignore the employee's notice period in determining the statutory notice that the employer must give. This is because it is the employer that actually terminates the employment. However, one of the qualifying conditions for payment is that the employee must be "ready and willing to work during the notice period, even though there is none available". This means that for the purposes of notice pay you should count only the period from the termination date to the end of the notice period given by the employee.

Basic awards of compensation for unfair dismissal

27. An unpaid basic award of compensation for unfair dismissal made by an employment tribunal is payable in full. A compensatory award is not payable.

Reimbursement of apprentices' and articled clerks' fees and premiums

28. The RPO may pay a sum that it considers reasonable to reimburse the fee or premium for the unexpired term of the apprenticeship or articles.

Protective awards

29. Payment due to an employee under a protective award made by an employment tribunal under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 is payable, within limits, under the insolvency provisions. It is treated for these purposes as arrears of pay. A tribunal making a protective award must specify:

- the number of days in the protected period - which should not exceed 90;
- the start date of the protected period - this is the date of the first of the dismissals being complained about or the date of the award, whichever is the earlier;
- the description of employees covered by the award.

30. The Secretary of State will not have been a party to the tribunal proceedings. Therefore, on receiving the tribunal's decision you should send a copy to the appropriate RPO, with a list of names and addresses of the relevant employees. You should also check that all the items listed in paragraph 29 have been included in the decision. If any of these has been omitted, it may be impossible to calculate the payments. In such cases you should contact the RPO immediately for advice, as the parties may have to apply for a review of the tribunal's decision.

31. The RPO calculates the awards and sends the payments direct to the employees.

32. Occasionally a decision is worded so as to apply only to union members. This is wrong in law, as the 1992 Act does not discriminate against non-union members. You should advise any other employees who think they should also be covered to apply directly to an employment tribunal under section 192 of the 1992 Act, as this is the only legal means to resolve the exclusion.

Redundancy payments

33. Under separate provisions of section 168 of the 1996 Act the RPO can also pay any statutory redundancy pay to which an employee is entitled. The redundancy payments provisions are outlined in the booklet "Redundancy Entitlement - Statutory Rights" (PL808), available at <http://www.dti.gov.uk/er/redundancy/payments-pl808.htm>

34. You can find basic information about redundancy entitlement where an employer is insolvent in the booklet "Redundancy and Insolvency - A Guide for Employees" (which also includes a tear-off RP1 claim form). You can get this booklet free of charge (see appendix 2). For general enquiries about entitlement to these payments, call the help line (see Appendix 2).

Statutory maternity pay and statutory sick pay

35. For enquiries about entitlement to statutory maternity pay, please contact Her Majesty's Revenue and Customs (HMRC) as it has responsibility for maternity pay. Contact your local tax office for assistance, or its helpline for experienced employers on 08457 143143.

36. For enquiries about statutory sick pay, contact the Department for Work and Pensions (DWP) as this is its responsibility.

Unpaid pension contributions

37. As well as making payments to employees, the RPO may make payments to pension funds where the employer has failed to pay contributions due on his or her own behalf or the employees'. Arrangements for such payments are described briefly at appendix 6 and more fully in a separate leaflet IL2 "Insolvency of Employers: safeguard of occupational pension scheme contributions". You can get this booklet free of charge - see appendix 2.

Claims in the insolvency

38. Payment by the RPO does not prejudice the right of any employee to seek recovery of any other debts, or debts in excess of the statutory upper limits, from the insolvent employer's assets in the usual way. Nor does payment by the Secretary of State imply that you, as IP, are bound to admit a claim by the employee, or the Secretary of State's subrogated claim, which you do not think is valid under insolvency legislation. If, before payment is made from the NI Fund, it becomes apparent that you do not agree that the employee is entitled to payment and would not accept the claim in the insolvency, the RPO would reject the claim and refer the matter to an employment tribunal for a legal ruling on the validity of the claim against the employer.

Retained employees

39. If you keep employees at work after the date of insolvency, you must pay wages for that period out of the funds of the insolvent employer, which you are entitled to use to continue necessary services. You must ensure that no claims for wages for periods after the insolvency date are made under the insolvency provisions if the employees are later dismissed. Wherever possible, you must give retained employees proper notice of the eventual termination of their employment, to reduce the debt against the employer and the burden on the NI Fund.

The appropriate date

40. The RPO has the power to pay only the debts that are due and unpaid on the "appropriate date", defined as:

- in relation to arrears of pay (except remuneration under a protective award) and to holiday pay, the date on which the employer became insolvent;
- in relation to remuneration under a protective award or to a basic award of compensation for unfair dismissal, the latest of:
 - the date on which the employer became insolvent;
 - the employee's termination date; and
 - the date on which the award was made;
- in relation to any other debt, whichever is the later of:
 - the date on which the employer became insolvent;
 - the employee's termination date.

Applicant's right to complain to a tribunal

41. An employee who has applied for an insolvency payment has the right, under section 188 of the 1996 Act, to complain to an employment tribunal against the decision of the Secretary of State if:

- the Secretary of State has failed to make any payment; or
- the payment by the Secretary of State is less than the amount that the employee considers should have been paid.

42. The respondent in all such cases will be the Secretary of State. In general you as IP should not be a respondent, but may be called as a witness in any dispute over entitlement. If the RPO rejects a claim made under the insolvency provisions, it will advise an employee to name as respondent in any appeal the Secretary of State for Trade and Industry and to give the address of the Redundancy Payments Office dealing with the claims. The RPO will also advise the employee to name any other appropriate respondent - for example, the transferee in cases where there was a TUPE transfer.

Section 2

The procedure

Information

43. Losing a job through the employer's insolvency can come as a shock, even where the employer has been known to be in financial difficulty for some time. One of the first things employees will want to know is what they are entitled to and how they can get help. The resources that you can make available to help with such queries will vary. In customer surveys employees often complain that they did not receive the relevant explanatory leaflets. **Appendix 8 lists the main forms and booklets used.**

RPO objective

44. The RPO's objective is to ensure that employees receive money to which they are entitled as quickly as possible. The RPO may calculate some individuals' entitlements sooner than others. This may be because it has to make extra enquiries, for example for directors, sub-contractors or employees on long-term absence. However, the RPO will make every effort to achieve the targets set out in the Insolvency Service Charter booklet.

The Insolvency Service Charter

45. The charter outlines what debts can be paid, briefly describes how claims are handled and gives the number of the helpline (see appendix 2), which is there to advise and deal with general enquiries. Please issue a copy to employees.

Notification and consultation about proposed collective redundancies

46. Employers may consult you about putting a company into insolvency before their formal appointment to see you. At that stage you should recommend that the employer starts the notification and consultation process immediately so that it is in motion at the time of the appointment.

47. You may also wish to advise employers to contact the Jobcentre Plus for assistance for employees facing redundancy. More information about how the Jobcentre can help is available at: <http://www.jobcentreplus.gov.uk/cms.asp?Page=/Home/Employers/HelpwithRedundancies>

Consultation with employees' representatives and protective awards

48. A company's insolvency does not affect the normal statutory duty to consult appropriate employees' representatives about proposed redundancies, as set out in section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.

49. Responsibility for conducting such consultation rests mainly with the employer but will fall to you if the employer has not started the consultation process before your appointment. Failure to carry out the necessary consultation may lead to a protective award for the affected employees and increase the employer's debt.

50. You may not incur a liability against the company if there are special reasons for you being unable to comply with the information and consultation requirements within the statutory time scales.

51. You should take all reasonable steps to reduce the liability against the company and the NI Fund by taking the relevant action within the time available before the dismissals and defending this action before an employment tribunal. You can find further information in the booklet "Redundancy consultation and notification PL833", which is available on the following DTI website: <http://www.dti.gov.uk/er/redundancy.htm>

Notification process

52. An employer proposing to dismiss 20 or more employees as redundant at one establishment within a 90-day period has a statutory duty to notify the Birmingham RPO which acts for the Secretary of State for Trade and Industry (section 193 of the Trade Union and Labour Relations (Consolidation) Act 1992). This is so that government departments and agencies and the Jobcentre Plus Rapid Response Service can be alerted and prepared to take any appropriate measures to assist or retrain the employees in question.

53. The notification must be in writing on form HR1, which you can get from the DTI Publications Orderline on 0870 1502 500, or email pubs.unit@dti.gsi.gov.uk. You can also download the form from <http://www.dti.gov.uk/er/redundancy/hr1.pdf>

54. There is a specified time limit for a notification. The date of notification is the date on which it is received by the RPO. The minimum times are:

- at least 30 days if between 20 and 99 employees may be dismissed;
- at least 90 days if 100 or more employees may be dismissed

55. An employer who has already notified one group of proposed redundancy dismissals and later decides to make a further group redundant need not add the numbers of employees together to calculate the minimum period for either group.

56. There is no obligation to notify redundancies of fewer than 20 employees within a 90-day period, but employers may nevertheless wish to consider doing so in borderline cases - particularly if the numbers involved are uncertain.

57. The notification should be sent by post or delivered by hand to the office stated on form HR1. **Employers must also give or send a copy of the notification to the representatives with whom they must consult about the proposed redundancies.**

58. In special circumstances it may not be reasonably practicable for the employer to meet fully the requirements for minimum notification periods. **In such circumstances, the employer must take all reasonably practicable steps toward meeting the requirements and explain why they cannot be met in full.**

Penalty for non-compliance with notification requirements

59. If an employer fails to give the required notification, the RPO may start legal proceedings that could lead, on summary conviction, to a fine of up to £5,000. (This upper limit is subject to review from time to time.)

Issue of application forms

60. Application form **RP1** is the main application for payment from the NI Fund. It is incorporated as a tear-off in the booklet "Redundancy and Insolvency - A Guide for Employees", and should be issued to employees as soon as possible after dismissal. Form RP1 should not be issued to

any employees until they have been formally made redundant. This is because their contract of employment must have officially ended before the Redundancy Payments Directorate can consider making payments. Where employees have left of their own accord and are owed arrears of pay and/or holiday pay, an RP1 can be issued. In these cases the RP14a must state clearly that the employee resigned and the date of the resignation.

61. Employees should complete form RP1 as soon as possible after dismissal. Some IPs may use a computerised version of RP1 that sets out the relevant information and requires only agreement and signature by the employee. This is acceptable. Employees must not, however, be asked to sign and date blank forms to be completed later on their behalf. An appointed agent or personal representative may complete an RP1 on an employee's behalf if the employee needs help in completing the form because of incapacity or illiteracy, or if an employee dies soon after the appropriate date.

62. The **RP2** form is the main application for claiming compensatory notice pay. It is computer generated and the RPO will send it direct to employees at the end of their statutory notice period.

63. The **RP13** form is an application for a refund of notional tax deducted from compensatory notice pay and is sent out by the RPO.

Issue of forms for more information about entitlement to payment

64. The **RP3** form is for more information about directors. **You should hold stocks of these forms**, which should be issued to directors for completion at the same time as the RP1 form.

65. The **RP4** is for more information from subcontractors and is sent out by the RPO.

66. The **RP6** is for more information about subcontractors from the IP or company director and is sent out by the RPO.

67. The **RP14/RP14OR Questionnaire** is for more information about the company and TUPE transfers (Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981 No 1794 as amended)). **IPs should hold stocks of RP14s, and Official Receivers should hold stocks of RP14ORs, as they are required in all cases.** The RPO does not usually make payments without a statement from the IP about whether or not the undertaking of the insolvent employer has been transferred to a new owner.

68. The RP14A is a statement of debt owed to employees. The RPO does not usually make payments without a statement from the IP of the amount of unpaid debt owed to the employees at the appropriate date. The RP14A is the relevant form for notifying these details. **You should hold stocks of RP14As** and send one to the RPO before or with the first completed RP1 claim forms.

69. The **RP18** form is for more information about TUPE transfers from company directors, the IP and transferee and is sent out by the RPO.

70. The **RP19** form is for more information about TUPE transfers from an employee and is sent out by the RPO.

Action on return of completed forms

71. Form RP1 should be returned by the employee direct to the relevant RPO or IP. Checks may be made later by an RPO Inspector or by enquiry from an RPO. Records maintained by the

insolvent employer should generally provide enough information from which to check or calculate an employee's entitlements. All such information must be made available. If the wage records are insufficient, you should discuss the facts of the case with the appropriate RPO to agree how far the claims should be admitted.

Completion of questionnaire and statement of employees' debts (RP14/RP14OR/RP14A)

72. The RPO cannot pay debts owed to employees until it is satisfied that their employment has not been transferred to a new employer through the TUPE Regulations and received a statement of debts owed to the employees. Form RP14 is a questionnaire seeking information about whether an undertaking has been transferred as well as general information about the employees and employer's contractual arrangements.

73. Please send RP14/RP14OR and RP14A to the RPO before or with the first completed claim forms, with a copy of any sale agreement and any other relevant documents. If you submit claims without an RP14, the RPO will send one to you.

74. If you continue to trade the business of the employer but dismiss employees at various stages, you should not wait until all dismissals have been carried out but should send an RP14 covering the first batch of dismissals and inform the RPO in writing of any change in circumstances for each subsequent batch. In this way the RPO can process without delay claims for any employees who are clearly not covered by a transfer, while investigating claims for other later dismissals that may be covered.

75. General information about the TUPE regulations and how they can affect claims is set out in Appendix 4. Further information is available at: <http://www.dti.gov.uk/er/redundancy.htm>

76. If you are uncertain about the effect of the regulations in a particular case, please discuss this with the appropriate RPO. Any guidance provided by the RPO will be on a "without prejudice" basis. Whether or not the RPO considers that claims are payable in any circumstances, employees have a right to bring claims in an employment tribunal against the transferee employer, if they consider that the regulations apply to them.

Set-off of debts between employee and employer

77. Occasionally, an employee will owe money to his or her employer at the appropriate date. In such cases the employee's entitlement under the insolvency provisions will be the net amount owed after set-off. (Income tax and ERNIC, however, are payable on the gross amount owed before set-off.) As the applicant may send his or her form directly to the RPO, you must give the RPO full written details of the amount owed to the employer and the gross amount owed to the employee. If there is a written agreement between the employer and employee on repayment, you should provide a copy. It is essential that the information is forwarded to the RPO immediately you become aware of it. Unless you give this information at the outset, the RPO will not be able to initiate the set-off. You will, therefore, have to pursue the individual for the money owed to the insolvent company.

Attachment-of-earnings court orders

78. Occasionally an employee may have a court order requiring their employer to make deductions from their wages and pay them directly to the court (or other party). As the Secretary of State is not the employer, the RPO is not empowered to make deductions and make direct payment to the court. In such cases you must tell the employee that he or she is responsible for making the payments to the court.

Deduction of income tax and ERNIC by RPO

79. The RPO will deduct from arrears of pay and holiday pay an amount of income tax at the basic rate in force at the time payment is made. The employee's share of ERNIC will also be deducted from the payment. The rates of contributions and earnings limits are the weekly rates and limits current at the time of payment, without regard to any previous pay practice. The number of weeks covered by an arrears payment will also be taken into account in assessing ERNIC liability.

Subrogated rights

80. Where an employee is paid from the NI Fund, the Secretary of State takes over the employee's rights to recover that amount of the debt under Sections 167 and 189 of the 1996 Act. These rights include any right of priority conferred under insolvency legislation. The Secretary of State has the same rights as the employee to be paid in priority to the employer's other creditors. The RPO's claims must be calculated against the individual employees' entitlements and not as a gross overall total against the employer. Any sums that the Secretary of State recovers from the employer are repaid to the National Insurance Fund. There is no difference in the treatment of statutory or contractual entitlements for subrogation purposes.

Lodging the RPO debt in the insolvency

81. The insolvency provisions of the 1996 Act do not affect the priority given to certain debts by Schedule 6 to the Insolvency Act 1986. This Schedule says that certain payments will be given preferential treatment within the limits that govern such priority. Employees' priority claims are:

- all holiday pay
- wages up to £800 in the four months immediately before the insolvency date
 - a protective award is treated as wages. The period of the award may span the insolvency date. If so, the period before the insolvency date may be preferential subject to the limit, and the post-insolvency period is unsecured
- certain occupational pension contributions
 - employees' contributions deducted from pay in the four months preceding the insolvency date
 - employer's contributions from schemes contracted out of the State earnings related pension scheme to the extent of the level by which the NI contribution is reduced in relation to the 12 months preceding the insolvency date

82. The RPO will send you an RP11 and RP 12 showing the preferential and non-preferential amounts paid to employees and how the payments were calculated. A proof-of-debt letter will also be sent to you stating the total preferential and non-preferential amounts due to the Secretary of State.

Crown set-off

83. The House of Lords, in the case of Secretary of State for Trade and Industry v Frid (West End Networks Ltd), found that the RPO was entitled to Crown set-off. The full decision is available on:

<http://www.parliament.the-stationery-office.co.uk/pa/ld200304/ldjudgmt/jd040513/frid-1.htm>

84. Set-off applies to both preferential and non-preferential debts. The Insolvency Act does not give any clear instruction as to how the set-off is apportioned between the two classes of debt; however, this position was resolved in the courts. The approach is different in England and

Wales to that in Scotland (see Appendix 7 for examples of calculations).

85. The RPD will send a revised proof-of-debt letter to inform you of the set-off. This will include the **original total amount of RPD debt, which remains unchanged** for the purposes of the calculation of dividends, but shows the outstanding balances of unpaid preferential and non-preferential debts which have been adjusted to reflect the amount after set-off. It should avoid overpayments by you and requests for the RPO to repay dividends.

Preferential claims

86. For preferential claims only, **section 189(3) of the 1996 Act states that the employee's claim and the Secretary of State's claim must be added together for computing preferential amounts due.** Section 189(4) of the 1996 Act gave the Secretary of State the right to be paid in priority to any other unsatisfied claims of employees (the so-called "super-preference" status); however, this part only of the Act has been repealed for cases where the date of insolvency is on or after 15 September 2003. From that date the Secretary of State has equal preference with the employee. However, if the insolvency falls **before** 15 September 2003, the Secretary of State retains super-preferential status over the claims of employees.

87. Please take care to separate claims for wages and holiday pay when making preferential dividends, otherwise there is a danger that the RPO could be under/overpaid.

Example of distribution for an employee who was made redundant in June 2002 and the insolvency date is before 15 September 2003

88. An employee's gross claim against his former employer is as follows:

- 4 weeks' wages @ £1,000 per week = £4,000 (£800 preferential; £3,200 non-preferential)
- 8 weeks' holiday pay @ £1,000 per week = £8,000 (all preferential)
- Total preferential claims = £8,800

89. Payments to an employee from the NI Fund are limited by statute, and the RPO paid £7,500 of the employee's claim as follows:

- 4 weeks' wages @ £250 per week = £1,000 (£800 preferential and £200 non-preferential).
- 6 weeks' holiday pay @ £250 per week = £1,500 (all preferential)

90. The RPO takes over the employee's rights in the insolvency in respect of the amounts it has paid him or her out of the NI Fund. For each category of preferential payments, the RPO must be paid in full before the employee receives any balance of the preferential amount due.

91. For preferential debts:

- The total claim is £8,800 made up of £800 for wages and £8,000 for holiday pay.
- The RPO paid £800 wages and £1,500 holiday pay.
- The employee's remaining unpaid preferential claim is £6,500 holiday pay.

92. If a dividend of 50p in the pound is payable for preferential debts, then the amounts available are £400 for wages and £4,000 for holiday pay. From this, the RPO receives all the £400 available for wages plus the £1,500 it has paid out in holiday pay. The employee would receive no wages but £2,500 in holiday pay (i.e. the £4,000 available less the £1,500 paid to the RPO).

Distributions where the insolvency date is on or after 15 September 2003

93. The RPO retains its preferential ranking but no longer has a super-preference status over the preferential claims of employees. That is, it is no longer paid in full before employees receive the balance of their preferential claims. If the preferential dividend is less than 100p in the pound, the RPO's portion is a percentage of the gross total of the Secretary of State and employee's claim for each category. The following calculation uses the same figures and dividend as the previous example, even though because of the increase in statutory limits the example is no longer authentic:

- For wages the RPO paid £1,000 of the £4,000, or 25%, of the total owed to the employee.
- For holiday pay RPO paid £1,500 of the £8,000, or 18.75%, of the total owed.
- The RPO would expect £850, comprising £100 for wages (25% of £400) and £750 for holiday pay (18.75% of £4,000).
- The employee would expect £3,500, comprising £300 for wages and £3,200 for holiday pay.

Non-preferential claims

94. The RPO had no right to be paid in priority to employees in respect of non-preferential debts, whether statutory or contractual. This remains unchanged. Money due to the employee for preferential claims must NOT be set off against the RPO's non-preferential claims.

Taxation of dividends

95. Because the RPO must deduct tax and national insurance at source, you need not pay any further contributions on the dividend due to the RPO. However, you should pay tax and ERNIC on dividends payable directly to the employee.

Preferential status of wages paid by a third party

96. In some cases a bank or other third party may lend the employer money to pay employees wages and make a separate claim in the insolvency (Insolvency Act 1986, schedule 6, part 11). If an employee is still owed wages at the insolvency date despite the advances made by the bank, then the employee has first claim to the preferential payment. How much of the third party's claim will be preferential depends on how much unpaid wages the employee has claimed in his or her own right.

97. For example, an employee would have been owed £900 in wages but for an advance of £200 from a bank. The employee's debt is reduced by £200 to £700. The maximum preferential amount is £800. The whole of the employee's £700 claim is preferential, leaving a £100 preferential payment to the bank.

98. The purpose of allowing third party claims to be preferential is to safeguard banks and other lenders who advance money to pay employees when a company is in financial difficulty. Whether a wage cheque drawn from an overdrawn account is regarded as pay depends on the way the account is kept. An overdrawn ordinary current account out of which wage cheques were regularly drawn does not constitute money advanced for the purposes of paying employees' remuneration (*Re Primrose (Builders) Ltd [1950] 2 All ER 334*). If a separate wages account were set up, drawings from this account would normally constitute an advance.

Brumark Investment Ltd: Fixed charge on book debts

99. At the time of printing, the Court of Appeal has overturned the High Court's judgment in favour of the Crown Departments on 26 May 2004. The Crown Departments successfully petitioned the House of Lords for leave to appeal against the Court of Appeal's decision and the hearing is set for April 2005. In view of the pending appeal the RPO will refuse IPs' requests to pay charge holders in respect of book debts that may arise as a result of this decision.

Payment of cheques to the National Insurance Fund

100. Please ensure that cheques are made payable to the National Insurance Fund and sent to:

AMEY PLC
7th Floor
Clarence House
Clarence Place
NEWPORT
South Wales
NP19 7AA

From 1 April 2005 please send payments to:

Insolvency Service
Finance Redundancy Payments Team
6th Floor East
Ladywood House
45-46 Stephenson Street
Birmingham
B2 4UZ

Please ensure that you quote the RPO case reference number when sending these cheques.

Approving IPs' fees

101. From 15 September 2003 the Inland Revenue and Her Majesty's Customs and Excise no longer have preferential claims. The RPO, by virtue of subrogation of employees' preference, remains a preferential creditor. This means that the RPO will usually be the largest preferential creditor, so it may be asked to vote on payment of IP fees. The address to send such requests is:

The Insolvency Service
Redundancy Payments Directorate
Area 5.8
PO Box 23
21 Bloomsbury Street
London WC1B 3QW

Appendix 1

Insolvency categories and relevant dates

England and Wales	Scotland	Effective date of insolvency
Bankruptcy	Awards of sequestration	Date of bankruptcy order (England and Wales). Date of award of sequestration (Scotland)
Making of compositions and schemes of arrangement	Executions of trust deed and making of composition contracts	Date of executing deed or signing contract, or operative date specified in the document
Making of administration orders (deceased insolvent)	Appointment of judicial factors (deceased insolvent)	Date of administration order (England and Wales). Date of appointment of judicial factor (Scotland)
Company and limited liability partnership administration orders	Company administration orders	Date of administration order
Company and limited liability partnership voluntary arrangements	Company voluntary arrangements	Date arrangement is approved
Compulsory liquidations of companies and limited liability partnerships	Compulsory liquidations of companies	Date of winding-up order
Voluntary liquidations of companies and limited liability partnerships	Voluntary liquidations of companies	Date of passing of resolution for voluntary winding up
Receiverships or managerships of companies and limited liability partnership undertakings		Date of appointment of receiver or manager
Possession taken by debenture holders of companies' and limited liability partnerships' property secured by a floating charge only		Date of taking possession of property comprised in or subject to the charge

Appendix 2

Addresses of Redundancy Payments Offices

Edinburgh Redundancy Payments Office Ladywell House Ladywell Road Edinburgh EH12 7UR	Tel: 0131 316 5600 E-mail: Edinburgh.rpo@dti.gsi.gov.uk <i>Scotland, Cleveland, Cumbria, Durham, Merseyside, Northumberland, Teesside, Tyne and Wear, Yorkshire</i>
Watford Redundancy Payments Office PO Box 15, Exchange House 60 Exchange Road Watford WD18 0YP	Tel: 01923 210 700 E-mail: Watford.rpo@dti.gsi.gov.uk <i>All London boroughs, Buckinghamshire, Essex, Hertfordshire, Kent, Suffolk, Surrey, Sussex</i>
Birmingham Redundancy Payments Office Cobalt Square 83-85 Hagley Road Birmingham B16 8QG	Tel: 0121 456 4411 E-mail: Birmingham.rpo@dti.gsi.gov.uk <i>All other areas</i>

Help line

A national help line is available to answer any of your queries. Phone: 0845 145 0004 (all calls are charged at local rates).

Publications Order Line

Booklets can be obtained free of charge from the following DTI Publications Order Line:

Tel: 0870 1502 500

Fax: 0870 1502 333

E-mail: publications@dti.gsi.gov.uk

Appendix 3

Calculation of a week's pay and application of the weekly limit on payment

A week's pay

1. For unpaid holiday pay or ordinary arrears of pay, the amount due, subject to the statutory weekly limit, is simply the sum due under the employee's contract for the period in question. For payments in respect of redundancy pay, notice pay, guarantee payments, payments for time off, and remuneration on medical or maternity suspension, we (the RPOs) have to calculate "a week's pay" as defined in the 1996 Act.

2. The method of calculation set out in the 1996 Act depends on whether or not an employee has normal working hours and whether or not his or her pay in normal working hours is liable to vary with the amount of work done.

3. Most employees have normal working hours established by their contract of employment and any relevant working agreement between the employer and the employees. These should be shown in their written statement of particulars. Hours of overtime are included only if they form part of the employee's normal working hours. This means not only that an employee is contractually obliged to work overtime but also the employer is contractually obliged to provide it. If an employee's pay for work done in normal working hours does not vary, for example in the case of the employee paid entirely by an hourly rate or by a fixed wage or salary, then a week's pay is the amount payable under the contract for the normal working hours at the "calculation date" as defined in sections 225 and 226 of the 1996 Act. Such pay includes any regular bonus or allowance (except expenses allowance), which does not vary with the amount of work done.

4. If an employee's pay for work done in normal working hours varies with the amount of work done, for example under piecework systems or when pay is partly made up of performance-related bonuses or commission, the amount of a week's pay is calculated by averaging the employee's income from the last 12 weeks worked before the calculation date. Any pay for hours not worked, for example under a guaranteed-week agreement, is left out of the calculation. If no pay was due for any one or more of those weeks, the period is extended to cover the last 12 weeks for which pay was due. If the employee has less than 12 weeks' service, the weekly rate is calculated using the number of weeks actually worked. The pay figure to use is the amount shown as earned, whether or not it was paid. In the absence of wage records to show the amount earned it will be necessary to take into account:

- pay received by others doing similar work for the same or a different employer;
- the expected pattern of working based on the terms on which the job was offered.

5. The pay of monthly paid employees is converted to an annual salary. Dividing the annual salary by 365 days, and then multiplying the result by 7 give a week's pay.

Application of the weekly limit: calculation of a part week

6. The weekly limit is applied, where applicable, to gross debts before deductions, except in the case of a compensatory notice payment, where the limit is applied after mitigation and reduction for notional tax.

7. In calculating the payment for a part week, the following arrangements apply:

- ***If there are normal working hours***

The amount payable for a part week is calculated on the basis of what is reasonable having regard to the employee's work pattern. If, for example, he or she works the same number of hours each day for 5 days a week and is owed 2 days' pay, the employee is entitled to 2/5 of his or her weekly salary (or 2/5 of the weekly limit, if smaller). If the number of hours worked varies, calculations can more accurately be related to an employee's normal working hours. If, for example, such an employee is owed wages for 25 of his or her normal 42 working hours, the entitlement will be 25/42 of his or her weekly wage (or 25/42 of the weekly limit if smaller).

- ***If there are no normal working hours***

It is necessary to average the number of hours worked to arrive at a fair calculation of the proportion that the part week represents of an average working week. Generally this will be the last 12 weeks worked before the "calculation date". Any weeks in which no work was done should be ignored and replaced with an earlier week.

National minimum wage

8. Where the hourly rate of pay is known to be less than the national minimum wage, the national minimum wage must be used when calculating a week's pay.

9. The national minimum wage rates increased from 1 October 2004. For workers aged 18 to 21 the minimum hourly rate is £4.10; for workers aged 22 and over, it is £4.85. From 1 October 2004, the Government has set a new rate for 16 and 17 year olds (above compulsory school-leaving age) of £3 an hour. These rates are reviewed annually. For more information, see the DTI website at: <http://www.dti.gov.uk/er/nmw/index.htm>

Appendix 4

Transfers of undertakings

1. The Transfer of Undertakings (Protection of Employment) Regulations 1981 ("TUPE"), apply when a business or part of a business is transferred to a new employer as an identifiable economic entity. The main provisions of the Regulations are:

- employees employed at the time of the transfer, *or who would have been so employed had they not been unfairly dismissed because of the transfer or a reason connected with it*, automatically become employees of the new employer, on the same terms and conditions (*Litster and ors v Forth Dry Dock and Engineering Co Ltd [1989] IRLR 161 HL*). Employees cannot be forced to transfer against their will, but those who do not wish to be transferred will be deemed to have left of their own accord and will forego entitlement to redundancy payment and compensatory notice payment;
- dismissals at any time which are mainly because of the transfer or a reason connected with it are considered unfair (TUPE, Regulation 8(1)), unless the reason or main reason for them was an "economical, technical or organisational reason entailing changes in the workforce" (TUPE, Regulation 8(2));
- the new employer becomes responsible for all rights, powers, duties and liabilities under or connected with the employees' contracts of employment, including any outstanding contractual debts such as holiday pay, arrears of salary and notice payments but excluding occupational pension rights;
- appropriate representatives of employees of the transferor and transferee, who may be affected by the transfer or measures taken in connection with it, must also be informed and consulted.

2. Whether or not a transaction amounts to a relevant transfer within the meaning of TUPE depends on the precise circumstances. In general terms, the test is whether there has been the sale or acquisition of a stable economic entity that retains its identity. Examples of transactions that may not count as relevant transfers include takeovers by share acquisition; the purchase of equipment alone; and the transfer of an undertaking situated outside the United Kingdom.

3. In 1986 the European Court of Justice set out a number of factors that are to be taken into account in determining whether there has been such a transfer (*Spijkers v Gebroeders Benedik Abbatoir CV, 24/85 [1986] ECR 1119 ECJ*). These include:

- the type of undertaking or business concerned;
- whether or not the business's tangible assets (e.g. buildings and moveable property) have been transferred);
- the value of the business's intangible assets at the time of the transfer;
- whether or not the majority of the employees are taken over by the new employer;
- whether or not the old business's customers are transferred;
- the degree of similarity between the activities carried on before and after the transfer, and the period (if any) during which those activities were suspended.

4. The court, however, made it clear that these are all merely single factors in the overall assessment that must be made, and cannot be considered in isolation. What is crucial is whether an 'economic entity' is transferred, and this is to be determined on an overall assessment of all the circumstances, no single factor being conclusive either way.

5. This approach is followed by the UK courts (*Cheeseman and others (appellants) v R Brewer Contracts Limited (respondents)* [2001] IRLR 144).

6. The courts have not extensively interpreted the term "economic, technical or organisational (ETO) reasons entailing changes in the workforce". So the following represents no more than the RPO's broad view and should not be taken as a definitive statement of the law. In cases of doubt it will be for an employment tribunal to determine the matter on the facts of the particular case.

7. The RPOs believe that where there is a genuine redundancy within the meaning of section 139(1) of the Employment Rights Act 1996, this will be likely to fall within the meaning of "economic, technical or organisational reasons entailing changes in the workforce" (TUPE Regulation 8(2)). However, not all dismissals that appear to be by reason of redundancy will fall within that Regulation. If, for example, a clause in the transfer agreement required the transferor to dismiss the employees before completion, even if that were held to be a redundancy within the meaning of section 139(1) of the 1996 Act, it would not necessarily fall within Regulation 8(2) because it would not be a reason that related to the conduct of the business. Subject to the warning above, the following may help you decide whether Regulation 8(2) applies:

- Dismissals unconnected with the transfer of the whole or part of the undertaking do not fall within Regulation 8 and claims arising from such dismissals will generally be paid from the National Insurance Fund. RPOs will generally regard as unrelated to the transfer any dismissals carried out before the opening of any negotiations to transfer part or all of the business.
- An example of an "economic" reason is where demand for a particular product has fallen so far that the company's profitability no longer allows so many staff to be employed or where a particular contract for goods or services has been terminated and there is no other work for the staff previously engaged on that contract.
- An example of a "technical" reason is where the company has been employing staff on manually operated machines and the new employer wishes to use only computerised machinery, for which the existing employees do not have the technical skills or for which fewer employees are needed.
- An example of an "organisational" reason is where a company at one location is taken over by another at a distant location, to which it is not practical to relocate the staff.

8. An argument that an employee has been dismissed for an ETO reason will not usually be sustainable if the employee continues to work for the transferee, even if on different terms and conditions; in *Berriman v Delabole Slate Ltd* ([1985] ICR 546) the Court of Appeal decided that for a change in the workforce within the meaning of Regulation 8(2) of TUPE there had to be a change in the numbers of the workforce or, possibly, their job functions which, although involving no overall reduction in the numbers, involved a change in the individual employees who made up the workforce.

Appendix 5

Claimants whose employee status may be in doubt

Company directors

1. A company director is normally classed as an office-holder. But a director may also be an employee of the same company. The matter is to be considered on the basis of all the evidence.

2. The Court of Appeal in *Secretary of State for Trade and Industry v Bottrill (1999) IRLR 326* decided that although the shares held by the director are of importance and could in certain cases be the deciding factor, all the circumstances of the relationship between the director and the company must be considered to establish whether the relationship is the same or sufficiently similar to that of "ordinary" employees to make the director an employee of the company.

3. The points a tribunal may wish to consider are:

- Is there a genuine contract between the company and the shareholder?
- How and for what reason did the contract come into existence?
- If the contract is not a sham, does it give rise to an employer/employee relationship?
- Of the various factors usually regarded as relevant, the degree of control exercised by the company over the shareholding individual is important.
- Whether there are other directors other than or in addition to the shareholding individual.
- Whether the company's constitution gives rights such that he is answerable only to himself and incapable of being dismissed.
- If he is a director, is he able under the articles of association to vote on matters in which he is personally interested?
- The actual conduct of the parties under the terms of the contract.

4. A decision that a director is not an employee for these purposes does not prevent the person being classed as such for the purposes of other legislation, e.g. tax or social security legislation.

5. Other relevant case law relating to directors' claims are:

Eaton v 1) Robert Eaton and 2) Secretary of State for Employment [1988] [IRLR 83, EAT - this case is important as it deals with 'control' of the company;

Wilson v Trenton Service Station Ltd [1987][EAT/100/87 unreported - this case deals with tax and national insurance and also partners trading under the guise of a limited company;

Secretary of State for Employment v Alex Rettie Black McLean [EAT/672/91 unreported] - this case is important as it deals with shareholdings as a means of control and financial investment other than shares;

Mr & Mrs Pratt-Johnson v 1) Integrated Machine Tools Ltd and 2) Secretary for Employment [EAT/7/93 unreported] - the importance of this case is that it also deals with the issue of 'control from outside the company'.

Temporary agency worker

6. In the case of *Jennifer Lee Montgomery v Johnson Underwood Ltd [2001] IRLR 269*, the employment business and its client both denied that Mrs Montgomery was its employee. The

Court of Appeal held that Mrs Montgomery was not an employee of the employment business. The Employment Tribunal and Employment Appeal Tribunal had already determined that she was not an employee of the client and this point was never at issue before the Court of Appeal.

7. The court decided there is a lack of 'mutual obligation' between the agency and the worker to provide and undertake work. In the light of this decision, it was unlikely that a temporary worker would have employee status with an insolvent employment business. The Court of Appeal, in the more recent case of *Dacas v Brook Street Bureau (UK) Ltd [2004] IPLR 358*, held that a temporary worker was not an employee of the agency, reinforcing the Montgomery decision. It did question whether a temporary worker could be an employee of the client but made no legal ruling on this. However, some Employment Appeal Tribunals reached different conclusions to the Court of Appeal in similar cases and this is still a hotly contested area of law.

Sub-contractors

8. Sub-contracting, though commonly associated with the building trade, covers a wide range of industries and occupations. Those sub-contractors who are clearly in business on their own account and who provide services to several different customers, are generally easy to identify.

9. However, many individuals may have been considered by a business to be self-employed, but their working relationship suggested that they were, in fact, employees of the business within the meaning of the 1996 Act.

10. The decision must take account of the balance of all relevant factors:

- was the individual free to accept or refuse work for the contractor;
- did he or she work under any express contractual arrangements, and if so was it a contract of employment;
- what were the arrangements (if any) for supervision of the work, holidays, sickness and pensions;
- did the individual have to carry out the work personally or could they hire or supply someone to do it on their behalf?
- whether the worker's involvement included a share of the profits or a risk of loss;
- whether the work was being done on the worker's own account or for the employer;
- basis of payment - was the individual paid regular weekly wages into his or her personal bank account or paid into his or her business account on the completion of a task.

11. The basis on which the individual paid tax and NI contributions and the label put on the relationship by the parties are factors to be taken into account, but neither will itself determine the issue.

12. Only "employees" as defined by section 230 (1) of the Act are entitled to payments from the NI Fund. The Working Time Directive has a much broader scope and refers to "workers". Satisfying the definition "worker" does not automatically mean that that person satisfies the definition of "employee".

Appendix 6

Unpaid occupational pension scheme contributions

1. Section 124 of the Pension Schemes Act 1993 (as amended) provides for the payment of certain contributions that are owed to an occupational or personal pension scheme when an employer becomes insolvent. "Persons competent to act" under the trust deed or rules of a scheme (for example, the trustees) may apply for payment to a scheme.

2. The following contributions are payable:

- unpaid contributions on behalf of an **employee**, i.e. contributions which have been deducted from the pay of the employee, but which have not been paid into the resources of the scheme, up to a maximum of the amount deducted from the employee's pay in respect of his/her contributions to the scheme during the 12 months ending on the day before the employer became insolvent;
- unpaid contributions payable by the **employer** on its own account, to a limit of whichever is the least of:
 - the balance of the employer's contributions relating to the 12 months ending on the day before the employer became insolvent;
 - the amount certified by an actuary as necessary for the scheme to meet its liability on dissolution for payment of benefits to the employees (this condition does not apply to "money purchase" schemes);
 - an amount equal to 10% of the total pay of the employees concerned for the 12 months ending on the day before the employer became insolvent.

3. The trustees or administrators of the scheme should apply for payment from the NI Fund on form RP15 enclosing form RP16 (actuarial certificate) if appropriate. Since the amount payable in respect of the employer's contributions does not depend on the result of a preferential claim, the completion of form RP16 need not await the declaration of a preferential dividend. You should agree the claim with the scheme's trustees or administrators, complete Part 2 of form RP15 and send it to the RPO with form RP16 if appropriate. The RPO will make the payment directly to the pension scheme's bank account or that of the trustee or administrator. **Please ensure that the correct pension scheme reference number is put on the RP15.**

4. Booklet IL2 "Insolvency of employers: safeguard of pension scheme contributions" gives further information.

Appendix 7

Crown set-off

Set-off in England and Wales

"Unit 2 Windows Ltd." - Chancery Division (Companies Court) (1986) BCLC 31.

1. This was a company in liquidation with enough assets to meet the claims of its preferential creditors but nothing to meet those of the ordinary creditors. One of the creditors was the Crown, represented by the Department of Health and Social Security. The DHSS sought to set off the VAT refund firstly against the non-preferential debt. The liquidator disputed this, stating it should be firstly set off against the preferential debt. The court held that under English law there must be a balancing of accounts in insolvency; the authority for set-off was not intended to benefit any class of creditor at the expense of another; and that the credit should be set off proportionately between the preferential and non-preferential part of the debt.

Apportionment of set-off between the two classes of debt

2. The amount of the debt to which Crown set-off is applied is the total debt lodged by the RPO with the IP. The apportionment is as follows:

- Establish the percentage of RPO preferential debt. The calculation should be made to two decimal points.
- Establish the amount of the Crown set-off using the percentages figure in above.
- The balance remaining will be the amount of non-preferential set-off.

Example

3. The total VAT credit available for set-off was £10,000. Four government departments were together owed £12,000. The RPD's portion was £2,000, made up as itemised below:

	Total	Preferential	Non-preferential
RPD claim	£2,000.00 (100%)	£1,300 (65%)	£700 (35%)
Set-off received	£1,660	£1,079 (65%)	£581 (35%)
Unpaid balance	£340	£221	£119

Set-off in Scotland

"Turner v Lord Advocate" - Court of Session (1993) BCLC 1463

4. In this case the Inland Revenue had set off the total payment against its non-preferential debt. The Receiver challenged this, arguing that it should be set off proportionately between the non-preferential and preferential elements of the debt, as was the position in England. The Court of Sessions ruled that in Scotland the law of compensation applies to set-off - i.e. there is no balancing of accounts, and a creditor can apply the set-off to whichever class of debts is most favourable to him or her.

Apportionment of set-off between the two classes of debt

5. The payment should be set off in the first instance against the *non-preferential* element of the debt, and any balance remaining against the preferential element.

Example

6. The background is that the total VAT credit available for set-off was £10,000. Four government departments together had a total of £12,000 owed to them. The RPD's portion was £2,000, made up as itemised below:

	Total	Preferential	Non-preferential
RPD claim	£2,000 (100%)	£1,300 (65%)	£700 (35%)
Set-off received	£1,660	£960	£700
Unpaid balance	£340	£340	Nil

Appendix 8

RPD Forms

RP1 - Application for redundancy pay, wages and holiday pay combined with information booklet
RP2 - Application for compensatory notice pay issued by RPO at end of notice period
RP3 - Questionnaire for directors
RP4 - Questionnaire for subcontractors
RP5 - Claims acknowledgment for employees
RP6 - Questionnaire for IP/company director for further information on subcontractors
RP9 - Compensatory notice pay: explanation for employee
RP10 - Calculation of redundancy pay, wages and holiday pay: explanation for employees
RP11 - Computer print out of debts for IPRP12 - Computer printout of calculation of debts for IP
RP14 - TUPE Questionnaire
RP14A - IPs Statement of employees' debts
RP14OR - TUPE Questionnaire for Official Receivers
RP15 - Application form for unpaid pension contributions
RP16 - Actuarial certificate for certain pension scheme claims
RP17 - Pensions claims acknowledgement
RP18 - Questionnaire for further TUPE information from IPs and transferee
RP19 - Questionnaire for further TUPE information from employees
HR1 - Notification of collective redundancies

RPD Information Booklets

Redundancy and insolvency: a guide for employees (includes RP1 form)
A guide for insolvency practitioners: employees' rights on insolvency of employer (IL1)
Insolvency of employees: safeguard of pension scheme contributions (IL2)

DTI/ACAS publications on employment rights

The DTI no longer provides hard copies of their information booklets. Further information about employment rights may be downloaded from: <http://www.dti.gov.uk/er/regs.htm>

ACAS publications cover a wide range of employment matters, which can be viewed online on: <http://www.acas.org.uk>.

Hard copies of their publications can also be ordered online from their website or you can telephone their order line on 08702 42 90 90 or email acas@eclogistics.co.uk

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