DÁIL ÉIREANN

AN COMHCHOISTE UM FHIONTAR, TRÁDÁIL AGUS FOSTAÍOCHT

JOINT COMMITTEE ON ENTERPRISE, TRADE AND EMPLOYMENT

Dé Céadaoin, 6 Iúil 2022

Wednesday, 6 July 2022

Tháinig an Comhchoiste le chéile ag 9.30 a.m.

The Joint Committee met at 9.30 a.m.

Comhaltaí a bhí i láthair / Members present:

Teachtaí Dála / Deputies	Seanadóirí / Senators
Richard Bruton,	Garret Ahearn,
Joe Flaherty,	Ollie Crowe,
Paul Murphy,	Paul Gavan.
Louise O'Reilly,	
Matt Shanahan,	
David Stanton.	

I láthair / In attendance: Deputy Mick Barry.

Teachta / Deputy Maurice Quinlivan sa Chathaoir / in the Chair.

Pre-legislative Scrutiny of the Companies (Protection of Employees' Rights in Liquidations) Bill 2021: Discussion

Chairman: The proceedings of Oireachtas committees will be conducted without the requirement for social distancing, with normal capacity in the committee rooms restored. However, committees are encouraged to take a gradual approach to this change. Members and witnesses have the option to attend meetings in the relevant committee room or online through Microsoft Teams. All those attending in the committee room and its environs should continue to sanitise and wash their hands properly and often, avail of sanitisers, be respectful of other people's physical space and practise good respiratory etiquette. If they have any Covid-19 symptom, no matter how mild, they should not attend in the committee room. Members and everyone else in attendance are asked to exercise personal responsibility in protecting themselves and others from the risk of contracting Covid-19. As members well know, members who wish to participate in the meeting remotely must do so from within the Leinster House complex only.

Apologies have been received from Senator Garvey.

The Companies (Protection of Employees' Rights in Liquidations) Bill 2021 proposes to provide for the inclusion of redundancy payments among the list of preferential debts provided for by section 621 of the Companies Act 2014. It also proposes to insert a new section 621A, which would provide that "payments due to provide for the discharge of the entitlements of the employees who have been made redundant as a result of the employers' insolvency shall have priority to all other debts." A central issue in our consideration of the Bill is the position of employees as creditors in the winding up of a company's liquidation. When a company is liquidated, either through insolvency or voluntarily, its assets are collected for distribution to its creditors.

Today, I am pleased that we have the opportunity to consider these matters further with representatives from the Irish Congress of Trade Unions, ICTU, and IBEC. From ICTU, I welcome Mr. Liam Berney, industrial officer, and Mr. Gerry Light, general secretary of Mandate. From IBEC, I welcome Ms Maeve McElwee, director of employee relations, and Ms Pauline O'Hare, senior employment law manager.

Before we start, I wish to explain some limitations to parliamentary privilege and the practice of the Houses as regards references that witnesses may make to another person in their evidence. The evidence of witnesses physically present or who give evidence from within the parliamentary precincts is protected by absolute privilege pursuant to the Constitution and statute. Witnesses are again reminded of the long-standing parliamentary practice to the effect that they should not criticise or make charges against any person or entity by name or in such a way as to make him, her or it identifiable or otherwise engage in speech that might be regarded as damaging to the good name of the person or entity. Therefore, if their statements are potentially defamatory of an identifiable person or entity, they will be directed to discontinue their remarks. It is imperative that they comply with any such direction.

The opening statements have been delivered to members. To commence our consideration on this matter today, I invite Mr. Berney to make his opening remarks on behalf of ICTU.

Mr. Liam Berney: We are pleased to accept the invitation to address the committee and to outline the views of Congress on the Companies (Protection of Employees' Rights in Liquidation) Bill 2021. This is important legislation and has the full support of ICTU. We understand

that the Bill seeks to change the law in two regards. First, it seeks to put workers at the head of the queue when it comes to the distribution of moneys from the liquidation of a business. Second, it seeks to make an unpaid collective redundancy agreement a recognised debt in the eyes of the law and one that must be taken into account in the liquidation process.

The proposed legislation comes against the backdrop of a number of high-profile cases that demonstrated the need to provide great protection for workers in the event of their employers going into liquidation. The lack of legal protection for workers in such situations was highlighted with the closure of Clerys in 2015. The circumstances surrounding the closure of Clerys are well known. The treatment of workers in that case was universally condemned.

Following the closure of Clerys, Congress led a campaign seeking legislative changes that would prevent any company from treating workers in that way again. As a result of this campaign, the Government commissioned Ms Nessa Cahill and Mr. Kevin Duffy, both law experts, to review relevant legislation with a view to identifying what changes could be made to give greater legal protection to workers. In March 2016, what has become known as the Duffy-Cahill report was published. This wide-ranging report made a number of recommendations. Among other matters, it recommended that employers be legally obliged to consult employees not less than 30 days before any collective redundancy could take effect regardless of whether the employer was insolvent. The report also made recommendations on sanctions and remedies arising from non-compliance with the requirement to consult workers, including the ramifications for directors under the Companies Act 2014.

The committee should note that Congress argued strongly through the Company Law Review Group for the adoption of the Duffy-Cahill report. While some progress has been made, the main recommendations have never been implemented. In April 2020, Debenhams announced that its business in the Republic of Ireland would be placed into liquidation with the loss of thousands of jobs. The failure to implement the recommendations in the Duffy-Cahill report meant that the Debenhams management had no legal obligations to its Irish workforce and could simply walk away.

It has been acknowledged by all political parties in the Oireachtas that the law regulating the liquidation of a business is unfair on workers and needs reform. The Duffy-Cahill report provided a fairer and more balanced approach and provided for the equitable treatment of workers. The Bill that we are discussing here is an attempt to ensure that what happened to workers in Clerys, Debenhams and Connolly Shoes can never happen again. We urge all political parties to support it.

If the Chairman does not mind, my colleague, Mr. Light, will make some additional comments.

Mr. Gerry Light: Like Mr. Berney, I thank the committee for the opportunity to address it today on this very important issue. My words should be taken as representative and reflective of the experiences endured by the many thousands of retail workers who have lost their jobs over the past number of years, in particular since the start of the Covid pandemic. For far too long, workers have been left totally exposed in a cruel and unfair fashion when the businesses for which they work collapse - many in contrived and preordained circumstances.

The Bill under scrutiny today matters not only to those who have lost their jobs but those who might suffer the same fate in the future. Since early 2020, between Debenhams and Arcadia alone, over 1,500 Mandate members were compulsorily redundant leaving the State to

pick up the bill while the businesses in which they worked conveniently disappeared into the dark and mysterious world of liquidation. The stark reality is that both of those businesses collectively negotiated agreements regarding redundancy that covered the terms of a previous redundancy deal. This is of particular importance given one of the key stated objectives of the Bill under scrutiny today.

For a remarkable 406 days, Debenhams workers stood on picket lines across this country in an effort to vent their frustration and anger at the way they had been treated but to their credit, they also demanded a better deal for workers in the future. At this juncture, I acknowledge some of the representatives of the ex-Debenhams workers in the Gallery here today. I do not know how many people in this room have ever stood on a picket line for any length of time, particularly for 406 days. To do so takes determination and courage beyond belief and a burning desire to expose the injustice that has been inflicted upon you. Instead of regularly noting that this dispute was a unprecedented record-breaking achievement, which it was, the time has come to recognise in a real and tangible way the sacrifices of these abandoned workers and ensure their collective efforts were not in vain and that workers in the future will not be left so crudely exposed. The greatest and most fitting recognition we can show is through the speedy passing of the Bill under consideration here today. This is why, along with ICTU, Mandate is unequivocal in its support for the main objectives contained in the Bill.

Along with the main requirements contained in the Bill, we should at the earliest opportunity take the Duffy Cahill report off the shelf where it has been gathering dust for the past seven years and seek to have as many of its recommendations implemented through appropriate changes to employment and company law. This is something ICTU and Mandate have been petitioning the Minister of State, Deputy English, to do with greater intensity since the demise of Debenhams and Arcadia and it is a campaign we intend to vigorously pursue to a satisfactory outcome.

Mr. Liam Berney: We were due to be joined by Teresa Hannick from SIPTU. Due to unfortunate circumstances, she cannot be here.

Chairman: I invite Ms McElwee to make her opening statement.

Ms Maeve McElwee: IBEC welcomes the opportunity afforded by the committee to address the committee on the Companies (Protection of Employees' Rights in Liquidations) Bill 2021. In amending section 621 of the Companies Act 2014, this Bill makes provision for recognition of enhanced redundancy payments in a liquidation, including those agreed in relevant collective agreements, and proposes to give preferential creditor status to employees in the event of a company being wound up in a company liquidation.

IBEC notes that the impetus for the Bill arises from the Debenhams dispute following the closure of its Irish operation in April 2020. IBEC opposes the Bill, not least in the context of the far-reaching effect it will have if implemented. While IBEC recognises the distress of the Debenhams employees on the closure of the Irish operation, it respectfully submits that the Bill is a disproportionate response to the situation and will ultimately undermine the voluntarist nature of the industrial relations landscape in Ireland giving rise to constitutional challenge.

The Bill proposes two amendments to the 2014 Act. In the first instance, IBEC submits that statutory redundancy entitlements in Ireland are already more favourable than those of our nearest neighbour and competitor, the UK, not least for the fact that, unlike Ireland, the UK imposes a maximum statutory redundancy payment of £17,130 and caps length of service

in any such calculations at 20 years. It is the case that claims for enhanced redundancy payments are generally pursued as industrial relations claims using established industrial relations mechanisms whereby any recommendation issued is not binding in law. Therefore, any such enhanced payment cannot be considered a legally enforceable debt recoverable from the social insurance fund, owing to employees and binding on a liquidator.

The proposed amendment will fundamentally undermine the voluntarist nature of the industrial relations landscape in Ireland. Giving a collectively bargained agreement statutory footing and effectively penalising employees who are not subject to such agreements will significantly and irreparably undermine the constitutionally protected voluntarist system of industrial relations in Ireland. IBEC submits that there are serious constitutional concerns with giving legal effect to an industrial relations instrument considering the constitutional right to dissociate, as recognised by the Supreme Court.

The effect of legislating, as proposed, would be to place an enhanced redundancy payment on a statutory footing in insolvency situations only, with the State paying the bill. Should an enhanced redundancy payment be limited to insolvencies, as proposed, it would create a two-tiered system. It will essentially mean that those who are made redundant arising from an insolvency will be entitled to an enhanced redundancy payment and every other employee made redundant, where no insolvency arises, will only be legally entitled to statutory redundancy. Any such proposal would not only be completely unfair and illogical, but, IBEC respectfully submits, a disproportionate and misguided response to the Debenhams situation.

The Duffy Cahill report published on 11 March 2016 arising from the circumstances resulting in the redundancy of employees from Clery's department store, which must be distinguished from the circumstances giving rise to the Debenhams closure, considered the question of what protections could be afforded to an *ex gratia* payment in a collective redundancy situation. The authors stated, "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". On 11 May 2021, the Department of Enterprise, Trade and Employment published the plan for action on collective redundancies following insolvency setting out its conclusions arising from the examination of the legal landscape underpinning redundancy provisions in insolvency situations. Notably, with regard to a proposal to introduce enhanced redundancy payments where there has been a breach of the Protection of Employment Acts, the plan concludes that "this approach is not recommended" as it "could create two classes of redundant employee and undermines the purpose of collective redundancies in the context of corporate restructuring". IBEC submits that amending legislation resulting in a secondary class of employee is entirely unacceptable, regardless of whether the redundancies arise collectively or otherwise or due to insolvency or otherwise. IBEC submits that rather than placing an additional and excessive burden on an already stretched Exchequer, resources would be better used to require timely submission by liquidators of claims for payments from the social insurance fund and ensure efficient administration of such claims.

Section 621 of the 2014 Act, as amended by section 49 of the Workplace Relations Act 2015, already requires certain payments to employees to be classified as preferential payments in liquidation, including compensation payable under Part 4 of the Workplace Relations Act 2015. Furthermore, section 42 of the Redundancy Payments Acts 1967 to 2015 provides for priority of payment of statutory redundancy payments in a winding-up situation. It is concerning that the Bill seeks to put, without any justification, one class of employee above another in a redundancy situation by proposing more favourable statutory rights for employees made

redundant where an employer becomes insolvent. Any such amendment would result in the State deciding that one class of employee is more deserving of preferential treatment than another despite both being made redundant, which, IBEC submits, is at best entirely unfair and disproportionate.

It is clearly the case that not all redundancies will be the result of employer insolvency. IBEC refers to those companies that faced unprecedented challenges arising from the Covid-19 pandemic resulting in them having to affect redundancies arising from a restructure or downsizing in order to remain solvent. To suggest that those employees would not be as preferred in the eyes of the law as employees made redundant due to insolvency is a matter of concern. Furthermore, the proposed amendment provides that payments due to employees as a result of employer insolvency "shall have priority to all other debts". Consideration must, therefore, be given to the potential impact any such amendment would have on the preferential ranking of other creditors in recovering any debts owed. If implemented, the amendment would put employee debts ahead of State creditors, including the Revenue Commissioners, resulting in a potential adverse impact on the Exchequer and the social insurance fund.

While IBEC is acutely aware of the need to protect employees at times of an employer's financial difficulty, it submits that effective legislative provisions and mechanisms already exist under both employment and company law. We respectfully submit that the Bill is an entirely disproportionate response to the Debenhams dispute, with proposed amendments that are not only unreasonable and divisive but also constitutionally challengeable.

Chairman: I ask members connecting remotely to use the raise hand function and, more importantly, to put their hands down when they finish speaking. A rota of speakers in place. The first person to indicate is Deputy O'Reilly. The Deputy he has 14 minutes.

Deputy Louise O'Reilly: I thank the witnesses. I will begin by taking a small amount of time to pay tribute to the Debenhams workers who have now spent more than 400 days on the picket line. They were not doing that for nothing. I am sure they want to see a proportionate response as a result of what they have gone through. Sinn Féin supports this legislation. We want to see it finalised and enacted. As the Debenhams workers have said, this would be a fitting tribute to their sacrifice and perseverance.

My first question is for Mr. Berney or Mr. Light. I note the IBEC submission makes reference to how generous Irish statutory redundancy is by comparison with Britain, but not funnily enough not by comparison with France, Germany or any other country in the European Union. Where there is a collective redundancy element within an agreement between workers, the union and management, would it be true to say that in that agreement there is also give and take for the workers? Any agreement may have an enhanced redundancy part of it. However, it will also contain requirements for the workers, meaning that any agreement is necessarily a form of compromise. The only difficulty is that when insolvency occurs, the rest of it cannot be actioned because the company is gone. Am I right in saying that?

Mr. Gerry Light: The Deputy is right in saying that. The big challenge is that the negotiation table disappears with a liquidation and, as a result, the power of the workers and their representatives also disappear. We are largely dealing in a vacuum then.

Deputy Louise O'Reilly: Not every redundancy situation is the same. Not every worker facing redundancy is in the same situation as others who are facing redundancy. It is not that this would create a different class of person to be made redundant. Many workers in the State

are not unionised and do not have an enhanced redundancy arrangement. Effectively, there are differences between workers. It is worth workers' while joining a union because a union can negotiate in respect of redundancies. We are trying to legislate for enhanced redundancy. Effectively, that would create a difference between the two.

Ms McElwee indicated that IBEC respectfully submits - thanks for that - that this is "a disproportionate and misguided response to the Debenhams situation". What would be a proportionate response? I am assuming that she, like the rest of us, accepts that what happened to the Debenhams workers was disgraceful and unfair, and should not be facilitated in law. What would a proportionate response look like?

Ms Maeve McElwee: We would, of course, acknowledge that it is a very difficult time for the Debenhams workers. It is a very difficult time for any worker who finds himself or herself in a situation of redundancy. Inevitably, it is also always a very stressful and challenging time, and no more so than when an employer has become insolvent. Different circumstances arise where there are questions over wrongdoing in how the liquidation occurred. My understanding of the Debenhams liquidation is that there was no sense that there was any non-compliance with the legislation or any operation to construct anything that was not clearly a business situation arising. There was no move to implement insolvency that was not a trading necessity, if that makes sense. The reality of a proportionate response is that the response needs to be fair and equitable when we look at all employees who may be facing a situation of redundancy and creating-----

Deputy Louise O'Reilly: I apologise for cutting across Ms McElwee, but I have limited time. As she said that this would be a disproportionate and misguided response, I asked specifically what would be a proportionate and well-guided response to the Debenhams situation? She specifically referenced that in her submission. She has characterised this legislation as being disproportionate and misguided. What legislation would be proportionate? Nobody is suggesting that any laws were broken. The legislation suggests that the law is not capable of dealing with that situation, which is why it needs to be changed. There is no suggestion that laws were broken. However, Ms McElwee characterised this as disproportionate and misguided. What would be proportionate and correctly guided specifically as it relates to the Debenhams situation? We are here in that context. There is no point in pretending otherwise.

Ms Maeve McElwee: It may have given rise to the conversation, but this legislation would apply to every case of redundancy as a result of insolvency. A fair and proportionate response is one that treats all employees equally and does not create a secondary class of employees who, by virtue of being made redundant through insolvency versus through other circumstances, achieve higher redundancy payments.

Deputy Louise O'Reilly: In what way would Ms McElwee like to see the legislation changed? I know she is happy with the existing level of statutory redundancy, and she has made a comparison there. The Bill is a response not just to what happened with Debenhams, but also to the fact that this it had happened in a number of instances that were not all exactly the same. We all want something to be fair and equitable, but what does that look like? Not every worker facing redundancy faces the same situation. Some workers with a collective agreement for enhanced redundancy will become redundant as a result of insolvency. What would Ms McElwee regard as a fair and equitable response in that situation? I do not believe the *status quo* is grand. I do not think what happened to the Debenhams workers is right. We need to legislate to prevent that happening again. If Ms McElwee is content with how things are, then we are at different ends of the spectrum.

Ms Maeve McElwee: We question whether it is appropriate and fair for two classes of employees, both of whom suffer the difficult situation of finding themselves redundant, should be entitled to different rates of pay and different priorities of payment under the law. That is the real question. Many employees find themselves in the very difficult situation of redundancy where an employer needs to restructure because it has lost business but may not be insolvent. Equally, many employers find themselves insolvent. I hope the Deputy will agree that the vast majority of employers deal with these things in accordance with the legislation and in the best way they possibly can when the circumstances arise. We are struggling to see a rationale for why somebody in an insolvency situation would be an entitled to higher statutory pay through the redundancy fund and a higher preference order versus somebody who was made redundant in other circumstances.

Deputy Louise O'Reilly: As Ms McElwee says, many employers do not, but those employers who do need the law to tell them what to do. Many employers are grand. They negotiate with their workers and honour agreements. That is fine. We do not need to legislate for those. We need to legislate for a situation where hundreds, if not thousands, of workers were left high and dry and on the picket line for 400 days. People will not be on the picket line for 400 days for nothing. There is obviously an issue here. There already exist different redundancy situations with some people having a collective agreement and some people not having one. Workers with a collective agreement facing redundancy as part of a restructuring have an employer they can negotiate with. With insolvency, that is not always the case. Those workers effectively have no protection because the employer can walk away as Mr. Light pointed out. As Ms McElwee will know, in an agreement with workers, there is give and take. The workers have already given things like productivity and wage restraint as part of the agreement. The employer has got out of that what it was going to get. There is reference in the agreement to enhanced redundancy, which can be negotiated with an employer in a restructuring arrangement. In an insolvency, however, it is different. That is why there needs to be legislation, as I am sure the witnesses will agree. Not all collective redundancies are the same. Where there is a collective agreement, however, the employer can walk away from it. That is grossly unfair. One could argue that the employer has already got the value of the agreement and can then walk away from it. I am not hearing that the witnesses recognise there is a real problem in this regard or that they think there is a legislative solution.

Ms Maeve McElwee: I do not know that there is necessarily a legislative solution. I agree with the Deputy in that regard. She is correct. All redundancies are different and the circumstances in each individual company pertain to what has been agreed and what is in place. Many employments have collective agreements but many others do not. If we are looking specifically at the issue of collective agreements, the challenge is that they are industrial relations agreements; they are not statutory awards or a statutory right or entitlement. That means that employees who do not have a collective agreement in place would be at a disadvantage if the State were to honour *ex gratia* industrial relations agreements. Based on my experience, I would challenge whether there is necessarily a benefit in terms of that trade-off in an *ex gratia* payment. An *ex gratia* agreement is normally agreed by an employer with its organisation at a time when it needs to reduce staff. The agreement is put in place. Individuals in the circumstances-----

Deputy Louise O'Reilly: I understand that. With respect, I do not need collective agreements to be explained to me.

Ms Maeve McElwee: I just wanted to answer the Deputy's-----

Deputy Louise O'Reilly: If Ms McElwee does not think there is an issue and that what happened to the Debenhams workers could not happen again or, if it did, that would be fine, that is one thing. I do not think we as legislators, should, stand over a gap in the legislation that allows workers to be treated in the way the Debenhams workers were treated. It behoves us, as legislators, to ensure we tighten up those loopholes. That is the intention of the Bill.

I am conscious that my time is short. I have a question for Mr. Berney and Mr. Light. Mr. Berney stated that the Bill has his full support and that of ICTU. That will be welcomed by the sponsors of the Bill. When workers face redundancy in the context of an insolvency, is it the case that they cannot negotiate? In some cases, they can do so but, in others, they cannot and, as Mr. Light observed, they find that the negotiating table is closed.

Mr. Gerry Light: In the vast majority of cases, that is the situation. One is faced with the liquidators, who very much operate in a black-and-white world and state that they have no responsibilities beyond their very limited remit. That is with what one is dealing.

With regard to the points the Deputy raised earlier in the context of concessions given, I make the point that the voluntary redundancy package that existed in Debenhams was part of an overall package. It evolved out of an examinership process five years prior to the closure of the company. Certain concessions were given by the workers and redundancy was offered on a voluntary basis. The company availed of those benefits for up to five years before it decided to just walk away from the Irish business.

Deputy Louise O'Reilly: That underlines the need for this legislation. The legislation is needed in order to give the ability to shore up the position in circumstances where there is no one with whom to negotiate.

Mr. Gerry Light: I made the point in my opening statement, and the Deputy echoed it, that nobody stands on a picket line for 406 days without good cause. That is driven by a sense of frustration and anger and an inability to address the core issue of the unfairness of the circumstances that presented to the Debenhams workers and to other workers, but predominantly to the Debenhams workers who endured that industrial dispute for 406 days.

Deputy Richard Bruton: I thank our guests for attending and for their presentations. All present appreciate and feel the injustice of what happened in the Debenhams case and in previous cases. It seems to me that part of what happened in those cases was that resources that ought to have been available to the company to meet its responsibilities were put beyond reach. That is not what we are addressing here, but am I wrong in thinking that was the root issue? The real issue was that the process one would normally expect employees to access to exercise their preferential rights had been undermined in that way. I know there have been attempts to address that aspect of company law.

On the legislation, are there precedents, either in Irish law or in legislation in other jurisdictions, for an arrangement of the sort proposed in the Bill whereby the State, not having been party to the original agreement, would be bound in the event of insolvency? It is not impossible to foresee situations where the State would feel it and the taxpayer were being unfairly exposed in such situations, not having had involvement in how the original agreement was put together. I am trying to explore that. Is there precedent for this sort of arrangement? It seems to be an unusual solution to a problem that all present recognise has arisen in these cases.

What is the view of ICTU on the point being made by IBEC that the State normally legis-

lates for all workers rather than creating a legal commitment on behalf of the State that differentiates in different situations? This will eventually come from the State because it has to pay up. Does ICTU consider that to be a valid argument? How are we to take that argument? It is worth trying to tease out, from both sides, what we are to make of the exceptional nature of what is being proposed here. It is clear that it is a well-intended solution to the problem but is it workable in practice or does it have questionable elements? I would like to hear more from both sides on that issue, and that of precedents elsewhere.

Ms Maeve McElwee: The Deputy has raised a key consideration and concern, which is that any collective agreement agreed privately in a business between an employer and its employees is negotiated without any agreement with the State. There is an enormous challenge, therefore, in terms of the liability that might ultimately rest with the State. If the State had to honour collective agreements on redundancy payments or *ex gratia* payments in the case of the liquidation of a very large employer or many small employers, that could overwhelm the Social Insurance Fund very quickly. It is important to remember that collective agreements are industrial relations agreements. They tend to be of the time that they are negotiated. They can be, and in many cases are, renegotiated as circumstances within organisations change. It will be extremely difficult for the State to consider legislating for one aspect of a collective agreement that may contain many different clauses in respect of terms, conditions, rights and entitlements as they pertain within an individual employment in the normal course of operations.

The clear question in this regard and in the context of fairness and equity is whether there is a deliberate attempt to put the assets of the business beyond the reach of the employees so that they cannot access their statutory entitlements. We know that in the vast majority of cases, that is not an issue. These are legitimate liquidations. They are legitimate redundancies that arise. They are very difficult circumstances. Unique circumstances can arise, and have arisen previously, but this is not an issue in the vast majority of cases. My understanding is that in the case of Debenhams, which gives rise to our discussion today, there was no effort to put funds out of reach so that employees could not draw down their statutory entitlement. We need to recognise that and consider the precedent that the Bill may set. The unintended consequence of something such as that, of course, is that as employers see themselves struggling into a difficult circumstance, rogue employers may find themselves in a situation where they may negotiate agreements internally and privately with no reference to the State or the State's requirements to pay in any liquidation collective agreements and *ex gratia* payments that go way beyond what they might otherwise do in their existing financial circumstances. Again, I am not suggesting that it would happen or that there would be a wholesale challenge to it but it may happen and it may be the unintended consequence of this type of legislation. Ultimately, the biggest issue for any employer is that these are people who are being treated differently and the challenge of creating different classes of employees with different entitlements, depending on how they might be made redundant and not recognising the fact that no matter how one is made redundant, one is still in many situations facing exactly the same set of challenging circumstances. However, some may be more challenged than others.

When we come just to that question of preference, obviously, as we already outlined, there are preferences built into the existing legislation. However, we have to remember that when preference is given to one creditor over another, and in this case, if it were to be employees in an insolvency situation, that money comes from somewhere, and the liquidator has to make those decisions. In many cases, that will come in terms of not paying other suppliers to that business and where they are small firms and do not get paid, we in turn just move that misery of financial challenge down through other organisations as well. There is already a balance in the legisla-

tion that tries to balance the rights of those who have preferential claim on anything that the liquidator has to adjudicate on in terms of who gets the payments that are being made through the current and existing processes under both company and employment rights legislation.

On the ongoing discussions with the Minister of State, Deputy English, it is my understanding that the liquidator will now be obliged to have 30 days of consultation with the employees because at that point they supersede the employer in situations of liquidation to engage with employees who are being made redundant through a liquidation process.

Mr. Liam Berney: I have just a couple of comments. I thank Deputy Bruton for the question. There has been an implicit line of argument this morning that necessarily, the taxpayer will fall the victim of or will have to pick up the debt for a collective redundancy agreement in a liquidation. It is my understanding in the Debenhams case that the assets of the company that were left in the Republic of Ireland at the time of the closure of the business would have been more than enough to meet the terms of the collective agreement that was in place at that time. It is not necessarily the case that the social welfare fund will be overwhelmed, as my colleague from IBEC said, by claims in liquidation for collective redundancies. I do not think is necessarily the case. The Social Insurance Fund will not have to pick up the debt because in many cases, there will be sufficient assets left in the business to meet the debt that is required.

Ms McElwee referred to discussions with the Minister of State, Deputy English. Those discussions have been going on for quite some time. We have had numerous promises from the Government about changes to the legislation and none of that has materialised. The Bill we are discussing is a response to the fact that there has been enormous frustration about the lack of action in this area. We need to have some action. In fairness to Deputy Barry, this Bill is a response to ensure that we do not face a situation such as the one in Debenhams again. For that reason, the Bill is very welcome.

I just want to make the point that it does not follow necessarily that the Social Insurance Fund will be left exposed in the way that has been suggested. In the case of many businesses that find themselves in this situation, assets remain to pick up the terms of the collective agreement. That was certainly the case with Debenhams.

Deputy Richard Bruton: On the issue of precedent, do we have precedent for legislation of this sort, either in Ireland or elsewhere, that the committee could have a look at? I appreciate that this is a well-intentioned measure but, ultimately, our job is to perform scrutiny to see whether there are unintended consequences and how we deal with such if they arise. I would like to hear a little more about the precedents for this sort of arrangement where the State, even if not in all cases, is underwriting something to which it was not party. How do we handle that?

Mr. Liam Berney: I do not have specific examples on precedent here this morning that I would be able to point to that would give the Deputy something to study in more detail. However, certainly, following the meeting, we will seek to provide him with that information. We will do that directly to the Deputy following the meeting.

Mr. Gerry Light: I wish to come in on that point as well. We have come across similar circumstances, particular from the trade union side, in the past, probably on far too many occasions, when we address the whole issue of precedent. In response to Deputy Bruton, it is yet another example of whether we want to be leaders or followers. Based on the particular circumstances of the Bill under scrutiny, what it is seeking and the circumstance that gave rise to it, we believe there is a valid case to be leaders in this regard, as opposed to followers.

To follow on from my colleague, Mr. Berney, in respect of the assets and the comments made by Ms McElwee in respect of the burden falling unnecessarily on the Exchequer, the State or the Social Insurance Fund, there are many things that can create a burden for the Exchequer and the State finances and we have seen that far too often, unfortunately, in the past number of years. Workers are rarely the cause of that. There are many other factors that have a much greater impact and potential impact than what we are talking about.

It was stated that nothing illegal was done in respect of the lead-up to it but there were many concerns in respect of the Debenhams business. We lived that as part of the negotiating team. I led the negotiating team back at the examinership process. There were many concerns over many years in respect of how the company was being managed and how certain assets were being put out of reach of the Irish business, particularly, to give a specific example, in regard to the online business. However, there were also assets retained within Irish business here as well – mainly the stock. We had many a battle over many months trying to extract maximum value from the stock. We even got liquidators into an unprecedented position to negotiate with us. Going back to Deputy O'Reilly's comments about whether there is a capacity to negotiate with liquidators, this was unprecedented that they actually sat down and started discussing with us the potential to access some of those assets. There were assets and retained assets, but it is about prioritising the distribution of those assets. That goes to the very essence of what the Bill under scrutiny is about.

Ms Maeve McElwee: Can I comment?

Chairman: Very briefly, yes.

Ms Maeve McElwee: I wish to address Deputy Bruton's point. When we look at this issue of assets and retained assets, while Debenhams has given rise to some of this conversation today, we are actually legislating for other events that will happen in due course. It will not always be the case that there may be assets left behind. While it will not necessarily be the State that will pick up the cost, in many cases, it will be and what is being suggested here is that the State would also pick up the cost for agreements to which it has not been a party to negotiating, in which case it is very difficult to see how the State could actually be bound to take up that statutory obligation. To be fair to the Minister of State, Deputy English, this has been subject to a significant amount of discussion, consultation and engagement, the reason being it is enormously complex and highly challenging. We have not had a whole lot of outcome on the basis that he is trying to balance the complexity, that is, the fairness in terms of the State obligation and the obligation to the taxpayer and protecting the employees from the perspective of not creating different classes of employees fairly and without undue potential for there to be unintended consequences.

That is the real concern in this regard. We are looking situations coming forward and that will continue to be the case for many years ahead. We will have redundancies and there will always be businesses that go into liquidation. It is something we need to think very carefully about. I am not aware of any other precedents. We will obviously look into it and come back to the Deputy. However, the likelihood is it is the complexity of this that makes it so challenging.

Chairman: Deputy Bruton's time is up, unfortunately. The next person indicating to speak is Deputy Paul Murphy.

Deputy Paul Murphy: I thank the witnesses for their presentations. First, I pay tribute to the Debenhams workers for their struggle. The very least the Dáil can do is to rapidly work

through and pass this legislation and to try to make sure that no future workers are put in the situation they were in. We went through the Clerys situation and then with Debenhams everybody said if only we had done what we were meant to do after Clerys and that there must not be another group of workers like that. Is it fair to say that Ms McElwee has sympathy for the plight of the Debenhams workers?

Ms Maeve McElwee: I have sympathy for any employee who finds himself or herself in a situation of redundancy. It is very distressing to lose one's job and to be without a means of income, but also the social engagement and friendships that have built up. It is a very difficult situation so, of course, I have a huge amount of sympathy for anyone in such circumstance.

Deputy Paul Murphy: Ms McElwee also made the case, which I do not dispute, that Debenhams was in compliance with the law. She is not saying that Debenhams broke the law.

Ms Maeve McElwee: Yes, that is my understanding.

Deputy Paul Murphy: She is also against changing the law.

Ms Maeve McElwee: I am against the proposals in the Bill because they create two classes of entitlement to employees who are suffering the same situation of redundancy depending on how the employer finds itself in terms of financial situations. I am speaking in the firm belief that the vast majority of employers act honourably and these circumstances arise in the normal course of a business environment.

Deputy Paul Murphy: Ms McElwee's opposition to this proposal is based on the inequality that could potentially be created, in her view, between workers.

Ms Maeve McElwee: There is huge potential for inequality to be created. A significant issue would also arise from recognising a voluntary agreement, which is agreed between an employer and employees, in circumstances that most likely do not envisage any situation of insolvency arising. Most *ex-gratia* payments and collective agreements are negotiated to sustain and maintain a going concern. Never in my personal experience have they been negotiated with an insolvency situation in mind. Therefore, making that a statutory obligation on the State is a concerning move.

Deputy Paul Murphy: I will address that because Ms McElwee has made that point a couple of times. She has said that the effect of the Bill would be to change the order of creditors and that suppliers could, therefore, lose out. It is also the case that the State did not have anything to do with the contract between suppliers and Debenhams in this case. Why on earth is Mc McElwee insisting that it is a problem that the State did not have anything to do with these collective agreements, but the State also did not have anything to do with the agreements between other creditors. Why is she suggesting that there is any sort of problem with the order of creditors being reordered?

Ms Maeve McElwee: I am suggesting that there is reason for a priority order. I begin by saying that I am not at all an expert in company law. There are priority orders in terms of how a liquidator distributes the assets. I am simply making the point that when you change the priority order in one situation, then there are less assets to be distributed elsewhere. One of those situations may well be that suppliers who are owed moneys as well will have less money and that will then impact on their employees and financial sustainability.

Deputy Paul Murphy: That is correct but it means there is no basis for the point Ms McEl-

wee is making that there is some problem here because the State was not involved in negotiating these collective agreements. The State was also not involved in the contracts between the creditors, supplier and the company. There is no basis for that position.

Ms Maeve McElwee: It is something of a separate issue.

Deputy Paul Murphy: We are just re-ordering the issue of creditors. I do not understand why the idea that the State has no hand in the collective agreements would have any relevance.

Ms Maeve McElwee: There is a legally enforceable contract between a supplier and the company that has gone into liquidation, therefore, the liquidator has to deal with the commercial contract that arises. As an industrial relations agreement around an *ex-gratia* payment is not a legally binding contract, it is a different situation.

Deputy Paul Murphy: The benefit we have in the Dáil is that we get to write the law. We can, therefore, change the law to say that workers absolutely do take precedence in this situation. On the other points about-----

Ms Maeve McElwee: But Deputy, could I challenge you then-----

Deputy Paul Murphy: Can I ask another question about the inequality of workers? Would Ms McElwee agree if we were to amend the legislation so that in all collective redundancy agreements, be they in insolvency situations or not, workers should take priority and have a legal right to those agreements?

Ms Maeve McElwee: The question that arises for me in that situation is if the law is changed so that those collective agreements become part of the legally binding contract, does one also change the law that says all collective agreements have to be the same? Otherwise, how does one mitigate against employers having very different *ex-gratia* payments and the State paying different amount of *ex-gratia* payments to different employees depending on the sector or industry they are in? Therefore, by requiring the *ex gratia* to be included as part of a statutory redundancy payment paid through the Social Insurance Fund, people would still be entitled to different amounts depending on what their employer had negotiated.

Deputy Paul Murphy: But this is not about the State paying for it and that is why there is a lot of confusion in what Ms McElwee is saying. She repeatedly refers to the State. This is talking about the company paying for it. She is saying that there is an issue-----

Ms Maeve McElwee: But the State would have to pay it in liquidation.

Deputy Paul Murphy: Can I finish the question? Ms McElwee is saying that there is an issue in terms of inequality of workers. If we accept that point, would she agree that we raise all workers?

Ms Maeve McElwee: I understand that is what the Deputy is saying.

Deputy Paul Murphy: Would she agree with raising all workers in order to address the issue of inequality that she mentioned?

Ms Maeve McElwee: The challenge is the way this particular Bill is worded. It is not raising all workers. It is raising some workers.

Deputy Paul Murphy: We could amend the Bill. Let us be clear. Is IBEC asking us to

amend it so that all workers receive that right?

Ms Maeve McElwee: No, I am not asking to amend the Bill and I will tell the Deputy why-----

Deputy Paul Murphy: No, she does not and that is the point. It is that she wants an equality of misery and not to have workers' rights to be raised.

Ms Maeve McElwee: No, it is not that. It is the fact that there are industrial relation norms that apply to the negotiation of collective agreements in our industrial relations framework. Unless we also change all of our industrial relations legislation, in which case it would effectively have to state that one cannot negotiate anything other than a standard additional statuary redundancy payment, we would not have to opportunity to make those agreements at all.

Deputy Paul Murphy: I have one final question. Fundamentally, the bottom-line point is that IBEC is in favour of companies like Debenhams being able to walk away from negotiated agreements with workers in insolvency situation. Ms McElwee is saying that this situation should continue.

Ms Maeve McElwee: That is not what I am saying at all. What I am saying is that in amending legislation, the particular provisions being proposed in the Bill do not equally and fairly address the issue at hand.

Chairman: Deputy Paul Murphy's time is up. The next person indicating to speak is Senator Gavan followed by the Bill's sponsor, Deputy Barry.

Senator Paul Gavan: I thank all the contributors. I will begin, perhaps unusually, by quoting my colleague, Deputy Bruton, who said that everyone appreciates the injustice here. Does Ms McElwee appreciate the injustice?

Ms Maeve McElwee: I might just ask the Senator to clarify which injustice?

Senator Paul Gavan: I could list a litany of them but we will start with Debenhams.

Ms Maeve McElwee: That the insolvency arose and redundancies occurred? Of course, it is very regrettable that the redundancies had to be implemented. It is very regrettable that Debenhams found itself in a situation of insolvency. It is very regrettable when such situations arise.

Senator Paul Gavan: Was it unjust?

Ms Maeve McElwee: I am not sure that I would find myself qualified to determine whether it was unjust. It is-----

Senator Paul Gavan: Surely, Ms McElwee has an opinion on it.

Ms Maeve McElwee: I have an opinion that it is very regrettable that the insolvency came about. As the Senator knows, Mr. Light already said that Debenhams was for many years restructuring and making considerable efforts along with its staff to deal with the challenges in the retail environment in Ireland. We knew for a long time that there were challenges in that business. In terms of what injustice occurred, I am not aware of any specific injustice but it is very regrettable.

Senator Paul Gavan: Ms McElwee has used words "very regrettable". She is not aware of

any injustice. Workers, some of whom are in this room, spent 400 days on a picket line.

Ms Maeve McElwee: I understand that-----

Senator Paul Gavan: Just to be clear, does Ms McElwee see any injustice in terms of what happened to them?

Ms Maeve McElwee: I am in a situation where I have to say to the Senator that I completely understand the difficulty. I have worked in industrial relations for 20 years. I completely understand the stress and distress of any industrial relations dispute, particularly where people feel the need to take to a picket line. Of course, that is an entirely difficult situation.

I also, though, have to step aside and say that I know this has been reviewed and that the liquidator and Minister have looked at it, and, to the best of my understanding and knowledge, no law has been broken and no deliberate attempt has been made to evade payment. Engagement has happened-----

Senator Paul Gavan: Does that not just demonstrate that the existing law is not adequate?

Ms Maeve McElwee: That is not what we are here to debate.

Senator Paul Gavan: It kind of is.

Ms Maeve McElwee: We are actually debating two specific clauses that have been proposed and I am trying to identify the challenge those specific clauses would present. I am trying to be balanced in this. Of course, I recognise the pain and distress that has been caused to anybody being made redundant. Of course, I recognise the challenge to anybody who has stood on a picket line. I have worked in this for many years. I do understand that. I have to explain the legislative piece and say that in the absence of that, we are trying to correct a challenge in a way that gives rise to much greater challenges.

Chairman: Does Senator Gavan wish to address the comments he made in his contribution?

Senator Paul Gavan: I will indeed. I will quote Ms McElwee when she said a few minutes ago there is a "balance in the existing legislation." I want to put that to my colleagues from the trade union movements. Do they believe there is a balance in the existing legislation?

Mr. Gerry Light: Certainly not. I do not think we would be here today advocating for the changes that are proposed in this Bill if we believed that. I certainly do not think that is the case.

Senator Paul Gavan: We have had a whole series of issues in terms of Clerys, La Senza, the Paris Bakery, Arcadia and Debenhams. I will go back to Ms McElwee. Is there a problem here? Does IBEC recognise there is a problem here that needs to be addressed?

Ms Maeve McElwee: I recognise absolutely that where there are challenges to how a piece of legislation is working, there is, of course, a question to be addressed. To be fair, the Minister has taken a great amount of time to look at all of the different issues that are arising and we, along with the ICTU and the trade unions, have engaged fully and comprehensively in addressing all the concerns in trying to look at all the challenges and ways in which this could be addressed. Every time there is an issue that people raise, of course, it is a matter for concern and a matter for conversation.

The challenge that has been put to me this morning as a representative is to look at these

two particular provisions in this Bill. What I am trying to address this morning are the issues for the State, the taxpayer and for employees arising from the two specific provisions that are set out in this Bill. I am trying as best I can to articulate the challenges and constitutional issues that arise with the way this has been framed and the fact that the State would ultimately end up underwriting payments and agreements to which it has it has not been party and how, in a liquidation situation, that could actually put a very significant strain on the insolvency fund.

Senator Paul Gavan: I do not accept that point. As has been pointed out already, a reordering of creditors does not necessarily lead to that situation at all. Would Ms McElwee agree that the Duffy-Cahill report has a central context here in terms of the issues we are discussing?

Ms Maeve McElwee: The Duffy-Cahill report was written in the context of the challenge that arose from the Clerys closure, which was an entirely different situation, in my understanding, from some of the subsequent redundancies and insolvencies that have arisen. There are certainly considerable issues within the Duffy-Cahill report. There are challenges with some of the recommendations on which we have engaged fully and consulted. We have raised them with the various different officials and Ministers and most recently, the Minister of State, Deputy English. All of the Duffy-Cahill report has been taken into account in the conversations that are ongoing in addressing some of these issues.

Senator Paul Gavan: I am just trying to get to the heart of where IBEC stands on these matters. The Duffy-Cahill report was commissioned by the Government. It made six specific proposals to help address this situation. Our colleagues from ICTU and Mandate highlighted the lack of implementation of those. Can Ms McElwee tell me how many of the six proposals from the Duffy-Cahill report IBEC supports?

Ms Maeve McElwee: I actually cannot off the top of my head. I will tell the Senator, however, that we were very disappointed with the Duffy-Cahill report because we found that many of the issues that were addressed by the report were not practical and could not be implemented in many circumstances. There was a significant challenge around the way some of those recommendations were framed. I cannot tell the Senator it was one out of six or four out of six but we are on the record as saying we were very concerned with the recommendations.

Chairman: Does Mr. Berney wish to come in here as well?

Mr. Liam Berney: Before Senator Gavan asked the question about the Duffy-Cahill report, I was just going to quote from one of the provisions. Proposal 1 aims to "ensure that employees will have

the opportunity to consult with their employer for a period of not less than 30 days before any collective redundancy ... [can take] effect ... whether the employer is insolvent or not.". If that proposal had been implemented and had been a legal requirement in advance of the liquidation of Debenhams, perhaps we would not be here discussing the issues we are discussing today. Perhaps the employer would have felt they would have had to come to an understanding with the employees about how the assets they had at their disposal could have been used to address the concerns of employees in that situation. I simply wanted to make that point.

Senator Paul Gavan: It is a really welcome point.

Ms Maeve McElwee: I might add that when the employer is no longer the employer when an insolvency happens, the issue with that 30-day consultation period is that the employer is no longer the employer-----

Senator Paul Gavan: That is the point. That is why we are here discussing this Bill today.

Ms Maeve McElwee: Exactly. It is no longer within the gift of the employer to be able to have that conversation. The challenge then is how we commit employees to 30 days of negotiation when the employer can no longer pay them.

Senator Paul Gavan: I am conscious I am running out of time. Just to be clear, IBEC opposed that proposal.

Ms Maeve McElwee: Yes.

Senator Paul Gavan: In fact, IBEC opposed all six proposals in the Duffy-Cahill report. Therefore, we have a situation where we have liquidation after liquidation and workers left on picket lines for hundreds of days, and IBEC is here today not just to oppose this legislation, which is why I want to put it in context, but it actually opposed anything that was put forward by the Duffy-Cahill report to address the situation. Is that not correct?

Ms Maeve McElwee: It is absolutely fair to say that, yes, we have raised concerns because we do not understand how they will practically work. Some of the issues the Duffy-Cahill report was trying to address would be much more appropriately addressed through company law than through employment law. I would say to Senator Gavan that the main challenge around that issue of the 30-day consultation, for instance, was that as an employer representative, we would no longer be representing an employer. An employer would no longer have the right in an insolvency situation to engage with their employees - that has been handed over to the liquidator. The liquidator may engage but the employees are no longer being paid because the business is in liquidation and is insolvent. How would one commit employees to that?

Senator Paul Gavan: I am out of time but, effectively, Ms McElwee is arguing for the *status quo*. I do not find that acceptable.

Chairman: I thank the Senator. The next person indicating to speak is Deputy Barry, the Bill's sponsor. He has seven minutes. He will be followed by Deputy Stanton.

Deputy Mick Barry: Deputy Bruton raised the issue of precedent and also asked the question as to whether there were international examples. The answer to that question is "Yes". If we look at legislation in Greece, France and Portugal, we will see that there is legislative provision for workers to be put at the head of the queue and be first to be paid in a liquidation situation.

I note as well that the representatives of IBEC would also like to make an international comparison. I will not put words in their mouths; I will quote them. They talk about how "our nearest neighbour and competitor, the United Kingdom", imposes a maximum statutory redundancy payment of £17,130 and caps length of service in any such calculation at 20 years. They say that we need to be competitive in relation to our nearest neighbour in that regard. Therefore, the international comparison upon which the IBEC representatives would like us to focus is legislation introduced by a Tory Government in Brexit Britain that wants to create a bargain basement labour market. Their Prime Minister has pointed to Singapore as an example. There is no mention of comparison with European Union countries. Deputy O'Reilly has mentioned Belgium and France, and I could mention many others, where workers have fought to improve conditions and they are now enshrined in law. I want to make that point at the outset.

I have spoken to hundreds of people, perhaps thousands, about the Debenhams dispute.

Not all of them are people on the left and not all of them are trade union activists or even trade unionists by any manner or means. I have to say that the first people I have met in the last two to three years who were not prepared to say that what happened in Debenhams was an injustice are the representatives of IBEC who are here this morning. I believe their viewpoint is representative of the view of a mere tiny minority in Irish society. The overwhelming majority of people feel there was deep injustice done in Debenhams and that it is a wrong that needs to be righted. My first question is for Ms McElwee. If she says that effective legislation provisions and mechanisms already exist under both employment and company law, how on earth would she prevent another Debenhams style situation from developing? What guarantee could she give if the law is not changed, which is what is being considered here?

Ms Maeve McElwee: I thank the Deputy for the question. I do not see any situation in which we could ever prevent other businesses becoming insolvent, other redundancies arising and people having to avail of their statutory entitlements either through the liquidator or potentially through the Social Insurance Fund. That is not something we could ever prevent. Unfortunately, it will be the case that there will be other redundancies and insolvencies. That is always a very challenging situation. That is why we have legislation that makes provision for statutory redundancy and why we have the Social Insurance Fund to make sure that where somebody or a business is insolvent-----

Deputy Mick Barry: Nobody disputes that there will be liquidations in future. The question is: how would Ms McElwee prevent Debenhams style injustice? She has not said a word which would indicate how that would be prevented.

Ms Maeve McElwee: In the Debenhams style injustice, is the Deputy referring to the payment of the ex gratia agreed in the collective agreement specifically?

Deputy Mick Barry: Yes, and workers being put down the queue.

Ms Maeve McElwee: Again, I believe it is a company law issue regarding the preferential treatment of creditors. That is a separate matter. In terms of the industrial relations framework that allows for collective agreements to be put in place, if we are to put those on a statutory footing, which I understand is what the Bill is trying to achieve, the challenge is one is making industrial relations, a piece of voluntarist legislation in a voluntarist industrial relations-----

Deputy Mick Barry: Chairman, I am tied for time, so I will resume. I note the fact that Ms McElwee was asked a question and she tried to switch it to another question.

Ms Maeve McElwee: I am not-----

Deputy Mick Barry: She has given no guarantee to the Debenhams workers here or workers watching this as to why such an injustice could not happen again.

Ms Maeve McElwee: Please allow me to answer.

Deputy Mick Barry: Chairman, I have a few other questions that I would like to ask.

Chairman: I will give you time. Do not worry. You can ask whatever questions you wish and it is up to Ms McElwee whatever way she wishes to answer them. She does not have to answer them the way you want her to answer them, in fairness.

Deputy Mick Barry: I have heard the way in which she has answered them.

Ms Maeve McElwee: I want to answer the question the Deputy has asked me.

Deputy Mick Barry: Chairman, I will need more time.

Ms Maeve McElwee: I cannot prevent that happening. It is a voluntary agreement between two parties that we are now aiming to make a statutory obligation. That is very challenging because there are different agreements in every individual company. It would be necessary to change many laws to make that happen. That is my challenge to this legislative measure.

Deputy Mick Barry: The Bill proposes to change the order in which the creditors are paid. If the workers are put to the head of the queue, can Ms McElwee explain how that in any sense imposes extra financial responsibilities on the State? Where in the Bill does it state that?

Ms Maeve McElwee: I might defer to my legal colleague, but in terms of putting the employees to the head of the creditor list, it does give rise to issues for other creditors in the list.

Deputy Mick Barry: It does. That is true.

Ms Maeve McElwee: Exactly. My understanding, and I will defer to the legal piece on this, is that in company law the idea of looking at this in a preferential staggering is that all creditors have an opportunity to be able to recoup some of their losses from a business that becomes insolvent, some of those being other smaller suppliers who also depend on some of that payment coming through so they can, in turn, pay their own employees as the businesses run through. If we were to commit to a preferential order, and I am not saying we should not, I am simply pointing out the fact that if we made that commitment, there is less to be distributed elsewhere for other workers potentially in other businesses. If we were also to commit to *ex gratia* payments, which are now voluntary and totally unregulated in terms of the agreements that any individual business can make, we might make very substantial impacts in that preferential order on any other creditor below. I am simply saying there are other effects that run through, particularly if we were to legislate for those currently voluntary collective agreements to be made a statutory obligation to be paid.

Deputy Mick Barry: I note the fact that Ms McElwee has not pointed to anything in the Bill which says that there is, of necessity, an increased charge on the State and that she accepts that the Bill changes the order of creditors. I presume she accepts that legislators have the right to change the order of creditors in that regard. If there was a circumstance, and I will conclude on this, where there was an outworking of this development and there was an increase on the Social Insurance Fund, I suggest the way we would do that is to end the position where the contribution to the Social Insurance Fund made by employers in the State is approximately a quarter of what would be the case in other European countries, end the position whereby the contribution from employers in this State is the lowest in the EU and have a more realistic and serious contribution from the employers as a class to the Social Insurance Fund, which can benefit working people.

I will leave it at that.

Chairman: Thank you, Deputy. The next speaker-----

Ms Maeve McElwee: Chairman, I will answer that last point very quickly. I am talking in the context of no cost to the State assuming that there are assets left to distribute. If it is the case that there is none, it may well come back to the State. Maybe the preferential creditors in terms of staff get all their payment, but we may end up having to support other businesses which then

suffer the loss of any payment coming through or any share of those assets if there is anything remaining. It is simply just looking at the flow through.

Chairman: Thank you, Ms McElwee. The next speaker is Deputy Stanton, who has seven minutes.

Deputy David Stanton: I welcome our guests and thank them for their contributions and for an interesting and important debate.

Ms McElwee mentioned both in her submission and her presentation that there may be constitutional issues involved in making the changes that are suggested. Could she go into more detail on how she sees that working out?

Ms Maeve McElwee: Our industrial relations system as it stands is a voluntarist industrial relations system. Looking at collective agreements, they are agreed between employers and their employees, whether the employees are represented by an accepted body, for example, an internal representative group or a trade union. They are agreed at the level of the organisation. They may have been negotiated through the Workplace Relations Commission or may, indeed, even have been ultimately adjudicated on by the Labour Court and recommendations issued. However, they are not legally enforceable. None of it has force of law. They have very strong moral force and they are agreements that have been made. The challenge from that perspective is that one would be taking what is now not a legally binding agreement that an employer and its employees have signed up to and giving it legal effect by virtue of making any *ex gratia* element of that collective agreement a requirement to be paid in an insolvency redundancy situation.

Deputy David Stanton: How does that impact on the Constitution or how does the Constitution impact on that, as Ms McElwee is suggesting?

Ms Maeve McElwee: I am suggesting that you would be requiring employers to negotiate and to give binding effect to agreements they understand to be voluntary, which in many ways would impinge on their rights from the point of view of whether this can be made legally binding. It was not negotiated in the framework of understanding that this could ever be a legally binding agreement. It is negotiated as best as possible and in the face of the prevailing circumstances. As I said, very rarely would any employer sit down and negotiate a redundancy agreement it would expect to see in the event of a liquidation or an insolvency arising. Typically, these types of redundancy agreements are negotiated with a view to making sure the business can continue to operate as a going concern, not with redundancy or insolvency in mind.

Deputy David Stanton: Ms McElwee might come back to us with some detail and find out exactly which section of the Constitution she is concerned about because I am not clear on that, but I hear what she is saying.

I notice that the wage cap for calculating statutory redundancy has not changed for a long time. Would it make a difference if that were adjusted? Our friends from the trade unions or Ms McElwee might like to comment on that.

Ms Maeve McElwee: I will answer first and then, if I may, allow my colleague to address the constitutional point. Any change to statutory redundancy payments is a matter for the Government in respect of its ability to support that, so I do not necessarily have an opinion on that.

Ms Pauline O'Hare: As for the constitutional issue, we know that the Supreme Court, in the Ryanair decision, has said that the right to associate is also to be seen as the right to disas-

sociate. As for collective agreements, we know that an *ex-gratia* payment, at the moment, if it is to be pursued, is done through the industrial relations mechanisms. Any Labour Court decision made is not binding and cannot be binding because the Supreme Court has recognised that the Constitution is to be interpreted as recognising the right of an employer to disassociate. Therefore, to put something non-binding on a statutory footing and to make an employer and the State bound by it presents constitutional issues because one cannot put something that is non-binding on a legal footing.

Mr. Gerry Light: Deputy Stanton has addressed a couple of issues with the statutory redundancy limits in the current legislation. That is certainly one of the areas that could be explored, aside from what we are discussing today. It could come under the remit of the parallel approach that has been adopted. I think my colleague has already commented that there is a very distinct delay, notwithstanding the complications that have been alluded to, and one of the reasons we are here considering Deputy Barry's Bill is, I think, that delay. The parallel process looks at company law and employment law. Within that context, one of the promises that were given, particularly within employment law, was that, in the first instance, a non-statutory expert group be set up. We are still waiting for that group to be set up, many months after the commitment was given by the Minister. There is a combination of things here that can be looked at and that will improve the lot of workers in the future. I would not rule out the suggestion Deputy Stanton has put to us as one of the areas that should be looked at.

Nobody in this room is a constitutional lawyer or an expert in that area. As for the arguments being made about the right to disassociate, I would argue that you should not be in any way disaffected when it comes to your rights in respect of a claim under what you believe to be, and what some would argue is or consider to be, depending on the circumstances in which it arises, a contractual right within employment law to the effect that if a redundancy situation is enshrined within the collective agreement - as I said, in particular circumstances - it constitutes a contractual entitlement as well..

Those are all the things we need to look at. Whatever comes from today's proceedings, we need to take a fresher and more intensive view of what is happening elsewhere with regard to trying to improve the lot of workers in circumstances similar to those we are discussing. The message should go out to the relevant Ministers that we really need to get our act together regarding the changes that are required to favour workers in respect of both company and employment law.

Deputy David Stanton: May I ask about the suggestion that has been made to set up a stand-alone fund to handle *ex-gratia* payments in insolvency situations such as these? Will either side comment on that?

Mr. Gerry Light: Sorry. Will the Deputy repeat the question?

Deputy David Stanton: A suggestion has been made that a stand-alone fund to handle *ex-gratia* payments in insolvency situations be set up. Will the witnesses comment on that? What are their views on that? Would it be a good idea? How would it be done?

Mr. Gerry Light: Anything that improves or has the potential to improve the lot of workers, particularly those who find themselves in circumstances such as those presented by Debenhams, Arcadia and others, should be explored. Deputy Barry's point is valid. For a long time now, the trade union movement has been attempting to shine a light on the area of employer PRSI contributions, in respect of which we lag far behind the European norm. Whatever needs

to be looked at needs to be looked at. It is a suite of measures. One of the very direct questions and one of the most important ones that were put today is how in the future we seek to achieve a situation whereby workers do not find themselves in circumstances similar to those in which the Debenhams workers and others have found themselves. Deputy Barry's Bill is very important and a very good start and would be a huge development if it were to be passed into law. There are other aspects, however, and I alluded to that in my submission and stated that we need to keep all the avenues open.

Today we got very close to an acceptance that we do not want a change in the current law. The point has been made on a number of occasions that in some way, the implication is that the current law is perfect. It is far from perfect. If it were perfect, there would not be 3,000 individual cases awaiting hearing before the WRC that Mandate is pursuing on behalf of its ex-Debenhams members in the area of improper consultation. That is in respect of both the former employer and the liquidators. We need to take cognisance of that and to ensure that whatever we do across a whole range of measures, we improve the lot of workers and give some solace to those who stood on picket lines for 406 days because that is a very important part of why they stood there. That is what they have told me and others. They have told me, "We are not just here for ourselves, Gerry; we are here for others in the future as well."

Ms Maeve McElwee: I will make a comment on the stand-alone fund. I know that it has been proposed previously. One of the questions we would have asked about how that would operate is who would pay into the fund. Is the proposal that employers that have collective agreements and that have committed to *ex-gratia* payments would fund that, or is it funded by all employers? In the latter case we have the constitutional issue of employers that have not negotiated collective agreements or do not negotiate collectively at all. Then there are also perverse incentives in that if you are contributing to the fund, perhaps you also agree the largest *ex-gratia* payment in order that you get the greatest benefit in the event that you have redundancies that have to be negotiated and that *ex-gratia* payment has now become statutory. Aside from all that, the largest challenge is still how to put a voluntary agreement on a statutory footing.

Chairman: Deputy Barry wishes to clarify a point.

Deputy Mick Barry: On a point of information, the point has been raised that there could be a question mark over the constitutionality of the Bill. The Ryanair case has been cited, as has the question of the position, as decided by the courts, on a right of disassociation. There seems to be an assumption that a collective agreement is a collective agreement negotiated by a trade union body. Many collective agreements, probably a majority, are, and I would argue that this is a strong reason for workers to join trade unions to improve their position in the workplace. It is not necessarily the case, however, that we are looking merely at collective agreements negotiated by trade unions here. I believe registered employment agreements, sectoral employment orders and individual employment contracts would be covered by this legislation. We could test it with legal opinion. It may be tested before a court of law some day. The argument that this is unconstitutional does not stand up in the context of the information I have shared with the committee.

Chairman: I thank Deputy Barry. We will definitely take those comments into consideration when doing further work on this Bill.

Deputy Matt Shanahan: I thank the witnesses for attending. This is an important committee meeting. As somebody from Waterford, I have great sympathy for the position that Debenhams workers found themselves on. Deputy Bruton asked earlier whether assets were put

beyond reach. I do not know whether they were but what was done to Debenhams workers was unacceptable. We cannot have a repeat of that in the State. That said, I have concerns in respect of IBEC's concerns, which Ms McElwee raised. I wish to ask her about one situation. Where a company is going into an examinership process and if it has a recognised collective agreement on a statutory footing, what is IBEC's position? How might it affect an examinership process or the ability of a company to continue trading if it has preferential debt?

Ms Maeve McElwee: I may not have fully understood the question so please correct me if I am wrong. In an examinership, in most circumstances, the ambition is for the organisation to come out on the other side as a going concern, so it would not necessarily be unusual for agreements to be entered into to facilitate downsizing or redundancies. Agreements would be put in place about whether that would be done voluntarily and how that selection might happen. An agreement on an *ex-gratia* payment or a collective agreement might well come into effect there because the ambition of coming out of examinership is that the business would continue. The collective agreement works because it is an agreed dynamic with the examiner with regard to the management of the business and its resources so it can continue. In an insolvency situation, the liquidator is challenged and charged with closing down the business and discharging its debts. It is no longer a voluntary agreement. There are no staff left to execute that agreement. There is no longer an incentive to have *ex-gratia* payments to incentivise people to volunteer for that redundancy in many circumstances, because the business is closing and all of its operations will be terminated. Any aspect of that which this legislation seeks to convert to a statutory payment then needs to be distributed, either from the assets or from the State fund.

Deputy Matt Shanahan: I thank Ms McElwee. Whether it is on a statutory footing or otherwise, is the collective agreement considered a hard debt within a business which is looking at an examinership process? That is what I am trying to figure out. If you are looking at examinership for a business and its total debt profile, where does the statutory agreement figure, not in the debt ranking but as an actual hard and fast debt? Is it a fixed figure or can it be modified? That goes back to a collective agreement. Will Ms McElwee elaborate on that, please?

Ms Maeve McElwee: It is not considered to be a statutory payment. That is the challenge. It is a voluntarily-agreed payment. I reiterate I am not a company law expert but as I understand it, the liquidator is charged with discharging all of the legal obligations of the firm to the greatest extent possible. Given that a collective agreement is not a legal agreement and is not a legally binding obligation on the liquidator, the liquidator must first deal with all the other assets to be discharged and does not take into account voluntarily-agreed collective agreements.

Deputy Matt Shanahan: I am particularly interested in examinership but we will not go there. It is probably a little complicated and the ground may be uncertain at the moment. I refer to the idea of a stand-alone fund and a collective agreement for enhanced statutory redundancy. Would IBEC be looking at a situation where both employees and employers would look to pay into such a fund? Could that be established as a separate insurance policy within a business, as opposed to falling back onto the State at a future point?

Ms Maeve McElwee: We have not engaged with members on that to any great degree. Perhaps the trade unions have a better view of whether employees would also be willing to pay into an insurable account. The challenge will always be deciding who the beneficiary is. People are paying into a fund from which they may never receive any benefit. Many employees would probably say they already look after this type of thing in their individual insurance policies. I do not know how open people would be to contributing. It would be challenging. Some organisations would be free to agree *ex-gratia* packages of eight weeks with no caps where others

might be confined to two. Who would actually manage, authorise or distribute it? It would be the whole industry and it would be for a very small cohort of collective agreements.

Deputy Matt Shanahan: Going back to my point, could this be done on an individual basis for a company? It could essentially set up its own insurance fund to cover its own statutory requirements, which would not necessarily fall back onto the State.

Ms Maeve McElwee: I think that is out of my competence to answer. I apologise. I do not know whether the liquidator's obligations could be distributed in that way. I can certainly look into it and answer that for the Deputy.

Deputy Matt Shanahan: We all want to be sure that workers will not find themselves in such situations again. I also have concerns about competitiveness. I heard Deputy Barry talk about raising the ceiling for employers' PRSI payments. He might like to look across the Continent and say that we are paying a very low rate. This is about competitiveness. If those rates rise, it will reduce our international competitiveness, which is a problem for Ireland Inc. in future. I thank the witnesses for coming in. We need to look at this. Workers' rights and redundancy have to be protected but it must be done in a way that does not damage our international competitiveness ultimately or create a two-tiered situation for those outside the collective process.

Senator Paul Gavan: A key thing that this Bill will do is put workers at the head of the queue when it comes to liquidation, to ensure that they get the money first. I have in mind people I met in Limerick who had over 20 years of service in Debenhams in Limerick, who had to spend 400 days on a picket line. That call seems entirely just. Would Ms McElwee support the call that workers should come first?

Ms Maeve McElwee: I can speak from an employment perspective. I have a lot of sympathy for people seeking redundancy. I understand that the Debenhams workers received their statutory redundancy entitlement, which was paid out and made available in good order. That was achieved.

Senator Paul Gavan: They had an enhanced deal and collective agreement.

Ms Maeve McElwee: I understand that. As I have outlined there are significant challenges with regard to making it a statutory obligation and what the liquidator is legally entitled to do.

Senator Paul Gavan: That is why we want to change the law.

Ms Maeve McElwee: I understand that. Many different issues arise. In terms of whether I would absolutely support them being the number one preferred creditor, there are other issues that arise for businesses in finding the balance so that all creditors have some opportunity to get a refund of what they are owed.

Senator Paul Gavan: Would Ms McElwee not accept that when it comes to who should be prioritised first, I cannot think of anyone more important than someone who has given 25 years of his or her life to a company, as did many of the people in Debenhams? Can Ms McElwee think of anyone more important?

Ms Maeve McElwee: As I understand it, the Senator's question is whether there should be preferential priority for *ex gratia* payments and not for their statutory entitlement. There is a priority order for all of the legal obligations that have to be met by the liquidator with regard to

all of the creditors who have a claim on a business. We are speaking about reordering what the legal entitlement is.

Senator Paul Gavan: We are.

Ms Maeve McElwee: My concern is not about the preference order. It is about the impact of restructuring part of that preference order. We are trying to add a statutory element to a voluntarily negotiated agreement and then giving that a priority order. This is the aim of the Bill as I read it. My key concern is not about the priority order - any business is free to negotiate any amount of *ex gratia* payment - but about the fact we are trying to convert a negotiated agreement and make it a statutory obligation. First and foremost there is a big industrial relations framework behind this that would need significant amending. It would also give a preferential right to employees who have a collective agreement to the detriment of any employee who does not have a collective agreement and give priority to that payment. There is an inherent unfairness-----

Senator Paul Gavan: It is not to the detriment-----

Ms Maeve McElwee: -----to workers generally.

Senator Paul Gavan: It is not to the detriment of other employees.

I am conscious of running out of time and I have a question for our colleagues from the trade union movement. In fairness to the Chair and the committee, we have been speaking about this issue for years. The previous Government promised action. It had a report. As Mr. Light has said, it has been sitting on a shelf ever since. We are now six years on from the Duffy-Cahill report. Why do the witnesses think there has been such a marked reluctance on the part of governments to deal with this issue given that we have seen the further tragedy of Debenhams since the Duffy-Cahill report? There is every likelihood, given the challenges faced by the retail sector, that there will be another Debenhams and Clerys in the coming months. Why do the witnesses think there is such a marked reluctance to go beyond, and again I will quote Ms McElwee, discussions, consultations and engagement? Why do they think there has been no action from governments to tackle the disgraceful situation that workers from Debenhams and others have found themselves in?

Mr. Gerry Light: It is hard to speculate in respect of answering that question but history is repeating itself. I have been a practising trade union official and activist for almost 35 years. To me it appears that when it has come to the interests of the State and those of many governments, the interests of workers have always been put second. We have seen yet another demonstration of this in the years since Clerys. There was every reason for swift action but it did not happen. Covid happened and we have had the instances of Debenhams and Arcadia. This must be the spur to look at the situation and ensure there is no repetition. Workers have to understand where they lie in the priorities of the State and successive governments. It is up to them to do something about it, whether through joining a trade union or other actions all the way to the ballot box. There are ample examples to prove that the interests of workers have not been served well by successive governments in recent years for a variety of reasons. We could probably spend the rest of this hearing going into them.

Chairman: I thank all of the witnesses from ICTU and IBEC for assisting the committee in its consideration of this important matter. The committee will further consider the matter as soon as possible. Is that agreed? Agreed.

Business of Joint Committee

Chairman: The committee's reports on the general scheme of the right to request remote work Bill and on the general scheme of the personal injuries resolution board Bill have been finalised. There will be a brief announcement on the launch of the reports on the plinth at 10.30 a.m. tomorrow. Any member who is available to attend the launch is welcome. Invites will be circulated after the meeting. The reports will also be circulated electronically to members, with hard copies available from tomorrow. We had hoped to have copies today but there has been a problem with printing. I thank the members for their collaborative work in finalising both reports.

The joint committee went into private session at 11.15 a.m. and adjourned at 11.40 a.m. until 9.30 a.m. on Wednesday, 13 July 2022.