

Key Considerations of Collective Redundancies

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In the current Covid-19 environment organisations within the Community and Voluntary sector continue to be impacted by the health crisis and with this comes a real and pressing need to consistently review resources and align new strategic priorities.

One of the biggest challenges in future proofing any organisation is where employers must consider implementing redundancies. With this comes an increased and real risk of discontent and increasing internal disputes and external employment claims, particularly in the areas of redundancy, unfair dismissal and discrimination / equality.

With this in mind, employers need to be conscious of the statutory provisions in relation to collective redundancy and whether it applies to the organisation.

What is a Collective Redundancy?

A collective redundancy situation arises where a dismissal for redundancy purposes occurs over any period of 30 consecutive days and where a minimum number of employees may be affected based on a specific threshold of employee numbers in their totality, such as those indicated below:

- five persons in an establishment normally employing more than 20 and less than 50 employees.
- ten persons in an establishment normally employing at least 50 but less than 100 employees.
- ten per cent of the number of employees in an establishment normally employing at least 100 but less than 300 employees.
- thirty persons in an establishment normally employing 300 or more employees.

Noteworthy, the number of employees normally employed is taken as an average number of employees in the 12 months before the date on which the first dismissal takes place.

Legislative Requirements

Under the Protection of Employment Acts 1977 to 2014, an employer has certain mandatory obligations when it comes to proposing collective redundancy situations, such as:

1. Engaging in an information and consultation process with employee representatives, and
2. Notifying the Minister for Employment Affairs and Social Protection of the proposed collective redundancy.

Information and Consultation Process with Employee Representatives

There must be an information and consultation process with employee representatives commencing not later than 30 days before any individual notice of dismissal is issued. It is an

offence for an employer to issue notice of redundancy to any employees during the 30 day period of consultation with employee representatives. The Act applies to all persons in employment in an establishment normally employing more than 20 persons.

Employers should be conscious of the separate requirements for information and consultation and notification to the Minister as the 30 day applicable periods under both of these requirements may not necessarily run concurrently. It is therefore important that formal notice is not issued until the conclusion of both stages.

The Protection of Employment (Exceptional Collective Redundancies) Act, 2007 does **not** apply to:

- Employees engaged under a contract for a fixed term or for a specified purpose except where the collective redundancies are affected before the completion of such term or purpose
- State employees other than designated industrial grades
- Local Authority officers
- Seamen.

Election of Employee Representatives

A requirement under the Protection of Employment Act, 1977 is for employers to engage in a consultation process with the relevant employee representatives, 'with a view to reaching an agreement', so that a reasonable opportunity is provided to the representatives to revert with their proposals.

As for who is considered an employee representative within the meaning of the Act, employee Representatives can be defined as:

- 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 such a trade union, staff association or accepted body, a person or persons chosen (under an arrangement put in place by the employer) by such employees from amongst their number to represent them in negotiations with the employer.

If the latter arises, employers can decide on the election mechanism for the employee Representatives, such as the number required and the classes of affected employees who can appoint their own representative. Once this has been decided by the employer it is then for the employees to nominate their own representative.

In the course of the information and consultation process, the employer is expected to provide the following information in writing to the employee representatives:

- Reasons for the proposed redundancies
- Number, and description or categories, of employees whom it is proposed to make redundant
- Number, and description or categories, of employees normally employed
- The period over which it is proposed to implement the redundancies
- The criteria for the selection of workers to be made redundant

- If there is to be a payment other than the statutory redundancy payment, the method of calculating such payment must be set out.
- Copies of all information in relation to the above, supplied to the employee representatives, must be sent to the Minister 'as soon as possible'.

Notification to the Minister for Employment Affairs and Social Protection

As and from 1 September 2017 Collective Redundancy notifications should be made to the Minister for Employment Affairs and Social Protection, Áras Mhic Dhiarmada, Store Street, Dublin 1. In this respect all notifications must be made at the earliest opportunity and in any event at least 30 days before the first notice of dismissal is given. The proposed collective redundancies must not take effect before the expiry of a period of 30 days beginning on the date of notification to the Minister.

The particulars to be specified in this notification must include each of the following points:

- The name and address of the employer indicating status in respect of sole trader, a partnership or registered Company,
- The address of the establishment in which the collective redundancies are proposed,
- The number of persons normally employed,
- The number and description or categories of employees who are affected by the proposed redundancy,
- The period during which the collective redundancies are proposed to become effective,
- The reasons for the proposed redundancies,
- The names and addresses of the employee representatives who have been consulted about the proposed redundancies,
- The date on which those consultations commenced, and the progress achieved to date of notification.

The employer must also give the Minister copies of all written information supplied to the employee representatives. If deemed necessary, the Minister may request the employer concerned to enter into consultations with him/her or an authorised Officer of the Department of Employment Affairs and Social Protection.

Formal Notice

Following the application of a fair selection process, notification to the employee representatives and the Minister and following a thorough period of information and consultation (within the confines of the legislation), it is only then when all avenues have been exhausted and where a genuine redundancy situation exists, that formal notice may be issued. Following this, each affected employee must be offered redress to an appeal system.

Statutory Redundancy Payment

Once notice has been issued, the employer arrangements for payment of Statutory Redundancy should be prepared in order to issue payment upon the date of termination.

At the conclusion of the process it is important that employers maintain records for 3 years. The Minister may initiate a prosecution for an offence within one year of the date of an alleged offence under the Act.

Risks

Consistent with any collective redundancy process are a multitude of risks falling under any of the relevant Acts pertaining to the process. For example, failure to consult with employee representatives and supply certain information under Sections 9 & 10 of the Act can leave an employer liable on summary conviction to a fine not exceeding €5,000.

Or, following the determination of the European Court of Justice in *Junk v Kuhnel Case C-188/03* where it was ruled that the consultation process required by the Directive must take place before employees are given notice of dismissal, rather than after individual notices of dismissal have been issued but before they take effect. This follows from the Court's reasoning that a redundancy, for the purpose of the Directive, means the declaration by an employer of its intention to terminate the contract of employment rather than the actual cessation of the employment relationship upon expiry of the notice period. To give effect to the judgement in *Junk* an insertion of a new Section 16(2) into the Protection of Employment Act, 1977 was made making it an offence for an employer to issue notice of redundancy to any employees during the 30 day period of consultation with employee representatives. An employer found guilty on indictment of a breach of Section 16(2) shall be liable to a maximum fine of €250,000.

The Unfair Dismissals Acts and Employment Equality Acts should also be considered when it comes to a collective redundancy process and especially when it concerns the selection of employees for the purposes of making roles redundant.

In *Boucher v Irish Productivity Centre*, it was held by the adjudicator that selection criteria cannot be based on subjective assessments of employees but rather the assessment must have independent, objective and verifiable criteria.

“to establish that he acted fairly in the selection of each individual employee for redundancy and that where assessments are clearly involved and used as a means for selection that reasonable criteria are applied to all the employees concerned and that any selection for redundancy of the individual employee in the context of such criteria is fairly made”.

In *Boucher*, the employer referred to a variety of criteria used to validate the retention of skills but the categories of these criteria were not put to the affected employees as part of the selection process which therefore precluded them from contributing in a productive way to the process, which led to the affected employees being disadvantaged.

“It is not for the tribunal to consider whether input would have made a difference but its denial is a denial of the right of the natural and constitutional right to defend oneself which is not at the gift of the employer or of this tribunal but is vested in every citizen no less in any enquiry affecting their employment, that when the enquiry might affect their liberty”.

With a threat of third-party involvement ever present in a redundancy process, especially those that are collective in nature, it is critical that employers are cognisant of the key considerations and follow best practice and legislatively compliant practices of the collective redundancy process to mitigate the risks of any complaints.

Medtronic



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**For further information or advice, please contact the designated HR & Employment Helpdesk at thewheelhrhelpdesk@adarehrm.ie or via telephone on (01) 5394661
Monday – Friday 9.00am- 5.00pm**