STRONGER TOGETHER
CONGRESS
Irish Congress of Trade Unions

3 February 2015

Mr Tom O'Neill
Meetings Administrator
Dublin South County Council
Tallaght
Dublin 24

RE: Motion Passed at Meeting (M3/124) on Informal Insolvencies

Dear Mr O'Neill

Thank you for your letter and information on the motion adopted by Dublin South County Council on the need to improve the legislation to ensure the rights of employees in situations of 'informal' and tactical insolvencies.

The downturn in the economy has highlighted a number of weaknesses in the legislative protection of employees in certain insolvency situations arising in part from the restrictive way in which the Insolvency Protection Scheme provided by the Department of Social Protection recognises 'insolvency'. Under this legislation some forms of business failures that result in insolvency are recognised but some such as those where the employer has stopped trading but has not gone into formal liquidation or receivership or wind up the company.

Employees are left in the unfortunate situation where their job is gone and their employer has simply walked away and they are barred from accessing the Department of Social Welfare's Insolvency Payment Scheme. This situation contrasts with the Redundancy Payment Scheme, which does not bar access to the employees in these circumstances.

In the attached 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

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Congress would like to highlight that the forthcoming transposition of the EU Public Procurement Directives significantly change the rules on public procurement and will allow public authorities to use their market power as a contracting entity to promote social and labour standards in order to promote fair competition and avoid downward pressure on wages and working conditions in the tendering process. The three new procurement Directives[1] (Public Procurement, Utilities and Concessions) must be transposed into national law by 17 April 2016.

1. **Public Procurement**: Directive 2014/24/EU on public procurement, which repeals Directive 2004/18/EC

2. **Utilities**: Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, which repeals Directive 2004/17/EC ; and

3. **Concessions**: Directive 2014/23/EU on the award of Concession Contracts, which does not directly replace any previous Directive.

The Directives provides that Public Authorities will be able to apply mandatory labour rights (social) clauses throughout the public procurement stages including as a minimum:

a. Compliance with health and safety, equality and employment law;

b. Respect for the industrial relations machinery of the State;

c. The practice of collective bargaining in the company;

d. The extent to which the pay, terms and conditions provided are in line with collective agreements in the relevant sector;

e. Prompt payment of awards (made to employees) where there have been minor infringements of employment rights.

Companies must be required to demonstrate their track record and monitored for continued compliance. Compliance with the relevant obligations above must be mirrored as a condition of the contract. Enforcement mechanisms must be included. Congress is strongly arguing for the exclusion of companies that consistently breach legal obligations including employment rights obligations from tendering for public procurement contracts, in that regard provision for data sharing between public authorities responsible for public procurement contracts and Revenue, Social Protection, the

[1] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0243.01.ENG
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0001.01.ENG .

Health and Safety Authority and the Labour Inspectorate (NERA) should be included as part of the transposition process.

Congress is also calling for public authorities to be required to have regard for, and give appropriate weighting to, the following non exhaustive list of social criteria when establishing the best price quality ratio (exMEAT):

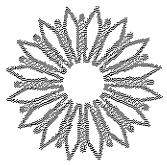
- Payment of the 'living wage';
- The impact on local employment;
- Promotion of equality of women and men at work;
- Increased participation of women in the labour market;
- Reconciliation of work and private life;
- Recruitment of disadvantaged persons;
- Employment of long-term job-seekers;
- Implementation of apprenticeships and training measures for unemployed or young persons;
- Accessibility for disabled persons;
- The quality of staff, including their organisation, qualification and experience, where the quality of staff can have a significant impact on the level of performance of the contract (Art 67.2(b) and Rec 94);

Congress is available to provide the members of the Authority with further information on our recommendations on these issues.

Yours sincerely

David Begg
General Secretary

db/nf



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Deemed Insolvency

&

Addressing Abuse of Limited Liability

Briefing Paper

February 2014

Introduction

The downturn in the economy has highlighted a number of inter-related weaknesses in the protection of employees in various insolvency situations. One of the major failings is the restrictive way 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. Importantly, there is no 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.

Employees find themselves in the unfortunate situation where their job is gone and their employer has simply walked away. The employee can be left with a month or two of unpaid wages. In other circumstances the employer dismisses the employees, ceases trading on paper and deliberately refuses to wind up the company as the empty shell operates as a shield allowing them to avoid paying the employees their unpaid wages and any other awards made by employment rights bodies. In both these circumstances the employees find they are barred from accessing the Department of Social Welfare's Insolvency Payment Scheme as despite the fact that the company has ceased to trade it has not been properly wound up. This situation contrasts with the Redundancy Payment Scheme, which does not bar access to the employees in these circumstances.

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.

Understanding the Problem: Complex Arrangements Simplified

Two Case Studies

A Retail Shop Case Study

- A small business (imagine a retail shop) where the owner and manager of the shop establishes a number of companies to create a shield between the employees, himself and the company's assets – a typical arrangement is as follows:
  - The employees are employed through company A
  - All of the assets of are held by company B
  - The operational, day to day activities are run through company C.
- The existence of these distinct companies is not obvious. The employees in particular are of the belief that they are dealing with a single employer; after all it is a very small locally based business - retail shop, the owners name is over the door.

- The problems begin when the employees' contracts of employment are unfairly terminated and a month's wages are unpaid. The employees' make a claim of unfair dismissal and this is upheld. An award is made in respect of the unfair dismissal and in respect of the unpaid wages.
- The awards are ignored by the employer.
- The employees' (union) secures a Court Order for the payment of the unpaid wages and the unfair dismissal awards.
- The Sherif seeks to seize goods/assets to enforce payment.
- At this point the employer brings to light the operation of his business. He outlines that there are no assets in company A to seize. All the assets and goods are owned by him but through company B not through company A.
- A new and unsuspecting workforce has in the meantime been recruited and are employed through a new company D.
- The situation of the company A employees is made worse by the actions of the employer. Company A has not been wound up, the employer has simply ceased operating this company. This means that the employees are barred from accessing the Department of Social Welfare Insolvency Payment Scheme as the definition of 'insolvent' for that Scheme does not recognise situations where the employer has simply ceased trading (a return of €0.00 or another minimal amount is made for company A to the Companies Office every year). The employees are thus effectively cut off from payment under the Insolvency Payment Scheme.
- Although the employer is manager and director of company A, B, C and now D, the law will continue to treat them as separate entities.
- The only option left for the employee and their union is to seek the winding up of company A – this can only be done by means of an application to the High Court and this is prohibitively expensive.

A Pub Case Study

- John worked for a pub in Dublin. He was notified by phone that the pub was "closing down". No documentation was issued to him and he was simply informed there was no money to pay redundancy.
- He was owed statutory redundancy, holiday pay and his last month's wages. His situation is recognised under the Redundancy Payments Act and this allowed him to get his statutory redundancy.
- However he will not be able to claim his holiday pay or his last month's wages from the Insolvency Payment Fund as the company has not been wound up. A check of the CRO website shows that the last filed accounts were in 2011. John is reluctant to make a claim for his employment law entitlements to the Rights Commissioner /EAT as he knows it will be very difficult to get the award in practice as the employer has simply walked away. The amounts of money owed are about 2000 euro in this instance.

Unfairly Denied Access to the Insolvency Payments Scheme

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 the Scheme, employees may claim, arrears of pay, holiday pay, pay in lieu of statutory notice along with employment rights awards owed to them by their 'insolvent' employer (see annex 1 for complete list and limitations).

The Department of Social Protection will make payments only in circumstances where the employer is legally insolvent. No payments will be made to employees from the Insolvency Payment Scheme in circumstances where the employer has not properly wound up the company. The Protection of Employees (Employers' Insolvency) Acts provides that an employer is only 'insolvent' for the purpose of access to the fund where the employer 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' situations such as 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 are barred from a much needed safety net.

Defining circumstances of '*deemed insolvency*' in line with the EU Directive.

Congress argues that failing to provide the employees such as those in our case studies with access to the scheme is contrary to the EU Directive on the Protection of Employees Rights in the Event of Insolvency of the Employer. That Directive provides that '*In order to ensure equitable protection for the employees concerned, the state of insolvency should be defined in the light of the legislative trends in the Member States and that concept should also include insolvency proceedings other than liquidation*' (**Directive 2008/94/EC** (para 4)).

Recognising circumstances of 'deemed insolvency' such as those of the employees described above is necessary if Ireland is to fulfil the objectives of the Directive. It is worth recalling that had their employer properly wound up the company then the employees would have their entitlement recognised.

What is needed is legal recognition of situations of 'deemed Insolvency'. Deemed insolvency can be defined as situations '*where the company has ceased trading and payments have de facto been stopped on a permanent basis* '.

This definition draws on the wording used in the EU Directive namely '*...other situations of insolvency, for example where payments have been de facto stopped on a permanent basis*

established by proceedings different from those mentioned in paragraph 1 as provided for under national law' (Article 2.4)

There are two further questions that need to be addressed (i) what is meant by *'permanent basis'* and (ii) what forum should be used to determine the situation of a deemed insolvency.

To answer the first question, to determine a period of time constituting a 'permanent basis' we can usefully look to how lay off situations are dealt with. In circumstances where an employee has been laid off for a continuous period of 4 weeks or more, the employee can give notice to the employer of their intention to claim redundancy under the Redundancy Payment Acts. Unless the employer gives counter-notice within 7 days the employee can proceed to apply for a redundancy payment. There is an argument for using the same or similar formula when determining situations of deemed insolvency. In any event, in circumstances where payments have stopped for a period of 6 weeks or more this should constitute a 'permanent basis'.

Turning to the second question of – of what forum should be used to make the determination that a situation of deemed insolvency exists. There is a strong argument to use the exiting decision making authority of the Department of Social Protection, as they are already responsible for deciding payments under the Insolvency Payment Scheme and the Redundancy Payment Scheme. In addition the determination of a situation of a deemed insolvency is used solely for purposes of providing employees with access to the Insolvency Payment Scheme Fund run by the Department of Social Protection . Employees and their unions should be able to make application directly.

Proposed Amendment to provide a definition of 'deemed insolvency

Protection of Employees (Employers Insolvency) Acts

Section 1 Interpretation.

1. –(3)
For the purposes of this Act, an employer shall be taken to be or, as may be appropriate, to have become insolvent if, but only if,
(*a*) he has been adjudicated bankrupt or has filed a petition for or has executed a deed of, arrangement (within the meaning of section 4 of the Deeds of Arrangement Act, 1887); or
(*b*) he has died and his estate, being insolvent, is being administered in accordance with the rules set out in Part I of the First Schedule to the Succession Act, 1965; or
(*c*) where the employer is a company, a winding up order is made or a resolution for voluntary winding up is passed with respect to it, or a receiver or manager of its undertaking is duly appointed, or possession is taken, by or on behalf of the holders of any debentures secured by any floating charge, of any property of the company comprised in or subject to the charge; or
(*d*) he is an employer of a class or description specified in regulations under *section 4 (2)* of this Act which are for the time being in force and the circumstances specified in the regulations as regards employers of such class or description obtain in relation to him; or

Insert amendment

(x) the employer is deemed to be insolvent in circumstances where he has ceased trading and payments to employees have been determined by the [relevant body] to have defacto been stopped on a permanent basis for a period of six weeks or more ; or

> (*e*) the employer is an undertaking which is insolvent under the laws, regulations and administrative procedures of another Member State in accordance with Article 2(1) of Council Directive 80/987/EEC of 20 October 1980 as amended by Article 1(2) of Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 and the employees concerned are employed or habitually employed in the State. [S.I. No. 630 of 2005]

In summary, resolving the problem for the employee can be addressed by amending the rules of the Insolvency Payment Scheme to recognise situations of 'deemed insolvency' i.e *trading has ceased and where payments have de facto been stopped on a permanent basis' defined as 'periods of six weeks or more'.*

Further amendments are desirable to ensure that the scheme operates in such a way that when the debt transfers to the Minister (Social Protection) s/he can then stand in the shoes of the employee and continue to pursue payment from the Director(s). It is to these amendments that we now turn.

Lifting the 'corporate veil' building on the National Minimum Wage Approach

The experience of our affiliated unions is that there is an increase in the number of employers adopting the company A, B and C, model described in our first case study. Our analysis is that the model is being used as a shield allowing the employer to avoid their obligations under employment law. This is an abuse of limited liability and cannot be allowed to continue. It is worth bearing in mind the requirements of EU Employment Law Directives that Member States have in place not only dissuasive sanctions and penalties on employers for breaches of employment law but also and to have effective remedies available for employees who has suffered a breach of their rights.

It is possible to address the emerging deficits by amending employment law. A template is already available in the National Minimum Wage Act 2000. The NMW Act 2000 provides a ready-made approach whereby it has been established that the corporate veil can be lifted when it comes to enforcing employment law. The Workplace Relations Bill will shortly be published and this Bill provides an ideal opportunity to build on the existing law and provide the type of safeguards needed to ensure against the abuse of limited liability described in our case studies above.

Section 37 of the National Minimum Wage Act 2000 provides:

> *'Where an offence under this Act is committed by a body corporate or by a person acting on behalf of a body corporate and is proved to have been so committed with the consent, connivance or approval of, or to have been attributable to any neglect on the part of, a person who, when the offence was committed, was a director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, that person (as well as the body corporate) shall be guilty of an offence and be liable to be proceeded against and punished as if guilty of the offence committed by the body corporate.'*

The Workplace Relations Bill could extend the provisions the NMW Act to all employment law offences. This could be achieved by including in the Work Place Relations Bill a provision similar to section 37 of the NMW Act but beginning – *'Where an offence under employment law is committed by a body corporate or by a person acting on behalf of a body corporate* .... . An amendment of this nature is in line with the overall intention to harmonise employment law procedures underpinning the Workplace Relations Bill.

The inclusion of such a provision would represent a significant improvement but it has the draw back that it does not to provide the Minister (including the Minister for Social Protection) and the employees with a means to pursue the Director(s) for their outstanding unpaid wages and employment awards. We can build further and consider a second provision to be included in the Workplace Relations Bill.

The principle that Directors can be held responsible, in certain circumstances, can be further developed to allow the Minister, employees and their unions to raise the same arguments in respect of 'awards for employment law breaches' as the labour inspectorate can raise in respect of 'fines for offences'.

The Workplace Relations Bill could provide as follows:

> *'Where a breach of employment law is committed by a body corporate or by a person acting on behalf of a body corporate and is proved to have been so committed with the consent, connivance or approval of, or to have been attributable to any neglect on the part of, a person who, when the breach was committed, was a director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, that person (as well as the body corporate) shall be liable to be proceeded against as if guilty of the breach committed by the body corporate.*

The purpose of these two provisions is to 1) extend the scope of offences that the labour inspectorate could pursue Directors for to all employment law and 2) allow the Minister/ employees to rely on the same provisions to seek recovery of payments made in respect of entitlements under the Insolvency Scheme.

There are a number of points that Congress has previously made in relation to the winding up application provided in the Companies Bill. These are also relevant to the consideration and we set these out below for completeness.

The Companies Bill and Winding Up of Companies

There is a significant change being made in section 571 of the Companies Bill, specifically that the minimum amount of indebtedness entitling a creditor to petition to have a company wound up is increasing from **€1,269.74 to €10,000.** At the moment, anyone owed more than €1,269.74 can petition to wind up a company. This amount is being increased to €10,000. This will impact unfairly on low paid employees who at €10,000 are likely to be written out of the procedure.

There is another provision which provides that a large number of small creditors with a combined debt of more than €20,000 can jointly petition the court to wind up the company. This would help in

some situations where there are large numbers of employees, although the appropriate court is the High Court, which involves large costs. Congress is recommending that in addition to allowing employees to petition in the District Court that the current amount of €1,269.74 be maintained at least when the petitioners are employees.

In relation to the winding up of a company section 572(2) of the Companies Bill sets out clearly that in relation to hearing such a winding up petition by a creditor, security for costs must be given until such time as the court is satisfied a prima facie case has been established. Costs in the District Court would be much lower and when the creditor in question is the employees there is every danger that access to justice will be denied because the hurdle of costs is too high.

A members' voluntary winding up is dealt with in Chapter 3 of the Bill. This involves a requirement for a declaration of insolvency from the directors which has not been forthcoming in number of high profile cases such as the Connolly Shoe situation so this does not provide a satisfactory solution.

Tackling Tactical Insolvency

The practice of tactical insolvency needs to be recognised and properly addressed.

> *Tactical insolvency involves the deliberate creation of insolvencies in order to gain financial advantage often at the expense of 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, or even continue to trade with a new but not very different name, sometimes using the employee's unpaid wages as seed capital.

More needs to be done to tackle this abuse of company law in order to profit from debts owing to workers (and others). The restriction and disqualification of directors is dealt with in Part 14 of the Companies Bill under compliance and enforcement. That Bill provides that where a company is not officially insolvent/wound up and multiple companies are being formed/name changes/changing registered offices etc. in an attempt to not pay employees or other creditors, there are procedures in place for dealing with this, albeit in the High Court and again, if the jurisdiction of the court was lowered it would be more accessible to workers. Congress is of the view this application should be capable of being brought in the Circuit Court, which would make it much more accessible to employees to challenge rogue directors.

There is undoubtedly a cross border dimension to this problem. It is therefore worth pointing out that Part 4 of the Companies Bill (Section 138) provides for a bond of €25,000 in circumstances where there is no Director resident in Ireland. A more realistic approach would set €25,000 as a minimum or 8% of the overall wages bill which ever was higher (8% represents a months pay). A bond is particularly relevant in the context of circumstances where employees are left with unpaid wages.

Finally, there is also a serious question about the role and advice being given by insolvency practitioners, concerns in particular is raised about their independence and whether they are legally required to have regard to protecting and maintaining the employment or the rights of employees.

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/Employee_Guide.aspx

Protection of Employees (Employer's) Insolvency Acts : Restatement of the Legislation as Amended
http://www.lawreform.ie/_fileupload/Restatement/Second%20Programme%20of%20Restatement/EN_ACT_1984_0021.PDF
EU Directive http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0094:EN:NOT

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

Ends

6th February 2014

For further information please contact

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