

OUR GUIDE TO HOW THE REDUNDANCY PAYMENTS SERVICE DECIDES A DIRECTOR'S EMPLOYEE STATUS

The Redundancy Payments Service ("RPS") has recently (in June 2023) clarified how it decides whether a director of a company is also its employee and should, therefore, be entitled to redundancy payments from the National Insurance Fund.

What does the RPS do?

The RPS processes the claims of employees of businesses that enter a formal insolvency process, such as Liquidation, Administration or a Voluntary Arrangement. It will liaise with the appointed insolvency practitioner to verify employees' claims.

Can a director of a company also be an employee?

Yes.

The RPS will, however, expect evidence in support of a director's claim.

Is it worth a director claiming redundancy?

If the RPS accepts that a director is also an employee of an insolvent company, then the director will be entitled to their:

- Outstanding wages;
- Accrued holiday pay;
- Pay in lieu of notice; and
- Redundancy pay.

Payments in each of the above categories are capped at a weekly gross limit. See elsewhere on this website for the current value.

What will the RPS expect to see?

The RPS may request a director to complete a questionnaire and provide documentation which could include, but not be limited to:

- Details of the company's structure, including the names of directors and shareholders;
- The director's last three years' P60s;
- The director's last three pay slips;
- The company's last twelve months' bank statements to verify the regularity of payments to the director;
- A contract of employment, if one exists;
- Confirmation of whether the terms of the contract were being implemented;
- A comparison of the contracted hours being claimed, compared to the work being undertaken;
- Dividends received in the last three years;
- Holiday pay arrangements;
- Workplace pension arrangements;
- Sick leave procedures; and
- Grievance and disciplinary procedures.

In addition, the director must be paid at least the National Minimum Wage in accordance with the National Minimum Wage Act 1998 ("the Act").

What if the director's level of pay falls below the National Minimum Wage?

The RPS has warned that it may refer a director to HM Revenue & Customs and the Insolvency Service's Investigations and Enforcement Services for breaching the Act if they have paid themselves below the National Minimum Wage.

What certainty is required by the RPS?

Overall, the RPS will consider whether, on the balance of probabilities, the director was also an employee.

What if the director's claim is rejected?

A director may make a claim to an employment tribunal if their claim is rejected.

Our conclusion

It is clear that a director may also be an employee and be entitled to a payment from the National Insurance Fund if their company fails. It is, however, important that the evidence to assist the RPS in coming to a positive conclusion is in place.

Practical planning

It's rare for a director to set out to form a company expecting it to fail. Most directors commit a significant amount of time and effort to ensure the success of their company and suffer increasing levels of stress when it is on the verge of insolvency. It is, therefore, only fair that they are compensated with what they are legally due if the company enters into a formal insolvency procedure.

When setting the balance of their income from a company between dividends and salary the directors should consider, as well as just tax efficiency, whether they are protected if the company fails.

A clear contract of employment will assist evidence the director's status, but careful consideration must also be given to whether the contract meets the requirements of the National Minimum Wage.

If you would like specific guidance for you or your company, talk to Sadlers today.