

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

Employee

I10/2005

against the decision of The Minister for Enterprise & Employment
in the case of :

Employer

under

PROTECTION OF EMPLOYEES (EMPLOYERS' INSOLVENCY) ACTS, 1984 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony B.L.

Members: Mr. B. Kealy
Mr C. Ryan

heard this complaint at Cork on 9th April 2008

Representation:

Appellant :
XXXX

Respondent :
XXXX

Mr. Myles Kirby represented the Liquidator.

This case was originally listed for hearing in Mallow on 13th November 2006. On that occasion it came before a division of the Tribunal other than the above-named division. For evidential reasons the case was not concluded before that division. Due to the change in the membership of the Tribunal in January 2007, that division could not be re-constituted. For this reason, the appeal was set down for hearing before the above-named division on 9th April 2008.

This case came before the Tribunal by way of an appeal under Section 9(2) of the Protection of Employees (Employers' Insolvency) Act, 1984, as amended.

The Facts

The appellant is a former employee of the company, was a member of the company executive pension scheme and one of the trustees of the said scheme. The appellant retired from the company on 20th July 2004.

The appellant went on sick leave on January 2000 and did not return to work thereafter. The company received payments in respect of the employee and employer pension contributions from Irish Life under a premium protection insurance policy.

The company did not forward the premium protection payments it received to the trustees of the pension scheme. The trustees became aware of this in 2003. The equivalent value of the payments due and unpaid to the pension scheme in employee and employer contributions from January 2000 was €37,500.73.

The company commenced making the contribution payments into the scheme in 2003. There were some inconsistencies in the evidence before the Tribunal as to when these payments were made. However, the limited documentation before the Tribunal shows that payments in respect of the employee and employer contributions were made to the trustees of the pension scheme for the period October 2003 to July 2004.

On 17th February 2004 the company agreed a payment structure with the trustees of the pension scheme to have the outstanding amount of €37,500.73 paid in full to the trustees of the pensionscheme by 20th July 2004, the appellant's retirement date.

On around 19th February 2004, the appellant was informed that the payments had not been made into the pension scheme but that the company had agreed a structure for the payment of the outstanding amount into the fund by 20th July 2004.

The appellant retired from the company on 20th July 2004. By that date €15,000 (in three separate payments of €5,000 in March, April and May 2004), had been paid by the company to the trustees of the pension scheme under the agreement, leaving an amount of €22,500 still outstanding (comprising of €12,857.14 in unpaid employer contributions and €9,642.86 in unpaid employee contributions).

The company went into liquidation on 5th October 2004 and a liquidator was appointed on that date. The outstanding amount of €22,500 had not been paid to the trustees of the pension scheme by the date of the liquidation.

The Managing Director of the company, the appellant and a company (a director of which represented the claimant in the proceedings before the Tribunal) were the trustees of the pension scheme.

The appellant had been employed in employment that was fully insurable for all social insurance benefits.

On 18th April 2005, the liquidator submitted claim Form IP6 for payment of the unpaid pension contributions from the Social Insurance Fund under the Insolvency Payments Scheme. The claim was accompanied *inter alia* by an Actuarial Certificate, Form IP7, certifying that the amount of €22,500 would be necessary for the purpose of meeting the liability of the Scheme on dissolution.

The Department on behalf of the Minister (hereinafter the Department) determined that there was no liability to make payment from the fund in respect of unpaid employee contributions. It further determined that an amount of €247.81 was due in respect of the unpaid employer contributions and made payment in that amount to the liquidator, in August 2005, for payment into the assets of the pension scheme.

Appellant's case:

It was the case on behalf of the appellant that as a result of the fresh agreement reached between the company and the trustees of the pension scheme on 17th February 2004, the outstanding amount of €22,067 was the employer's contribution falling due but unpaid to the trustees of the pension scheme within the twelve months immediately preceding the date of insolvency and that payment of the said sum of €22,067 was being claimed from the Social Insurance Fund under the provisions of Section 7 of the Act.

The Department's case on behalf of the Minister was:

1. Employee contributions

- (1) Section 7(2) of the Protection of Employees (Employers' Insolvency) Act 1984 provides that payment in respect of employee contributions can only be made from the Social Insurance Fund in respect of unpaid employee contributions due over the twelve months prior to the insolvency *if the same amount has been deducted from the employee's pay*.
- (2) The 1984 Act does not define "pay", but it defines "normal weekly remuneration" by reference to Schedule 3 of the Redundancy Payments Act 1967 which, in turn, links normal weekly remuneration to work done. It refers in its first paragraph to "an employee who is paid by a fixed wage or salary" "and in the case of any other employee whose remuneration does not vary in relation to the amount of work done....". Section 10 of the 1984 Act, which provides for the transfer of employees' rights and remedies in respect of payments made under the Act, refers specifically to those rights under Section 285 of the Companies Act. Section 285 refers, in subsection (2)(b) and 2(c) to debts in respect of wages or salary "in respect of services rendered". Based on this interpretation of the terms of section 7(2) of the Protection of Employees (Employers' Insolvency) Act 1984 the Department's case was that no such deductions were made from the appellant's pay as he was not in receipt of "normal weekly remuneration" from his employer during the twelve months immediately preceding the date of insolvency.
- (3) Similarly, the Department further contended that payments made under an income continuance plan or other insurance policy do not constitute "normal weekly remuneration" or "pay" under the 1984 Act and that accordingly, the Department on behalf of the Minister is not liable to make any payment in respect of deductions that might have been made from these payments in respect of employees contributions during the period from 6th October 2003 (the beginning of the twelve-month period prior to the insolvency) to the employee's

retirement on 20th July 2004.

- (4) For the reasons set out at (2) and (3) above as no deductions had been made from the appellant's pay in respect of employee contributions during the period from 6th October 2003 to his retirement on 20th July 2004, no payments were made by the Department in respect of that element of the claim.

Employer contributions

In relation to employer contributions, Section 7(3) of the 1984 Act limits these to the lesser of the following amounts:

- (a) relevant contributions remaining unpaid in respect of the 12 months prior to the insolvency
- or
- (b) the amount certified by an actuary to be necessary for the purpose of meeting the liability of the scheme on dissolution to pay the benefits of the scheme

The Actuarial Certificate, Form IP7, certified that the amount of €22,500 would be necessary for the purpose of meeting the liability of the Scheme on dissolution.

The Liquidator, in response to a request from the Insolvency Payments Section, stated that the amount due in respect of employer contributions for the period 6th October 2003 to 20th July 2004 was €247.81.

As the amount due for unpaid employer contributions (€247.81) in respect of the period concerned was lower than the amount necessary for the purpose of meeting the liability of the scheme on dissolution to pay the benefits of the scheme (€22,500), the Department paid €247.81 to the liquidator for payment into the assets of the pension scheme. Payment of that amount was made in August 2005.

The legislation

Section 7 of the Protection of Employees (Employers' Insolvency) Act, 1984, as amended provides inter alia at:

(2) In this section "relevant contributions" means contributions falling to be paid by an employer in accordance with an occupational pension scheme ... either on his own account or on behalf of an employee; provided that for the purposes of this section a contribution of any amount shall not be treated as falling to be paid on behalf of an employee unless a sum equal to that amount has been deducted from the pay of the employee by way of a contribution from him.

(3) The sum payable under this section in respect of unpaid contributions of an employer on his own account to an occupational pension scheme ... shall be the lesser of the following amounts –

- (a) *the balance of relevant contributions remaining unpaid on the date on which he became insolvent and payable by the employer on his own account to the scheme ... in respect of the period of 12 months ending on the day immediately preceding that date,*
- (b) *the amount certified by an actuary ... to be necessary for the purpose of meeting the liability of the scheme ... on dissolution to pay the benefits provided by the scheme ... to or in respect of the employees of the employer.*

(4) *Any sum payable under this section in respect of unpaid contributions on behalf of an employee shall not exceed the amount deducted from the pay of the employee in respect of the employee's contributions to the occupational pension scheme ... during the period of 12 months ending on the day immediately preceding the date on which the employer became insolvent.*

The Tribunal considered the legislative provisions, the evidence (oral and documentary) and the submission before it on the term “pay”.

The unpaid employee contributions

The appellant was not in receipt of pay during the twelve months immediately preceding the date of liquidation and accordingly no deductions were made from his pay.

The Tribunal declares there is no liability to make payment from the Social Insurance Fund in respect of unpaid employee contributions into the assets of the pension scheme

The unpaid employer contributions

The literal interpretation of subsection (3) means that the statutory scheme only provides for payment from the Social Insurance Fund in respect of unpaid contributions falling due within and only attributable to *the period of the twelve months ending on the day immediately preceding the date of insolvency*. The statutory scheme does not provide for payments of unpaid contributions that fell due in an earlier period even if there is a private agreement between the parties that payment in respect of these earlier unpaid contributions will be made within the twelve-month period ending on the day immediately preceding the date of insolvency. To allow otherwise would be to expose the Social Insurance Fund to a greater liability than is provided for in the Act.

The Tribunal rejects the argument made on behalf of the appellant that the €22,500 was the unpaid employer contribution that fell due during the twelve months immediately preceding the date of liquidation. The said outstanding amount of €22,500 fell due under a private agreement between the company and the trustees of the pension scheme and was comprised of accumulated unpaid contributions in respect of an earlier period for both unpaid employee and employer contributions.

The uncontroverted evidence before the Tribunal is that payments were made into the pension scheme covering the contributions due between October 2003 and July 2004 (the relevant portion of the twelve month period ending on the day immediately preceding the date of insolvency) except that there was a shortfall in the payment of the employer contributions due to the pension scheme in the amount of €247.81. This amount is less than the amount necessary for the purpose of meeting the liability of the scheme on dissolution to pay the benefits of the scheme (€22,500). The Department paid the amount of €247.81 to the liquidator for payment into the assets of the pension scheme in August 2005. Accordingly, there is no liability to make further payment in

respect of the unpaid employer contributions from the Social Insurance Fund under the Protection of Employees (Employers' Insolvency) 1984 Act as amended.

Declaration

The Tribunal declares that there is no liability to make further payment from the Social Insurance Fund under the Protection of Employees (Employers' Insolvency) 1984 Act as amended, in respect of unpaid employer contributions, into the assets of the pension scheme.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

