Patricia,

I have looked at the news report to which you refer. I have also read through Part 7 of the Emergency Measures in the Public Interest (CoviD-19) Bill 2020.

I note from the news reports that the Employment Law Committee of the Law Society have written in detail to the Minister for Employment Affairs and Social Protection on this matter. Obviously I have not seen this letter. However, from what is contained in the news reports it appears that the issues raised stem from views expressed by Richard Grogan, which were set out in an article which he published on an on-line legal bulletin called 'Irish Legal News". I have copied this article below.

I think that the views expressed by Mr Grogan (upon which I assume the views expressed by the Employment Law Committee are wholly or partially based) are hyperboles and are based on the proposition that the legislation, when enacted, will be interpreted and applied in a way that undermines the object that the enactment is intended to achieve. There is no basis in law or in logic for such a proposition.

Legislation must always to interpreted and applied in a manner consistent with the intention of the Oireachtas. While the primary approach must always be to give the words and phrases used in the legislation their ordinary and natural meaning, regard must always be had to the underlying rationale for the legislation, as ascertained from a reading of the Act as a whole. This was emphasised time and again by the Courts, most recently on Wednesday last, by the Supreme Court in a case entitled *A.W.K. v Minister for Justice for Justice and Equality, Ireland and the Attorney General* IESC [2020] 10.

The plain intention of this proposed legislation is to assist employers to avoid insolvency and to protect employment during the emergency period. It is bordering on the absurdity to suggest that it could be applied in a manner that produces the opposite result.

It is true to say that the Bill is lacking in the type of detail that might otherwise be expected in legislation such as this. That, however, is understandable having regard to the context in which it was drafted and has to be enacted. This is offset by a significant provision at section 27(3) which provides: -

> *The business of an employer shall be treated as being adversely affected to the extent referred to in subsection (2)(a) where, in accordance with guidelines published by the Revenue Commissioners under subsection (19), the employer demonstrates to the satisfaction of the Revenue*

> *Commissioners that, by reason of Covid-19 and the disruption that is being caused thereby to commerce, there will occur in the period of 14 March 2020 to 30 June 2020 at least a 25 per cent reduction either in the turnover of the employer's business or in customer orders being received by the employer.*

It appears to me that this provision is intended to authorise the Revenue Commissioners to fill in the detail of how it is to be established if an employer qualifies for the relief provided by the Bill. You will note that in Mr Grogan's article this provision is dismissed as providing 'mere guidelines' and it is suggested that they will have no legal standing. That proposition ignores the fact that the Revenue Commissioners are mandated by the Bill to issue guidelines and that section 27(3) expressly provides that those guidelines are to be relied upon in determining eligibility for the wage subsidy.

It is also true to say that the provision relating to the subsidising of net pay will produce different results for different individuals, depending on their normal deductions etc. But that is inevitable given the general scheme of the legislation.

It seems to me that what is being contended for by Mr Grogan (and from the reports, the Employment Law Committee) is an arrangement whereby all employers would have 75% of their wage bill subsidised by the exchequer, without any limitation, on a mere declaration by the employer of a reasonable belief that it is necessary. That in my opinion is wholly impractical and open to abuse. Moreover, such an arrangement could be challenged on Constitutional grounds in that it could be seen as an abrogation by the State to properly safeguard public funds and ensure that they are used for the purposes intended.

I think that it would best be left to the Minister and the Revenue Commissioners to dispel the concerns expressed. The intention of the proposed legislation is clear. It is an emergency measure enacted in a time of serious danger. It contains, as it must, safeguards to ensure that public funds are used for the purpose intended which are not unduly burdensome and can be further augmented by statutory guidelines to be issued by the Revenue Commissioners.

It seems to be to be highly irresponsible in present circumstances for anyone to advocate that employers would not avail of this scheme.

Kevin

## Richard Grogan: Employers should not use coronavirus wage subsidy scheme

 Richard Grogan

*Employment law solicitor **Richard Grogan** of **Richard Grogan & Associates** argues that Irish employers should not take advantage of the new temporary wage subsidy scheme introduced in response to the coronavirus pandemic.*

The *Emergency Measures in the Public Interest (Covid-19) Bill 2020* was introduced with a considerable amount of fanfare that it would be a lifeline for employers and employees whereby employees could be maintained in employment.

Because of the way the bill has been drafted, this is not a scheme which many employers will be able to avail of. It is our view that both employment law specialists and insolvency practitioners will not be advising employers to go into this scheme.

I think it is important that this would be explained.

The scheme which is set out in section 26 of the bill, in subsection 2 provides that the scheme is only available to business of an employer who has been adversely affected (which in subsection 3 is a reduction of at least 25 per cent in turnover) to the extent that an employer is unable to pay the wages or salaries of the employees which would be normally paid.

The employer will be required to make a declaration to this effect. The effect of this is that the employer is effectively making a declaration that the employer is insolvent. In the case of a limited company, this means that the employer will now be trading when they are insolvent. This then creates the issue of fraudulent trading. For companies it is hard to see how any professional advisor could advise and employer to make a declaration that they are effectively insolvent and continue to trade.

The bill also provides that the employer must have an intention of continuing to employ the employee. This is to a date which will be specified by the minister in due course, but as yet no such date has been specified. Further, the employer will have to be able to show that they are making their best efforts to pay the employee their full or at least an additional portion of their wages or salary over the €410.

If it subsequently transpires that the employer would have been able to pay the full wages or at least an additional amount of those, then the entire sum paid by the State to the employer will be refundable plus interest and penalties. Take for example a situation, where an employer has monies specifically set aside for an urgent investment into the business which will be needed for

that business to continue, it is an argument that those monies will have to be used to pay the employees their full wages or salary.

The next issue is that the bill is unclear as to the period in which the employer's turnover is to be impacted to go into the Scheme. Many businesses will have completed work in February and in the start of March which monies will be paid in April or May. However, because of the downturn, their ability to create turnover in June, July and August may be significantly impacted. The bill does not specify what the turnover period is for the reduction nor how do you prove there was a reduction in turnover. Is it a reduction in turnover in the first two months of 2020 or is it a reduction in turnover for the equivalent period in 2019? The bill is silent on this. Therefore, it is going to be unclear as to what the reference period is.

The bill clearly, in subsection 5(d), envisages that the employer is going to be paying some sums extra.

The issue of the additional payment which the employer is obliged to try and do has a sting in the tail in respect of section 26(5) (I). This provides that where the employer makes the top up, which the employer is obliged to attempt to if they have the funds and must do to avoid having a clawback of the benefit and being hit with an interest and penalty charge, then any additional payment will not be treated as an expense of the business.

Normally all wages are an expense of the business and are deductible in calculating the profits. In respect of the additional payment, which will be made, the employer will pay employer's PRSI on those sums. The tax paid on same and the amount of the uplift will not be allowed to be used in calculating the profits of the business. This is irrespective as to whether the employer is a company or a non-incorporated entity. This means that the employer who attempts to do the right thing and pay the full wages and salaries is going to be penalised for doing so, but must do so to avail of the scheme.

The scheme will not cover employees who have been paid in excess of €76,000 per annum gross. However, the legislation is set on the basis of a net, gross, weekly wage. Therefore, you could have two employees, both on the same salary. One may have a mortgage, and a pension scheme which brings their net wages below €960 per week. The other may not. One will be eligible to go under the scheme, the other employee will not. This is a significant defect in the bill.

Even where an employer will go into the scheme, if the Revenue Commissioners make a determination that there is other outstanding tax due by the employer, then the Revenue will be entitled to deduct from the monies which would be paid to the employer to pay these wages or salaries such amount as the Revenue shall determine, but the employer will still be liable to pay that €410 per week to the relevant employee.

There is going to be a cost for employers as regards a payroll cost in setting out their payslip. Section 26 (15) specifically provides that statement setting out the relevant payments as to what element is coming from the State and what element is coming from the employer. If not done, will result in the provisions of section 987 of the *Taxes Consolidation Act 1997* applying such as in those circumstances the employer shall be liable to a penalty.

There is a very worrying provision in section 26 subsection (8) which provides that the names and address of all of employers to whom the temporary wage subsidy has been paid shall be published on the website of the Revenue Commissioners. There are certainly significant GDPR concerns about this but this has a significant issue for employers. It means that there is effectively a publication to the general public that the particular employer has declared that their business is insolvent and unable to pay their debts as they are become due. We would have significant concerns that such publication will ruin the credit rating on employers going into that scheme.

There is a solution. The solution is quite simple. The payment should be made on the basis of a best estimate as to whether there will be a 25 per cent reduction in turnover in a specified period. The wage subsidy should be paid to all employee who are kept in employment. There should be no wage cap.

The intentions of the bill are laudable. However, as this bill is drafted, it would appear that prudent employers will not go into the scheme but instead go for lay-off. We would estimate the cost of actually complying with the provisions of the bill for the average SME will be significant. Legal and accountancy advice is going to be needed. That is going to be a cost. Employers who go into the scheme without that advice, may find themselves, later this year, seeing significant claims going against them for interest and penalties.

The Revenue will have six years in which to pursue employers. Interest will be running at compound rates on a daily basis. The cost of an employer, making sure that they are compliant with the scheme, is going to be substantial and may wipe out the benefit of the scheme for most SMEs.

There is a final anomaly. We are all been asked to physically distance at the present time, yet the employer is going to have to make a statutory declaration. This means being physically present and close to another person who can see them sign and can then witness their signature. This will either be a solicitor or a peace commissioner.

Finally, we would say, that while the scheme is laudable, the way the scheme has been written would appear to be one which has been drafted in such way that, effectively, a lot of employers who avail of the scheme could ultimately find themselves having to repay the entire sum plus interest and penalties.

The scheme is complex. There are anomalies. Unless there is a clear and simple scheme, employers will not buy into the scheme.

Some may say that they have looked at the Revenue guidelines. The law in relation to guidelines is very clear. The guidelines are simply guidelines. If a dispute arises, the decision will be made on the basis of what the legislation says, and to a significant extend, the bill provides for an opinion being made by a state official, and on that basis an assessment being raised. To challenge such in assessment, the employer will have to pay that tax and interest first.

As the bill is drafted, we certainly will not be recommending the scheme.

RGA | Richard Grogan & ASSOCIATES


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