

Introduction

1. Covid 19 has already had a tragic impact upon the health of many in the UK. One notable other consequence however, has been the impact upon the British economy.
2. On the evening of 17th March 2020, seeing the impending closure of restaurants, cafes, shops and numerous other business, the Chancellor of the Exchequer Rishi Sunak announced a £330bn support package. It involved loans for business, deferred VAT payments, and business rates holidays, and relieved many. However, should this pandemic extend for as long as some fear, there remains a risk of the ongoing overheads and negligible revenue becoming overwhelming. Some businesses will likely fail.
3. So, what does that means for those they employ? What are they entitled to, and how do they go about getting it? This article seeks to answer those questions.

Insolvency

4. The most likely situation is when an employer company falls into liquidation, its assets are sold and redistributed. However, it could also comprise administration, administrative receivership, or bankruptcy of an individual employer (rarer).
5. This article focuses on the situation where one is dismissed for redundancy upon their employer becoming insolvent. However, alternatively in an insolvency situation:

- a. One may be given the option to continuing working for the insolvent company. Whilst this should not impact one's rights to make the claims below, it could affect the ability to claim any unpaid wages after the relevant date of insolvency;
- b. Some insolvent companies may be subjected to a 'TUPE' transfer, under the 2006 Regulations. Their employment would then likely continue with the transferee. Workers should be alive to this happening to them.

The two main routes

6. So, if one is in the position of being dismissed for redundancy, by an insolvent employer, there are two main routes to claiming outstanding sums.
7. The first is under Schedule 6 of the Insolvency Act ("IA") 1996. This effectively allows an employee or worker to be registered as a creditor, with a view to recovering from the remaining assets of the employer. One can recover:
 - a. Unpaid remuneration, up to 4 months preceding the relevant date (Para 9, Sched 6 IA 1996). This can include inter alia, wages, salary, commission, and maternity pay. Importantly however, the preferential status of this claim is only secured up to £800. Any amounts sought over that, will fall as unpreferred;
 - b. Accrued holiday pay, unlimited in amount and time. This has preferential status;
 - c. Some pension loss, although (as often with pension loss), a full analysis of this exceeds the scope of this article.
8. One can make this claim by making contact with the relevant insolvency practitioner, dealing with the employer's insolvency¹.
9. Route two, is under the Employment Rights Act ("ERA") 1996. This arises where the employer becomes insolvent, the employee is dismissed, and there is a debt unpaid at the relevant date.

¹ <https://www.gov.uk/register-creditor-bankruptcy>

These provisions entitle an employee to claim from the National Insurance Fund, for the government to effectively reimburse those who have lost out.

10. Sections 182 to 188 allow an employee to claim:

- a. Arrears of pay, of up to 8 weeks;
- b. Accrued holiday pay, of up to 6 weeks (now calculated to include commission);
- c. Statutory Notice Pay, being 1 week for each year of continuous employment, up to 12 weeks. A 'week's pay' is capped at £525 per month, to be increased to £538 from 6th April 2020. As earnings, there may be tax and NI incurred.

11. Should the Fund fail to pay out the above sums, or fail to pay enough, a complaint can be made to an Employment Tribunal. S.188 mandates this should be done within 3 months of the Fund's decision being communicated to the employee. The Tribunal can then make a declaration about what is owed, although cannot order its payment. One can hope the Fund would then follow that declaration.

12. The ERA also provides for the Fund to pay a statutory redundancy payment, if an employer becomes insolvent. Section 166 entitles:

- a. Employees to claim. This claim is likely unavailable to casual workers;
- b. If they have been continuously employed for 2 years;
- c. A payment calculated by reference to the maximum week's pay (currently £525), and the employee's age and years of service (up to 20 years);²
- d. That is tax free, up to £30,000, although it would not exceed that in any event.

13. Procedurally, one can apply on the GOV.UK website. This suggests the redundancy payment and arrears should be sought first, and then notice pay.

14. Claims should be made within 6 months of dismissal. Moreover, with statutory redundancy pay, the Fund is only liable if the employer 'would be', and so the employee must first take one of

² <https://www.gov.uk/calculate-your-redundancy-pay>

the steps set out under S.164 ERA 1996. One of these must be taken within 6 months of the relevant date:

- a. A written claim to the employer for the payment;
- b. A claim for the payment from the employer in the Tribunal (which in itself, usually has to be presented within 3 months of dismissal);
- c. Presentation of an unfair dismissal claim against the employer (which in itself, usually has to be presented within 3 months of dismissal).

Which route to take?

15. The following are relevant considerations:

- a. Self-employed, worker or employee? The first two of these categories will not have full access to the Fund. They may have to rely on the IA;
- b. The IA allows for a preferential claim of unlimited holiday pay, whilst the ERA only gives 6 weeks. The ERA's payment under the fund is guaranteed however, whilst the IA claim, despite its preferential status, may still end up ranking behind creditors with fixed charges over the insolvent company's assets;
- c. With arrears of pay, the IA gives £800 preferential protection. The ERA gives a guaranteed payment of up to £525 per week, for 8 weeks, being £4,320. However, a well-paid employee, with perhaps 1 week arrears of pay, may still opt for the IA, to dodge the impact of the ERA's weekly pay cap. Even then though, there would be a risk of those with fixed charges getting there first;
- d. Different routes have different time limits. Moreover, the IA often allows one to get in earlier, as the claim can be made when the liquidator is appointed, whilst under the ERA one must wait until their dismissal.

Conclusion

16. Whilst the safety net provided by the above routes is by no means substantial, they should operate to at least ensure that a person is no worse position that if they have been made redundant by a solvent employer. It is important to be aware of the different routes to claim, and particularly the time limits for doing so.
17. For many, the ERA and the guaranteed payments from the Fund will be best. However, tactical considerations, or simply employment status, may push one towards the IA.

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