



Briefing Paper

**Recommendations for the operation of the Insolvency Payment
Fund in circumstances where the ‘insolvent’ employer fails to
wind up the company.**

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Why is this an issue?

The current downturn in the economy has highlighted weaknesses in the insolvency legislation. One of the major failings is the manner in which the Protection of Employees (Employers' Insolvency) Acts 1984 to 2006 recognises 'insolvency'. Under this legislation some forms of business failures resulting in insolvency are recognised but some are not. In the year to October there were 1,282 insolvencies recorded (representing an increase of 6% on the same period in 2011). There is, however, no recording or recognition of 'informal' insolvencies and in some sectors these are becoming the norm rather than the exception.

Informal insolvencies occur where employers stop trading but do not go into actual liquidation or receivership or wind up the company. The employees who find themselves in the unfortunate situation that their job is gone and their employer has simply walked away without paying them their wages or other debts arising from the employment relationship are being unfairly denied access to the Department of Social Protection's Insolvency Payment Scheme. Other problems in accessing the scheme are occurring in circumstances where insolvent employers have incorrectly designated employees as self-employed workers and have not made social insurance payments on their behalf.

In this briefing paper we explain the legislative root of the problem and its impact and we offer solutions. We also highlight the very real problem of 'tactical insolvency' whereby unscrupulous employers deliberately use insolvencies in order to gain financial advantage at the expense of their employees (and suppliers) often using their workers unpaid wages a 'seed capital' for their new enterprise.

Recommendations

Congress is calling on the Minister to allow the Insolvency Payment Scheme to operate in a manner similar to the Redundancy Payment Scheme i.e.

- a. that on production of a letter from the employers accountant (or similar proof) the Insolvency Payment Scheme can make a payment to the employee; and**
- b. that the Minister can then recover the debt from the employer;**
- c. in circumstances where an Employment Rights Body has determined that the worker has the status of an employee they can receive payment from the Insolvency Payment Scheme with any outstanding monies in respect of contributions being pursued by the Department from the employer in line with existing principles and practice;**
- d. that the problem of tactical insolvency be addressed.**

Negative impact of informal insolvency on employees

Employees who find themselves in the unfortunate situation where their employer has become insolvent and they are owed money arising out of the employer/employee relationship are protected under the Protection of Employees (Employers Insolvency) Act 1984 to 2006¹. The Act implements the EU Directive (Directive 80/987 [1980] OJ L283/23) relating to the protection of employees in the event of insolvency of their employer. The Directive provides that member states must ensure that a fund is available from which employees can claim payment of debts arising from the employment relationship which have not been paid as a result of the employer's insolvency. It also obliges member states to protect the interests of workers in relation to pension schemes in the event of an employer's insolvency.

Unfortunately, the level of protection provided to employees in informal insolvency situations is not the same as formal insolvency situations. There are two interlinked reasons for this 1) there are strict time limits which the Act imposes on an employee seeking to recover debts from the insolvent employer and 2) the Act's definition of employers' 'insolvency' is very narrowly drawn.

The legislation provides that an employer is only 'insolvent' where he or she falls within one of the following five categories:

1. The business is in liquidation
2. The business is in receivership
3. The employer is legally bankrupt
4. The employer has died and the estate is being administered under the relevant legislation
5. The employer is insolvent under the legislation of another EU Member State

This means that 'informal insolvency' i.e where an employer simply ceases trading but does not wind up the business is not recognised as an 'insolvency' and as a consequence the employees fall outside the scope of a much needed safety net.

Access to the Insolvency Payment scheme denied

The major set back of falling outside the narrow definition of insolvency is that employees are denied access to the Insolvency Payment Scheme operated by the Department of Social Protection.

It worth recalling at this stage that the purpose of the Insolvency Payments Scheme is to protect pay-related entitlements owed to employees who lose their employment because of the insolvency of an employer in accordance with requirements of the EU Directive. Under

¹ The original 1984 Act under which the Scheme operates has been amended on a number of occasions by various other pieces of legislation and, with these amendments, is known collectively as the Protection of Employees (Employers' Insolvency) Acts 1984 to 2006.

the Scheme, employees may claim, normally through the employer representative (Liquidator/Receiver), arrears of pay, holiday pay, pay in lieu of statutory notice and various other entitlements that may be owed to them by their 'insolvent' employer (see annex 1 for complete list). Entitlements are limited to €600 per week. There is also a limit of eight weeks for arrears of pay, sick pay, holiday pay and pay in lieu of statutory notice and in most cases, the Scheme covers entitlements relating to the period of eighteen months prior to the date of the insolvency of the employer or the termination of employment.

But for employee to get the benefit of the Scheme, an employer must be legally insolvent i.e they must fall into one of the 5 categories described above. If a business shuts down without becoming legally insolvent the employees are denied access to the scheme. This is giving rise to immense hardship for workers who expect and deserve to have an entitlement under the scheme but because of employer or insolvency practitioner inaction cannot access it.

This situation contrasts with the Redundancy Payment Scheme, which does not bar access to the same employees. The Redundancy Payments Scheme is quite separate from the Insolvency Payments Scheme and payment under one does not affect an employee's statutory entitlement under another.

The Redundancy Payment Scheme operates on the basis that the employee can apply to the Department and payment can be made on the production of a letter from the employer's accountant to the effect that the employer cannot afford to pay the employees redundancy. The debt transfers to the Department who can recover it from the employer.

CASE STUDY

John worked for a pub in Dublin. He was notified that they were "closing down". No associated documentation was issued to him and he was informed there was no money to pay redundancy.

He is owed statutory redundancy, holiday pay and his last month's wages. The construction of the Redundancy Payments Act allows him to get his statutory redundancy. (He got this)

However he will not be able to get holiday pay or his last month's wages as the company is does not have a status described in the Insolvency Legislation. A check of the CRO website shows that the last filed accounts were in 2008 and there has been no update to its status. It is not in receivership etc. Even if John is brought to a Third Party to claim these entitlements it will be difficult to get them. The employer has simply walked away.

The amounts of money owed are about 2000 euro in this instance.

Statutory Time limits rule out the possibility to benefit from any later formalisation of the insolvency

As set out earlier the limited definition is compounded by time limits. Establishing that a claim arises within the ‘relevant period’ can be difficult in circumstances where there is a long delay between the employer company ceasing to trade and the date of any future formal insolvency. The longer the period that elapses after the company ceases trading and before, for example, the Companies Office strikes the company off, the less chance an employee has of making a claim under the legislation.

Appeals to the Employment Appeals Tribunal

It’s worth point out that appeals are unlikely to provide a way to deal with this problem. Any person who has applied for a payment under the Scheme in respect of arrears of pay, sick pay, holiday pay or outstanding occupational pension scheme or PRSA contributions may appeal to the Employment Appeals Tribunal on the grounds that the payment made was less than the amount that should have been paid, or the application has been refused contrary to the rules of the scheme. Appeals should be made to the Tribunal within six weeks of the notification of the decision to the applicant. The Tribunal, at its discretion, may extend the period for making an appeal in certain circumstances. The Department itself may refer a claim to the Employment Appeals Tribunal for a decision where there is a doubt as to whether a claim or part of a claim is allowable. A decision of the Tribunal on any matter referred to it under the Act is final and conclusive, but a person dissatisfied with the decision may refer a decision to the High Court on a question of law only.

Given the problems are caused by problematic definitions of ‘insolvency’ explained earlier appeals are unlikely to provide a satisfactory remedy.

What change are we calling for?

We are calling for the Insolvency Payment Scheme to operate in a manner similar to the Redundancy Payment Scheme i.e.

2. that on production of a letter from the employers accountant (or similar proof) the Insolvency Fund can make a payment to the employee;
3. that the Minister can then recover the debt from the employer.

Legislative change or change by Regulation?

The Minister has the power to extend the definition of insolvency to cover these types of informal insolvency situations by means of regulation. Section 4(2) of the 1984 Act allows the Minister to make regulations specifying the circumstances in which a class or description of employers are for the purposes of this Act taken to be or have become insolvent. However, after consultation with the Attorney General's Office in the late 1980s, the Minister came to

the conclusion that primary legislation would have to be introduced and the issue could not effectively be resolved by means of regulation without wider implications to the definition of “insolvency” (399 *Dáil Debates* Cols 106–107 (May 23, 1990)). This is arguable that the power to amend the definition by Regulation was specifically created to deal with the current situation that of changing business practice. Change by means of Regulation could also be speedier.

Workers urgently need access to this safety net and we are therefore calling on the Minister to use the Finance / Social Welfare Bill 2012 or by means of Regulation to make the necessary changes to ensure their access to payment of an entitlement they would have except for the inaction of their employer.

False self-employment and insolvency

Another problem facing employees arises in circumstances where employers have not made social insurance contributions on their behalf. Some problems have arisen in gaining access to the Insolvency Payment Scheme even in circumstances where the employee has successfully proved that they have been incorrectly designated by their employer as a self-employed worker. In circumstances where the employment status of the worker has been considered by a Rights Commissioner and found to be that of an employee there should be no impediment to their seeking and receiving their entitlements as an employee from the Insolvency Payment Scheme. Any outstanding payments are the employers responsibility and the Minister should pursue the employer in line with existing practice. There is no justification for what amounts to a punishment of employees for their employers actions.

What changes are we seeking?

That where an Employment Rights Body (or other competent authority) has determined that the worker has the status of an employee they can apply to and receive payment from the Insolvency Payment Scheme. Any outstanding monies in respect of contributions should be pursued by the Department from the employer.

Tactical insolvency and the improper use of company law

The problem of tactical insolvency needs to be addressed. Tactical insolvency involves the deliberate creation of insolvencies in order to gain financial advantage by unscrupulous employers at the expense of their employees and suppliers. Unions report situations where employers walk away leaving their workers high and dry despite the existence of profitable ‘associated companies’ while others open up shop again with a new but not very different trading name, sometimes using the employee’s unpaid wages as seed capital.

It should be possible to tackle this abuse and introduce powers for the Office of Director of Corporate Enforcement (ODCE) to pursue the associated or start-up company for these debts where there is a strategic ‘insolvency’ involving abuse of company law in order to profit from debts owing to workers (and others). There are circumstances justifying a piercing of the

corporate veil to establish who the directors of these companies are in order to link the debt. There is also a serious question about the role and advice being given by insolvency practitioners, concerns in particular are raised about their independence and whether they give sufficient regard to protecting and maintain employment or the rights of employees.

Insolvency and Pension Rights

It is not the intention of this paper to deal with the linked issue of pension entitlements in the situation of insolvency. Congress view is that Member States are required to ensure that employees accrued rights under company or inter-company pension schemes are fully funded by Member States in the event that the employer becomes insolvent and the assets of their schemes are insufficient to fund those benefits. We look forward to the outcome of the consideration by the European Court of Justice in the case taken by our affiliate UNITE, the union representing the Waterford Wedgwood workers, over Ireland's failure to comply with the Directive.

Potential problems in the proposed Personal Insolvency legislation

The Personal Insolvency Bill sets out a scheme for dealing with personal insolvency. Congress has highlighted that there may be unintended consequences where the person seeking one of the insolvency solutions is also an employer. Our concern is two fold, firstly that this form of insolvency would be recognised as an 'insolvency' for purposes of granting employees access to the Insolvency Payment Fund and secondly that the legislation would properly secure, in priority, the entitlements of employees where their employer is invoking personal insolvency under the Personal Insolvency legislation (see separate submission on the treatment of wages and other debts arising in the employment relationship in the context of the Personal Insolvency Bill 2012 www.ictu.ie).

Conclusion

Working people are paying a heavy toll throughout the economic crisis, through the high level of redundancies and rising unemployment. The need for a safety net guaranteeing payment of employees' remuneration when their employer is in a state of insolvency is recognised and protected by the EU. It is unacceptable that employees, through no fault of their own, are denied access this essential financial safety net by the inaction of their employer.

This budget (2013) provides an opportunity to amend the legislation to ensure that workers are entitled to benefit from the protection afforded under the Insolvency Payment Fund.

Ends
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Useful Restatement of the Legislation as Amended

http://www.lawreform.ie/fileupload/Restatement/Second%20Programme%20of%20Restatement/EN_ACT_1984_0021.PDF

Relevant Regulation - S.I. No 682 of 2005 Protection of Employees (Employers' Insolvency) (Forms and Procedure) Regulations 2005 (PDF, 863KB)

<http://www.djei.ie/publications/sis/2005/si682.pdf>

Relevant Regulation - S.I. No 630 of 2005 European Communities (Protection of Employees (Employers' Insolvency)) Regulations 2005 (PDF, 166KB)

<http://www.djei.ie/publications/sis/2005/si630.pdf>

Personal Insolvency Bill

2012<http://www.oireachtas.ie/documents/bills28/bills/2012/5812/b58112d.pdf>

ANNEX 1

Payments made from the Social Insurance Fund

Subject to some limits and conditions, the following entitlements are covered by the Scheme:-

- 1. Arrears of wages.*
- 2. Deductions such as union dues, health insurance, e.g., V.H.I, Aviva, life assurance, etc., made from wages by agreement but not paid to the relevant body.*
- 3. Arrears of sick pay due under an occupational sick pay scheme (limited to the difference between any disability or injury benefit in addition to any pay-related benefit payable under the Social Welfare Acts and normal weekly remuneration).*
- 4. Holiday pay.*
- 5. Pay in lieu of the statutory notice entitlement set out in the Minimum Notice and Terms of Employment Act 1973, or payment of an award by the Employment Appeals Tribunal under that Act.*
- 6. An amount which an employer is required to pay under an Employment Regulation Order within Part IV of the Industrial Relations Act 1946 where proceedings have been instituted.*
- 7. An amount which an employer is required to pay by order of the Labour Court under a Registered Employment Agreement within Part III of the Industrial Relations Act 1946, or in respect of which proceedings have been instituted.*
- 8. Certain arrears of pension or PRSA contributions not paid into the pension scheme or PRSA. An amount which an employer is required to pay under a determination, decision, order, award, recommendation or mediated settlement (as appropriate) under the following legislation:*

- Unfair Dismissals Act 1977 or damages at common law for wrongful dismissal*
- Employment Equality Acts 1998*
- Maternity Protection Act 1994*
- Adoptive Leave Act 1995*
- Parental Leave Act 1998*
- National Minimum Wage Act 2000*
- Carer's Leave Act 2001*
- Payment of Wages Act 1991*
- Terms of Employment (Information) Act 1994*
- Protection of Young Persons (Employment) Act 1996*
- Organisation of Working Time Act 1997*
- Protections for Persons Reporting Child Abuse Act 1998*
- European Communities (Protection of Employment) Regulations 2000*
- Protection of Employees (Part -Time Work) Act 2001*
- Competition Act 2002*
- Protection of Employees (Fixed -Term Work) Act 2003*
- European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003*
- Industrial Relations (Miscellaneous Provisions) Act 2004 – award by a*

Rights Commissioner concerning victimisation

- *Employment Permits Act 2006 – award by a Rights Commissioner concerning penalisation of an employee.*

Entitlements under the above legislation are covered only where the determination, decision, order, etc., was made no earlier than 18 months prior to the date of insolvency of the employer or after that date, and has not been appealed, or by which the appeal deadline has passed. The Scheme is extended from time to time to include new entitlements

For full details see **Department of Social Protection Guide to Insolvency**

<http://www.welfare.ie/EN/Schemes/RedundancyandInsolvency/insolvency/Pages/EmployeeGuide.aspx>