Insolvency Act 1986—The New Part A1 Moratorium: Impact on Employees and Pensions

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Abstract

This article focuses on the impact on employees or pensions where a company enters a moratorium under Pt A1 of the Insolvency Act 1986 (IA 1986). It starts by giving a general overview of the Pt A1 moratorium process, including the impact on most pre-moratorium debts (PMDs). It then looks at the implications for employment and pensions issues including:

- *the impact on payment of employee wages;*
- *the impact on payment of pension contributions; and*
- *if there is a later relevant insolvency process over the company, whether a potential "super-super-priority" can apply in that insolvency to some claims (mainly unpaid financial contracts). These rank ahead even of claims of adopted employees.*

Introduction

This article discusses the impact on employees or pensions where a company enters a Pt A1 moratorium. This is the statutory moratorium process under Pt A1 of the Insolvency Act 1986, as inserted from June 2020 by the Corporate Insolvency and Governance Act 2020 (CIGA 2020).[1]

The Pt A1 moratorium is a new statutory moratorium, applicable on a court filing by the directors of a company. It is freestanding (i.e. not part of another insolvency process). The directors remain in charge of the company, but a monitor, who must be an insolvency practitioner (IP), must be appointed to monitor the company during the process.

The relevant statutory provisions were added by CIGA 2020 to IA 1986, to form Pt A1. IA 1986 refers to the "moratorium", but this article refers to a "Pt A1 moratorium", to distinguish this process from the moratorium on legal process applicable in court liquidations and administrations (IA 1986 s.130(2) and Sch.B1 para.43(6)).

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[1] See the Insolvency Service publication: *A Guide for Monitors* (26 June 2020) and S. Beale, P. Keddie and T. Bromley-White, *Corporate Insolvency and Governance Act 2020* (Bloomsbury Professional, 2020).

Employee and pension implications of a Pt A1 moratorium

A moratorium applies if the directors of a company make a relevant court filing. The process involves a monitor (who must be an IP) supervising the company, which generally remains under the control of its directors.

During the Pt A1 moratorium, there is a stay on most legal process and payments of most pre-moratorium debts (PMDs) are limited.

Specific implications for employment and pension issues are discussed below. They include:

- *Employee wages:* There is an employee element in that the moratorium affects claims that can be made against the company and also payments that may be made by the company. Wages and salary for employees are however exempt, but other payments are not.
- *Pensions:* There is a pensions element in that some contributions to a pension scheme are exempt from the payment holiday (as being part of wages or salary)—IA 1986 s.A18 (and because the definitions are very similar, such contributions also benefit in some cases from the super-super priority on a subsequent winding-up or administration).

  The extent of the contributions benefiting from the exemption (and super-super priority) is unclear, but the better view is that it only extends to:

  — employee contributions to pension schemes that have been deducted by the employer from wages; and
  — perhaps to employer contributions towards accrual of money purchase benefits.

  The exemption from the payment holiday (and the super-super priority) is unlikely to apply to employer contributions to a defined benefit (DB) pension scheme.
- *Super-super-priority:* If a relevant insolvency process starts within 12 weeks after a moratorium ends, various debts (mainly those outside the payment holiday in the moratorium) are given a super-super-priority[2] in that insolvency process (even ahead of the super-priority in favour of claims of adopted employees in an administration), ranking ahead of all other claims in the insolvency (save for fixed charges etc)—IA 1986 s.174A and Sch.B1 para.64A. The super-super-priority debts can include any unpaid financial contracts, including loans (but the super-super-priority does not apply if the finance contract has been accelerated). This could impact on pension schemes in that their claims will in the main rank behind any such debts.

[2] Not called a "super-super" priority in the legislation, but given the title in this article as the priority ranks ahead of the "super-priority" given to adopted employee claims in an administration (IA 1986 Sch.B1 para.99)—see, e.g. the comment by Lord Browne-Wilkinson in *Powdrill v Watson* [1995] 2 A.C. 394 at 447G; [1995] 2 W.L.R. 312 HL. Also, David Richards LJ in *Re Debenhams Retail Ltd* [2020] EWCA Civ 600; [2020] Bus. L.R. 788 at [30] and [31].

Super-super-priority

The moratorium extension provisions and restructuring plan provisions contain protections for moratorium debts (see below).

If a winding-up or administration[3] starts within 12 weeks of the end of any moratorium, then there is a super-super-priority over the property of the company ahead of all other claims (save assets outside the company's property, such as those subject to a fixed charge and assets held on trust). This super-super priority is for:

- moratorium debts; and
- priority PMDs—(broadly) PMDs for which the company did not have a payment holiday (but excluding accelerated finance debts).

Such debts are also a veto category for Companies Act 2006 (CA 2006) Pt 26A restructuring plans,[4] CA 2006 Pt 26 schemes of arrangement[5] and company voluntary arrangements (CVAs)[6] in that individual creditor consent is needed if they are to be affected.

This is a controversial priority. The relevant priority PMDs will rank ahead of other unsecured claims—for example, pension debts—and any other claims secured by a floating charge. The effect can be to prioritise unsecured lenders, including intra-group lending (if debts outside payment holiday and provided have not been accelerated).

Administrators may not distribute[7] or make other payments to assist the administration[8] unless super-super-priority debts are paid.[9]

The super-super-priority is limited to "moratorium debts" and "priority pre-moratorium debts".[10] Priority PMDs are defined in IA 1986 s.174A(3) as limited to PMDs for:

- monitor expenses;
- goods or services supplied during the moratorium;
- rent for a period during the moratorium;
- wages or salary[11] under a contract of employment for a period before or during the moratorium;
- redundancy payments[12] falling due before or during the moratorium; and
- financial services contracts or instruments falling due before or during the moratorium if not a "relevant accelerated debt" (i.e. if not accelerated during "relevant period").

[3] Winding-up: IA 1986 s.174A, inserted by CIGA 2020 Sch.3 para.13. Administration: IA 1986 Sch.B1 para.64A, inserted by CIGA 2020 Sch.3 para.31(3).
[4] CA 2006 s.901H inserted by CIGA 2020 Sch.9 para.1.
[5] CA 2006 s.899A inserted by CIGA 2020 Sch.9 para.35.
[6] IA 1986 s.4(4A) inserted by CIGA 2020 Sch.3 para.4.
[7] IA 1986 Sch.B1 para.65.
[8] IA 1986 Sch.B1 para.66.
[9] IA 1986 Sch.B1 para.64A, added by CIGA 2020 Sch.3 para.31.
[10] Both terms as defined in IA 1986 s.174A. Priority PMDs are defined as the PMDs listed in s.174A(3). For moratorium debts and PMDs, s.174A(11) cross refers to IA 1986 s.A53.
[11] Wages or salary are defined in the same way as in IA 1986 s.A18 (PMD without a payment holiday)—see below.
[12] Redundancy payments are defined in the same way as in IA 1986 s.A18 (PMD without a payment holiday)—see below.

This is broadly similar to PMDs without a payment holiday,[13] but excluding "accelerated debt" under finance contracts.

If super-super-priority applies, then on a subsequent liquidation or administration (within 12 weeks), priority debts are payable in an order set out in the Insolvency Rules.[14] The following order applies:

- amounts payable in respect of goods and services supplied during the moratorium, where supplier would not have had to make the supply but for IA 1986 ss.233B(3) or (4);
- wages or salary arising under a contract of employment;
- all other priority debts (apart from monitor's remuneration or expenses); and
- monitor's remuneration or expenses.

Part A1 Moratorium—general

A Pt A1 moratorium involves the following;

- A breathing space initially for up to 20 business days, but extendible. The directors can extend for up to 40 business days (or more if the court agrees or up to 12 months with creditor consent).
- The process is overseen by a "monitor" (who must be a "qualified person"—i.e. an IP[15]). The company can continue trading.
- There is a payment holiday in relation to some debts—but moratorium and some PMDs must be paid in full.
- There are restrictions on legal process against company.

For pensions purposes, entry into a Pt A1 moratorium by an employer in relation to an occupational pension scheme (OPS) is not a trigger for a PPF assessment period[16] (under the Pensions Act 2004 (PA 2004)) or a s.75 debt[17] (under Pensions Act 1995 (PA 1995) s.75). For employment purposes, it is not a trigger for a preferential debt[18] or claim on the National Insurance Fund.[19]

Eligibility

Entry into a Part A1 moratorium is open to UK and overseas companies, but not the types of companies listed in IA 1986 s.A2 and Sch.ZA1. This includes investment banks, insurance companies and other entities involved in finance markets. In addition, generally companies that have been in an insolvency process or a Pt A1 moratorium in the last 12 months are excluded (IA 1986 Sch.ZA1 para.2, subject to a temporary inclusion under CIGA 2020 s.3 and Sch.4 paras 5–7).

The directors of the company need to consider that the company "is, or is likely to become, unable to pay its debts"—IA 1986, s.A6(1)(d).

[13] IA 1986 ss.A18(3) and A53. See below.

[14] From 1 October 2021 under the Insolvency (England and Wales) Rules 2016 (IR 2016) (SI 2016/1024) rr.3.51A and 7.108A (as added by SI 2021/1028). Originally CIGA 2020 Sch.4 paras 42 and 43 (temporary rules).

[15] Definition of qualified person in IA 1986 s.A54(1).

[16] See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Chs 60–63.

[17] See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Chs 64–70.

[18] See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Chs 21–24.

[19] See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Chs 28–30.

An IP, as the proposed monitor, must consider that "it is likely that the moratorium for the company would result in the rescue of the company as a going concern"—IA 1986 s.A6(1)(e).

Procedure

For a UK company, with no outstanding winding-up petition, the directors need to file at court (IA 1986 ss.A3(2) and A6) the following:

- a statement by the directors: their view that company "is or is likely to become unable to pay its debts";
- a statement from the proposed monitor that company is "eligible";
- a statement from the proposed monitor that in his or her view "it is likely that the moratorium for the company would result in the rescue of the company as a going concern"; and
- the consent of the proposed monitor (and confirmation that he or she is a qualified person[20]).

For an overseas company, with no outstanding winding-up petition, the directors apply to court with same documents (IA 1986 s.A5), but the court needs to make an order (as to which it has a discretion).

For a UK or an overseas company with an outstanding winding-up petition, the directors apply to court with same documents (IA 1986 s.A4). The court may order moratorium only if it is satisfied that it "would achieve a better result for company's creditors as a whole than likely if the company were wound up".[21]

Notifications: s.A8

On the moratorium coming into force:[22]

- the directors must notify the monitor "as soon as reasonably practicable"—s.A8(1); and
- the monitor must then notify the registrar of companies and "every creditor of the company of whose claim the monitor is aware"—s.A8(2)

Those needing to be notified will include employees and workers, and pension scheme trustees.

If the company participates in (or used to participate in) an OPS which is not a money purchase scheme, notices being sent to creditors should also be sent to the Pensions Regulator (TPR) and (for Pension Protection Fund eligible schemes) the Pension Protection Fund (PPF)—ss.A8(2) and A17(8).

[20] i.e. an IP—definition of qualified person in IA 1986 s.A54(1).

[21] This seems a harsher test than the test for administration ("reasonably likely" to achieve purpose: Sch.B1 para.11(b)). Compare also the monitor's view: "likely that the moratorium for the company would result in the rescue of the company as a going concern". Discussed in *MI Squared Ltd v King* [2022] EWHC 331 (Comm); [2022] 2 B.C.L.C. 279.

[22] i.e. the documents filed at court or the making of the relevant court order.

Notifications: PPF

The PPF notification obligation is limited to where the company is an employer in relation to an eligible scheme (within PA 2004 s.126)—IA 1986 ss.A8(2)(d) and A17(8)(d).

The term "employer" has the same meaning as in PA 2004 Pt 2.[23] Regulations under PA 2004 s.318(4) can expand the meaning of "employer". The PPF Entry Rules Regulations[24] expand the meaning of "employer" to include some former employers.

The eligible scheme requirement limits the PPF notification obligation to the usual DB tax registered OPSs.[25]

A monitor acting in relation to a company under IA 1986 Pt A1 needs to be a qualified IP—IA 1986 ss.A6(1)(b)(i) and A54(1). But a monitor does not seem to be someone who "acts as an insolvency practitioner in relation to a company" within IA 1986 s.388, so does not have the PPF notification obligations as a person within PA 2004 s.121(9)(a).[26]

Notifications: TPR

The obligation under Part A1 to notify TPR is limited to where the company is *or has been* an employer under an OPS which is not a money purchase scheme—ss.A8(2)(c) and A17(8)(c).

On CIGA 2020 coming into force, TPR issued brief guidance[27] on the notification obligation. TPR said "We do not expect to be notified where an employer no longer has any obligation to a pension scheme providing defined benefits". But the statutory obligation on the monitor to notify TPR does not contain that limitation—see s.A8(2)(c).

Failure to comply is a criminal offence—s.A8(5)—unless the monitor has "reasonable excuse". It may perhaps be that the monitor could seek to rely on TPR's statement as a reasonable excuse, but this is untested. It may be that monitors may be tempted just to tell TPR (and the PPF) on every appointment. If a particular scheme is not identified, this is likely to trigger a TPR request for information under PA 2004 s.72. Monitors will also be aware of the potential criminal offences (and, financial penalties) for wilfully or recklessly giving false or misleading information to TPR.[28]

A monitor acting in relation to a company under IA 1986 Pt A1 needs to be a qualified IP—IA 1986 ss.A6(1)(b)(i) and A54(1). But a monitor does not seem to

[23] See IA 1986 s.A54(1), cross referring to PA 2004 ss.318(1) and (4).

[24] The Pension Protection Fund (Entry Rules) Regulations (SI 2005/590) reg.1(5).

[25] See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Ch.55. But there is presumably the possibility (at least before the end of 2023) that the eligible scheme limits in PA 2004 are contrary to art.8 of the EU Employment Insolvency Directive (2008/94) and so what look like limitations in UK legislation do not actually exist (see, e.g. the recent decisions in *Hampshire v Board of the Pension Protection Fund* (C-17/17) EU:C:2018:674; [2019] I.C.R. 327; *Pensions-Sicherungs-Verfein VVaG v Bauer* (C-168/18) EU:C:2019:1128; [2020] I.C.R. 985 and *Hughes v Secretary of State for Work and Pensions* [2021] EWCA Civ 1093; [2022] I.C.R. 215). See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Chs 27–60.

[26] See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Ch.61.

[27] The Pensions Regulator, "Moratoriums for employers in financial difficulty", *https://www.thepensionsregulator.gov.uk/en/document-library/scheme-management-detailed-guidance/funding-and-investment-detailed-guidance/moratoriums-for-employers-in-financial-difficulty*.

[28] Crime: PA 2004 s.80. Financial penalty: PA 2004 s.80A providing for a financial penalty under PA 2004 s.88A (as added by the Pension Schemes Act 2021 ss.113 and 115).

be someone who "acts as an insolvency practitioner in relation to a company" within IA 1986 s.388, so does not have the notification obligations (to the PPF and TPR) under PA 1995 s.22—PA 1995 ss.22(1)(a) and (3).[29] Nor does the information obligation to trustees apply under PA 1995 s.26, as this only applies "while section 22 applies in relation to a scheme by virtue of subsection (1)"—s.26(1).

Extension of Pt A1 moratorium

The company's directors can extend the initial 20 business days:

- (once) for up to a further 20 business days (s.A10); or
- for up to one year with consent of pre-moratorium creditors (PMCs) with payment holiday (ss.A11 and A12); or
- for an unlimited period, with approval of the court (s.A13).

But there is a need to file again similar statements about company being unable to pay debts and that the monitor considers it likely the moratorium will result in company rescue.

In addition, on an extension, a director statement is needed that (a) all moratorium debts, and (b) all PMDs for which the company does not have a payment holiday that have fallen due have been paid or otherwise discharged.

In agreeing an extension (where court approval is sought) the court must consider the interests of PMCs and the likelihood of rescue—s.A13(5).

PMDs for which the company does not have a payment holiday will include employee wages and salary but not (usually) pension trustees—see below. So employees will not usually get a vote on extensions, but trustees of DB pension schemes (or the PPF on their behalf) will.

Creditor vote on a moratorium extension—ss.A11 and A12

The moratorium can be extended for up to one year with a creditor vote. There is a need to use a "qualifying decision procedure"—s.A12(2). The directors then need to file updated documents at court—s.A11.

Creditor consent means consent of (a) the PMCs for which the company has a payment holiday, who (b) have not been paid or discharged—s.A12(4)

The Insolvency (England and Wales) Rules 2016 deal with procedure for a creditor approval. There were temporary rules in CIGA 2020 Sch.4 paras 23–28. These were similar to those for CVAs, save that they dealt with secured creditors as well and there is a need for a simple majority (not 75% as in CVAs).

A creditor needs to have delivered a proof of debt—IR 2016 r.15.28(A1). The vote is according to amount of debt at the decision date—IR 2016 r.15.31(za). If the debt is unliquidated or unascertained, then the convenor or chair assesses the amount.

Since 1 October 2021, the creditor vote is passed if the two tests below are met (IR 2016 rr.15.34(1A)–(1C),[30] as amended by SI 2021/1028):

[29] See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Ch.59.

[30] This test differs somewhat from the temporary test originally in CIGA 2020 Sch.4 para.28 which dealt with secured PMCs separately from unsecured PMCs.

(a) vote in favour of a majority (in value) of the PMCs (as defined in CIGA 2020 s.A12); and
(b) a majority of the unconnected PMCs did not vote against.

PMCs are as defined in CIGA 2020 s.12—IR 2016 r.15(2).

Whether or not a creditor is connected is to be decided by convenor or chair.[31] The term "connected" has same meaning as in IA 1986 s.249[32] and will include all employees of the company (associated under IA 1986 s.435(4) and so connected within s.249(b)).

Employees are mainly likely not to be PMCs (as there is no payment holiday for wages or salary). They could have non-wage claims (e.g. expenses), in which case they will rank as PMCs for them. Pension trustees likely to be creditors (PMCs) for DB employer contributions or s.75 debts (discussed below).

A pension trustee may be a connected creditor (e.g. if a subsidiary company of the company).

PPF to vote for pension trustees

From July 2020, voting regulations[33] under IA 1986 s.A51 provide for PPF to exercise votes of pension trustees (to exclusion of trustees, but after consulting them) if the company is an employer in relation to a PPF eligible scheme (IA 1986 s.A51(6), applying PA 2004 s.126).

The relevant rights which are exercisable by the trustees or managers of the scheme as a creditor of the company are instead to be exercised by the Board to the exclusion of the trustees or managers of the scheme—reg.2(2). Before exercising a right under reg.2(2), the Board of the PPF must consult the trustees or managers of the scheme—reg.2(3).

This applies to the rights of the trustees under or by virtue of:

(a) IA 1986 s.A12 (creditor consent for the purposes of s.A11); or
(b) a court order under IA 1986 s.A44(4)(c) (challenge to directors' actions).

The 2023 PPF guidance note[34] comments that this provision means that "any voted lodged by the scheme trustees would be invalid".

The PPF issued guidance[35] in March 2021 (updated in November 2023) on its likely attitude to a Pt A1 moratorium involving a company with a relevant pension scheme. The guidance is consistent with the approach that the PPF has taken on restructurings using other restructuring mechanisms (such as CVAs) in recent years. It is likely that the PPF will seek to use the relevant powers afforded to it to ensure that pension schemes are adequately protected as part of any restructuring process.

The PPF guidance comments that:

[31] IR 2016 r.15.34(1C).
[32] IR 2016 r.1, note. See generally D. Pollard, *Connected and Associated: Insolvency and Pensions Law* (Bloomsbury Professional, 2021).
[33] From 7 July 2020, the The Pension Protection Fund (Moratorium and Arrangements and Reconstructions for Companies in Financial Difficulty) Regulations 2020 (SI 2020/693).
[34] PPF, *Guidance Note 9—Corporate Insolvency and Governance Act 2020* (March 2021), *https://www.ppf.co.uk/-/media/PPF-Website/Files/Trustees-and-advisers/Insolvency-and-restructuring/Guidance-Note-9----CIGA.pdf*
[35] PPF, *Guidance Note 9—Corporate Insolvency and Governance Act 2020* (2021).

- the pension scheme is likely to be a substantial creditor. The PPF expects that the directors and monitor will "fully engage" with the PPF and TPR. The PPF expects to be provided with "all relevant information necessary to permit the proper management of the pension scheme by the trustees".
- This includes information to allow "an understanding of the ongoing covenant, existing funding arrangements and the PPF exposure to the PPF deficit and drift". This will be "especially important if the directors consider it will be necessary for the moratorium to be extended beyond its initial period".
- Given that the PPF is required to consult with the trustees before exercising the voting rights:

> "2.5.2 Monitors and directors must factor into their time planning the need for this consultation including, where appropriate, obtaining relevant advice from trustees' covenant advisors. Trustees must ensure that they have the correct level of expertise on their board and have properly qualified professional advisors to address restructuring situations. This should be addressed no later than the potential need for a moratorium becoming apparent."

In relation to the amount of the vote exercisable by the PPF (on behalf of the pension scheme), the guidance includes the PPF's view that this should be fixed at the estimated buy-out deficit under PA 1995 s.75:

> "2.5.3 The PPF considers that the trustees' vote (exercised by the PPF) on a proposed extension to a moratorium should have the value of the estimated debt that would be due from the employer if section 75 of the Pensions Act 1995 ('PA95') applied. This is because should the moratorium fail with a subsequent insolvency, a debt will become due under s75 PA95 and that debt will be claimed in the employer's insolvency."

As noted above, where a debt is unliquidated or unascertained, then under the Insolvency Rules the convenor or chair assesses the amount. This is a similar position as under a CVA. However, unlike in a CVA, entry into a Pt A1 moratorium is not a "relevant insolvency event" triggering a debt under PA 1995 s.75. This means that the pension scheme's s.75 debt claim is still both future and contingent (as well as unlikely to be definitively certified[36]).

In practice the PPF may look to maximise its leverage by seeking as high a debt as possible, but ultimately it is up the chair to fix the amount of the debt. Agreeing the PPF debt as being an estimated s.75 amount could in some cases affect the other creditors and whether or not the relevant resolution is passed. This could conceivably result in challenges in contested close cases (although it may be that these are rare). The PPF's reasoning for use of a s.75 debt amount relies on the fact that if a restructuring fails, and there is a subsequent insolvency then the s.75

[36] See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Ch.68.

debt will be claimed in that insolvency. But this does no more than reinforce that the s.75 debt amount is both contingent and future.

As mentioned above, a Pt A1 moratorium has special majorities for voting by "connected" creditors. In cases where the PPF controls trustee debt voting, but the trustee is a connected creditor of company, the question arises as to whether the PPF control means that the relevant debt is treated as being one of the PPF (and so presumably not connected) or remains to be treated as a connected debt? The same issue can arise in a CVA.[37] The better view is that the statutory control does not operate by way of an assignment of the voting rights away from the trustee (payments presumably still go to the trustee), so that it is unlikely that PPF is to be treated for this purpose as the creditor instead of the trustee.

Removing the connection before the process starts but for the purpose of the Pt A1 moratorium runs the risk of being seen as a material irregularity as contrary to the good faith principle applicable to such votes.[38]

During the Pt A1 moratorium

The Pt A1 moratorium has been described as the first debtor in possession regime in English law.

Broadly:

- The company's affairs are "monitored" by the monitor (an IP), to form a view whether it remains likely that moratorium will result in rescue—IA 1986 s.A35.
- The directors still run the company and it can continue trading.
- There are limits on new credit/security/payments—IA 1986 ss.A25–A28.
- The company cannot be put into administration or liquidation (save by the directors)—IA 1986 s.A20.
- There is a moratorium on instituting, carrying out or continuing legal process (including legal proceedings, execution, distress or diligence)—IA 1986 s.A21, But there are exceptions, including for all employment tribunal proceedings.
- There is a "payment holiday" (i.e. broadly a restraint on legal process) for some PMDs—IA 1986 s.A18.
- Entry into a Pt A1 moratorium is one of the insolvency processes that triggers the ipso facto protections for contracts involving goods or services under IA 1986 s.233B.[39]

[37] See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Ch.85.

[38] See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Ch.85 and in particular the IVA case, *National Westminster Bank Plc v Kapoor* [2011] EWCA Civ 1083; [2012] Bus. L.R. D25.

[39] See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Ch.12.

Debt categories (IA 1986 s.A53; Nortel)

PMD with payment holiday—IA 1986 s.A53 and outside IA 1986 s.A18(3)	PMD without payment holiday—IA 1986 s.A53 and within IA 1986 s.A18(3)	Moratorium debt—IA 1986 s.A53
Debts/liabilities to which company becomes subject before or (by reason of pre-moratorium obligation) during moratorium, except excluded class	PMDs within excluded class, i.e.: (a) the monitor's remuneration or expenses; (b) goods or services supplied during the moratorium (can be provided for in Insolvency Rules); (c) rent in respect of a period during the moratorium; (d) wages or salary arising under a contract of employment;[40] (e) redundancy payments;[41] or (f) debts or other liabilities arising under a contract or other instrument involving financial services (IA 1986 Sch.ZA2).	Debts or liabilities: (a) to which company becomes subject during moratorium (other than by reason of pre-moratorium obligation); or (b) to which company becomes subject after moratorium by reason of an obligation incurred during the moratorium.
Subject to per person payment restriction (not over £5,000 or 1% of creditors) unless monitor or court agree	Super-super-priority (save accelerated finance debt)	Super-super-priority

It seems clear that the company's existing obligations (e.g. under an existing schedule of contributions or under PA 1995 s.75) to pay contributions to pension schemes are PMDs and are not moratorium debts even if they only fall due during the moratorium. This is because they arise "by reason of an obligation incurred before the moratorium came into force"—IA 1986 ss.A53(1)(a) and A53(2)(a).

This divide between PMDs and moratorium debts is very similar to that dealing with where obligations are provable debts or not, as discussed in *Re Nortel*.[42] This case is cited on this point in the explanatory notes to CIGA 2020 in relation to IA 1986 s.A53 (at para.129):

[40] Defined in IA 1986 s.A18(7) as including various items—see below.

[41] Defined in IA 1986 s.A18(7) as meaning (in Great Britain) a redundancy payment under Employment Rights Act 1996 (ERA 1996) Pt 11 or a payment made to a person who agrees to the termination of their employment (where they would have been entitled to a redundancy payment under Pt 11 if they had been dismissed). It is not clear if this is wide enough to catch a contractual redundancy payment at a higher level than the statutory payment under Pt 11.

[42] *Re Nortel GmbH* [2013] UKSC 52; [2014] A.C. 209 at [72]–[86], per Lord Neuberger. See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Ch.34.

> "129 …. In particular, the terms 'pre-moratorium debt' and 'moratorium debt' are defined. The wording used in the definition of 'pre-moratorium debt' is intended to bring in the distinction made in *Re Nortel GmbH (in administration)* and related companies [2013] UKSC 52, between provable debts and expenses in administration. Following the Supreme Court's reasoning, liabilities such as contribution notices and financial support directions under the Pensions Act 2004 should be considered pre-moratorium debts (and, therefore, not payable during the moratorium) even if the request to pay them arises after the start of the moratorium."

Moratorium on payments

Payment of any PMDs for which the company has a payment holiday to a person of over £5,000 in total (or 1% of company's total debts if greater) can be made only (IA 1986 s.A28) if:

- the monitor consents; or
- with a court order.[43]

It is not absolutely clear if this limit is £5,000 (or 1%) per recipient or that is the total of all payments to all persons. This limit does not extend or increase if the moratorium is extended.

This restriction does not apply to payments in respect of debts which are not PMCs with a payment holiday, i.e. PMCs where the company does not have a payment holiday (e.g. wages or salary or redundancy payments) or moratorium debts.

It is a criminal offence for a company to make a payment in breach of the restriction in IA 1986 s.A28(1). The criminal offence extends to any officer[44] of the company who authorised or permitted the payment without reasonable excuse—IA 1986 s.A28(5).

Disposal of property (not subject to security) is only allowed (IA 1986 s.A29) if:

- this is in the ordinary way of the company's business; or
- the monitor consents; or
- with a court order.

There seems potentially to be an overlap with the payment provisions, in that a payment (within IA 1986 s.A28) is potentially also a disposal within IA 1986 s.A29. For other purposes in IA 1986 the term disposal includes a payment—see, for example, IA 1986 s.127[45] dealing with property dispositions in liquidations. However, payments of wages or pension contributions are more likely to fall within the ordinary course of business exclusion.

[43] It is not clear if this is limited to the insolvency court or applies to any court. Compare the position on consent for legal processes, where the definite article is used instead: various legal processes are allowed "with the permission of the court" both in a Pt A1 moratorium (IA 1986 s.A21(1)) and in administrations (IA 1986 Sch.B1 para.43).

[44] The term "officer" is defined to include "a director, secretary or manager"—IA 1986 s.251.

[45] Note that s.127 is not applicable if a winding-up petition was presented pre moratorium: IA 1986 s.127(3), added by CIGA 2020 Sch.3 para.12. On payments out of current accounts being dispositions under s.127, see Stefan Lo, "Current accounts and void disposition after commencement of winding up" [2020] J.B.L. 624.

Moratorium on legal process

There is a restriction or stay on enforcement and legal proceedings (IA 1986 s.A21). This is similar to the moratorium for administrations (IA 1986 Sch.B1 para.43[46]). But, unlike that for administrations, the restriction for Pt A1 moratoriums does not apply (IA 1986 s.A21(1)(e)) to:

- Employment Tribunal (ET) proceedings: all ET proceedings are excluded from the restriction and not caught—including any claims by a non-employee (e.g. a trade union or a worker).
- Non-ET proceedings involving a claim between an "employer" and a "worker".
  The term worker means (IA 1986 s.A21(6)) an individual who is a worker under ERA 1996 s.230(3) or an agency worker within the Employment Relations Act 1999 s.13(2). The definition in s.230(3) covers both an employee and a self-employed worker.[47]
  So a pensions ombudsman or court claim by a current employee or worker is not caught by the restriction (but a claim by a former employee or a trustee claim seems to be caught).
- Where the court gives permission. But it seems that it is not possible to ask for permission to enforce a PMD with a payment holiday—IA 1986 s.A21(2). This is likely (in a pension context) to include pension contributions or s.75 debts.

Given the similarity with the moratorium for administrations,[48] it is very likely that similar principles will apply. This means that:

- the restriction on enforcement and legal proceedings will only apply to legal process *against* the company (or its property). This means that claims *by* the company are not caught. Counterclaims against the company are seemingly caught—*Cook v Mortgage Debenture Ltd*;[49]
- the restriction probably applies to most regulatory proceedings against the company if involves a formal hearing or process (e.g. Pensions Ombudsman or TPR panel proceedings). This almost certainly includes the issue of a warning notice by TPR—see *Hudson v Gambling Commission*[50] but contrast *Financial Conduct Authority v Carillion Plc*;[51]
- the restriction does *not* apply to claims against third parties (e.g. guarantors, directors)—*Re Rhondda Waste Disposal Ltd*[52] and *Ince Gordon Dadds LLP v Tunstall*;[53]

[46] See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Ch.11.
[47] A "limb (b) employee" under ERA 1996 s.230(3). So called in *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29; [2018] I.C.R. 1511 at [11].
[48] See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Ch.9.
[49] *Cook v Mortgage Debenture Ltd* [2016] EWCA Civ 103; [2016] 1 W.L.R. 3048.
[50] *Re Frankice (Golders Green) Ltd (In Administration)* [2010] EWHC 1229 (Ch); [2010] Bus. L.R. 1608 (Norris J).
[51] *Financial Conduct Authority v Carillion Plc (In Liquidation)* [2021] EWHC 2871 (Ch); [2022] Ch. 162 (Michael Green J).
[52] *Re Rhondda Waste Disposal Ltd* [2001] Ch. 57; [2000] 3 W.L.R. 1304 CA.
[53] *Ince Gordon Dadds LLP v Tunstall* [2019] B.C.C. 1109; [2020] I.C.R. 124 EAT.

- legal process probably does *not* include exercise of contract rights (but note the separate ipso facto protections for contracts for the supply of goods and services under IA 1986 s.233B[54])—e.g. *Olympia and York*;[55] and
- it seems likely that pension scheme actions or triggers (eg triggering a winding-up of the scheme[56] or calculating and serving a s.75 debt certificate[57]) are outside the moratorium on legal proceedings.

Termination of moratorium

The monitor must terminate the Pt A1 moratorium if the monitor thinks various matters are met (including if the moratorium is no longer likely to result in rescue)—IA 1986 s.A38.

These events include that the monitor thinks that company is unable to pay any of the following that have fallen due—IA 1986 s.A38(1)(d):

- moratorium debts; and
- PMDs for which the company does not have a payment holiday.

Challenges

Challenges can be made to the monitor's or directors' actions if they have unfairly harmed interests of an applicant (IA 1986 ss.A42 and A44). A challenge can be brought by PPF if there is unfair harm to pension trustees—IA 1986 s.A45.

The court cannot order payment of compensation by monitor under a s.A42 claim—IA 1986 s.A42(4)(c). A later liquidator or administrator may challenge monitor's remuneration—IA 1986 s.A43.

Pension contributions as financial services contracts?

PMD without payment holiday include "debts or other liabilities arising under a contract or other instrument involving financial services"—IA 1986 s.A18(3)(f).

It is unlikely that the arrangements between an employer and a pension provider (e.g. a pension trustee or a personal pension (PP) provider) will fall within this category. Although pension contributions may well be debts,[58] it is unlikely that they will be debts under "a contract or other instrument involving financial services".

The meaning of a "contract or other instrument involving financial services" is widely drawn in IA 1986 s.A18(7) and Sch.ZA2. It is likely to include both secured and unsecured banking and finance arrangements and intra-group loans. Schedule ZA2 does not take the approach of just generally cross-referring to the financial securities legislation (e.g. relevant EU directives or the Financial Services and Markets Act 2000 (FSMA 2000)). Instead, it includes a general reference to a

[54] See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Ch.11.
[55] *Re Olympia & York Canary Wharf Ltd (No.1)* [1993] B.C.C. 154; [1993] B.C.L.C. 453 ChD (Millett J).
[56] See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Ch.75.
[57] Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Ch.65.
[58] Contributions payable to occupational pension trustees under the statutory schedule of contributions are (broadly) deemed to be debts under PA 2004 s.228(3). See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Ch.64.

"financial contract" (para.2) with later paragraphs containing some reference to other legislation in some areas (e.g. the definition of "commodities" in para.2(3), a "securities financing transaction" (para.3) or a "derivative" (para.4)).

None of the categories of contract or transaction in Sch.ZA2 look easily to cover the payment of contributions to a pension scheme (whether occupational or personal), even though the contributions once received may be used by the pension provider (trustee or PP provider) in a way which would then be a financial contract (e.g. in the purchase of securities).

The financial services legislation itself generally applies to PPs (e.g. their establishment and running), but not (broadly) to OPSs.[59] The establishing, operating or winding-up of a PP scheme is a regulated activity.[60] Interests in PPs are investments under FSMA 2000.[61]

"Wages or salary under a contract of employment?"

Payments and liabilities excluded from the payment holiday under IA 1986 s.A18 are "wages or salary *arising under a contract of employment*". Such a claim also gets the potential new super-super-priority, which in effect cross-refers to s.A18.[62]

IA 1986 s.A18(7) defines "wages or salary" as *including*:

> "(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."

This is definition is almost identical to the definition for adopted liabilities in administrations—see IA 1986 Sch.B1 para.99(6).[63]

The case law on the super priority in administration for qualifying liabilities under adopted employment contracts (IA 1986 Sch.B1 para.99) is very likely to apply to the Pt A1 moratorium as well. A summary is:

Super Priority in administration:

Qualifying	**Not qualifying**
Wages and salary	Unfair dismissal awards (*Re Allders*, *Paramount Airways*)

[59] Interests under the trusts of an OPS (as defined in PSA 1993 s.1) are specifically excluded from the definition of investments—art.89(2) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544). Similarly OPSs are excluded from being a Collective Investment Scheme—para.20 in the Schedule to the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (SI 2001/1062).

[60] Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) art.52.

[61] Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) art.82(2).

[62] Winding-up: IA 1986, definition of "priority pre-moratorium debt" s.174A(3) and (11)—added by CIGA 2020 Sch.3 para.13; Administration: IA 1986 Sch.B1 para.64A—added by CIGA 2020 Sch.3 para.31; veto category for restructuring plans (CIGA 2020 Sch.9 para.1 inserting CA 2006 s.901H); schemes of arrangement (CIGA 202 Sch.9 para.35(5) inserting CA 2006 s.899A); and CVAs (CIGA 2020 Sch.3 para.4(2) inserting IA 1986 s.4(4A)).

[63] See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Ch.42.

Qualifying	Not qualifying
Holiday pay (and payments in lieu of holiday)	Protective awards (*Krasner v McMath*, *Re Huddersfield*)
Sick pay	Damages for wrongful dismissal (*Leeds United FC*)
Employer contributions to OPSs (if contractual—most likely only if money purchase)	Payments in lieu of notice (*Krasner v McMath*, *Re Huddersfield*)

Pension contributions as wages or salary?

For pension contributions to be PMDs without a payment holiday under the wages or salary head they need to be both:

- "under a contract of employment"; and
- part of "wages or salary", which is defined as "includes … a contribution to an occupational pension scheme".

This is the same wording as for super-priority adoption liabilities on administration (IA 1986 Sch.B1 para.99). But in practice in relation to pension contributions, the adoption super-priority is less of an issue in an administration for a PPF eligible DB scheme, because both:

- often (perhaps usually) entry of company into administration will trigger a PPF assessment period (PA 2004 s.132), so the schedule of contributions and accrual of benefits will cease (PA 2004 s.133); and
- auto-enrolment (AE) duties also cease on a scheme entering a PPF assessment period (PA 2008 s.31).

However, a Pt A1 moratorium is not (unlike an administration) an insolvency event for PPF assessment purposes.

The brief 2020 TPR Guidance[64] on the moratorium says:

> "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."

It is not clear to what "in respect of the company's employees" is referring to here.

It seems likely that the position varies, depending on both:

- the recipient of the pension contributions: a PP, OPS or NEST; and
- for an OPS, whether the contribution is towards a money purchase (defined contribution (DC)) benefit or is in relation to a DB; and
- whether the contributions are by the employee (i.e. member contributions), deducted at source by the employer when paying wages or salary, or by the employer.

[64] The Pensions Regulator, "Moratoriums for employers in financial difficulty", *https://www.thepensionsregulator.gov.uk/en/document-library/scheme-management-detailed-guidance/funding-and-investment-detailed-guidance/moratoriums-for-employers-in-financial-difficulty*.

The table below is a summary.

Pension contributions outside payment holiday? i.e. part of "wages or salary" under a contract of employment?

	Member contributions (deducted at source)	**Employer contributions**
PP (or NEST)	Very probably (not to an OPS, but *IRC v Lawrence* principle applies?)	Arguable (but *IRC v Lawrence* points against)
OPS: DC benefit	Yes	Likely (but need to show "under a contract of employment") Unlikely to cover other payments, e.g. expenses, indemnity claims
OPS: DB benefit	Yes	Very unlikely: • amount may not be related to employment (e.g. lump sum deficit reduction contributions); and • even if it is, more likely to be under scheme rules or statute than under a contract of employment Depends on terms of contract of employment Employer matching of employee salary sacrificed contributions perhaps more likely

PP contributions

As noted above, the definition in IA 1986 s.A18(7) of "wages or salary" expressly provides that it includes contributions to an "occupational pension scheme". The term "occupational pension scheme" is not expressly defined generally in IA 1986 (although this term is also used in the administration super-priority provisions in IA 1986 Sch.B1 para.99).

However, for the purposes of IA 1986 Pt A1, the term "occupational pension scheme" is defined in IA 1986 s.A54(1) as having the same meaning as in PSA 1993 s.1, which includes an OPS but not a PP.

On this basis, the express inclusionary wording in s.A18(7) includes, within wages or salary, contributions to an OPS, but not to a PP. The issue arises as to whether PP (or NEST) contributions are or are not within "wages or salary".

They are not contributions being made to an "occupational pension scheme" within the definition in PSA 1993 s.1. It is a bit more arguable that they are within administration super-priority in Sch.B1, because the term "occupational pension scheme" is not defined in IA 1986 Sch.B1.

So the Pt A1 legislation seems a bit clearer for the moratorium case than for the adopted employment contract case. If Parliament had wanted to extend the provision to PP contributions, it would have been simple to draft the provision to refer to "pension scheme" rather than OPS. This still leaves open the question of whether such contributions fall within "wages or salary" as a general matter, even if the express inclusion wording does not apply.

Employee pension contributions deducted from pay

Are employee contributions to a PP or an OPS (DB or DC) part of wages or salary if deducted at source by the employer? It seems likely that they will be held to be part of "wages or salary". They seem to be similar to the deduction and payment of PAYE tax by an employer.

In the administration case in 2001, *IRC v Lawrence*,[65] the Court of Appeal held that PAYE tax deducted from pay by an employer was part of "wages or salary" and so it was covered by the administration super-priority for adopted employment contracts. This was a decision under slightly different administration wording in the legislation (before the changes from 2003), but the changes do not seem material for this purpose.

There could be an impact if a salary sacrifice arrangement[66] is in place. In such an arrangement, what would otherwise be member contributions are instead reduced to zero, with the member's gross pay being reduced by an equivalent amount. This can reduce the level of national insurance contributions (NICs) payable by both the member and the employer. But it is only effective for the national insurance effect if the contributions convert to being by the employer (and not the member). This could mean that none of these contributions counts as wages or salary for this purpose.

Employer PP contributions

Are employer contributions to a PP (or NEST) part of wages or salary? They will be towards DC benefits, but they are not payable to an OPS (see the discussion on this above). There is the factual issue of whether such payments fall "under a contract of employment".

In *IRC v Lawrence*[67] it was held that there was no administration super-priority for payment of employer NICs, unlike the position of employee NICs deducted from pay by the employer.

It feels as though employer contributions to a scheme to secure crediting of DC benefits should fall with "wages or salary". The definition in IA 1986 s.A18(7) of "wages or salary" is stated to be inclusive. Pension benefits fall within "pay" for EU sex discrimination purposes—see *Barber*. [68]

Recent cases seem to be extending the treatment (eg for tax) of payments to third parties as being remuneration or pay, for example:

- *RFC 2012 Plc v Advocate General for Scotland*[69] (SC held that payments to an employee benefit trust fall within remuneration for tax purposes); and
- *University of Sunderland v Drossou*[70] (EAT decision that employer pension contributions count as part of a "week's pay" under ERA 1996), but contrast *Benson v Secretary of State for Trade and*

[65] *Inland Revenue Commissioners v Lawrence* [2001] 1 B.C.L.C. 204, [2001] I.C.R. 424 CA.
[66] See Ch.31, "Salary Sacrifices and Pensions" in D. Pollard, *Employment Law and Pensions* (Bloomsbury Professional, 2016).
[67] *Inland Revenue Commissioners v Lawrence* [2001] 1 B.C.L.C. 204, [2001] I.C.R. 424 CA.
[68] *Barber v Guardian Royal Exchange Assurance Group* (C-262/88) EU:C:1990:209; [1991] 1 Q.B. 344.
[69] *RFC 2012 Plc v Advocate General for Scotland* [2017] UKSC 45; [2017] 1 W.L.R. 2767.
[70] *University of Sunderland v Drossou* [2017] I.C.R. D23; [2017] I.R.L.R. 1087 EAT. Note only one party attended.

Industry[71] (EAT held that pension contributions not within "arrears of pay" and NIF claims).

OPS DC employer contributions

Are DC employer contributions to an OPS part of "wages or salary under a contract of employment"? They will be contributions to an OPS, so their status will depend on whether such payments fall "under a contract of employment". This depends on the terms of the employment contract, which itself may be oral and may depend on any communications with employees.

For DC contributions, it seems more likely to be arguable that they (or a rate) are specified in the contract and so are "under the contract". For any other contributions to the scheme (e.g. funding, expenses, s.75), this seems less likely (see the discussion of OPSDB below).

The employer contribution obligation should be recorded in payment schedule if a money purchase scheme (PA 1995 ss.87 and 88) or in a schedule of contributions (PA 2004 Pt 3) if a hybrid scheme.

OPS DB employer contributions

Are DB employer contributions to an OPS categorisable as either:

- "wages or salary arising under a contract of employment"—IA 1986 s.A18(3)(d); or
- "amounts payable in respect of" (IA 1986 s.A18(3)) wages or salary arising under a contract of employment?

DB employer contributions will be contributions to an OPS, so their status will depend on whether such payments fall "under a contract of employment". The answer depends on the terms of the employment contract, including potentially the communications with employees (perhaps in particular about salary sacrifice arrangements).

Employer contributions to an OPS can take various forms:

- payment of employee contributions deducted from pay (these are usually treated as not being employer contributions—see above);
- general employer contributions, which can themselves be split between:
  - — future service contributions (i.e. in respect of active members)—often expressed in the schedule of contributions as a percentage of pensionable pay; and
  - — deficit recovery contributions; more usually expressed as lump sum amounts; and
- other payments, depending on the terms of the scheme and the schedule of contributions or arrangements with the trustees. Examples are expenses, payments under an indemnity to the trustee (e.g. for liabilities incurred in good faith), and special contributions (e.g. on an augmentation or benefit increase).

[71] *Benson v Secretary of State for Trade and Industry* [2003] I.C.R. 1082; [2003] I.R.L.R. 748 EAT.

Other than those crediting DC benefits, contributions to an OPS (e.g. funding, expenses, s.75), are much more difficult to categorise as being "under a contract of employment". For DB the emerging benefits themselves look arguably to be to be part of pay in some contexts (e.g. *Barber*), but the earlier funding looks much less likely to be part of pay (e.g. *Air Jamaica Ltd v Charlton*[72]).

Contracts of employment envisaging DB schemes and benefits may well not refer to funding (and are even more unlikely to refer a specific rate). The deficit recovery contributions are likely to relate to the funding of the scheme as a whole, and so will relate to all members, not just those currently employed (ie including pensioners and deferred members who will usually not be current employees of the company). This is an indication that such contributions are unlikely to be categorised as being "under" a contract of employment.

Payments under schedule of contributions or scheme rules are statutory, not under a contract of employment (and so look similar to employer NI contributions as in *IRC v Lawrence*[73]). The employer contribution obligation should be recorded in schedule of contributions—PA 2004 s.227.

Similarly, compliance with employer duties under AE legislation is statutory, rather than contractual (but there is no right of action based on breach of statutory duty—PA 2008 s.34).

The "in respect of" wording in IA 1986 s.A18(3) is quite wide (eg *IRC v Lawrence*[74]), but the disconnect with individual current contracts of employment looks likely to be considered too wide to allow the categorisation of such employer contributions as being in respect of wages or salary.

Impact of failure to pay pension contributions

If any pension contributions are not paid, because they are not clearly within wages or salary. There may be adverse consequences if they are not paid:

- failure to pay contributions may (depending on the rules of the OPS) be a trigger for scheme winding-up (or for trustees to trigger scheme winding-up) and hence a s.75 debt. It seems unlikely that the Pt A1 moratorium would prevent such a winding-up being triggered (see above);
- failure is likely to be a breach of schedule of contributions/payment schedule. There would be the usual statutory consequences—e.g. notify TPR, members. There is a potential civil penalty (PA 1995 s.10) on the employer (and officers) absent "reasonable excuse"—PA 2004 s.228(4)(b). But potentially the statutory moratorium prohibition could be a "reasonable excuse".
- there may be a breach of the auto enrolment (AE) duties on employer (Pensions Act 2008). Compliance with employer duties under AE legislation is statutory and not necessarily contractual—see PA 2008 s.34.

[72] *Air Jamaica Ltd v Charlton* [1999] 1 W.L.R. 1399; [1999] Pens. L.R. 247 PC.
[73] *Inland Revenue Commissioners v Lawrence* [2001] 1 B.C.L.C. 204, [2001] I.C.R. 424 CA.
[74] *Inland Revenue Commissioners v Lawrence* [2001] 1 B.C.L.C. 204, [2001] I.C.R. 424 CA.

- Failure to pay pension contributions is however probably not contrary to Pt 2 of ERA 1996 (formerly the Wages Act). Pension contributions are not within "wages" as not paid to the worker—ERA 1996 s.27(1).

What if the directors want to pay some pension contributions?

In many cases it may be the case that, regardless of any doubts on whether they are within wages or salary, that the directors of the company want to continue the payment of any DC or member pension contributions. The directors may want to do this both to avoid the consequences noted above and because to do otherwise might otherwise be a concern for the workforce (and impact on the company's potential survival).

In practice this may mean that the company may want to continue to pay such contributions. If the directors are concerned that the contributions are not clearly within "wages or salary" then the company could still continue to pay:

- with monitor (or court) consent; or
- if within the £5,000 (or 1%) cap under IA 1986 s.A28 (but this is probably per recipient, so may be an issue if payment is to a single personal pension provider or set of trustees).

The monitor should only agree if he or she thinks the payments "will support the rescue of the company as a going concern"—IA 1986 s.A28(3). The court is likely to adopt a similar approach.

The directors may want to be cautious. Under IA 1986 Pt A1, making an unauthorised payment is a criminal offence on the company and any officer[75] who "without reasonable excuse" authorised or permitted the payment—IA 1986 s.A28(5). The penalty on conviction is up to two years' prison or a fine or both.[76] If it appears to the monitor that an officer has committed an offence in connection with the moratorium, the monitor must report this to the appropriate authority—IA 1986 s.A48(2).

Impact on s.75 debts?

Debts on the company arising under PA 1995 s.75 seem highly likely to be PMDs subject to a payment holiday. They are unlikely to be within "wages or salary under a contract of employment".

If the debt had been triggered before the Pt A1 moratorium, then it will be a PMD. If triggered during the moratorium then (as discussed above) it is still a PMD (and not an MD), as it arises "by reason of any obligation incurred before the moratorium comes into force …". This tracks the divide between provable debts and expense liabilities in judgments in *Re Nortel*.[77]

Triggering a s.75 debt (e.g. the trustees or TPR triggering a winding-up of the OPS) is probably not itself within the stay on legal process in IA 1986 s.A21(1)(e). But trustees suing the employer in the courts or before the Pensions Ombudsman

[75] The term "officer" is defined to include "a director, secretary or manager"—IA 1986 s.251.
[76] IA 1986 Sch.10, as amended by CIGA 2020 Sch.3 para.33.
[77] *Re Nortel GmbH* [2014] A.C. 209 at [72]–[86], per Lord Neuberger.

(or enforcing any security or commencing winding-up proceedings) would be within the stay in IA 1986 ss.A20–A22.

There may perhaps be an exclusion allowing legal proceedings if the trustees are all current employees or workers. This would be on the basis that the exclusion for proceedings "involving a claim between an employer and a worker" (IA 1986 s.A21(1)(e)(ii)) could then perhaps apply. A narrower approach to this exclusion could see it be restricted only to claims involving a person in their capacity as a worker.

Note that an intentional act preventing recovery of s.75 debt due from employer "without reasonable excuse" became from October 2021 a criminal offence (PA 2004 s.58A) when the relevant provisions in the Pension Schemes Act 2021 (PSA 2021) came into force.

Contribution notices and financial support directions

If made before a moratorium starts, contribution notices (CNs) or financial support directions (FSDs) made by TPR under PA 2004[78] against the company will be:

- PMDs without a payment holiday;
- caught by the payment limits; and
- not have any super-super-priority.

It seems unlikely that they can be seen as "wages or salary under a contract of employment".

The same analysis applies if CN or FSD is made after a moratorium starts.

CNs or FSDs, whether made before or after moratorium starts are very unlikely to be moratorium debts as they will be "by reason of an obligation incurred before the moratorium comes into force"—IA 1986 s.A53. This tracks the wording used by Lord Neuberger in *Re Nortel*. In that case, a potential post administration FSD was held to be a provable debt within the Insolvency Rules as "a liability which arose 'by reason of any obligation incurred before' the insolvency event".[79]

> "[85] … Given that the group in each case was in very serious financial difficulties at the time the Target companies went into administration, this point is particularly telling. In other words, the Target companies were not in the sunlight, free of the FSD regime, but were well inside the penumbra of the regime, even though they were not in the full shadow of the receipt of a FSD, let alone in the darkness of the receipt of a CN."

The explanatory notes for CIGA 2020 made this clear at [129]:[80]

> "The wording used in the definition of 'pre-moratorium debt' is intended to bring in the distinction made in *Re Nortel GmbH (in administration) and related companies* [2013] UKSC 52, between provable debts and expenses in administration. Following the Supreme Court's reasoning, liabilities such as contribution notices and financial support directions under the Pensions

[78] See Pollard, *Corporate Insolvency, Employment and Pension Rights*, 7th edn (2022), Pt 12.

[79] *Re Nortel GmbH* [2014] A.C. 209 per Lord Neuberger at [72] and Insolvency Rules 1986 r.13.12(1)(b) (now IR 2016 r.14.1(3)(b)).

[80] See also The Insolvency Service, *Guidance for Monitors* (June 2020), p.19.

Act 2004 should be considered pre-moratorium debts (and, therefore, not payable during the moratorium) even if the request to pay them arises after the start of the moratorium."

This means that any legal process to bring or enforce a CN or FSD against the company will be within the stay on legal process against the company. This is likely to include (in the same way as the moratorium in an administration):

- a hearing before the TPR determinations panel; and
- issue of a warning notice.

CNs and FSDs can still be made/processed against third parties, for example, connected or associated persons (moratorium only applies to claim against the company).

PSA 2021 offences

Where the company supports any OPSs, it is possible that entry into a Pt A1 moratorium (and any restructuring or insolvency that follows) could be seen as having a detrimental impact on the support for the pension scheme or the payment of its benefits. For example, failure to pay a CN "without reasonable excuse" became a criminal offence (PA 2004 s.40A) when PSA 2021 came into force.

The company and other persons (e.g. the monitor or the directors) will need to take account of the potential for a Pt A1 moratorium to trigger a CN or FSD claim or the criminal sanctions or financial penalties under PSA 2021 following it coming into force. Most of these crimes or penalties tend not to apply if there is a "reasonable excuse" or similar. For some there is an express exemption for an IP (i.e. potentially including the monitor) acting as such.

This potential for an action allowed by CIGA 2020 to result in a sanction under other provisions was raised in Parliament during the passage of the bill that became CIGA 2020. The comment was made by Baroness Drake[81] that CIGA "opens up the possibility that what may be lawful action under the Corporate Insolvency and Governance Bill may invite criminal sanctions under the Pension Schemes Bill".

Part A1 Moratorium: Chart summarising Impact on employee claims

	Pre-MD with payment holiday or Pre-MD without payment holiday	**Stay on proceedings?—IA 1986 s.A21**	**Payment limit?—IA 1986 s.A28**	**Potential super-super priority?**	**Protection of supplies and services applies?—IA 1986 s.233B**
Employee—wages or salary for period before moratorium	Pre-MD without payment holiday	No	No	Yes	Perhaps no (not applicable to employees)

[81] House of Lords debate on 23 June 2020.

	Pre-MD with payment holiday or Pre-MD without payment holiday	**Stay on proceedings?—IA 1986 s.A21**	**Payment limit?—IA 1986 s.A28**	**Potential super-super priority?**	**Protection of supplies and services applies?—IA 1986 s.233B**
Employee—wages or salary for period during moratorium	Pre-MD without payment holiday	No	No	Yes	Perhaps no (not applicable to employees)
Employee—statutory or voluntary redundancy pay falling due before or during moratorium	Pre-MD without payment holiday	No	No	Yes	Perhaps no (not applicable to employees)
Employee—non wages or salary (e.g. expenses or termination payment) for period before or during moratorium	Pre-MD with payment holiday (not wages or salary)	No	Yes	No	Perhaps no (not applicable to employees)
Other worker—payments for services in period before moratorium	Pre-MD with payment holiday (not wages or salary under a contract of employment)	No	Yes	No	Yes
Other worker—payments for services during moratorium	Pre-MD without payment holiday (amounts for services supplied during moratorium)	No	No	Yes	Yes