

Employee Claims in Liquidation following a Company Voluntary Arrangement [“CVA”]

Employees affected by their employer’s insolvency have been making claims against the National Insurance Fund for arrears of pay, holiday pay, pay in lieu of notice, and redundancy for many years. Such claims are based on Section 182 of the Employment Rights Act 1996 [“ERA 1996”]

However, a ruling by the Employment Appeals Tribunal [“EAT”] in favour of the Secretary of State will restrict the ability for an employee to claim holiday pay and arrears of pay from the fund where their employer enters Liquidation following a CVA, and their employment subsequently ends.

Such an event has often been considered to represent the end of one insolvency procedure and the start of another. However, for the purposes of the ERA 1996 this is not the case and the relevant date for employee claims is the date the CVA was approved, not the date of Liquidation. As such, any holiday pay and wage arrears that accrue after the CVA commenced will not be covered by the National Insurance Fund and will become unsecured claims in the Liquidation.

The EAT, in reaching their decision analysed S182 ERA 1996 and in particular the definition of insolvency and what constituted an appropriate date. S183 of the Act specifically includes CVA’s within the definition of Insolvency and S185 defines the ‘appropriate date’ for arrears of pay and holiday pay as being the date on which the employer became insolvent.

In light of this, the EAT ruled that

- The ERA permits of only one insolvency event (As moving from CVA to Liquidation, the underlying state of insolvency has not changed)
- The Liquidation would have been a separate insolvency event had there been no CVA
- The appropriate date under S185 ERA 1996 is the date on which the company became insolvent, and the Act formally recognises a CVA as a form of insolvency.

As a result, some employees through no fault of their own could end up in a position where certain claims will not be covered by the National Insurance Fund. The EAT was conscious of the apparent unfairness of the ruling and the perception that it contradicts the very reason the State guarantee exists. However, it was satisfied that the ERA 1996 clearly covered such scenarios and whilst some provisions may give unfair results, they still have to be applied.

Please note that should your clients require any confidential advice regarding any insolvency matter they are welcome to contact Ian, John or Robert. An initial consultation is provided free of charge and without obligation. Also, if you or any of your colleagues require any clarification regarding insolvency law or procedure, please do not hesitate to contact us.