A Guide to Collective Redundancies for Insolvency Practitioners

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Introduction

When an insolvency practitioner is appointed over a business, redundancies affecting the employees of the insolvent business are often a contentious issue.

A collective redundancy arises where a certain minimum number of employees are made redundant vis-à-vis the size of the 'establishment' within a 30-day period:

- 5 employees where 21-49 employees are normally employed
- 10 employees where 50-99 employees are normally employed
- 10% of employees where 100-299 employees are normally employed
- 30 employees where 300 or more employees are normally employed

Therefore, in any situation where a business with 21 or more employees enters into liquidation, a question of collective redundancies will arise.

Obligations in a Collective Redundancy

In Ireland, there are various obligations in a redundancy situation and additional specific obligations in a collective redundancy, particularly as regards information and consultation with employee representatives and notification of the Minister for Employment Affairs and Social Protection (the "Minister") (with certain exceptions where the winding up resulted from bankruptcy / winding up proceedings or some other court order as set out in the table below). These are set out in the **Protection of Employment Act, 1977 – 2014** ("the Act").

Obligation	Consequences of a Breach	Effect of Bankruptcy / Winding up Proceedings or Court Order
Consultation	Criminal Offence / fine up to €5,000 WRC Order / 4 weeks' gross remuneration per employee	No effect – Obligation still applies
Information	Criminal Offence / fine up to €5,000 WRC Order / 4 weeks' gross remuneration per employee	No effect – Obligation still applies
30 day waiting period before issuing notice of dismissal following commencement of consultation with Employees	Criminal Offence / fine up to €5,000 WRC Order / 4 weeks' gross remuneration per employee	No effect – Obligation still applies
Notification to Minister	Criminal Offence / fine up to €5,000	Obligation does not apply unless requested by the Minister
Copy of Notification to Employee Reps	Criminal Offence / fine up to €5,000	Obligation does not apply unless requested by the Minister
30 day waiting period before first dismissal takes effect following notification to Minister	Criminal Offence / fine up to €250,000	Obligation does not apply Unless requested by the Minister
Retention of Records	Criminal Offence / fine up to €5,000	No effect – Obligation still applies

Collective Redundancies in Practice

In principle, these obligations apply in all collective redundancy situations irrespective of whether the decision was made by an employer or a liquidator.

However, the longstanding commercial reality is that many liquidators do not typically prescriptively comply with collective redundancy obligations. In many such cases, a liquidator will almost immediately inform employees that the business is closing and that their roles are redundant with immediate effect.

This might be because most insolvency practitioners believe that employees automatically become redundant when the petition to wind up a company is approved by the court. **Section 589 of the Companies Acts 2014** provides that "*the winding up of a company by the court shall be deemed to commence at the time of the presentation of the winding-up petition in respect of the company*". Therefore, by the time a liquidator is appointed, that liquidator may form the view that the employees have already been made redundant.

There may also be confusion caused by the Act where an employer does not have to comply with certain obligations depending on the circumstances leading to its winding up (as set out in the table above).

Regardless of the rationale, the reality is that there will likely be no assets available in the business to compensate employees or pay a fine resulting from a breach of the Act. In addition, there is a further safeguard for employers at section 22 of the Act where there were "substantial reasons" related to the business, which made it impractical to comply with the obligations of the Act. As such, it could be argued that the immediate closure of a business was the only viable option as the business was unable to pay its employees. However, if employees are awarded compensation by the WRC, this is likely be paid by the Social Insurance Fund.

Clery's Case – Obligation to Consult

The prevailing view of insolvency practitioners was challenged and indeed shaken by a decision of the Workplace Relations Commission (WRC) in the 'Clery's case' in January 2016 where a cumulative award of nearly €120,000 was made to 61 former Clerys workers.[1]

In the Clerys case, a provisional liquidator was appointed and almost immediately informed employees that the store was closing and their roles were being made redundant with immediate effect. The employees claimed that their employer was obliged to consult with them notwithstanding the fact that a liquidator had been appointed under a court order. In response, the employer (via the liquidator) submitted that they were not required to consult with the employees as the powers granted by the High Court when appointing the liquidator did not include the power to consult with employees in accordance with the Act.

However, this argument was rejected by the WRC which relied on European case law (a case called *Claes*[2]). The Claes judgment held that employers must comply with employment legislation irrespective of the circumstances leading to the winding up of the business.

[1] R-157441-pe-15/PG

[2] C-225/10

The WRC went on to confirm that these obligations must be carried out by the management of the establishment in question where it is still in place (even with limited powers) or by the liquidator where that establishment's management has been taken over in its entirety by the liquidator.

Essentially, the WRC made it clear that these obligations apply regardless of Section 589 of the Companies Act 2014 or whether the employer was under the control of a court appointed liquidator.

The WRC made awards ranging from €394 to €3,408 per employee, totalling approximately €120,000. There is no explicit explanation in the decision as to how this was calculated or what it represents, but it may well be the maximum of 4 weeks' pay.

It appears from the Clery's case that there is an obligation to consult with employees and this should be done by liquidators where they have taken over the management of the business in its entirety. In practice, this can be difficult as it requires insolvency practitioners to recognise the continuation of the employees' employment following their appointment and consult with the workforce for at least 30 days thereafter. The practical difficulty is that there may be insufficient funds in a liquidation to commit to this process.

This is a reality that the Department of Business Enterprise and Innovation seems alive too. In a report following the Clery's dispute (the "Duffy/Cahill Report") a number of proposals emerged which if implemented would necessitate a change in liquidator practice. These include the removal of any exception to the minimum employee notice and consultation periods in liquidation scenarios as well as a significant increase in the maximum award payable to employees where minimum notice period hasn't been adhered to, from 4 weeks to 2 years pay. However, these proposals have not been implemented since they were suggested in 2016.

Debenhams – Public Relations

The issues around employee redundancy rights in liquidation have remerged in public discourse since the liquidation of Debenhams in April 2020 and the resulting dispute between the liquidator and the employees. Former Debenhams employees and their supporters have been picketing and sometimes occupying various Debenhams locations for several months in an attempt to secure an ex gratia redundancy payment set out in a pre-existing agreement with the company.

Normally, an employee is entitled to a statutory redundancy payment (2 Weeks Salary x Number of Years' Service + 1 Week's Salary, with weekly salary capped at €600). There is no legal requirement to pay over and above the statutory redundancy amount.

In the Debenhams case, the employees are demanding that the employer honours the pre-existing collective agreements but there are no assets available to meet their demands. While the collective agreements are not contractually enforceable, the protests have resulted in a public relations backlash for Debenhams and it has impeded the winding up procedure.

While both Government and opposition have cited a desire to bring about legislative change to prevent similar disputes arising in the future, there is a fear that the taxpayer will inevitably end up footing the bill from the Social Insurance Fund. Nevertheless, the Government has recently agreed to review the law in this area and to re-examine the Duffy/Cahill Report.

This whole area of employment law is likely to become a highly contentious space for the foreseeable future as the Covid-19 pandemic slowly but surely adversely effects the economy at large.

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