# Consultation on the Report
# by
# Nessa Cahill BL and
# Kevin Duffy, Chairman of the Labour Court

# "Expert examination and review of laws on the protection of employee interests when assets are separated from the operating entity

**June 2016**

## A. **Introduction**

Ibec welcomes the opportunity to respond to the Expert Examination and Review of Laws Protecting Employee Interests and to participate in the consultation process established by the Department of Jobs Enterprise and Innovation.

Ibec would like to take the opportunity to reiterate the deep concern of the business community at the events leading to the sudden dismissal of the workers at Clerys department store. We acknowledge the shock and distress that has been expressed by the workers at the absence of notice and consultation in advance of the termination of their employment and at their treatment on the day in question.

We believe that it is now critical that any policy response addresses the behaviour complained of. However, this response must recognise the possibility of no change in relevant legislation but instead on the value of a renewed focus on other legal remedies that may be available in existing company law which have yet to be invoked. For this reason, Ibec was pleased to note that the findings in the report support our view that there are useful remedies within the Companies Act 2014 that may be utilised, specifically section 599 which is described as a "*potentially useful provision to address the concerns outlined in the Terms of Reference*"[1]

This is an important point, because, while acknowledging the deep sense of outrage at the events leading to the dismissal of the Clerys workers, it is vital that there is no knee jerk reaction to introduce legislation, under the guise of punishing employers, which might, in a different context, actually operate to disadvantage workers. We will outline our response to each individual proposal below, but by way of example, a proposal to introduce a 30 day consultation period for the disposal of an asset, as suggested in proposal 2, may have the effect of limiting a company's ability to adapt to a rapidly changing trading environment sufficiently quickly, perhaps even damaging the organisation to an extent that would cost jobs that might otherwise be saved had a month's delay not been required by the proposed new provisions.

We are particularly drawn to the statement in the report that, while

> *"there are many provisions in the Companies Act 2014 that may be invoked to sanction and punish directors…the Terms of Reference do not extend to measures against directors and they are not therefore addressed here, although it must be noted that these provisions could be of real significance in the circumstances outlined in the terms of reference, both as a deterrent and as a means of sanctioning the conduct described therein."*[2]

It is deeply regrettable that the authors of the report felt so constrained by the terms of reference set out for this review. The above statement indicates that the authors believed that there are real and effective remedies already on the statute books which are likely to address the issues complained of, but those matters were beyond the scope of the exercise in which they were engaged.

Notwithstanding this observation, the authors proceeded to make significant proposals for fundamental changes to employment law. Ibec is concerned that the

[1] Page 29, paragraph 12.41 of the report.
[2] Page 29, paragraphs 12.42 and 12.43 of the report.

vast majority of Irish businesses, who conduct their affairs in a legally compliant and morally sound manner, could be seriously adversely impacted by these proposals if enacted - all because the scope of the review prevented adequate attention being applied to the full range of remedies which may already be available. For this reason, Ibec is opposed to any proposed change in the law until all relevant measures in Irish law have been fully and comprehensively assessed. If these measures are tested and found wanting, a case may be made to review whether proposals to change legislation may be warranted.

**General observations on the proposals in the report**

The proposals in the report are particularly worrying when so much information remains outstanding about the closure of the Clerys store at this point in time. The report of the liquidator and that of the Director of Corporate Enforcement into the circumstances surrounding the closure of Clerys have, as yet, not been made available. Ibec further notes that the report of the Company Law Review Group has yet to be submitted to the Minister. Ibec strongly believes that these reports should have been fully examined before any conclusions were drawn or policy recommendations made.

As stated above, in particular, it is of concern that there are already remedies available under the Companies Act 2014 which have yet to be invoked and which address the concerns raised about the manner in which the liquidation was effected. Indeed the authors of the expert examination not only acknowledged the existence of this "*substantial weaponry*" but stated that these company law provisions "*are only of weight if they are employed and seen to be employed*". As Mr Duffy and Ms Cahill themselves stated, "*it is striking that many of the provisions of the Companies Act which may be of assistance are not frequently invoked (such as section 608) or are not invoked at all (such as section 599)*". Rather than making ill-advised and reactionary changes to employment law, Ibec believes that these company law provisions should first be invoked and fully tested.

Given the authors' acknowledgement of the remedies currently available under company law, Ibec is disappointed that rather than fully exploring how these may be employed, the authors proposed drastic changes to employment law. If implemented, these changes would have far-reaching consequences on compliant employers. To punish all employers in this way would be a disproportionate and misplaced response to the issues raised.

Ibec's response to each of the six proposals for reform set out at Part III of the report is set out below.

B. **The proposals for reform**

*Proposal 1 – Remove the insolvency exception from the prohibition on implementing collective redundancies during the consultation period*

[The report suggests the deletion of the "*statutory exemption at section 14(4) of the Protection of Employment Act*". As there is no section 14(4) of the Protection of Employment Acts, Ibec is proceeding on the basis that the authors intended to suggest the deletion of section 14(3) of the Act.]

Ibec is alarmed at this proposed removal of the already limited derogation from the requirement to engage in a 30 day consultation period prior to making collective redundancies in an insolvency situation.

Sections 9 and 10 the Protection of Employment Acts 1977 to 2007 place onerous obligations on employers to inform and consult on collective redundancies. These sections prescribe the subject matter on which employers are required to consult with their employees, including the reason for the proposed redundancies, the period within which the redundancies are to take effect, the possibility of avoiding some or all of the redundancies and other relevant matters. A strict time frame of at least 30 days for information and consultation is imposed by the legislation. Failure to observe the provisions is a criminal offence attracting a fine of €5,000 on summary conviction. Where collective redundancies are effected before this time expires, the employer may face a fine on indictment of €250,000.

The Protection of Employment Acts provide a very limited derogation from its requirements in an insolvency.

The Act provides for an exemption only in respect of

(1) the obligation to notify the Minister of proposed collective redundancies (although an employer must comply with the notification obligation if the Minister so requests) and

(2) the prohibition on collective redundancies taking effect within the 30 day consultation period, where the collective redundancy arises from the employer's business being terminated following bankruptcy or winding up proceedings or for any other reason as a result of a decision of a court of competent jurisdiction.

These, Ibec submits, are very limited derogations for employers facing insolvency.

First, the Minister may, notwithstanding the employer's circumstances, require the employer to notify him/her of proposed redundancies. Second, as recognised by the authors[3], the derogation does not release employers from the obligation to consult with employees about proposed collective redundancies as it merely exempts employers from the provisions of sections 14(1) and 14(2), but not the provisions of sections 9, 10 and/or 11. Finally, the exemption only applies to business closures following court ordered bankruptcy or winding up proceedings and does not apply to redundancies effected by a receiver or an examiner.

Furthermore, Ibec notes that the "special circumstances" defence for failure to comply with collective redundancy requirements as open to employers in the UK does not exist in Ireland. Therefore, the reality for most employers is that failure to comply with the requirements of the Protection of Employment Acts constitutes a near strict liability offence in Ireland.

Indeed, Ibec submits that the limited nature of this derogation was highlighted by the former Clerys employees' recent claims to the WRC.

[3] Page 12, paragraph 5.24 of the report.

In this case, the claimants successfully argued that OCS Operations t/a Clerys had breached sections 9 and 10 of the Protection of Employment Acts and were awarded compensation as a result. In her determination, Mr Rosaleen Glackin cited the decision of the then European Court of Justice (ECJ) in the case of *Claes v Landsbanki Luxembourg SA, in liquidation [C-235/10]*. In the *Claes* decision, the ECJ stated that even in an insolvency; "an establishment has a duty, up until the moment when its legal personality definitely ceases to exist, to fulfil the obligations arising under Articles 2 and 3 of the Directive 98/59." The ECJ went on to hold that as long as the management of an establishment remains in place, if must fulfil the obligations arising under collective redundancy legislation. It further, and most radically, held that if the management of an establishment is taken over by a liquidator, it is the liquidator that must fulfil the obligations of collective redundancy legislation.

This, Ibec suggests, is a particularly wide interpretation of collective redundancy legislation and serves as evidence of the significant protection offered by the Protection of Employment Acts to employees like the former Clerys workers.

In any case, we question the value to employees of an information and consultation period in the case of an insolvent company. Where is the benefit in retaining staff in employment in such circumstances, expecting them to continue to work where there is generally no work to be done, nor any realistic prospect of saving jobs? Indeed, Ibec notes that the authors' themselves recognised the absurd situation which could result, where employees, although not in receipt of wages, would be unable to claim job seekers benefit from the Department of Social Protection on the basis that they are not yet unemployed. Ibec respectfully questions whether such a measure is in the interests of staff.

Furthermore, Ibec is of the view that the absence of information and consultation in the Clerys case, while it likely contributed to the shock and distress of the employees affected was not the issue of most concern. The issue at the centre of the matter would appear to be the separation of the Clerys building from the trading arm of the business (in which the employees were employed) as highlighted in the report to Government by Mr Ged Nash TD, Minister for Business and Employment[4]. This separation placed those assets out of reach of OCS Operations Ltd.'s creditors, including their employees and concessionaires. Ibec accepts that these issues are worthy of examination, however, we believe that no conclusions should have been drawn or proposals for reform made until the liquidator's report became available or until the Director of Corporate Enforcement had considered the matter.

Ultimately, Ibec believes, as recognised by the authors, that the likely result of implementation of proposal 1 would be an increased continued cost to the Exchequer of such unpaid wages which would likely have to be paid from the Social Insurance Fund.

The issue of trading while insolvent also arises. The authors try to address this point by suggesting that the company would be prevented from trading but that employees would continue to accrue contractual entitlements including wages. We see little value in establishing a right to continued entitlement to pay where the employer is in effect no longer in existence, where there is no work to be done and where the

[4] See "The Sale and Liquidation of Clerys – a report to Government" page 5

consultation process itself can yield nothing in practical terms but what the workers would be entitled to under statute anyway.

*Proposal 2 – Place an obligation on the de facto decision maker*

Ibec respectfully disagrees with the proposed introduction of an additional 30 day consultation period if a related company or person contemplates a decision in relation to a significant asset that will lead to collective redundancies.

Ibec submits that such an amendment would severely curtail the ability of businesses to adapt to what can sometimes be rapidly changing trading conditions. This is particularly so given that the authors have suggested that the decision to which the provision relates could not be implemented until after the expiry of the consultation period.

Ibec is further concerned by the suggestion that a failure to comply with such a measure should constitute a criminal offence. This, in Ibec's view, would be a disproportionate response to the issues addressed in the report. Indeed, given the breadth of the possible scope of the proposal, constitutional issues[5] are likely to arise in relation to the absence of clarity regarding the nature of the criminal act itself in this context. It is important to remember that scenarios such as arose in the closure of Clerys are very rare and the vast majority of businesses honour their statutory obligations to consult. To punish all employers with these heavy handed measures is a disproportionate response, particularly when Ibec believes, and the authors of the report acknowledge, that remedies already exist under the Companies Act 2014 to address the events and behaviour complained of in the Clerys case.

Section 599 of the Companies Act 2014 provides a liquidator, creditor or contributor with the power to apply to the High Court for an order directing that a related company should contribute to the debts of a company being wound up. In deciding whether to make the order, the Court must have regard to the extent to which the related company took part in the management of the company being wound up, the conduct of the related company towards the creditors of the company being wound up and the effect which the order would have on the creditors of the related company. An order can only be made where the Court is satisfied that the circumstances giving rise to the winding up of the company are attributable to the actions or omissions of the related company. There is a dearth of case law to guide us on the circumstances in which a contribution order would be made in this jurisdiction. However, Ibec notes the authors' view that, in principle, the criteria of section 599 may well be satisfied in the circumstances outlined in the terms of reference provided to them.

Ibec also notes the authors' suggestion that section 608 of the Companies Act 2014 could be availed of if a company that is in insolvent liquidation is proved to have disposed of a valuable property for less than full value, with the effect of leaving inadequate or no assets to meet the claims of employees. In such circumstances, the entity in possession of the asset or the proceeds of the sale of the asset could be required to return the asset/proceeds of sale to the liquidator (if the court finds that it is just and equitable to do so). The authors of the report refer to the costs associated with High Court litigation as a possible deterrent to proceeding in this

[5] Douglas v DPP Supreme Court ([2013] 2 I.L.R.M. 324)

way. When dealing with a significant number of employees, supported by a union, the cost to the individual is likely to be significantly mitigated simply by the numbers involved. However, Ibec acknowledges that cost may be a concern, in which case it may be appropriate to consider the introduction of a cost free means of making a similar application, perhaps via the relevant Minister or the Director of Corporate Enforcement.

In any case, it would appear to us that the scope of these provisions should be properly explored before any steps are taken to introduce new employment law measures which have the potential to be costly and burdensome to business, and even elicit an unhelpful result for employees, depending on the individual circumstances.

There also exist various other provisions in the Companies Act 2014 which could be used to sanction and punish directors of companies in liquidation where there has been dishonest or irresponsible conduct, fraudulent trading or other fraudulent transactions[6].

Ibec is of the view that these provisions, if properly utilised, can work to ensure that the conduct of directors in liquidations is vigorously and thoroughly investigated and could act as a more effective means of deterring and sanctioning poor corporate behaviour than further amendments to employment law. At the end of the day, the majority of the proposals suggested as part of the report do nothing to correct the allegedly poor corporate behaviour the subject of the report; they simply pass additional significant cost on to the Exchequer.

*Proposal 3 – Redress for failure to inform and consult*

Ibec is concerned at the proposal to increase compensation for failure to inform and consult over a 30 day period in a collective redundancy situation from four weeks' pay per employee to up to two years' pay per employee.

Ibec respectfully disagrees with the statement in the report that the current redress for failure to inform and consult cannot "*have a sufficient deterrent effect in all cases*". Ibec would point out the significant criminal sanctions which may be imposed for failure to comply with the information and consultation provisions in the Protection of Employment Acts which, in Ibec's view, constitute extraordinarily severe penalties.

In reality, this proposal constitutes a penalty on the State and the taxpayer, which will ultimately be required to pay any such awards from the Social Insurance Fund. In such circumstances, this proposal cannot be said to have a deterrent effect as it does not purport to change the much criticised corporate behaviour prior to the liquidation of the company employing the Clerys workers nor does it create any consequences for those engaging in the behaviour complained of in the future.

Furthermore, Ibec is at a loss as to what meaningful consultations can take place in a situation of insolvency, where there are unlikely to be funds to pay anything other than the employees' statutory entitlements, if the funds are even there to extend to those entitlements. The suggestion of meaningful consultation in that context is illusory.

[6] S. 717, 722, 819, 842 Companies Act 2014.

*Proposal 4 – Recovery of assets or proceeds*

The proposal appears to suggest that:

1. Where collective redundancies arise in an insolvent employer;
2. The employer is unable to fully discharge the debts owing to employees;
3. The Minister for Social Protection has made payments under the Social Insurance Fund;
4. An asset of significant value has been disposed of;
5. The effect of the disposal was to perpetrate a fraud on employees; and
6. It is just and equitable to do so,

the person who appears to have the use, control or possession or the property/proceeds of sale, can be ordered to restore the asset or its value to the employer.

Ibec submits that before proposing such extensive measures, section 608 of the Companies Act 2014 should be, as currently drafted, fully tested as it may well prove effective in its current form. Ibec submits that it is contrary to the principle of better regulation and, indeed, common sense to layer additional statutory provisions on top of those which are yet to be fully tested.

*Proposal 5 – Statutory injunction*

Ibec disagrees with the proposal to couple an obligation to inform and consult on a proposed decision in relation to a significant asset that will lead to collective redundancies with a statutory provision to allow for an application to the courts to prevent the reduction of a company's assets below the level necessary to discharge the accrued liabilities to employees.

As stated above, Ibec submits that such an amendment would severely curtail the ability of businesses to adapt to what can sometimes be rapidly changing trading conditions. Such measures may even operate to employees' disadvantage, where a company is damaged by its hampered ability to address its business issues in sufficient time, resulting perhaps in job losses which might otherwise have been saved.

*Proposal 6 - Enhanced redundancy payments*

Ibec respectfully submits that amending the law to make provision for the pursuit of ex-gratia payments would be a disproportionate and misguided response to the Clerys situation. This appears to be tacitly acknowledged by the authors of the report[7].

In the first instance, Ibec notes that the statutory redundancy entitlements in Ireland are already more favourable than those of our nearest neighbour and competitor, the United Kingdom. Eligible employees in Ireland are entitled to a statutory redundancy payment of two weeks' pay per year of service plus a bonus week. Eligible employees in the UK, on the other hand, are entitled to half a week's pay per year of service under 22, one week's pay per year of service between ages 22 and 40 and one a half week's pay per year of service for ages 41 and over. A week's pay is

[7] Pages 41 and 42 of the report

currently capped at £475 in the UK which, even allowing for current exchange rates, is lower than the €600 cap in Ireland. While there is no maximum statutory redundancy payment in Ireland, the UK imposes a maximum statutory redundancy payment of £14,250 sterling.

Providing for a mechanism whereby ex-gratia payments would be more accessible to employees of employers who have contravened the Protection of Employment Acts creates two tiers of redundant employees;

(1) employees made redundant by employers who have complied in full with their information and consultation obligations would only be statutorily entitled to statutory redundancy payments; and

(2) employees made redundant by an employer who breached the Protection of Employment Acts would have a greater entitlement to additional ex-gratia payments on top of their statutory redundancy entitlement.

To Ibec, creating such a two tiered classification of employees seems illogical and grossly unfair. Indeed, Ibec notes the view of the authors of the report that "*it is not desirable to create a special class of redundant worker with legal rights that go beyond those of the generality of workers who lose their employment in circumstances of redundancy*".

Furthermore and as recognised by the authors themselves, practical difficulties would likely arise in determining whether an entitlement to enhanced redundancy payment in fact arises.

The authors' main proposal in relation to ex-gratia payments appears to be a suggested amendment to the Terms of Employment (Information) Acts 1994 to 2012 requiring the employer to commit to payments which may be made at a future date in the event of redundancy. Ibec is at a loss as to how an employer could comply with this provision without a crystal ball to hand. It is grossly irresponsible to suggest entering into contractual commitments with no guarantee of being able to comply with same, safe in the knowledge that the taxpayer will pick up the bill.

The proposal seems to disregard the clear fact that the financial capacity of an employer when it recruits an employee is likely to be vastly different to its financial capacity if forced to make redundancies. It therefore seems absurd to expect an employer to make provision in its employment contracts for potential redundancy payments which may be required to be paid some twenty or more years down the line when its financial circumstances will likely have drastically changed.

Ibec is concerned that taking this action would serve only to encourage rogue employers to make gratuitous promises to employees, in the knowledge that they may never be called upon to make good those promises. Rather the taxpayer would have to foot an additional and, potentially excessive, bill for the actions of such non-compliant employers.

Ibec notes the payments already available to employees out of the Insolvency Payments Scheme and the Redundancy Payments Scheme. Ibec understands that employees can suffer delays in receiving payments from these schemes, although we acknowledge that the Department of Social Protection expedited such payments

to the former Clerys employees. Ibec is of the view that, rather than placing an additional and excessive burden on an already stretched Exchequer, resources would be better used to

(1) require timely submission by liquidators of claims for payments from the Social Insurance Fund and

(2) ensure efficient administration of such claims.

## C. **Conclusion**

Ibec acknowledges and shares the concern at the events leading to the dismissal of the workers at Clerys department store. However, we are concerned at the limitations apparently placed on the authors of the report in the conduct of their review of the facts. Neither the liquidator's report nor that of the Director of Corporate Enforcement was available at the time the review was concluded, meaning that critical information was missing from the facts under review. Furthermore, the authors themselves acknowledged that the terms of reference did not extend fully to the behaviour of directors under the Companies Act 2014, limiting the extent to which they could examine potentially very useful and relevant statutory remedies and sanctions. The resulting report does not provide an adequate basis for a change in Irish legislation.

Existing employment law already places onerous obligations on employers to inform and consult employees on proposed collective redundancies. In the vast majority of cases, while the motivation (being the protection of employment rights) underpinning the obligations is clear, these obligations come at a time of deep strain for businesses. While Ibec is acutely aware of the need to protect employees at times of an employer's financial difficulty, Ibec is concerned about employers' capacity to comply with any further regulation in this area.

In particular, Ibec is disappointed that, rather than first encouraging the testing of relevant company law provisions acknowledged by the authors' themselves, they proposed drastic changes to employment law. If implemented, these changes would have far-reaching consequences on compliant employers. Ibec submits that to punish all employers in this way would be a disproportionate and misplaced response to the issues raised and may even operate in certain circumstances to the detriment of workers – such is the reactionary nature of the narrative surrounding the issues the subject of this report.

The closure of Clerys cost the State an estimated €2.5 million. This figure would be greatly increased in similar situations in the future if the proposals in this expert examination are implemented.

While Ibec recognises the hurt and distress expressed by the former employees of Clerys, it should be noted that they did recover their full entitlement to statutory redundancy and outstanding contractual payments from the State Insolvency Fund. In this respect, they were left in financial circumstances no different from those employees who lose their employment with an employer in a very straitened financial situation.

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