Dear IP

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DEAR INSOLVENCY PRACTITIONER
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Heading of Insolvency Practitioner Regulation

Dear Reader

Attached is a special edition of Dear IP concerning the introduction of the Insolvency Service's new Case Management System CMS).

CMS is being rolled out initially to the agency's Redundancy Payments Service (RPS), with the subsequent onboarding of its other operational areas, including our investigation & enforcement and official receiver teams, taking place within a timeframe of 12-18 months. The implementation of CMS will impact Insolvency Practitioners in two main ways.

Firstly it will update and modernise the calculation of redundancy payments through automation, providing RPS with the ability to apply the latest tax and legislative rules - and any periodic changes thereto - in real time. Insolvency Practitioners and any agents they instruct to carry out redundancy payments may therefore want to study the details of the changes to redundancy payments to check that their own internal calculation models are 'in sync' with RPS's, and for that reason this special edition necessarily deals with the 'granular detail' of the changes. To facilitate alignment going forward, the code for the calculation engine that has been developed to support and integrate with CMS has been made available as open source so that practitioners, Agents and their software providers can utilise their own version of the solution if they wish.

Secondly, it has been decided to switch the RP14/A upload service away from the

current RPS portal and route this process instead through the Director Conduct Return Service (DCRS). Again this will provide a more modern, more stable and more secure platform for those data transfers. As part of this change, DCRS will be re-named the Insolvency Practitioner Service (IPS). The method of uploading will not change. The only substantive change is that the DCRS platform will serve IPs for both director conduct returns and the submission of redundancy claims information, although there will be a simple, automated password re-set process to go through when users first log on to the updated service. Full instructions for using IPS will be published on the relevant GOV.UK web pages.

In this issue:
Information/Notes page(s):

Chapter 11   **Employment Issues**
Article 64

64) Update for Insolvency Practitioners on the development of the Insolvency Service's new case management system (CMS)

1. As advised in the previous editions of *Dear IP*, the Insolvency Service is introducing a new Case Management System (CMS) in the first quarter of 2019, with our current planning projections putting us on target to go live on 18 March.

2. CMS will bring about changes to the way the Redundancy Payments Service (RPS) receives information from IPs and their authorised Agents on employers and redundancy claims in their insolvency cases (the RP14/A forms). CMS will also modernise and make more efficient the process of calculating redundancy payment entitlements.

RP14/A submissions

3. The submission process itself will remain largely unchanged when CMS goes live, although some additional validation of the data is being introduced which will mean, for example, that correctly formatted National Insurance numbers (NINOs) will need to be entered into the RP14/A form in order for it to upload successfully.

4. The XML form schemas have been updated accordingly, so it is important that IPs and Agents observe and adhere to the data entry requirements going forward. Access to the updated forms will be incorporated into the updated guidance and instructions for the new Service. The Q&A sections below provide some further detail about the data that IPs will be required to include in the RP14/A forms.

5. The main change is that the channel for submission will switch from the portal that IPs and their Agents currently use to the online Director Conduct Return Service (DCRS), which will be renamed the Insolvency Practitioner Service (IPS) to reflect the broadening of its function to capture redundancy payments information in addition to the director conduct reports that it already processes.

6. The process for submitting Director Conduct Reports within the updated Service will be unaffected.

7. The change is driven by the fact that DCRS offers a more modern, secure and adaptable platform for the RP14/A upload than the existing portal, which was developed at the same time as the case management solution for RPS which is being replaced by CMS. The implementation of CMS now provides both the rationale and the opportunity to move to that more modern service.

8. Users will continue to be supported in resolving any problems they encounter with the uploading of RP14/A forms via the contact email address for reporting issues at IPHelpdesk@insolvency.gov.uk

How will DCRS be adapted to take in RP14/A information?

9. As just indicated, DCRS will be renamed the Insolvency Practitioner Service to acknowledge the fact that going forward it will not just be dealing with director conduct reports.

10. More substantively, a new role of "Agent" will be will be added to the existing group of DCRS users which currently comprises IPs, Service Managers and staff. There is widespread use by IPs of third party service providers – Agents - to process, prepare and submit RP14/A forms, and therefore the updated digital service will recognise and enable this user type.

11. Current Agent firms and their nominated Service Managers will be directly authorised and set up on IPS by the Insolvency Service's Redundancy Payments Service. This will expedite and facilitate the assimilation of the existing, relatively small community of ERA agents into the new IPS, as they already have established links and contact points with RPS. Going forward, any new Agent firms entering the market will need to arrange for an IP to make the initial approach to RPS for them to be authorised and set up on the Insolvency Practitioner Service.

12. Those IPs and IP firms who do not engage Agents to submit RP14/A forms will be able simply to submit this information based on their existing IP / Service Manager / Staff settings within DCRS. When adding new staff to carry out RP14/A uploading work, IPs will simply follow the process they are already familiar with, which includes the automatic generation of temporary passwords for first log on and registration within the system.

13. The only change otherwise from the IP point of view will be that when they and their staff log on to the Service, they will be presented with both options i.e. of submitting a director conduct report and / or of submitting an RP14/A form. The screen shot below of a prototype dashboard for IPS users illustrates this:
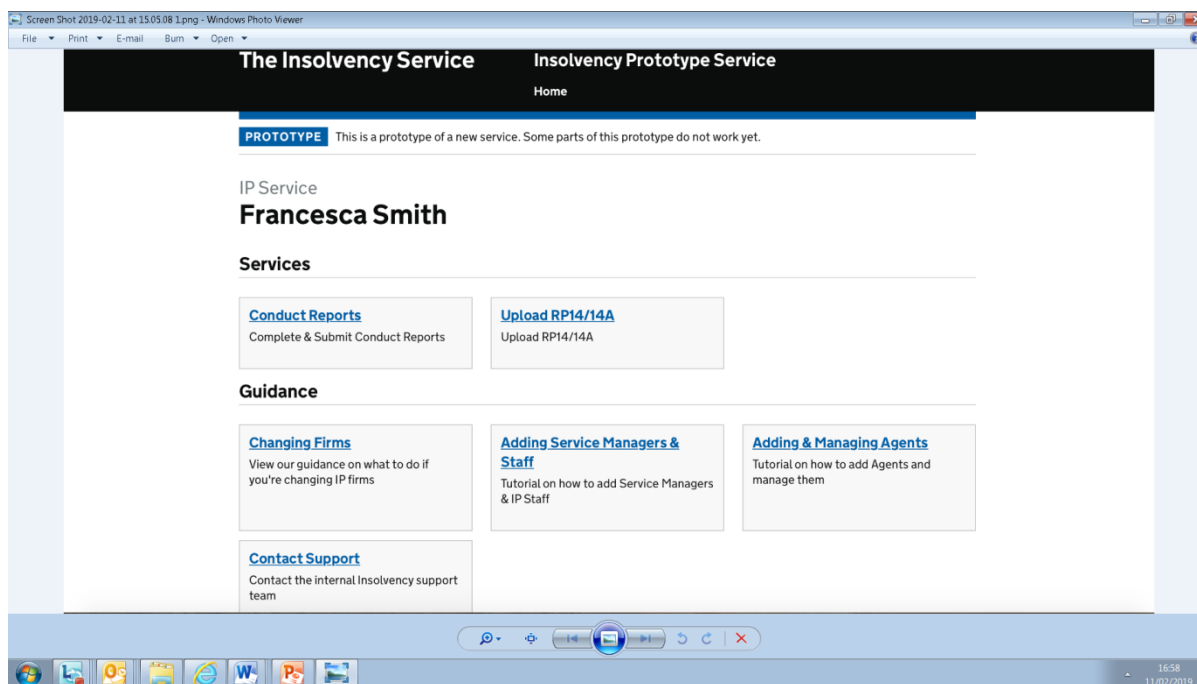
14. Neither the RP14/A upload process nor director conduct return report process will look or feel any different for the users once they have selected the option they need on the dashboard.

15. When a third party Agent logs on to DCRS, they will be presented with the RP14/A upload option only. The system will ensure that their user journey is kept completely separate and distinct form the IP user journey, and Agents will have no visibility whatsoever on any director conduct material.

16. Updated instructions and FAQs on the use of IPS, and / or links to this guidance, will be published on the relevant GOV.UK pages of the internet

<u>What minimum data requirements have been set for the RP14/A forms and why are they necessary?</u>

RPI4

17. The RP14 form must include the **employer name** and **payroll contact details.**

18. Users should note that the payroll contact details will be used for issuing redacted RP1s.

RP14A

19. The RP14A form must show the relevant case number (CN) and, for **every claimant**, **a validly formatted National Insurance number** (NINO). Failure to enter this information will result in a failure message that will identify for the user which entry or entry requires correction, so that they can then take the necessary action and re-upload the form. HMRC guidance on NINO formatting will be incorporated into the updated instructions and a link to these is included here:

    https://www.gov.uk/hmrc-internal-manuals/national-insurance-manual/nim39110

20. Under the current upload service it is possible for RP14A forms to be uploaded even if the field for NINOs is left blank. This only results in delays to claims processing, as the form then needs to kept in a holding area within RPS pending further inquiries of, and correspondence with, the IP. By including NINOs as part of the set of validating data necessary for successful RP14/A uploading, we will provide a better service to our customers and minimise inconvenience to our IP partners.

21. The RPS also has a duty to report the payments it makes in the form of Real Time Information (RTI) to HMRC. Therefore the inclusion of validly and correctly formatted NINOs in the RP14/A forms will also facilitate accurate reporting for this purpose.

Redundancy Payments calculations

Automated calculations – the calculation engine

22. CMS will integrate with an internally developed "calculation engine". The speed, accuracy and consistency of the calculations performed by the Redundancy Payments Service will be improved as a result of this technical development, resulting in a better and more efficient service to one of the Insolvency Service's most vulnerable stakeholder groups.

23. Another direct result of the implementation of CMS and the calculation engine will be that it will be far easier and quicker to apply changes to the basis of the calculations in response to legislative changes and / or developments in Employment Tribunal case law.

24. CMS will hold the information relevant to the claims (i.e. RP1s, RP2s, RP14 / 14As, etc) and that information will be used by the engine to perform the calculations. The code has been made available in Open Source at https://github.com/InsolvencyService/RPSCalculationEngine to enable practitioners, agents and their software providers to clone and utilise their own version of the solution if they wish

25. The remainder of this article focuses on the technical detail of the basis of the various redundancy payment calculations, and on the extent to which the advanced functionality of CMS and its integration with the calculation engine has affected this. In particular, the functionality will enable RPS to apply real time changes to the calculations to reflect the latest tax rules emanating from HMRC and developments in employment case law.

26. Certain of the calculations and payments will remain unaffected by the implementation of CMS, including Redundancy Pay itself and payments relating to Pensions. The affected calculations, which will be discussed in the subsequent paragraphs of this article, are:

   • Arrears of Pay (AP)
   • Protective Awards (PA)
   • Holiday Pay Accrued (HPA)
   • Holiday Pay Taken (HPT)
   • Compensatory Notice Pay (CNP)
   • Notice Worked not Paid (NWNP)
   • Basic Award (BA)
   • Apportionment of Preferential Debt

Arrears of Pay Calculation (AP)

27. AP payments remain subject to statutory limits – Parts XII of the ERA 1996 – Sections 184(1)(a) / 185(b) / 186.

28. 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. The calculation works in

conjunction with the Protective Award calculation (if applicable), paying the best weeks (up to a maximum of eight).

29. Where the financial value between the weeks are the same, RPS will automatically select those weeks that are within the preferential limit of 4 months prior to the date of insolvency, enabling INSS to claim the most it can preferentially and thus protecting the National Insurance Fund (NIF) by looking to maximise the return to public funds.

30. We envisage that the advanced functionality that will make it possible to automate these calculations will lead to a reduction in the amount of contact, correspondence and therefore rework that historically has resulted when claimants have approached the RPS and IPs in these cases.

31. Because RPS will be paying the best weeks (up to 8) including Protective Awards (PA) - which usually come at a later date - the debt categorisation of payments could change over time. This in turn means the RPS's potential claim in the insolvency could change over time.

32. As now, if we have made a payment for AP at an early stage and then make a payment in respect of a PA later date, we shall take account of the earlier sums paid when making the latter payment.

33. The best weeks paid by the RPS could be a mixture of AP and PA.

Protective Award Calculation (PA)

34. As indicated at paragraph 17 above, the PA calculation will sometimes interplay with the AP calculation, and the same statutory limits apply. Changes to the PA calculation mean there will now be an automatic selection of the most financially advantageous weeks to the claimant, rather than the first chronological weeks of the protective award.

35. 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. This administrative burden is now mitigated by the functionality in CMS and the calculation engine to identify the best weeks (up to a maximum of eight in conjunction with Arrears of Pay claims).

36. Again as discussed in relation to the AP calculation, the payments RPS make may change over time and that, in turn, means the potential claim in

the insolvency will change. As now, if RPS had made a payment for AP at an early stage and then make a payment in respect of a PA later date, it takes account of the earlier sums paid when making the latter payment.

37. Any mitigation by way of jobseeker allowance / income support that needs to be deducted from a PA will now be applied to the whole of the protective award period, not just the first eight weeks.

38. The calculation will also deduct tax, dependent on whether the claimant's date of dismissal and the date of the Employment Tribunal Judgment awarding the PA are in the same tax year. This approach will implement the HMRC tax guidance concerning PAs: https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim02550

39. PA payments will continue to be subject to deductions of National Insurance Contributions (NICS).

40. Where the financial value between the best weeks are the same, we shall automatically select those weeks that are within the preferential limit of 4 months prior to the date of insolvency. This in turn will allow the INSS to claim the most it can preferentially. This protects the NIF by looking to maximise the return to public funds.

Holiday Pay Taken Not Paid (HPTNP) calculation

41. Holiday Pay Taken Not Paid (HPTNP) is still subject to the statutory limits found at part XII of the ERA – Sections 184(1)(c) + 184(3), 185(a) and 186 and will now be calculated and paid net of tax and NI.

42. The HPTNP calculation works in conjunction with the Holiday Pay Accrued (HPA) calculation to automatically make sure that no more than the statutory max of 6 weeks holiday pay is paid.

43. HPTNP will now automatically be included in the Apportionment calculation, removing the need for the manual creation of proofs of debt and thus making the process of generating PODs quicker and more accurate.

44. Any HPTNP in respect of a period up to four months prior to the date of insolvency will be preferential and subject to apportionment (similar to AP, PA and NWNP). This is because it is classed as remuneration for the purposes of Schedule 6 (Category 5) of the Insolvency Act 1986: https://www.legislation.gov.uk/ukpga/1986/45/schedule/6

Holiday Pay Accrued (HPA) calculation

45. HPA is still subject to the statutory limits found at part XII of the ERA – Sections 184(1)(c) + 184(3), 185(a) and 186. The calculation works in conjunction with the Holiday Pay Taken (HPTNP) calculation to automatically make sure that no more than the statutory max of 6 weeks holiday pay is paid.

46. According to the Working Time Regulations 1998 (WTR), all employees are statutorily entitled to 5.6 weeks holiday per year, up to a max of 28 days. Employees of course could have a contractual entitlement in excess of this. How many days 5.6 weeks equals is dependent on the number of days per week an employee works. E.g. 1 day per week = 5.6 days. 5 days per week = 28 days

47. Under the WTR, employees are expected to take 4 weeks holiday (up to a max of 20) for Health and Safety Purposes. How many days 4 weeks equal is also dependent on the number of days per week an employee works. E.g. 2 days per week = 8 days. 5 days per week = 20 days

48. The amount of 'Carry Over' holiday allowed when calculating the claimants entitlement to payments from the NIF will be limited to 1.6 x number of days per week the claimant works (up to a maximum of 8 days carry over), as follows:

1 day worked = 1.6 days maximum carry over

2 days = 3.2 days maximum carry over

3 days = 4.8 days maximum carry over

4 days = 6.4 days maximum carry over

5, 6 and 7 days worked = 8 days maximum carry over

49. Employees can carry over more holiday in excess of the 4 weeks they are legally obliged to take and in excess of their statutory holiday entitlement if they have a contract of employment that allows them to do so e.g. a 5 day week employee with an annual contractual entitlement of 35 days would take 4 weeks holiday (20 days) and carry over the remaining 15.

50. The RPS however will only recognise the carry over difference between 4 weeks and 5.6 weeks (i.e. 1.6) up to a maximum of 8 days. Any Holiday

Pay Accrued owed in excess of the statutory limits will be a residual claim in the insolvency.

Compensatory Notice Pay

51. Due to a change in tax law from 6th April 2018, there is a need to change the way Compensatory Notice Pay (CNP) is calculated. Details of the change can be found in HMRC's guidance that was updated on 16th April 2018:

https://www.gov.uk/hmrc-internal-manuals/employment-income-manual

52. CNP claims with a dismissal date pre 06/04/2018 will continue to be calculated as they were previously (subject to deductions of notional tax and mitigation of new earnings and benefits).

53. CNP claims with a dismissal date of 06/04/2018 onwards will now be subject to deductions of tax **and NICS**, as well as mitigation new earnings and benefits.

54. An additional change to the post 06/04/2018 CNP calculation is the point at which the statutory limit of a weeks pay for S186 ERA is applied. In a pre 06/04/2018 CNP claim, the statutory weeks pay limit is applied <u>after</u> deducting notional tax, whereas in a post 06/04/2018 CNP claim, the statutory weeks pay limit is applied <u>before</u> deducting tax and NICs

55. An exemplar illustration of the difference between a pre and post 06/04/2018 CNP appears at the end of this article.

Notice Worked Not Paid (NWNP) calculation

56. This is a new calculation in its own right and the calculation is not currently in the RPS case handling system (CHAMP).

57. This calculation is in respect of someone who has been given notice of dismissal by their employer, works their notice period (in whole or part), but subsequently is not paid for the period of notice worked. Similar to AP and HPT, NWNP can be calculated and paid net of Tax and NI

58. NWNP is currently assessed as Arrears of Pay, but arises from a different statutory entitlement (S184 (1)(b) ERA) and has different statutory limits (Section 86 ERA).

https://www.legislation.gov.uk/ukpga/1996/18/section/184

https://www.legislation.gov.uk/ukpga/1996/18/section/86

59. Because NWNP arises from a different statutory entitlement it should be separated from AP and made a claim component in its own right. This means our NWNP calculations are in greater compliancy with the ERA.

60. NWNP will be collected from the RP1 and the RP14a. Any AP claimed for a period after the date notice was given will be processed as NWNP, not AP. Future changes to forms may look to include additional questions e.g. Period From / To and Amount.

   As a consequence of it being a separate calculation to AP, a period of NWNP and AP can overlap and be claimed simultaneously. For example – someone was given their notice, has worked it but not been paid for it – this is a NWNP claim. The notice weeks will be calculated according to the claimants weekly rate of pay.

61. If during the worked notice period the claimant worked overtime or earned commission / bonus in excess of their weekly pay, this can be paid as AP.

62. Any period of NWNP would reduce the period of CNP. The dates on the RP2 will be automatically amended to reduce the CNP projected notice period.

63. Any NWNP in respect of a period up to four months prior to the date of insolvency will be preferential and subject to apportionment (similar to AP, PA and HPT). This is because it is classed as remuneration for the purposes of Schedule 6 (Category 5) of the Insolvency Act 1986: https://www.legislation.gov.uk/ukpga/1986/45/schedule/6

64. As CHAMP does not calculate NWNP on its own, but as part of AP, anything we have paid here is likely to have already been claimed preferentially, so there is no impact on dividends already paid.

Basic Award (BA) calculation

65. Due to a change in tax law from 6 April 2018, there is a need to change the way Basic Awards (BA) are calculated. Details of the change can be found in HMRC's guidance which was updated on 16 April 2018: https://www.gov.uk/hmrc-internal-manuals/employment-income-manual

66. BA claims pre 06/04/2018 are not subject to tax and NIC deductions, but BA claims post 06/04/2018 will be subject to both.

67. Because the payment of BAs are in respect of a singular period in time and because of the relatively high value that can be involved, consideration has to be given to both the Lower Earning Limit (LEL) and Upper Earning Limit (UEL) when calculating NICs deductions: https://www.gov.uk/national-insurance

68. BAs are usually calculated the same as RP, but the Employment Tribunal can depart if the circumstances are right:

   https://www.citizensadvice.org.uk/work/problems-at-work/employment-tribunals-from-29-july-2013/employment-tribunals-valuing-a-claim/employment-tribunals-basic-award/employment-tribunals-how-to-work-out-your-basic-award-if-you-are-claiming-unfair-dismissal/

Apportionment of Preferential Debt

69. The way that Apportionment is calculated is not changing. The changes relate only to the types of claims that are subject to Apportionment. The new calculation will automatically apportion Arrears of Pay (AP), Notice Worked Not Paid (NWNP), Holiday Pay Taken (HPT) and Protective Awards (PAs). This is in accordance with Schedule 6 (Category 5) of the Insolvency Act 1986:

   https://www.legislation.gov.uk/ukpga/1986/45/schedule/6

70. Only those sums paid by the RPS in respect of the period four months prior to the date of insolvency will continue to be subject to the apportionment calculation. Most PAs are for a period after insolvency, so ordinarily, will not be subject to apportionment.

71. Removing the need for manual intervention to calculate our proof of debt (POD) leads to an improved preferential / non preferential claim calculation and the quicker issuing of PODs, leading in turn to a better customer service to IP's and their agents. This protects the NIF by recovering the correct amount of preferential debt and by looking to maximise the return to public funds. (Currently PODs require intervention to manually calculate and apportion HPT and NWNP.)

72. The Apportionment calculation will also automatically consider and disapply itself from apportioning AP and HPT claims where a Regulation 8(6) Transfer of Undertakings Protection of Employment 2006 applies (Rescue Insolvency TUPE). In these circumstances, only those amounts that can be claimed from the NIF remain as a debt in the insolvency with any extra amounts above the SoS's statutory liability becoming the responsibility of the transferee. It follows from this that in such circumstances there would be no residual balance due to the employee from the transferor. There is nothing to be apportioned against. As such the RPS would expect 100% of any preferential dividends that are payable.

ANNEX A – EXAMPLE CNP CALCULATIONS

Pre 06/04/2018 CNP Calculation:

Number of week's entitlement x weekly rate of pay

Minus Mitigation new earning and / or benefits

Minus Notional Tax (20%)

= X

Compare to statutory limit (number of weeks entitlement x statutory weekly limit) = Y

Pay lower of X or Y = NET Payment

Example:

10 weeks x £600 weekly pay = £6000

Minus Mitigation of new earning and/or benefits £1000

Minus Notional Tax 20%

= £4000 (X)

Compare to statutory limit (10 weeks x £508 = £5080) = Y

Pay lower of X or Y = £4000 NET Payment

Post April 18 Calculation:

Number of week's entitlement x weekly rate of pay

Minus Mitigation of new earnings and/or benefits

= X

Compare to statutory limit (no of weeks entitlement x stat weekly limit) = Y

Select lowest of X or Y

Minus Tax (20%) and NI (12%) = NET payment

Example:

10 weeks x £600 weekly pay = £6000

Minus Mitigation £1000

= £5000 (X)

Compare to Statutory limit (10 weeks x £508 = £5080) = Y

Select lowest of X or Y (=£5000)

Minus Tax 20% and NI 12%

= £3400 NET Payment

General enquiries regarding this article may be sent to:
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