

CIGA 2000 – The Moratorium – are all defined benefit pension scheme contributions exempt from the payment holiday?

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In this note we consider one important issue for insolvency and pensions practitioners which arises from the Moratorium in Part A1 of the Insolvency Act 1986 (“IA 86”) introduced by the Corporate Insolvency and Governance Act 2020 (“CIGA 2020”).

The key effect of the moratorium is the payment holiday it introduces in respect of some debts owed by the company. One significant exception to this is sums owed under financial services contracts. We explored that in our article *“DEEP DIVE INTO THE MORATORIUM – A LENDER’S PERSPECTIVE”* which can be found [here](#).

In this note we consider another important exception to the payment holiday – *“wages and salary”*. In particular, we explore which forms of pension contributions fall within the payment holiday and which fall outside the holiday.

It appears to us that something of a consensus has emerged that certain classes of employer contribution, in particular deficit repair contributions made to a defined benefit scheme, or even any type of employer contribution, do not fall within the *“wages and salary”* exemption. We think the position

is less clear than the consensus would suggest and compelling arguments can be made either way.

This note explores those arguments.



THE KEY PROVISIONS

The starting point is s.A18 which defines the scope of pre-moratorium debts for which a company has a payment holiday (*“Payment Holiday Debts”*) in these terms:

“(3) In this Part a reference to pre-moratorium debts for which a company has a payment holiday during a moratorium is to its pre-moratorium debts that have fallen due before the moratorium, or that fall due during the moratorium, except in so far as they consist of amounts payable in respect of—

...

- (d) wages or salary arising under a contract of employment,
- (e) redundancy payments,

...

(7) In this section—

"redundancy payment" means—

(a) a redundancy payment under Part 11 of the Employment Rights Act 1996 or Part 12 of the Employment Rights (Northern Ireland) Order 1996, or

(b) a payment made to a person who agrees to the termination of their employment in circumstances where they would have been entitled to a redundancy payment under that Part if dismissed;

"wages or salary" includes—

(a) a sum payable in respect of a period of holiday (for which purpose the sum is to be treated as relating to the period by reference to which the entitlement to holiday accrued),

(b) a sum payable in respect of a period of absence through illness or other good cause,

(c) a sum payable in lieu of holiday, and

(d) a contribution to an occupational pension scheme."

Pre-moratorium debts are defined by s.A53:

"(1) In this Part "pre-moratorium debt", in relation to a company for which a moratorium is or has been in force, means—

(a) any debt or other liability to which the company becomes subject before the moratorium comes into force, or

(b) any debt or other liability to which the company has become or may become subject during the moratorium by reason of any obligation incurred before the moratorium comes into force..."

This will encompass pension scheme deficit repair contributions (and, should they be triggered, s.75 debts).

One effect of a debt being classed as a Payment Holiday Debt is that it is subject to a payment holiday pursuant to s.A28 IA 86. The second is that Payment Holiday Debts benefit from a super priority, even ahead of the expenses of the liquidation or administration, where there is an insolvency event (see s.174A IA 86 for winding up

and Schedule B1 ¶164A for administration). Moratorium Debts benefit from the same super priority.

CONTRIBUTIONS TO A DEFINED BENEFIT PENSION SCHEME

In broad terms one might usefully divide contributions to a pension scheme into two categories: employee contributions, and employer contributions. Employer contributions to a defined benefit scheme can be further sub-divided into:

- a. "future service contributions" in respect of active members currently employed in pensionable service by the Employer – these contributions are paid in respect of benefits as they are accruing;
- b. deficit repair contributions, which might be in respect of active, deferred and pensioner members – these are paid to make up a shortfall between the pensions scheme's assets and its past service liabilities; and
- c. a s.75 Debt.

Of course, the moratorium itself is not an "insolvency event" which would trigger a s.75 debt. However, one can conceive of circumstances where such a debt could be triggered prior to the moratorium, whether due to an employer leaving a scheme, or trustees triggering winding up.

There are two sources of the obligation to pay future service and deficit repair contributions. First, the scheme rules typically empower the trustee to determine, or the trustee to agree with the employer, what contributions need to be paid into the scheme. Secondly, Part 3 of the Pensions Act 2004 ("PA04") creates a statutory obligation for there to be a Recovery Plan in place to repair the scheme deficit. If an Employer fails to make a payment pursuant to the Recovery Plan a statutory debt is triggered (that is if a debt isn't already triggered pursuant to the scheme rules) (s.228 PA04).

WHAT CONTRIBUTIONS ARE PAYMENT HOLIDAY DEBTS

There is (rightly) consensus that employee contributions are not payment holiday debts, because they fall squarely within “wages and salary”.

As such, in this section, we consider some of the arguments going to whether classes of employer contributions are or are not Payment Holiday Contributions.

The Argument that Employer Contributions do fall within the payment holiday

We will first set out some of the arguments for why Employer Contributions might fall within the Payment Holiday.

Future Service Contributions

First, the case of *IRC v Lawrence* (2000) 144 S.J.L.B. 191 might suggest that a distinction is to be drawn between employee and employer contributions. *Lawrence* concerned whether national insurance contributions (“NIC”) had priority in an administration. The judge at first instance drew a distinction between employee and employer national insurance contributions (“NIC”), a distinction which was not disturbed on appeal. Arguably that distinction can be read across and applied to pension contributions in the context of a Moratorium.

Lawrence concerned s.19(6) IA86 which read:

“(6) Any sums payable ***in respect of*** liabilities incurred, while he was administrator, ***under contracts of employment adopted by him*** ... shall, to the extent that the liabilities are qualifying liabilities, be charged on and paid out of any such property as is mentioned in subsection (4) and enjoy the same priority as any sums to which subsection (5) applies.

(7) For the purposes of subsection (6), a liability under a contract of employment is a qualifying liability if—

(a) it is a liability to pay a sum by way of wages or salary or contribution to an occupational pension scheme, ...”

The judge held that the *contractual* obligation to the employee was to pay their gross pay, albeit employers had a statutory obligation to deduct the tax owed by the employee at source and pay that to the Inland Revenue. As such, employee NICs formed part of a liability to pay a sum by way of wages to the employee, albeit by reason of statute it would never actually be received by the employee.

So far as employer NICs were concerned, the judge at first instance held that:

*“Liability for them is an extraneous liability of the employer, albeit a liability occasioned by the contract of employment. It is not a liability which is a derivative of the original liability to the employee for salary or wages under the contract. ***It is a separate liability owed to a different person under and by virtue of legal requirements wholly outside the employment contract.*** In my judgment it is not a “sum payable in respect of a liability incurred” under an employment contract within the meaning of subsections 19(5) or (6).”*

It was argued by the revenue that the words “in respect of” imported sufficient width to capture employer NIC contributions. The judge rejected this, stating:

“These words are words of considerable flexibility; they may indeed be capable of stretching to encompass the [Employer NICs]. But, in my judgment, the subsections must be given some sensible limitation. Given the historical context of the subsections and having regard to them in the context of the Act, there is no indication that the legislature intended to confer the special priority on sums owed solely by virtue of a legal requirement extraneous to the contract of employment. In my judgment, it would have required some very specific language to confer priority on such extraneous sums.”

Secondly, depending on the terms of the employees' employment contract, the employer's obligation to pay future service contributions may not be an obligation "under" the contract of employment. Rather the employer's obligation to contribute arises under the trust deed and rules and/or is a statutory obligation pursuant to Part 3 Pensions Act 2004.

Thirdly, the overall purpose of the Moratorium provisions is furthered by including such employer payments in the Payment Holiday. As the explanatory notes to CIGA 2000 state:

*"1. The overarching objective of this Act is to **provide businesses with the flexibility and breathing space** they need to continue trading during this difficult time. The measures are designed to help UK companies and other similar entities by easing the burden on businesses and helping them avoid insolvency during this period of economic uncertainty.*

...

*2... to introduce greater flexibility into the insolvency regime, **allowing companies breathing space** to explore options for rescue whilst supplies are protected, so they can have the maximum chance of survival...*

4. There is currently no free-standing moratorium available for UK companies. The policy is to introduce such a moratorium allowing a company in financial distress a breathing space in which to explore its rescue and restructuring options free from creditor action."

Contributions to a scheme go to fund benefits which need to be paid very far in the future. It might be thought more consistent with the overarching purpose of providing breathing space for such contributions to also benefit from a payment holiday during the moratorium. This is particularly so when one takes into account that, if included in the payment holiday, such contributions would benefit from super priority if there were an insolvency event.

Deficit Repair Contributions

All of the arguments above also apply to deficit

repair contributions and there are further arguments as to why such contributions should be treated as falling within the payment holiday.

First, it will be recalled that the wages and salary exemption is engaged in respect of "*amounts payable in respect of wages or salary arising under a contract of employment*". It can be argued that the contract of employment which is being referred to ought to be interpreted as a *current* contract of employment (i.e. one under which an employee in pensionable service is working *during* the Moratorium). Such a reading would be more consistent with the purpose of the Moratorium provisions.

A very significant portion of deficit repair contributions may well relate to members who are no longer employees of the employer, i.e. even if it could be said that such contributions arise "*under*" a contract of employment, a very significant part of them wouldn't arise under a *current* contract of employment.

It seems the Pensions Regulator has also drawn that distinction between current employees and past employees. In its (brief) guidance on the Moratorium it states:

"Note that all contributions due in respect of the company's employees who are members of any occupational pension scheme must still be made during a moratorium."

Secondly, the overall purposive argument is even stronger when it comes to deficit repair contributions. Just like future service contributions, these contributions go to fund liabilities which will arise very far in the future. Furthermore, these contributions may well relate to benefits accrued by individuals who have long since left employment with the employer. It might be thought that wages and salary are exempt from the payment holiday so that the employees who are necessary to the continued operation of the company during the Moratorium are paid and continue to work for the employer. It is difficult to see how this purpose is materially advanced by requiring deficit repair contributions to be paid.

S.75 Debt

A moratorium does not of itself trigger a s.75 debt. However, if such a debt has already been triggered for non-insolvency reasons, the arguments above would apply to it with equal force.

The Argument that Employer Contributions do not fall within the payment holiday

First, quite simply ss.(7)(d) states in unambiguous, unqualified terms that:

"wages or salary" includes ... (d) a contribution to an occupational pension scheme."

On the face of the provision, no distinctions are drawn between different forms of pension contribution.

Secondly, the statutory words do not require the obligation to pay a contribution to be contained within the contract of employment. The statute does not state that amounts **payable under** a contract of employment are exempted. Rather, the words are wider than this; they are:

*"amounts payable **in respect of** ... wages and salary under a contract of employment"*

As the judge in *Lawrence* recognised, the words "*in respect of*" are wide words indeed. It is well arguable that such words extend to payments made to fund promised deferred remuneration.

This is supported by the other forms of payment listed in ss.(7)(a) – (c). Each of those payments are payments to which employees have a *statutory* entitlement. Of course, a contract of employment may make provision for holiday pay, pay in lieu of holiday or sick pay. However, if the contract does not, the employee has a statutory entitlement to those payments and a statutory remedy if they are not paid. It would be bizarre if, having specifically been written into ss.(7), those statutory rights were deemed not to count as "wages and salary" because they were not contractual.

By the same token, it would be odd to distinguish between different types of contribution to a pension scheme, based on whether the source of that obligation is the employment contract, statute, or scheme rules.

Thirdly, there is no basis in the words of the statute to distinguish between current employment contracts, or contracts where the employment relationship has been terminated. This is supported by the fact that ss.(7) envisages payments being made in respect of redundancy -payments which are necessarily being made in respect of a terminated contract of employment. Insofar as the Pensions Regulator's guidance draws a distinction between contributions payable in respect of current and former employees, it is wrong to do so.

Fourthly, the issue in *Lawrence* is readily distinguishable from the case of contributions to pension schemes. In practice the issue in *Lawrence* was the priority HMRC would take in an administration. Whilst the employer NICs were referable to employment, they were being paid to HMRC. By contrast, contributions to a pension scheme are going towards funding deferred remuneration which was promised to employees.

Fifthly, it might be thought that the statutory provisions exempting "wages and salary" from the payment holiday are aimed at exempting employees' remuneration. Exempting funds which are ultimately directed at remunerating employees (past or present), is consistent with that aim.

CONCLUSIONS

Quite apart from the legal arguments, trustees may well take the (perhaps counter-intuitive) view that they would prefer as many contributions to the scheme as possible to benefit from the payment holiday. This would be so that they obtain super priority in the event of an insolvency event. On such an insolvency event, the other creditors will no doubt wish to argue the opposite.

Again, perhaps counterintuitively, the Employers of many schemes may wish to ensure that contributions are made to the Scheme during the

moratorium. This is because some schemes contain a power exercisable by the trustees to trigger a winding up (and so s.75 debt) in the event of a missed contribution.

As for the legal argument, it is clear that there is no easy answer as to how employer contributions are to be treated. Those faced with the issue will no doubt want to start with a practical assessment of the employer's position and prospects. However, ultimately the issue will require clarification by the courts.

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