

## Understanding the Redundancy Process: Considerations, Risks & Covid Measures May 28, 2021

A recent study by Social Justice Ireland stated that unemployment in Ireland could reach 390,000, the highest in over 35 years. Over 1.2million people had their employment impacted by Covid-19 and it is likely that some of these are unlikely to return to their jobs once restrictions have finally been fully lifted.

While there have been some positives in terms of a decrease in the number of people in receipt of the Pandemic Unemployment Payment or PUP, there were still over half a million unemployed people in April 2021.

However, the ongoing crisis is forcing many employers to examine whether it will be economically viable to reopen or reopen with the same headcount. The impact on organisations within the Community, Charity and Not-for-Profit sector has resulted in restrictions on service delivery, fundraising and resourcing which has led to some reliance on the Government supports. However, while the Government's commitment to continue with financial supports is welcome, they have indicated that these will likely be phased out from September, leaving employers with some difficult decision to be made in relation to redundancies.

For a genuine redundancy to take place, there are five headings that need to be complied with:

- The organisation ceases to operate the business for which the employee was employed to do,
- The work the employee was contracted to do has ceased or the requirement for that work has reduced,
- The organisation has decided to carry on the business with fewer, or no, employees,
- The work the employee was contracted to do is to be performed in a different way and/ or the employee is no longer qualified to carry out that work,
- The employee's work is to be done by a different employee who is sufficiently qualified and capable.

While there may be no other option to help protect an organisation, redundancies can be fraught with risks if not managed correctly. One of the main issues is ensuring it is done in a fair and objective manner and ensure a consultative procedure is put in place with employees who are at risk of being made redundant.

If an employer does not follow the correct procedure, they leave themselves open to serious financial implications. If it is found that an employee was unfairly dismissed, they can be awarded up to two years' gross salary as compensation under the Unfair Dismissal Acts or an adjudicator may agree to reinstatement in some cases.

There are some careful considerations that an employer must take into account before selecting a position for redundancy. The employer must demonstrate that a redundancy situation existed.

Having demonstrated that a genuine redundancy situation exists, it is essential to use fair selection criteria in selecting an employee for redundancy.

### **Selecting roles for redundancy**

To fairly select an employee's role for redundancy, an employer must first establish which positions are to become redundant. Having established that certain positions are no longer required, employees in that position must be considered against the criteria for selection.

When setting out the criteria for selection, employers should consider precedence – has the organisation made redundancies in past and, if so, what selection methods were used. The two main methods of selection used are 'last in first out' or 'matrix selection criteria' that can be based on qualifications, skills, experience or a combination of all three. If a redundancy process has been previously used by the organisation and it wants to use a different procedure, then it must have a specific reason justifying a departure from the procedure that applied previously.

Employers need to be careful and transparent when dealing with redundancies. While a redundancy situation may exist, an employee can have grounds for complaint if the manner of the selection for redundancy was unfair.

In selecting a particular employee for redundancy, an employer must apply selection criteria that are reasonable and are applied in a fair manner. An employee is entitled to bring a claim for unfair dismissal if they consider that they were unfairly selected for redundancy or consider that a genuine redundancy situation did not exist.

Under the Unfair Dismissals legislation, selection for redundancy based on certain specific grounds is considered unfair. These include redundancy as the result of an employee's trade union activity, pregnancy or religious or political opinions. The Employment Equality legislation also prohibits selection for redundancy that is based on any of the following nine grounds: gender, civil status, family status, age, disability, religious belief, race, sexual orientation or membership of the Traveller community.

It is important to point out that the burden of proof in a claim for unfair dismissal is on the employer. While an organisation may believe they are justified in making an employee redundant, they risk leaving themselves open to claims if they don't follow correct policies and procedures set out in the Redundancy Payments Acts 1967 - 2014.

### **Redundancy arising from lay off**

People often use the term 'lay off' to refer to redundancies and many employers have had to lay off employees due to the public health restrictions. However, lay off in this context is not the same as a redundancy.

Lay off and short time are temporary situations where an employer is no longer able to retain the employee in their normal capacity.

### **Employee's right to be made redundant suspended**

Pre-Covid, an employee could request to be made redundant after a period of four consecutive weeks (or a broken period of six weeks) on lay off or short time under the Redundancy Payments Act 1967. The employer then has 7 days to provide counter notice and where the employer cannot guarantee that they can provide 13 weeks unbroken employment within four weeks of the employee's notice, the employer must pay redundancy to the employee provided they qualify for a statutory redundancy payment.

However, if an employee has been put on lay off due to Covid-19, they cannot claim redundancy as this right has been suspended until 30<sup>th</sup> June 2021 as part of emergency legislation introduced in March 2020. This was to help prevent vast numbers of employees on periods of lay off seeking redundancy, which would inevitably put a huge financial burden on employers.

### **Risks associated with redundancy**

Critical to any planned redundancy is the fact that fair procedures must apply, and an employer must be able to demonstrate all considerations. Implicit in any potential redundancy are the justifications that a genuine redundancy situation exists, fair selection procedures are employed, and legislative requirements are met in terms of procedures and compliance.

If any of the above is not in line with fair procedures or natural justice then an employee can seek redress under the Unfair Dismissals Acts, the Redundancy Payment Acts, the Protection of Employment Acts or the Employment Equality Acts if the dismissal was on any of the nine grounds previously mentioned, which may result in financial liability or other redress on the employer.

### **Conclusion**

The easing of restrictions and slow emergence into a more normalised environment means that organisations are going to have to fully understand the implications of the last 15 months which may lead to some difficult resourcing decisions being made. Paramount to any at risk and redundancy process is the application of proper procedures, best practice, transparency, and compliance. Where all these are present organisations can mitigate the risks that inevitably flow from such a process while also managing the interests of the organisation.