

Monaghan / Cavan County Enterprise Board Seminars

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MANAGING YOUR BUSINESS IN A CHALLENGING ENVIRONMENT

Redundancy and Reorganization

An employee is entitled to a redundancy payment if he is laid off or kept on short time or both for a certain period. This certain period is either four consecutive weeks or six weeks over a period of 13 consecutive weeks. In this situation, if the employee subsequently wishes to claim redundancy he must serve a written notice (an R.P. 9 Form) of intention to claim redundancy because of the lay-off or short time. Alternatively, the employee may give written notice of the intention to terminate the Contract of Employment.

Redundancy and Collective Redundancy

It may be helpful firstly if I detail the general law with regard to Redundancy in Ireland. The relevant legislation is the Redundancy Payments Acts, 1967 – 2007.

Scope of the Act

In order for an employee to be covered by the Acts, he/she must satisfy the following criteria:

- ❖ The employee must be aged over 16.
- ❖ The employee must have a minimum of 104 weeks continuous service, since reaching the age of 16.
- ❖ The employee must be employed in employment insured for all benefits under the Social Welfare Acts and must have been so employed in the period of 4 years ending on the date of termination. In the case of regular part-time employees the requirement of being insured for all benefits under the Social Welfare Acts is not necessary, but other requirements must be complied with.

Under Section 20 of the Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007, the age cap of 66 years for entitlement to Statutory Redundancy has been removed. Employees who

have reached 66 years of age and whose date of termination is on or after the 8th May 2007 are now covered by the provisions of the Redundancy Payments Acts 1967 to 2007.

The Acts require employers to make payments to employees in respect of redundancy. An employee who is dismissed shall be taken to have been dismissed by reason of redundancy if, for one or more reasons not related to the employee concerned, the dismissal is wholly or mainly due to:

- a) The employer has ceased, or intends to cease to carry on the business for the purposes of which the employee was employed, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed.
- b) The requirement of that business for employees to carry out work of a particular kind in the place where he was so employed have ceased or diminished or are expected to cease or diminish.
- c) The employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee had been employed (or had been doing before his dismissal) to be done by other employees or otherwise.
- d) The employer had decided that the work for which the employee had been employed (or had been doing before his/her dismissal) should henceforward be done in a different manner for which the employee is not sufficiently qualified or trained.
- e) The employer has decided that the work for which the employee has been employed (or had been doing before his dismissal) will henceforward be done by a person who is also capable of doing other work for which the employee concerned is not sufficiently qualified or trained.

There are rules for calculating “continous service”. There are also rules for calculating “reckonable service. Once the employee meets the relevant criteria, i.e. is aged over 16 , has two years continous service and has been either dismissed by reason of redundancy, or termination of his/her employment as a result of short-time or lay-off, then he/she is entitled to be paid a statutory lump sum. This lump sum is calculated as follows:

- ❖ Two weeks pay per year of reckonable service, and
- ❖ An additional weeks pay.

Presently, weekly pay is subject to a ceiling of €600.00 per week.

There are specific rules for calculating “week’s pay” for Time Workers, Pieceworkers and Shift Workers. There are also rules for calculating pay for persons who do not have normal working hours.

Managing Redundancy

If possible, it is preferable for an organization to establish a formal procedure on redundancy. In many organizations a formal agreement may have been negotiated and agreed between management and trade union or employee representatives. Some organizations deal with redundancies by an informal arrangement with a practice which varies for each redundancy or they may only start to consider the appropriate procedure for the first time when a redundancy situation arises.

In order to plan and implement a redundancy situation properly, the following stages will be followed in most redundancies:

- planning
- invitation of volunteers
- consultation, both collective and individual
- identification of a pool for selection
- notification of large-scale redundancies (Collective Redundancies – see below) to the *Department of Enterprise Trade and Employment*
- use of objective selection criteria
- compliance with dismissal procedures
- advance notice of individual consultation meeting
- permitting a colleague to be present at consultation meetings
- opportunity to appeal
- allowing seeking of suitable alternative employment
- statutory or other redundancy payment
- relocation expenses
- helping redundant employees obtain training or alternative work.

Of course, the exact procedure varies according to the timescale and size of the redundancy. The core points concerning some of these stages are summarised below.

Planning and preventive measures

Organisations should always attempt to avoid redundancies. Ways of doing this include:

- natural wastage
- recruitment freeze
- stopping or reducing overtime
- offer early retirement to volunteers (subject to age discrimination issues)
- retraining or redeployment
- offering existing employees sabbaticals and secondments.
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Seeking volunteers

As part of the overall procedure, once the need for redundancies has been identified and careful planning has taken place, offering a voluntary redundancy package and then seeking willing redundancy volunteers may avoid compulsory redundancies altogether.

Individual and collective consultation

Individual consultation is necessary for all redundancies and the law requires that collective consultation is required in the multiple redundancy situations referred to below. Organisations must follow appropriate disciplinary and dismissal procedures. Case law concerning consultation continually evolves, so keeping informed of relevant decisions is vital.

Consultation should also include:

- the reason for the redundancy dismissals
- why and how individuals have been selected
- possible ways of avoiding redundancy
- possible alternative work.

Collective consultations must start at the earliest possible date and not later than 30 days before notice of dismissal is given to any of the employees concerned. The law requires meaningful consultation - it is not enough only to inform.

Selection

In the earlier stages, employers will need to carefully determine the initial selection pool for redundancy. Unless there is a customary arrangement, an employer should identify the group of employees at the planning stage who may be made redundant. This will usually be those who undertake a similar type of work in a particular department, or work at a relevant location, or whose work has either ceased or diminished, or is expected to do so. These will be the selection pool.

In the later stages of the redundancy process, individuals must be selected from within the wider pool. Where there is a choice between employees, selection must be based on objective criteria which may include:

- length of service
- attendance records
- disciplinary records
- skills, competencies and qualifications
- work experience
- performance records.

Following the Age Discrimination legislation 'last in, first out' (LIFO) is now risky as a selection method. LIFO remains a risky method, and is usually an unsatisfactory way of retaining the most competent.

Tribunals should look favourably on selection procedures based on a points system which scores each employee against the relevant criteria. However, great care must be taken in the choice and application of the criteria to avoid factors which may be discriminatory on any grounds. Unfairness can be indirect or overt, for example, selection of part-timers in preference to full-timers could be discriminatory if a high proportion of women are affected.

Unfair Dismissals

In law, there are many reasons which are automatically unfair for selecting employees for redundancy, including:

- trade union activity
- part-time status
- pregnancy or maternity-related reasons
- exercising rights under Minimum Wages Act
- penalization under the Safety, Health & Welfare at Work Act
- sex, race, religion, disability, age, marital status, family status, membership of travelling community and sexual orientation.

There is no minimum service requirement for these statutory provisions to apply.

A dismissal may also be a normal (ie not automatic) unfair dismissal if there is not a genuine redundancy or if the selection criteria are too imprecise or subjective. And although the reasons for redundancy may be completely fair, it may still be judged unfair on procedural grounds such as lack of consultation.

Appeals

Employees dismissed by reason of redundancy should be given the opportunity to appeal their selection for redundancy. The appeal should be handled carefully and comply with disciplinary and dismissal procedure.

Alternatives

Employers must consider suitable alternative work and are expected to look for alternatives throughout the organisation. The law removes entitlement to a statutory redundancy payment if an employee unreasonably refuses a suitable alternative.

Giving the bad news – counselling and support

Giving notice is unpleasant and needs careful handling. Common faults include being brutally abrupt or too vague. Managers should be trained to handle redundancies with sympathy and clarity. Particular care will be needed to make sure that people know where to go for further advice or support.

Employees can be badly affected by redundancy and need support to accept

reality and mount an effective job search. A well-designed redundancy programme should enable employees to refresh their interview skills, redraft CVs and reply effectively to job advertisements. Good counselling by outplacement consultants or others, also reassures those remaining that the organisation is prepared to treat redundant employees well.

Survivor care

In any redundancy situation, the immediate priority is the fair and sensitive treatment of employees who are losing their jobs. Once this has been achieved, the organisation's ongoing effectiveness in today's competitive market is largely dependent on the morale of the survivors. Clumsy redundancy handling is bad for the employer's business and long-term reputation.

A demoralised workforce, anxious about job security and critical of the handling of the redundancies of colleagues, is not likely to display commitment, enthusiasm and initiative. Therefore, the primary objectives of management should be to:

- give all the workforce a full explanation of the situation and explain the policies and practices adopted to those made redundant
- demonstrate the necessity for change
- give an appraisal of future employment prospects and details of changes in working arrangements
- handle redundancies in a responsible, fair and effective way
- provide a forward-looking, positive attitude for the future and show survivors the value of their role in that future
- conduct, where necessary, individual discussions with remaining key workers to reassure them of their importance and employment prospects
- ensure that managers have, or develop, the necessary personal skills and attitude to operate effectively during periods of traumatic change.

An employee's right to a Redundancy Payment

A covered employee is entitled to a redundancy payment if he/she is dismissed by reason of redundancy. If the employee has at least 104 weeks of service, the employer must provide the employee with written Notice (an RP1 Form) of the dismissal at least 2 weeks before the date on which the dismissal is due to take place.

A copy of this Notice must be sent to the Minister at the same time as the employee receives the original. Failure to comply with these requirements may leave the employer liable to a fine of up to €3,000.00.

Time off to look for Work

During the 2 week redundancy notice period, an employee is entitled to reasonable paid time off to look for work or to make arrangements for training for future employment. The employer may ask for evidence to verify that the time off was spent in the pursuit of these aims.

Redundancy Certificates

An employee will receive a redundancy certificate from the employer when he/she is dismissed for reasons of redundancy or when he/she terminates the contract for reasons of lay-off or being kept on short-time. The certificate must be given to the employee no later than the day the dismissal takes effect. Employees taking redundancy by reason of lay-off or short-time must receive the redundancy certificate within 7 days of serving notice of intention to claim.

A copy of the redundancy certificate must also be sent to the Department of Enterprise Trade and Employment. Failure to meet with any requirements regarding the redundancy certificate may result in the employer having to pay a fine of €3,000.00.

The Social Insurance Fund (Redundancy Fund)

The Redundancy Payments Act, 1967 required the redundancy fund be established. The Redundancy and Employer's Insolvency Fund was established and financed by employer contributions. These contributions were pay related and collected together with PAYE by the Revenue Commissioners. However, in May 1990 this fund was joined with the Occupational Injuries Fund and the Social Insurance Fund to form a more encompassing Social Insurance Fund.

The contributions made to the Social Insurance Fund by employers and employees vary from time to time. Employers who pay redundancy lump sums are entitled to a rebate from this Fund.

Employer Rebates

An employer is entitled to claim a rebate from the Social Insurance fund of up to 60% of the redundancy lump sum paid out, **provided** the employee was given 2 weeks minimum notice of dismissal.

An employer must send a completed redundancy certificate and Social Insurance Rebate Claim form to the Department of Enterprise, Trade and Employment within 6 months of the date on which the redundancy lump sum was paid to the employee.

If an employer fails to comply with the required notice or forms, the Minister has the power to reduce the entitlement to rebate to as low as 40% of the lump sum.

Avoidance of the Act

Any provision in any agreement or contract which attempts to limit the operation of the Act will be considered null and void.

The Protection of Employment Act 1977 (including European Communities Regulations S.I. No. 288 of 2000)

This Act applies to all persons in employment on or after the commencement of the Act (and the regulations effective January 2000), in a workplace normally employing more than 20 employees.

Exceptions:

This Act does not apply to:

- ❖ Dismissals of employees under fixed term or fixed purpose contracts when the contract has expired or the purpose has been achieved or has ceased.
- ❖ To a person employed by or under the State.
- ❖ Officers of a local authority.
- ❖ Those employed under the Merchant Shipping Act, 1894
- ❖ Those employed in an establishment where the business carried on there is being terminated following bankruptcy or winding up proceedings or for any other reason which is a result of a court decision.
- ❖ Any class of employees which the Minister specifies.

The purpose of the Act is to implement the EC Directive regarding the approximation of the laws of member states relating to collective redundancies and for other related matters. I now propose to deal in more detail with “Collective Redundancies” and it would be helpful to firstly explain some of the definitions which apply under the legislation:

Definitions:

“**Contract of Employment**” means a contract of service or of apprenticeship.

“**The Minister**” means the Minister for Enterprise Trade and Employment.

“**Employees’ Representative**” means a trade union, staff association or excepted body with which it has been the practice of the employer to conduct collective bargaining negotiations or in the absence of same, a person or persons chosen (under an arrangement put in place by the employer) by such

employees from their number to represent them in negotiations with the employer.

“**Staff Association**” means a body of employees of one employer who negotiate for the wages or other conditions for its own members only.

“**Normal Number of Employees**” means that the normal number of employees employed in any workplace will be the average number employed in the 2 months preceding the date of the first dismissal.

“**An Authorised Officer**” means a person appointed to this role by the Minister and who will be given a certificate of appointment.

Collective Redundancies

1. Collective Redundancies

A collective redundancy means the dismissal for redundancy reasons over any period of 30 consecutive days at least:

- ❖ 5 in a workplace normally employing between 20-50 employees.
- ❖ 10 in a workplace normally employing between 50-100 employees.
- ❖ 10% of the number of employees in a workplace normally employing between 100-300 employees.
- ❖ 30 in a workplace normally employing 300 or more employees.

The reason for collective redundancies are as follows:

- (a) The employer has ceased, or intends to cease to carry on the business for the purposes of which the employee was employed, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed.
- (b) The requirements of that business for employees to carry out work of a particular kind in the place where he was so employed have ceased or diminished or are expected to cease or diminish.
- (c) The employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee had been employed (or had been doing before his dismissal) to be done by other employees or otherwise.
- (d) The employer has decided that the work for which the employee had been employed (or had been doing before his/her dismissal) should henceforward be done in a different manner for which the employee is not sufficiently qualified or trained.
- (e) The employer has decided that the work for which the employee has been employed (or had been doing before his dismissal) will henceforward be done by a person who is also capable of doing other

work for which the employee concerned is not sufficiently qualified or trained.

2. Consultation with Employees' Representatives

When an employer proposes to create collective redundancies he/she must initiate consultations with employees' representatives. Consultation must be initiated at the earliest stage possible but not later than 30 days before the first dismissal takes effect.

The consultation will include the following matters:

- ❖ The possibility of avoiding the redundancies, or reducing the number of employees affected or mitigating their circumstances in the event of any redundancies.
- ❖ The basis for selecting employees for redundancy.

3. Supply of Certain Information

An employer has an obligation to supply employees' representatives with all relevant information concerning the collective redundancies for the purpose of the consultation. This information includes the following in written detail:

- ❖ The reasons for the proposed redundancies.
- ❖ The number, description or categories of employees proposed for redundancy.
- ❖ The number of employees normally employed.
- ❖ The period during which it is proposed to effect the proposed redundancies.

The employer must also supply the Minister, in writing and as soon as possible, with copies of all the information supplied to the employees' representatives.

If an employer fails to initiate consultation, or to carry out the consultation procedure correctly, he/she will be guilty of an offence and liable on summary conviction to a fine not exceeding €1,904.61.

4. Notifying the Minister of the Proposed Redundancy

An employer must notify the Minister in writing of his/her proposed collective redundancies at the earliest possible stage but no later than 30 days before the first dismissal takes effect.

A copy of notification must be given to the employees' representatives as soon as possible. The employees' representatives may send to the Minister any written observations relating to the notification. If an employer fails to send this notification he/she may be liable on summary conviction to a fine of up to €1,904.61.

5. Commencement of Collective Redundancies

Collective redundancies may not take effect unless 30 days have passed since the Minister and the employees' representative were made aware of the proposed redundancies. If this time period is not upheld and a redundancy takes effect before the 30 days have expired, the employer involved will be guilty of an offence and liable on summary conviction of a fine of up to €12,500.00.

6. Consultation with the Minister

The Minister may require an employer to consult with him/her or with an authorized officer with a view to seeking solutions to the problems of the collective redundancies. The employer will supply all relevant information for this consultation process.

7. The Powers of an Authorised Officer

An authorized officer may:

- ❖ Enter any premises at a reasonable time if he/she considers that a person is employed there and make any inquiry or examination to ensure that the provisions of this Act are being complied with.
- ❖ Require an employer or an employee to produce records which the employer is required to keep. The officer may copy any of these records.
- ❖ Examine and question any employee or employer. The employer and employee must answer truthfully and sign a declaration that all answers given are true.
- ❖ An authorized officer may not enter a private dwellinghouse unless the Minister certifies that there are reasonable grounds for believing that an offence under this Act has been committed by an employer regarding an employee employed in the house.

A person will be guilty of an offence and liable on summary conviction to a fine of up to €1,904.61 if he/she:

- ❖ Impedes or obstructs an officer carrying out his/her duties
- ❖ Refuses to produce records or produces, or allows to be produced, false material.
- ❖ Prevents the questioning of any person.
- ❖ Willfully fails or refuses to comply with a lawful requirement of the authorised officer.

8. Protection of Employee Rights

An employee retains the right to the same period of notice of dismissal to which he/she is entitled under any other Act or his/her contract of employment.

9. Keeping Records

An employer must keep any records proving that he/she is complying and has complied with the provision of the Act. All records must be kept for a period of at least 3 years. Failure to maintain records correctly will mean that the employer is guilty of an offence and liable on summary conviction to a fine of up to €1,904.61. If an employer fails to keep records, the onus of proving that this Act has been complied with lies with the employer.

10. Avoidance of the Act

Any provision in any agreement or contract which attempts to limit the operation of this Act will be considered null and void.

11. Complaints to the Rights Commissioner

Under the regulations (effective April 2001) an employee or employees' representative may present a complaint to a Right commissioner within 6 months from the alleged contravention (extended a further 6 months in certain circumstances the Commissioner considers reasonable). The nature of the complaint is restricted. That is, it may only relate to the failure of an employer to fulfill his/her obligations under the under the Act to either consult with, or supply the required information, to an employee's representative. Should the Rights Commissioner find in favour of an employee the decision may require the employer to take a specified course of action to comply with the Act or pay compensation to the employee of up to 4 weeks remuneration.

12. Proceedings Under this Act

The Minister may prosecute offences under the Act. Proceedings may be initiated within 1 year form the date of the offence.

If an employer is found guilty of failing to consult with employees' representative or if he/she has instigated redundancies before 30 days have elapsed, he/she may plead for a lower fine if he/she can prove that the offence was caused by substantial reasons relating to the business which resulted in non-compliance with the requirements of the Act.

13. Exceptional Redundancies

Under the Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 there is now entitlement for Unions to refer an exceptional redundancy issue to the "Redundancy Panel" and for the Minister to refer the matter to the Labour Court

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