



Pension Schemes (Northern Ireland) Act 1993

1993 CHAPTER 49

PART VII

INSOLVENCY OF EMPLOYERS

VII

INDEPENDENT TRUSTEES

115 Requirement for independent trustee where employer becomes insolvent, etc

- (1) This section applies in relation to an occupational pension scheme which is constituted by trust deed—
- (a) if a person (“the practitioner”) commences to act as an insolvency practitioner in relation to a company which, or an individual who, is the employer of persons in the description or category of employment to which the scheme relates; or
 - (b) if the official receiver becomes—
 - (i) the liquidator or provisional liquidator of a company which is the employer of any such persons, or
 - (ii) the receiver and the manager, or the trustee, of the estate of a bankrupt who is the employer of any such persons.
- (2) If and so long as this section applies to a scheme, subject to subsection (5), it shall be the duty of the practitioner or official receiver—
- (a) to satisfy himself that at all times at least one of the trustees of the scheme is an independent person; and
 - (b) if at any time he is not so satisfied, to appoint under this paragraph, or to secure the appointment of, an independent person as a trustee of the scheme.

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- (3) For the purposes of subsection (2) a person is “independent” only if—
- (a) he has no interest in the assets of the employer or of the scheme, otherwise than as trustee of the scheme;
 - (b) he is neither connected with, nor an associate of—
 - (i) the employer;
 - (ii) any person for the time being acting as an insolvency practitioner in relation to the employer; or
 - (iii) the official receiver, acting in any of the capacities mentioned in subsection (1)(b) in relation to the employer; and
 - (c) he satisfies such other requirements as may be prescribed;
- and any reference in this section or sections 116 to 118 to an “independent trustee” shall be construed accordingly.
- (4) Articles 4 and 7 of the Insolvency (Northern Ireland) Order 1989 (connected and associated persons) shall apply for the purposes of subsection (3)(b) as they apply for the purposes of that Order.
- (5) Where, apart from this subsection, the duties imposed by subsection (2) in relation to a scheme would fall to be discharged at the same time by two or more persons acting in different capacities, those duties shall be discharged—
- (a) if the employer is a company, by the person or persons acting as the company’s liquidator, provisional liquidator or administrator; or
 - (b) if the employer is an individual, by the person or persons acting as his trustee in bankruptcy or interim receiver of his property.
- (6) Where this section applies in relation to a scheme, it shall cease to do so—
- (a) if some person other than the employer mentioned in subsection (1) becomes the employer of persons in the description or category of employment to which the scheme relates; or
 - (b) if at any time neither the practitioner nor the official receiver is acting in relation to the employer.
- (7) Nothing in subsection (6) affects the application of this section in relation to the scheme on any subsequent occasion when the conditions specified in subsection (1) (a) or (b) are satisfied in relation to it.
- (8) In this section—
- “acting as an insolvency practitioner” and “official receiver” shall be construed in accordance with Articles 2(2) and 3 of the Insolvency (Northern Ireland) Order 1989;
- “bankrupt” has the meaning given by Article 9(1) of the Insolvency (Northern Ireland) Order 1989;
- “company” means a company within the meaning given by Article 3(1) of the Companies (Northern Ireland) Order 1986 or a company which may be wound up under Part VI of the Insolvency (Northern Ireland) Order 1989 (unregistered companies).
- (9) References in this section to an individual include references to a partnership.

116 Members' powers to apply to court to enforce duty under s. 115

If—

- (a) section 115 applies in relation to a scheme; but
 - (b) the practitioner or official receiver neglects or refuses to discharge any duty imposed on him by subsection (2) of that section in relation to the scheme,
- any member of the scheme may apply to the High Court for an order requiring him to discharge his duties under that subsection.

117 Further provisions as to appointment and powers of independent trustees

- (1) If, immediately before the appointment of an independent trustee under subsection (2) (b) of section 115, there is no trustee of the scheme other than the employer, the employer shall cease to be a trustee upon the appointment of the independent trustee.
- (2) If and so long as section 115 applies in relation to a scheme—
 - (a) any power vested in the trustees or managers of the scheme and exercisable at their discretion shall be exercisable only by the independent trustee; and
 - (b) any power—
 - (i) which the scheme confers on the employer (otherwise than as trustee or manager of the scheme), and
 - (ii) which is exercisable by him at his discretion but only as trustee of the power,shall be exercisable only by the independent trustee;

but if, in either case, there is more than one independent trustee, the power shall also be exercisable with the consent of at least half of those trustees by any person who could exercise it apart from this subsection.
- (3) If and so long as section 115 applies in relation to a scheme, no independent trustee of the scheme shall be removed from being a trustee by virtue only of any provision of the scheme.
- (4) If a trustee appointed under subsection (2)(b) of section 115 ceases to be an independent trustee, then—
 - (a) he shall immediately give written notice of that fact to the practitioner or official receiver by whom the duties under that provision fall to be discharged; and
 - (b) subject to subsection (5), he shall cease to be a trustee of the scheme.
- (5) If, in a case where subsection (4) applies, there is no other trustee of the scheme than the former independent trustee, he shall not cease by virtue of that subsection to be a trustee until such time as another trustee is appointed.
- (6) A trustee appointed under subsection (2)(b) of section 115 shall be entitled to be paid out of the scheme's resources his reasonable fees for acting in that capacity and any expenses reasonably incurred by him in doing so, and to be so paid in priority to all other claims falling to be met out of the scheme's resources.

118 Duty of insolvency practitioner or official receiver to give information to scheme trustees

- (1) Notwithstanding anything in Article 133 of the Insolvency (Northern Ireland) Order 1989 (court orders for inspection, etc.), if and so long as section 115 applies in relation to a scheme, it shall be the duty of the practitioner or official receiver to provide the

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trustees of the scheme, as soon as practicable after the receipt of a request, with any information which the trustees may reasonably require for the purposes of the scheme.

- (2) Any expenses incurred by the practitioner or official receiver in complying with a request under subsection (1) shall be recoverable by him as part of the expenses incurred by him in discharge of his duties.
- (3) The practitioner or official receiver shall not be required under subsection (1) to take any action which involves expenses that cannot be so recovered, unless the trustees of the scheme undertake to meet them.

CHAPTER II

PAYMENT BY THE DEPARTMENT OF UNPAID SCHEME CONTRIBUTIONS

119 Interpretation of Chapter II

- (1) For the purposes of this Chapter, an employer shall be taken to be insolvent if, but only if, in Northern Ireland—
 - (a) he has been adjudged bankrupt or has made a composition or arrangement with his creditors;
 - (b) he has died and his estate falls to be administered in accordance with an order under Article 365 of the Insolvency (Northern Ireland) Order 1989; or
 - (c) where the employer is a company—
 - (i) a winding-up order or an administration order is made or a resolution for voluntary winding up is passed with respect to it,
 - (ii) a receiver or manager of its undertaking is duly appointed,
 - (iii) possession is taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge, or
 - (iv) a voluntary arrangement proposed for the purpose of Part II of the Insolvency (Northern Ireland) Order 1989 is approved under that Part.
- (2) In this Chapter—

“contract of employment”, “employee” and “employer” and other expressions which are defined in the Industrial Relations (Northern Ireland) Order 1976 have the same meaning as in that Order, except that the definition of “employee” in Article 2(2) of that Order shall be construed as if the words “otherwise than in police service” were omitted;

“holiday pay” means—

 - (a) pay in respect of a holiday actually taken; or
 - (b) any accrued holiday pay which under the employee’s contract of employment would in the ordinary course have become payable to him in respect of the period of a holiday if his employment with the employer had continued until he became entitled to a holiday;

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

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- (3) For the purposes of this Chapter, the definition of “personal pension scheme” in section 1 has effect with the substitution for the words “employed earners” of the word “employees”.
- (4) Any reference in this Chapter to the resources of a scheme is a reference to the funds out of which the benefits provided by the scheme are from time to time payable.

120 Duty of Department to pay unpaid contributions to schemes

- (1) If, on an application made to it in writing by the persons competent to act in respect of an occupational pension scheme or a personal pension scheme, the Department is satisfied—
 - (a) that an employer has become insolvent; and
 - (b) that at the time he did so there remained unpaid relevant contributions falling to be paid by him to the scheme,then, subject to the provisions of this section and section 121, the Department shall pay into the resources of the scheme the sum which in its opinion is payable in respect of the unpaid relevant contributions.
- (2) In this section and section 121 “relevant contributions” means contributions falling to be paid by an employer to an occupational pension scheme or a personal pension scheme, either on his own account or on behalf of an employee; and for the purposes of this section a contribution shall not be treated as falling to be paid on behalf of an employee unless a sum equal to that amount has been deducted from the pay of the employee by way of a contribution from him.
- (3) The sum payable under this section in respect of unpaid contributions of an employer on his own account to an occupational pension scheme or a personal pension scheme shall be the least of the following amounts—
 - (a) the balance of relevant contributions remaining unpaid on the date when he became insolvent and payable by the employer on his own account to the scheme in respect of the 12 months immediately preceding that date;
 - (b) the amount certified by an actuary to be necessary for the purpose of meeting the liability of the scheme on dissolution to pay the benefits provided by the scheme to or in respect of the employees of the employer;
 - (c) an amount equal to 10 per cent. of the total amount of remuneration paid or payable to those employees in respect of the 12 months immediately preceding the date on which the employer became insolvent.
- (4) For the purposes of subsection (3)(c), “remuneration” includes holiday pay, statutory sick pay, statutory maternity pay under Part VI of the Social Security (Northern Ireland) Order 1986 or Part XII of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 and any such payment as is referred to in Article 42(4)(a) to (d) of the Industrial Relations (Northern Ireland) Order 1976 (guarantee payments, etc.).
- (5) Any sum payable under this section in respect of unpaid contributions on behalf of an employee shall not exceed the amount deducted from the pay of the employee in respect of the employee’s contributions to the scheme during the 12 months immediately preceding the date on which the employer became insolvent.

121 Certification of amounts payable under s. 120 by insolvency officers

- (1) This section applies where one of the officers mentioned in subsection (2) (“the relevant officer”) is acting or has been or is required to be appointed in connection with an employer’s insolvency.
- (2) The officers referred to in subsection (1) are—
 - (a) the official receiver; or
 - (b) any such person as is referred to in paragraph (1) or (2) of Article 3 of the Insolvency (Northern Ireland) Order 1989 (insolvency practitioners), as read with paragraphs (3) and (4) of that Article.
- (3) Subject to subsection (5), where this section applies the Department shall not make any payment under section 120 in respect of unpaid relevant contributions until it has received a statement from the relevant officer of the amount of relevant contributions which appear to have been unpaid on the date on which the employer became insolvent and to remain unpaid; and the relevant officer shall on request by the Department provide it as soon as reasonably practicable with such a statement.
- (4) Subject to subsection (5), an amount shall be taken to be payable, paid or deducted as mentioned in subsection (3)(a) or (c) or (5) of section 120 only if it is so certified by the relevant officer.
- (5) If the Department is satisfied—
 - (a) that it does not require a statement under subsection (3) in order to determine the amount of relevant contributions that was unpaid on the date on which the employer became insolvent and remains unpaid, or
 - (b) that it does not require a certificate under subsection (4) in order to determine the amounts payable, paid or deducted as mentioned in subsection (3)(a) or (c) or (5) of section 120,

it may make a payment under that section in respect of the contributions in question without having received such a statement or, as the case may be, such a certificate.

122 Complaint to industrial tribunal

- (1) Any persons who are competent to act in respect of an occupational pension scheme or a personal pension scheme and who have applied for a payment to be made under section 120 into the resources of the scheme may present a complaint to an industrial tribunal that—
 - (a) the Department has failed to make any such payment; or
 - (b) any such payment made by the Department is less than the amount which should have been paid.
- (2) Such a complaint must be presented within the period of three months beginning with the date on which the decision of the Department on that application was communicated to the persons presenting it or, if that is not reasonably practicable, within such further period as is reasonable.
- (3) Where an industrial tribunal finds that the Department ought to make a payment under section 120, it shall make a declaration to that effect and shall also declare the amount of any such payment which it finds that the Department ought to make.

123 Transfer to Department of rights and remedies

- (1) Where in pursuance of section 120 the Department makes any payment into the resources of an occupational pension scheme or a personal pension scheme in respect of any contributions to the scheme, any rights and remedies in respect of those contributions belonging to the persons competent to act in respect of the scheme shall, on the making of the payment, become rights and remedies of the Department.
- (2) Where—
- (a) the Department makes any such payment as is mentioned in subsection (1); and
 - (b) the sum (or any part of the sum) falling to be paid by the employer on account of the contributions in respect of which the payment is made constitutes a preferential debt within the meaning of the Insolvency (Northern Ireland) Order 1989 for the purposes of any provision of that Order (including any such provision as applied by an order made under that Order) or any provision of the Companies (Northern Ireland) Order 1986,
- then, without prejudice to the generality of subsection (1), there shall be included among the rights and remedies which become rights and remedies of the Department in accordance with that subsection any right arising under any such provision by reason of the status of that sum (or that part of it) as a preferential or preferred debt.
- (3) In computing for the purposes of any provision referred to in subsection (2)(b) the aggregate amount payable in priority to other creditors of the employer in respect of—
- (a) any claim of the Department to be so paid by virtue of subsection (2); and
 - (b) any claim by the persons competent to act in respect of the scheme,
- any claim falling within paragraph (a) shall be treated as if it were a claim of those persons; but the Department shall be entitled, as against those persons, to be so paid in respect of any such claim of the Department (up to the full amount of the claim) before any payment is made to them in respect of any claim falling within paragraph (b).

III

PRIORITY IN BANKRUPTCY

124 Priority in bankruptcy, etc

Schedule 3 shall have effect for affording priority in cases of insolvency to liabilities in respect of contributions to occupational pension schemes and in respect of state scheme premiums.