

Discussion Document: NMW Claims & NMW Arrears of Pay Calculations

Introduction

The purpose of this document is to discuss the options available to IPs when completing RP14/14A forms in director redundancy cases which involve a claim made by the director at National Minimum Wage (“NMW”). This document is written taking into account current RPS communications and working practices. It also considers the issue according to the Employment Rights Act 1996 (“ERA1996”) and case law authorities.

SIP2 and FCA Regulation

IPs should always review a company’s books and records when completing an RP14/14A. This is a requirement under SIP2. RCUK will supply to the IP all the evidence RCUK has collated to verify a claim when confirming to the IP how RCUK intend to make the claim to the RPS on behalf of the claimant. RCUK are FCA regulated and have a regulatory duty to fully evidence claims before submission to the RPS. RCUK’s evidence should be used in conjunction with the books and records held by the IP.

The issues

The issue on NMW claims is:

- How should records and evidence be used and documented on the RP14/14A?

Should IPs:

- Just put the PAYE rate and any Arrears of Pay (“AP”) based on whether the director was paid in the last chronological months prior to his or her employment finish date, or;
- Complete the RP14 with the NMW rate based on the hours worked per week and accept that if the director was underpaid for a period (confirmed by PAYE records) calculate that underpayment and then allow the director to choose the best eight weeks to maximise his or her claim.

There seems to be some confusion on this point partly due to contradictory guidance from regulators and compliance companies combined with confusion over what the role of the IP is in the claims process. Unfortunately, because the RPS will not support a claim (all elements including AP) without the IP supporting it on the RP14/14A, the RPS are putting the IP in a difficult position by making them responsible for what a director can or can’t claim. The good news is the RPS, through the Dear IP publications, have provided some guidance on what they accept and therefore how an IP should interpret books and records and the ERA1996 and case law authorities, therefore confirming what an IP can and can’t sign off on an RP14/14A.

Current interpretations

RCUK are currently working with IPs who have varying views of what is acceptable. There appears to be predominantly two options for IPs:

1. Some IPs take the view that they complete RP14/14As simply stating what they see on PAYE records and chronological arrears of pay. Their view is that the RPS must make the final decision on what they pay.
2. Other IPs take the view that if they complete the RP14/14A as in one above they are not interpreting the information they have in books and records correctly and are not presenting it to the RPS to allow the director to claim what they are legally entitled to. If the RPS insist on only supporting claims if the IP supports the claim on the RP14/14A what else can they do in order to avoid the RPS rejecting legitimate claims which they would normally support and forcing the director to have to appeal via tribunal.

What have the RPS issued which provides some clarification to support Option 2?

Whether an IP adopts the approach set out in either one or two above is clearly a decision for the IP alone, however the RPS have issued some guidance on these matters which may help make the decision as to 'what is' and 'what is not' acceptable to put on the RP14/14A.

NMW

Regarding whether the RPS will pay out at NMW rates, the RPS have been clear on this matter and therefore RCUK believe that if PAYE records show the director as being underpaid there is no issue in submitting the RP14/14A at NMW rates:

1. Dear IP *November 2018– Issue No 82, Chapter 11- Employment Issues* states '*National Minimum Wage. If the removal of dividends / director's fee from 'a week's pay' means the remaining rate of pay is below the applicable National Minimum Wage (NMW), the rate of pay used by the RPS would be uplifted to the NMW. This is because employees have the right to be paid at least the NMW for their employment. This includes payments from the RPS.*'

https://content.govdelivery.com/attachments/UKIS/2018/11/05/file_attachments/1101772/Dear%20IP%20Issue%2082%20November%202018.pdf

It should be noted the RP14 forms used in Northern Ireland allow for claims to be uplifted by the IP to NMW.

NMW and AP claims

How an IP can support AP claims calculated due to underpayments of salary to NMW rates is more complicated however, the RPS have confirmed the case law authorities which they accept which allow this:

2. Arrears of Pay ("AP") calculations in National Minimum Wage ("NMW") claims.
Dear IP *February 2019 – Issue No 85 Chapter 11- Employment Issues* states the new calculation engine takes into account the following, '*7. Changes to the AP calculation mean there will now be an automatic selection of the most financially advantageous weeks to the*

claimant, rather than the last chronological weeks.' It then goes on to state '*The authority of Mann –v- Secretary of State [1999] IRLR 566 confirmed that the Secretary of State (SoS) can pay the most advantageous weeks to the claimant, **but the administrative burden should be on the claimant, not the SoS, to select the best weeks.***'

https://content.govdelivery.com/attachments/UKIS/2019/02/25/file_attachments/1161404/Dear%20IP%20Issue%2085%20February%202019.pdf

The administrative burden is on the claimant to select the best eight weeks and because of the way the RPS require the IP to support the claim it can be inferred that the IP should be aware of this and also support it on the RP14/14A. Otherwise how else would the director ever be able to claim the best eight weeks.

RCUK construct AP claims for directors by utilising the case law authorities the RPS accept. Below is a simple example of what RCUK do to select the best eight weeks:

Claimants gross PAYE is £150 per week and they have been paid right up to their employment finish date.

The claimant worked 40 hrs per week and should have been paid 40 hrs x £8.21 = £328.40 gross per week.

The claimant has 10 years of service and their employment finish date is 30th September 2019 which means they have worked 6 months of the 19/20 tax year at the NMW rate of £8.21/hr.

During the last 6 months of their employment they have earned £150 per week which is a total pay of £3,900 (an IP's books and records and RCUK's collated evidence provided should confirm this). However, they should have been paid £328.40 gross per week which is a total for the 6 months of £8,538.

The director has been underpaid for the period £4,638 (£8,538 - £3,900). This is their actual gross arrears of pay and equates to 14 weeks of arrears of pay (£4,638 divided by £328.40 = 14 weeks AP).

Once the total of the arrears of pay has been calculated, actual pay can be rolled back to cover previous periods of underpayment. As the pay is rolled back it leaves a total remaining period where the director will have received no pay at all. This is consistent with the ruling of the European Court of Justice in **Regeling v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid [1999] ICR 605, ECJ**, where it was held that (by reference to the provisions of **EC Directive 80/987 article 4(2)** which are implemented by **Employment Rights Act 1996 section 184**), where a worker had an outstanding claim in relation to a period of employment before the relevant reference period and a claim in relation to the reference period itself (which would be the period of eight weeks under Employment Rights Act 1996 section 184), any payments of wages made by the employer during the reference period were to be taken as satisfying the claim in relation to the earlier period in priority to the claim in relation to the reference period. The effect is that part-payment of wages during the eight-week

period should be treated as being in respect of any earlier outstanding pay arrears and should not be set off against any entitlement to pay during the eight-week reference period.

In summary, an IP's books and records should support the underpayment of NMW and also therefore support the gross arrears of pay the directors are claiming should actual pay be allowed to be rolled back. The issue for IPs is to whether they are prepared to support the case law authority of ***Mann –v- Secretary of State [1999] IRLR 566*** and *the ruling of the European Court of Justice in ***Regeling v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid [1999] ICR 605, ECJ.****) and submit RP14/14As accordingly.

RCUK submit every NMW claim to the RPS on this basis and at the point of submitting the claim RCUK supply them all the same supporting evidence we have supplied to the IP including the roll back calculation sheets. In cases where IPs have supported this on RP14/14As RCUK have always seen the claims paid out as expected. The RPS are aware of the case law and have stated in Dear IP they support it, if they did not we would not expect to see the claims paid out as they are.

What are the risks for IPs supporting NMW claims and correctly calculated AP claims?

The issue of risk is clearly a sensitive and difficult subject and is personal to the office holder.

RCUK believe the biggest risk to an IP is adhering to their own regulation concerning SIP2. To date any action by regulators relating to redundancy claims has been based on IPs not being able to confirm they have checked books and records before submitting an RP14/14A.

What is the risk of submitting an RP14/14A after reviewing books and records and completing the forms via either option one or option two documented earlier in this discussion paper? The answer to the level of risk for either option is the same. Neither option is wrong.

For there to be a risk the claim would need to be proven to be inflated or fraudulent but in either option as long as appropriate and relevant evidence in books and records is checked this should not be an issue as they will confirm to the RPS what the director is legally entitled to.

However, due to the current working practice of the RPS to not support claims unless supported on the RP14/14A the question for the IP is simple, will they be prepared to support the director with what they are legally entitled to claim and submit RP14/14As choosing option two.