SIPTU

SIPTU's response to the invite from the Joint Committee on Enterprise, Trade and Employment to make a written submission to the Committee in relation to the Pre-legislative Scrutiny of the **General Scheme of the Protection of Employees (Employers' Insolvency) (Amendment) Bill 2024.**

July 2024

Organising for Fairness at Work and Justice in Society

Introduction

SIPTU broadly welcomes the legislative provisions contained in the Heads of Bill that will provide a mechanism for workers to access the Social Insurance Fund (SIF) where their employer has ceased trading but has not been formally wound-up (if they are a company) or ceased to act as an employer (if they are a natural person).

The lack of such a legislative provision has been of great concern to this union and its members, and it has been raised as a concern through the direct representation of the Irish Congress of Trade Unions to Government. Changes to the Protection of Employees (Employers' Insolvency) Act 1984, to allow access to the SIF for such affected workers was called for in the Duffy/Cahill report in 2016[1] and again through the ICTU representative to the Company Law Review Group in 2017[2].

There are however provisions contained in the Heads of Bill which this union wishes to address for consideration by the Committee.

The Heads are listed below, with the particular issues arising under the Heads listed underneath and the recommendations to address these issues are included also.

[1]https://enterprise.gov.ie/en/consultations/consultations-files/appendix-2-duffy-cahill-employment-protection-report.pdf
[2]https://www.clrg.org/publications/clrg%20adhoc%20committee%20report.pdf

HEAD 5

Head 5 – Amendment of section 6 (Employees' rights on insolvency of employer.) Provide that:

(1) The Principal Act is amended at Section 6(4)(a) by deleting ", where the amount of that debt is or may be calculated by reference to the employee's remuneration,".

(2) The Principal Act is amended by the insertion of the following subsection after subsection 6(4):

"(4A) For the purpose of calculating the amount payable where section 6(4)(a) applies, the debt mentioned in section 6(2) or awards mentioned in section 6(3) shall be divided by the employee's normal weekly remuneration. The computed amount shall then be multiplied by the amount specified in section 6(4)(a)."

The purpose of this Head is described in the Heads of Bill as being "…to provide a legislative basis for the long-standing policy approach to applying a salary ceiling to all types of debts paid under the Principal Act" and that the policy intention of the Head *"is that all debts mentioned in section 6(2) or awards mentioned in section 6(3) are subject to a salary cap, which is currently €600 per week".*

This "long-standing policy" approach was however, found to be ultra vires the provisions of the Act by the Court of Appeal[3], as the Act did not allow a salary cap to be applied to all debts owed to workers under section 6 (2) or awards claimed under section 6 (3) from the SIF.

There are therefore three separate but related issues with the proposed Head 5.

1. **The calculation proposed will disproportionately reduce the amounts awarded to workers who earn over €600 per week.**
2. **The Court of Appeal has clarified that the policy approach adopted was ultra vires the Act and changing the Act to match the policy approach is opportunistic, particularly when other Government Departments have not treated such awards in a similar manner.**
3. **The salary cap contained in the Act has not increased for 20 years.**

[3] Brady & Anor -v- Minister for Social Protection & Anor [2019] IECA 178

1. **The calculation proposed will disproportionately reduce the amounts awarded to workers who earn over €600 per week.**

The effect of this proposed Head on workers earning over €600 per week will be that any award made to them by the Workplace Relations Commission or the Labour Court, which is then claimed from the SIF will be disproportionately reduced. The calculation the Head proposes to use to reduce the amount payable is to use the salary of the worker as a divisor of the award, with the resulting figure multiplied by €600.

The following examples illustrate how the proposed calculation will operate in effect for a series of workers on different salaries:

The reason a salary cap for awards has such a disproportionate effect when applied to awards in the examples above, is because it was not the intention of the Act that it would be applied to awards, as found by the Court of Appeal. Under the existing Act a salary cap applies only where the amount of the debt being claimed from the SIF is or may be calculated by reference to the employee's salary. While some awards from the Workplace Relations Commission and the Labour Court are calculated by reference to a worker's salary, many are not. For example where an award is compensatory as distinct from relating to wages owed.

RECOMMENDATION 1:
Do not extend the salary cap to all debts and awards as proposed by the Heads of Bill.

2. The Court of Appeal has clarified that the policy approach adopted was ultra vires the Act and changing the Act to match the policy approach is opportunistic particularly when other departments have not treated such awards in a similar manner.

The Revenue Commissioners already distinguish between awards made by the Workplace Relations Commission and Labour Court, under employment legislation for the purpose of determining whether an award is taxable or attracts certain tax reliefs[4]. This distinction is made between salary/wages, including arrears of same (which are taxable) and compensation for a wrong done quantified by reference to salary/wages (which has the relief applied to it).

This distinction is between wages owed and compensation and is more analogous with the current provisions of the Act and it could be used to distinguish those awards to which a salary cap applies and those to which one does not, as an alternative to amending the Act as Head 5 proposes.

RECOMMENDATION 2:
Do not extend the salary cap to all debts and awards as proposed by the Heads of Bill but instead align the distinction between wages owed and compensation in a similar manner to the Revenue Commissioners.

When a claim is made to the SIF, the Department could request that the Workplace Relations Commission and Labour Court determine whether the amount of the award is wages owed or compensation, to determine if the salary cap should properly apply. This was done in 1984 when the then Minister referred an award[5] from the then Employment Appeals Tribunal (EAT) to the Secretary of the Division of the Tribunal which had heard the case and made the award. The Tribunal confirmed the position to the Minister allowing the payment to be made from the SIF[6].

RECOMMENDATION 3:
Do not extend the salary cap to all debts and awards as proposed by the Heads of Bill but instead provide for the Department to seek clarification from the Workplace Relations Commission and Labour Court where there is doubt as to the nature of the award

3. The salary cap contained in the Act has not increased for 20 years.

The €600 figure salary cap, which is currently only to be used for certain payments from the SIF in accordance with the Act, but which is proposed will be used for all payments under Head 5 of the Bill, was introduced in 2004[7] and has not been increased since.

RECOMMENDATION 4:
Should the government wish to use the "opportunity" to make the make changes proposed in Head 5, serious consideration should be given to increasing the salary cap figure in line with the increase in wages over the same period.

AND

RECOMMENDATION 5:
Should the salary cap be extended to all debts and awards as proposed by the Heads of Bill, introduce a calculation that does not disproportionately impact on those above the cap.

[4] https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-07/07-01-27.pdf
[5] Cronin v Red Abbey Garage (PMPA) Ltd UD871/1984
[6] See Kerr: Irish Employment Legislation, Release 66, Page KK-70, Thomson Reuters
[7] Protection of Employees (Employers' Insolvency) (Variation of Limit) Regulations 2004

HEAD 22

Head 22 – Time limit for applications made under Historical Employer Deemed Insolvent Application

Provide that:

" The Minister shall not consider an application submitted under Head 19 if it is submitted to him or her after the expiration of the period of 2 years beginning on the date of the commencement of this Part."

This Head, as set out in the Heads of Bill, "requires an employee to submit an application to have their employer deemed insolvent within two years of the commencement of this Part".

The Heads of Bill further states "The two-year window in which applications must be submitted is considered a proportionate length of time to ensure employees can inform themselves of their new rights under this Bill, while also avoiding a permanent and open-ended liability for the State".

Respectfully it is submitted that this is not a "new right" as described rather it is a right that workers were deprived of as the State had failed to correctly transpose Directive 2008/94/EC by failing to provide in Irish law for the procedure required by Article 2(1)(b) of the Directive. Equally to suggest there may be a potential "permanent and open-ended liability for the State" ignores that many workers who could have availed of such a procedure had the State not failed to correctly transpose Directive 2008/94/EC may no longer be alive or may not have the necessary information or capability to make such an application.

Given the duration of time which the State had failed to correctly transpose Directive 2008/94/EC the two-year time limit for the Historical Employer Deemed Insolvent Application is not proportionate and is too short.

RECOMMENDATION:
Increase the time limit for Historical Employer Deemed Applications to 6 years.

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