**THE COURT OF APPEAL**

Neutral Citation Number: [2017] IECA 37

**[2015 No. 474]**

**Finlay Geoghegan J.**
**Peart J.**
**Hogan J.**

**BETWEEN**

**MAGDALENA GLEGOLA**

**APPLICANT/APPELLANT**

**AND**

**THE MINISTER FOR SOCIAL PROTECTION, IRELAND AND**

**THE ATTORNEY GENERAL**

**RESPONDENT**

**JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 24th day of February 2017**

1. This appeal concerns the entitlement of the appellant to be paid from the Social Insurance Fund a debt due to her by her former employer, The Metro Spa Ltd. in the sum of €16,818.75, pursuant both to a recommendation of the Rights Commissioner dated 11th October, 2012, and to the State's obligations pursuant to Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer ("the Directive").

**Background Facts**

2. The appellant was employed by The Metro Spa Ltd. ("the Company"). She claims she was dismissed on 30th November 2011, having been informed that the Company was going into liquidation. The reason given for her dismissal was redundancy.

3. She subsequently formed the view that the Company had continued to trade, and she made a complaint to the Rights Commissioner in May 2012 under the Payment of Wages Act 1991, the Organisation of Working Time Act 1997 and the Unfair Dismissals Acts 1977 to 2001. Furthermore, her solicitor wrote to the Company alleging that the Company's designation in the Companies Registration Office was "normal" rather than "in liquidation", and that the "undertaking" continued to trade. Reasons for the appellant's dismissal were sought. On 7th June, 2012, the solicitor for the Company responded and stated:

> "Our client ceased trading in November 2011. This can be verified from an inspection of the premises at Clarendon Street from which it used to trade. The only reason the company has not entered into liquidation is because of the costs which would be attendant on same and the lack of any resource within the company to meet the same. In the circumstances, it is clear that a true redundancy situation did exist and is verifiable."

4. The Rights Commissioner held a hearing in August 2012, which was not attended by the Company, and issued a recommendation on 11th October, 2012. The recommendation stated:

> "As there was an unexplained absence of the Respondent, I accept the uncontested evidence presented on behalf of the Claimant. I find her claims well-founded and make the following awards:-
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> Unfair Dismissals Act - €10,000 in compensation
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> Organisation of Working Time Act - €5,000 in compensation
>
> Payment of Wages Act - €1,818.75 in unpaid wages."

5. The recommendation records a summary of the claimant's position as:

> "The Claimant does not accept that a redundancy situation exists and further asserts that the procedures applied to her, culminating in her dismissal were unfair. The Respondent's company has not been placed in liquidation and continues to trade. There were plenty of opportunities for the Claimant to be re-engaged and retrain where appropriate."

6. The total amount awarded was €16,818.75. It is accepted for the purposes of this appeal that the recommendation of the Rights Commissioner, not having been appealed by the Company, became binding and was subsequently a debt due by the Company to the appellant.

7. On 16th October, 2013, the Company was struck off the Register of Companies for failing to file accounts.

8. On 13th March 2014, the appellant issued a petition in which she sought an order restoring the Company to the Register pursuant to s. 12B of the Companies (Amendment) Act 1982; an order winding up the Company pursuant to the provisions of the Companies Acts and Article 3 of EU Regulation 1346/2000; an order pursuant to s. 251 of the Companies Act 1990 and liberty to bring applications under s. 297A of the Companies Act 1963 and s. 140 of the Companies Act 1990 by way of notice of motion. The petition was served, *inter alia*, on the Company but was not advertised in the ordinary way. The petition and grounding affidavit explains the purpose of the petition as being that the appellant was seeking to have her award from the Rights Commissioner paid from the Social Insurance Fund established pursuant to the Protection of Employees (Employers' Insolvency) Act 1984. Further, it was submitted that the petitioner was unable to afford the costs of a liquidator and therefore was seeking a determination under s. 251 of the Companies Act 1990 by reason of advice she had received that this would be sufficient to comply with the requirements of Article 2.1 of the Directive which, it was contended, had direct effect.

9. A motion was brought in the petition proceedings in the High Court [2014 149 COS] and ultimately heard by Charleton J. on 28th April, 2014. The Court dispensed with any advertisement; deemed the hearing of the motion to be hearing of the petition; made an order restoring the Company to the Register of Companies and other consequential orders and made the following declaration:

> ". . . pursuant to s. 251 of the Companies Act 1990, that the company is unable to pay its debts and that the reason for it not being wound up is due to the insufficiency of its assets."

10. Armed with this order, on the 10th June, 2014, the solicitor for the appellant wrote to the Secretary General of the Department of Social Protection seeking payment of the amount of the award recommended by the Rights Commissioner from the Social Insurance Fund. It was contended that the declaration pursuant to s. 251 of the Companies Act 1990 was sufficient to trigger Article 2(1)(b) of Directive 2008/94/EC, which it was submitted has direct effect in the State. It was intimated that in default of payment within 21 days, judicial review proceedings would issue, and it was further stated that the appellant was reserving her right to seek damages from the State for its failure to transpose European law in accordance with the decision of the European Court of Justice in *Francovich v. Italy*.

11. By order of the High Court (Barton J.) of 7th July, 2014, leave was granted for the judicial review proceedings. The statement of grounds was verified by an affidavit of the solicitor for the appellant, and subsequently a notice of opposition verified by affidavit was delivered.

12. Following a full hearing, the application for mandamus was dismissed for the reasons set out in the written judgment of Hedigan J., delivered on the 23rd June, 2015. In essence, the trial judge concluded that on the facts, and on the procedures up to that moment in time undertaken by or on behalf of the appellant, she had not satisfied the requirements of Article 2(1)(b) of the Directive and hence could not sustain a claim against the State in reliance upon the direct effect of Article 2(1)(b) of the Directive. The trial judge did not consider the alternative claim for damages pursuant to the Francovich principles.

13. On appeal, counsel for the appellant pursued two distinct submissions in the alternative.

14. First, he submitted that the declaration granted by the High Court (Charleton J.) on 28th April, 2014 in the petition proceedings pursuant to s. 251 of the Companies Act 1990, satisfied the requirements of Article 2(1)(b) of Directive 2008/94/EC, and accordingly, the State is obliged to make the payment to the appellant out of the Social Insurance Fund in accordance with the principles of direct effect.

15. The second submission, which only arises if the Court does not accept the first, is that the State has failed to transpose Article 2(1)(b) of Directive 2008/94/EC in failing to have in place a procedure where, as part of the statutory scheme applicable to a petition to wind up a company by the Court, an application could be made, in the alternative for an order of a type envisaged by Article 2(1)(b). Further, it was contended that in accordance with the *Francovich* principles, the appellant is entitled to an award of damages against the State in the amount of the Rights Commissioner's recommendation.

16. Counsel for the Minister disputes the adequacy of the declaration pursuant to s. 251 of the Companies Act 1990 to satisfy the requirements of Article 2(1)(b) of Directive 2008/94/EC. She also submits that Ireland is not in breach of its obligations in relation to the transposition of the Directive by the enactment of the Protection of Employees (Employers' Insolvency) Act 1984. Her final submission is that even if there has been a breach by the State, that the appellant has not satisfied all of the criteria for an award of damages in accordance with the *Francovich* principles.

17. Prior to considering the opposing submissions, it is necessary to set out the EU and Irish legislative schemes. Directive 2008/94/EC, passed on 22nd October, 2008, repealed and replaced Council Directive 80/987/EEC which had been substantially amended several times. It was now sought in the interests of clarity and rationality that the protection of employees in the event of the insolvency of their employers be codified. Nothing turns on this, save it explains the earlier date of the implementing legislation in the State.

18. Article 1 states that the Directive applies to certain employees' claims arising against employers "who are in a state of insolvency within the meaning of Article 2(1)".

19. Article 2(1) provides:

> "1. For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency where a request has been made for the opening of collective proceedings based on insolvency of the employer, as provided for under the laws, regulations and administrative provisions of a Member State, and involving the partial or total divestment of the employer's assets and the appointment of a liquidator or a person performing a similar task, and the authority which is
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> competent pursuant to the said provisions has:
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> (a) either decided to open the proceedings; or
>
> (b) established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings."

20. Article 2(2) specifies that the Directive is without prejudice to national law as regards certain definitions, none of which include the term "state of insolvency". Article 2(4) permits Member States to extend employee protection to other situations of insolvency, but without certain transnational obligations provided for in the Directive. The Directive, in Chapter 2, requires Member States to ensure that guarantee institutions guarantee certain employees' outstanding claims. No issues arise in these proceedings in relation to Ireland's compliance with those provisions of the Directive.

21. The Directive (or its predecessor) was sought to be implemented by the Protection of Employees (Employers' Insolvency) Act 1984. The issue relates to s. 1(3) of the 1984 Act which, insofar as is relevant to a company, provides:

> "(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) . . .

(b) …

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. . .”

22. On the facts herein, no receiver or manager was appointed; no possession was taken by a debenture holder, and no resolution was passed for voluntary winding up.

23. The entitlement of a person to recover from the Social Insurance Fund pursuant to s. 6 of the 1984 Act is confined to a situation where the employment was “by an employer who has become insolvent”.

24. The problem for the appellant, having regard to the provisions of the 1984 Act, was that as her former employer was a company in accordance with s. 1(3) for the purposes of the Act, it is considered to have become insolvent “if, but only if, [emphasis added]” a winding up order has been made, or one of the other situations in subparagraph (c) applies, none of which applied on the facts of this situation between the appellant and the Company.

25. The appellant was a creditor of the Company with an unpaid debt. As such, she was a person entitled to petition for the winding up of the Company pursuant to sections 213 and 214 of the Companies Act 1963. However, as far as she was aware, the Company did not have any assets and she averred that she was not in a position to indemnify a person to act as liquidator of the Company.

26. An analogous situation arose in *Re Davis Joinery Ltd.* [2013] 3 I.R. 792. That case concerned a petition to wind up a company where the petitioner was a person who wished to make a claim against the Social Insurance Fund in respect of a debt of €53,080. When the matter first came before Laffoy J. in the High Court, there was no person (who had consented to do so) put forward to act as official liquidator for the purposes of the winding up.

27. Laffoy J. ultimately delivered a written judgment which sets out, with usual clarity, the problem presented by the manner of implementation of the Directive by s. 1(3) of the 1984 Act, and the provisions of the Companies Act 1963. While s. 1(3) of the 1984 Act only requires the making of a winding-up order, Laffoy J., for reasons fully set out at paras. 30 to 32 of her judgment, reached the conclusion that it would not be appropriate to make a winding-up order without ensuring that the office of official liquidator is filled from the time of the making of the winding-up order. It appears, on the facts recorded in the judgment, that it was proposed that she make a winding-up order with a person who had only consented to act as a provisional liquidator. However, she was unwilling to do that and adjourned the petition to enable the parties ascertain if the insolvency practitioner was prepared to consent to act as official liquidator. He subsequently consented and the winding-up order and appointment of liquidator was made in the usual form for the purposes of the winding up under the supervision of the Court.

28. In those proceedings, Laffoy J. identified clearly the problem for employees with a debt owed by a former employer, a company, which would otherwise qualify for payment out of the Social Insurance Fund, but where the company is not formally wound up, either on a voluntary or compulsory basis by order of the Court. Laffoy J. also made a number of general observations in relation to the problems arising from the transposition of the Directive, to which I will return.

29. The appellant herein was not as fortunate as the petitioner in *Re Davis Joinery Ltd*. She did not have a person willing to act as official liquidator. In *Re Davis Joinery Ltd.*, Laffoy J. records that she pointed out that “the role of an official liquidator performed under the supervision of the High Court is an onerous role and may involve the official liquidator incurring expenditure which he may not be in a position to recoup”.

30. Faced with this problem, counsel for the appellant attempted to find an alternative provision in the Companies Acts which might enable the definition of “state of insolvency” in Article 2(1)(b) of the Directive be satisfied. He identified s. 251 of the Companies Act 1990. Insofar as is relevant, it provides:

“(1) This section applies in relation to a company that is not being wound up where—

(a) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(b) it is proved to the satisfaction of the court that the company is unable to pay its debts, taking into account the contingent and prospective liabilities of the company, and

it appears to the court that the reason or the principal reason for its not being wound up is the insufficiency of its assets.

(2) The following sections, with the necessary modifications, shall apply to a company to which this section applies, notwithstanding that it is not being wound up—

(a) sections 139 , 140 , 203 , and 204 of this Act, and

(b) the provisions of the Principal Act mentioned in the Table to this section.”.

31. As is clear from the language of that section, in order that s. 251 can apply in relation to a company, it must be both proved to the satisfaction of the Court that “the company is unable to pay its debts . . .” and it must appear to the Court that the reason or principal reason for its not being wound up is the insufficiency of its assets. The petition and verifying affidavit in the proceedings before Charleton J. addressed those issues, and he made the declaration already set out that “the company is unable to pay its debts and that the reason for it not being wound up is due to the insufficiency of its assets”.

**State of Insolvency**

32. The first issue is whether the declaration made by Charleton J. in the petition proceedings in the High Court satisfies the requirements of Article 2(1)(b) of the Directive such that the Company was, consequent on that declaration, "deemed to be in a state of insolvency" within the meaning of Article 2(1)(b) of the Directive. Counsel for the appellant submits that it was, and that, accordingly, the appellant was entitled to payment out of the Social Insurance Fund when the demand was made.

33. I cannot agree with that submission. The presentation of a petition to wind up a company pursuant to the Companies Acts is, in the wording used in Article 2, a request for the opening of collective proceedings based on the insolvency of the employer. It would, for the reasons set out by Laffoy J. in *Re Davis Joinery Ltd.*, always be accompanied by an application for the appointment of a liquidator. The relevant request, in accordance with the opening paragraph of Article 2(1), must be both for the opening of the collective proceedings and the appointment of a liquidator or a person performing a similar task. Leaving to one side the question as to whether the petition presented by the appellant for the winding up of the Company without an application for the appointment of a liquidator even meets that part of Article 2(1), in order that there be a deemed state of insolvency, the person to whom the request was made i.e. in the Irish context, the High Court, must have done one of two things. The first is decide to open the proceedings, and that would normally mean either the appointment of a provisional liquidator or the making of a winding-up order and appointment of an official liquidator, neither of which occurred here. Otherwise, the Court must have made a decision of the alternative type envisaged in Article 2(1)(b). That requires that the Court has established, and is satisfied, that the company's undertaking or business "has been definitely closed down and that the available assets are insufficient to warrant the making of a winding-up order or the appointment of a provisional liquidator as an initial step to making a winding-up order".

34. I accept the submission made on behalf of the Minister that the purpose of the requirement of satisfying a Court, or other competent authority taking the decision, that the relevant company's undertaking or business "has been definitively closed down" is a requirement of certainty, which is designed to protect the insolvency funds. As is stated in Article 2, an employer is being deemed to be in a state of insolvency for the purposes of the Directive without the opening of formal insolvency proceedings. The declaration made in the High Court by Charleton J. does not address this issue. Counsel for the appellant fairly told us that Charleton J. was informed of the reason for which he was being asked to make the declaration, as was termed pursuant to s. 251 of the Companies Act 1990, but that he nonetheless did not consider he was in a position to make a declaration, pursuant to that section, to the effect that the business of the Company had been definitively closed down.

35. By reason of that conclusion, it is unnecessary to consider whether s. 251 of the Companies Act 1990 in fact gives the High Court a jurisdiction to make a declaration of that type. However, lest the issue should arise again, it appears appropriate to indicate that it does not appear to me to give such a jurisdiction. The section, in its terms, states that it will apply if the Court is satisfied of certain matters. If s. 251(1) does apply, then the consequences are that the other sections in the Companies Act,, as set out in s. 251(2), apply to the company in question , notwithstanding that it is not being wound up. Those are sections which normally apply to companies which are being wound up. The only decision to be made on an application pursuant to s.251(1) is whether it applies to the company or not. It does not confer jurisdiction to make other declarations.

**Failure to Transpose**

36. In these circumstances, it is therefore necessary to consider next whether the State has failed to fully and properly transpose Directive 2008/94/EC. As appears, Article 1 applies the Directive to employers "who are in a state of insolvency within the meaning of Article 2(1)". Translating this term and employing the more familiar Irish terminology and procedure, Article 2(1) deems an employer, which is a company, to be in a state of insolvency where a petition has been presented for its winding up and the appointment of a liquidator and the Court, in accordance with the Irish laws, regulations and administrative provisions, has done one of two things: either decided to make a winding-up order or appoint a provisional liquidator with a view to the hearing of a petition and the making of a winding-up order, or has made a finding or declaration that the undertaking or business of the company has been definitively closed down and that the available assets are insufficient to warrant making a winding-up order or appointing, as an initial step, a provisional liquidator.

37. The reason for which I have referred to the appointment of a provisional liquidator in the context of the opening of insolvency proceedings is the judgment of the Court of Justice in Case C-341/04 *Eurofood IFSC Ltd EU*: C: 2006: 281 [2006] E.C.R. I-3813 which indicates that the appointment of a provisional liquidator may constitute the opening of insolvency proceedings within the meaning of the insolvency regulation. However, nothing turns on that for the purposes of this appeal.

38. It is common case that there is no provision under the Companies Acts which enables a petitioner for an order for the winding-up of a company and appointment of a liquidator to apply for and be granted the alternative form of order envisaged in Article 2(1)(b). For the reasons already set out, s. 251 does not enable the Court to make such an order. Consideration was given to s. 216 of the 1963 Act, but counsel for the Minister properly did not submit that the jurisdiction to make "any other order that it thinks fit" in the context of s. 216 could be considered as granting such a jurisdiction.

39. In addition to the absence of any provision in the Companies Acts which would enable a court hearing a winding-up petition to make, instead of an order for the winding-up and appointment of a liquidator, an order of the type set out in Article 2(1)(b) of the Directive, the definition in s. 1(3) of the Protection of Employees (Employers' Insolvency) Act 1984 creates a difficulty. It provides "an employer which is a company will be taken to have become insolvent, if but only if, a winding up order is made or a resolution for voluntary winding up is passed or a receiver or manager of its undertaking is duly appointed. . ." The requirement that a winding up order is made in order that a company will be taken to have become insolvent has the effect that the 1984 Act does not permit a person to make a claim against the Social Insurance Fund in circumstances of a deemed state of insolvency following an application and decision by a court of a type specified in Article 2(1)(b) of the Directive.

40. For those reasons, I have concluded that the State has failed to correctly transpose Article 2(1) of Directive 2008/94/EC.

**Damages**

41. The applicable principles are not in dispute. They were set out in the seminal decision of Joined Cases C-6/90 and C-9/90, Francovich and Bonifaci, of 19th November, 1991 at paras. 39 to 41 where the Court of Justice stated:

> "39. Where, as in this case, a Member State fails to fulfil its obligation under the third paragraph of Article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.
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> 40. The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.

41. Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law."

42. Further, it is not in dispute that the *Francovich* judgment itself decided that Directive 80/987/EEC entailed the grant of rights to individuals. Similar provisions in Directive 2008/98/EC do likewise.

43. The Court of Justice has further expanded on the second condition identified, namely, that the breach of Community law is sufficiently serious to warrant an award of damages against the Member State. In Cases C-46/93 and C-48/93, *Brasserie du Pecheur* and *Factotame*, [1996] E.C.R. I-1029 at paras. 55 and 56, it stated:

> "55. As to the second condition, as regards both Community liability under Article 215 and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.
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> 56. The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law."

44. Those criteria have been the subject of consideration by this Court in *Ogieriakhi v. Minister for Justice* [2016] IECA 46. Counsel for the appellant relied upon the further factors to be taken into account which had been identified by the Court of Justice in its judgment in Case C-278/05 *Robins & Ors.* [2007] ECR I-1081, where at paras. 70 to 72, it stated:

> "70. The condition requiring a sufficiently serious breach of Community law implies manifest and grave disregard by the Member State for the limits set on its discretion, the factors to be taken into consideration in this connection being, inter alia, the degree of clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities (*Brasserie du Pêcheur* and *Factortame*, paragraphs 55 and 56).
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> 71. If, however, the Member State was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see *Hedley Lomas*, paragraph 28).
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> 72. The discretion enjoyed by the Member State thus constitutes an important criterion in determining whether there has been a sufficiently serious breach of Community law."

45. Reliance was also placed upon the judgment of Laffoy J. in *Re Davis Joinery Ltd.*, already referred to, and in particular the observation made by her at paras. 33 to 35:

> "33. While the court has been able to provide assistance to the petitioner, it has been able to do so by applying the provisions of the Act of 1963 in the ordinary way. However, the problem arising from the transposition of the Employers' Insolvency Directive has been around for a long time and, as stated in Regan, Employment Law (Bloomsbury, 2009) at para. 12.23:-
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> 'The Act's failure to deal with informal insolvency is probably its greatest defect and certainly its most controversial one'.
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> That problem is not cured by this decision.
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> 34. The petitioner in this case has been fortunate in that his solicitors and counsel have taken the matter this far on his behalf and have been of very considerable assistance to the court and must be commended for that. However, one has to be concerned for less fortunate employees of corporate employers who have become caught up in what has become known as 'informal insolvency' and who are not in a position to petition to have the employer corporation wound up. Unless the issue is successfully litigated by an adversely affected employee in the future in this jurisdiction, or on a reference to the ECJ, the obvious unfairness inherent in the Act of 1984, as amended, will only be redressed by legislative change. Whether such change should be implemented is a matter of policy for the Government and the Oireachtas.
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> 35. Finally, for the avoidance of doubt, it must be emphasised that nothing in this judgment should be interpreted as expressing any view as to whether the Petitioner can maintain an action against the State for loss incurred as a result of the manner of transposition of the Employers' Insolvency Directive."

46. Applying those principles to the facts herein, I have concluded that the breach by the State in failing to transpose fully Directive 2008/94/EC by failing to provide a procedure whereby a person, such as the present appellant, who is owed a debt by her employer, a company which is insolvent, but where no steps have been taken by the directors to wind up voluntarily and there are no assets available in the company to satisfy the probable costs to be incurred by a liquidator, to obtain the alternative type of order identified in Article 2(1)(b), is sufficiently serious in accordance with the principles set out above, to warrant an award of damages.

47. First, Article 2(1) of the Directive sets out with clarity the conditions under which an employer will be deemed to be in a state of insolvency for the purposes of the Directive. Those are minimum terms of a state of solvency, as Article 2(4) expressly permits greater protection to be given to employees. Thus, it is clear that an employee must be entitled to recover against an insurance fund where, in accordance with such minimum criteria, a state of insolvency exists in relation the employer.

48. Second, Article 2(1) makes expressly clear the fact that in relation to a company, an order for winding up is not required and that a deemed state of insolvency may exist where a Court, in proceedings in which there is a petition to wind up, makes the alternative type of order set out in Article 2(1)(b). Notwithstanding the clarity of this provision, the State, in passing the 1984 Act, defined insolvency exclusively in relation to a company as requiring either a resolution to wind up voluntarily or the making of an order for the winding up. The additional provisions in relation to appointments of receivers or taking of possession by a debenture holder are not relevant.

49. As Laffoy J. observed in *Re Davis Joinery Ltd.*, the problem with what she refers to as "informal insolvencies" was well recognised and known for some time prior to her judgment in that case in 2013. The Oireachtas has addressed the issue of insolvent companies

not being formally wound up for other purposes, such as in s. 251 of the Companies Act 1990. The written reserved judgment of Laffoy J. delivered on 19th July, 2013 sets out with great clarity the problem at issue, and the resolution reached in that case for the petitioner with the assistance of his solicitor, counsel, and an insolvency practitioner who was willing to act as official liquidator. That judgment was delivered approximately eight months prior to the petition presented by the appellant herein to the High Court seeking the winding up order.

50. Hence, whilst I have noted that there were no infringement proceedings commenced against Ireland by the Commission, nevertheless, it appears to me, for the reasons outlined above there was a manifest disregard by the State of the limits of its discretion. The State was not called upon to make a legislative choice in transposing Article 2(1) of the Directive so as to provide in Irish law a procedure which would enable an employer which was a company, which appeared to have definitively ceased trading and where there was an insufficiency of assets, to enable a liquidator be appointed be deemed to be in a state of insolvency so that the employee could benefit, as intended by the Directive, by payment from the Social Insurance Fund.

51. Whilst the amount of the debt due to the appellant herein is relatively small, nevertheless, it is a sufficiently serious breach where it leaves the employee intended to benefit from the provisions of the Directive unable to recover monies due to her by her employer in circumstances in which the Directive provides they should be recoverable from the Social Insurance Fund.

52. The final question is the causal link. Counsel for the State informed the Court, on instructions, that no point was being taken in relation to the amount of the award made by the Rights Commissioner. It is also accepted that such award became binding on the employer. However, there are two issues in dispute on the causal link. They both relate to the question as to whether the Court should now be satisfied that if the procedure envisaged by Article 2(1)(b) had been in place at the relevant time, the appellant would, as a matter of probability, have satisfied the Court that the Company's undertaking or business had been definitively closed down and that the available assets were insufficient to warrant the making of a winding-up order and also that the appellant would have brought the application within the times specified in the 1984 Act. Submissions were made on behalf of the State with particular reference to the matters averred to in the verifying affidavit in the petition proceedings, and also the fact that the appellant had, before the Rights Commissioner, disputed that the business of the Company had been definitively closed down.

53. It is true that the appellant gave evidence, which was accepted by the Rights Commissioner, that she considered that her employer was then continuing to trade. That hearing was in August 2012. Notwithstanding that the employer did not appear at the hearing, the position maintained by solicitors on its behalf in their letter of 7th June, 2012 was that their client had ceased trading in November 2011, and it was suggested that this could be verified from an inspection of the premises from which it used to trade. The Company was subsequently struck off by the Registrar of Companies on 11th October, 2013. I recognise that the fact that a company is struck off for failure to file returns does not mean that it is not in fact continuing to trade. When the petition was presented in March 2014, it was served on the Company and the Company did not appear in the High Court.

54. On the causal link, it appears to me this Court must be satisfied that the absence of the relevant procedure in the State required by Article 2(1)(b) of the Directive caused the appellant's loss in failing to recover the amount awarded by the Rights Commissioner from the Social Insurance Fund. I am satisfied on the evidence before the High Court and this Court that if there had been in place in late 2012 or 2013, a procedure under which the appellant could have petitioned the High Court for the winding up of the Company and appointment of a liquidator, but also seek in the alternative an order or declaration that the business of the Company had been definitively closed down and that the available assets were insufficient to warrant a winding up by the Court and appointment of an official liquidator, that the appellant would, as a matter of probability, have been able to discharge the requisite evidential burden.

55. Further, it appears to me that if such a procedure had been available in the Companies Acts or other relevant legislation, that as a matter of probability, the solicitors acting for the appellant who were already advising her in May 2012 would as a matter of probability have made any application within the relevant timeframe.

56. Accordingly, in my judgment, the appellant is entitled to recover damages in the sum of €16,818.75 against the State for its failure to correctly transpose Directive 2008/94/EC.

**Conclusion**

57. I would allow the appeal; vacate the order of the High Court; grant a declaration that the State has 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 and make an award of damages against the State in the sum of €16,818.75.