



When the axe falls

In these economically straitened times, every prudent solicitor needs to be familiar with redundancy legislation to be able to advise clients about the procedures to be followed, the common pitfalls in redundancy selection – and the alternatives. Janice Walshe sharpens the axe

The turbulent economic times we are facing have ensured that redundancy queries are now among the most frequent being put to any general practice. Long gone are the days when these queries would be referred to more specialist colleagues or counsel. Nowadays, every prudent solicitor needs to be familiar with complex redundancy legislation – and should be in a position to advise clients not just about the procedures to be followed, but also about the common pitfalls in redundancy selection and about creative alternatives to redundancy.

The Employment Appeals Tribunal provided a very helpful analysis of the concept of redundancy in the *St Ledger* case, where it said: “Impersonality runs throughout the five definitions in the acts [see panel, next page]. Redundancy impacts on the job and only as a consequence of the redundancy does the person involved lose his job.”

In addition, the tribunal pointed out that “change also runs through all five definitions. This means change in the workplace. The most dramatic change of all is a complete closedown. Change may also mean a reduction in needs for employees, or a reduction in number. Definitions (d) and (e) [see panel] involve change in the way the work is done or some other form of change in the nature of the job. Under these two definitions, change in the job must mean qualitative change. Definition (e) must involve, partly at least, work of a different kind, and that is the only meaning we can put on the words ‘other work’. More work or less work of the same kind does not mean ‘other work’ and is only quantitative change.”

The tribunal’s words are helpful in terms of identifying when a redundancy situation has arisen. However, what may seem simple in theory is rarely so straightforward in practice. While it is one thing to demonstrate that a genuine redundancy situation exists, it is quite another to prove that employees

have been fairly selected for redundancy. Many unfair dismissal cases are lost because the employer cannot show that he or she used a fair procedure in implementing a genuine redundancy.

Implementing redundancies

From the outset, it is important to identify the areas of work where redundancies will potentially be made.

Consultation with employees should take place at the earliest possible stage. While there are statutory rules regarding consultation periods in collective redundancies (at least 30 days before the first notice of dismissal is given), it is a matter for the employer to decide whether and what way to conduct consultation where the number of potential redundancies falls below the collective redundancy threshold. (At least five in an establishment normally employing more than 20 and less than 50 employees; at least ten in an establishment normally employing at least 50 but less than 100 employees; at least 10% of the number of employees in an establishment normally employing at least 100 but less than 300 employees; at least 30 in an establishment normally employing 300 or more employees.)

However, an employer will have a much stronger defence to an unfair dismissal claim if he can show that he consulted in a meaningful way with his employees. If it is the practice of the employer to negotiate with a trade union, this should, of course, also take place as soon as possible.

It is vital that the employer decides upon objective selection criteria prior to making any redundancies. These should be written down and adhered to strictly. Documents should be retained that show how each employee was marked in relation to these criteria (see panel, next page)

Alternatives to redundancy

When employers need to reduce costs, the temptation to simply make large-scale redundancies is obvious. However, alternatives to redundancy should be given serious consideration. Alternative measures are not only effective at reducing costs, but can also ensure that employers retain key skills and resources – and

maintain staff morale. In addition, imposing non-redundancy cost-cutting measures is far less likely to lead to litigation where employees are aware that the alternative is redundancy.

Employers can be creative in terms of deciding upon alternatives to redundancy, and such creativity has been seen recently in this country, particularly in the financial sector. Here are some of the more commonly used alternatives.

Redeployment

Redeployment arises where an employee is moved from one area of work to another or from one employer to an associated employer, either because there is an insufficient need for their services in the area where they formerly worked, or because there is an urgent need for additional staff in the area to which they are being transferred. Redeployment can be permanent or temporary, and it is one of the most common and effective alternatives to redundancy.

Before proposing redeployment, an employer should consider:

- The implications for the business, both now and into the future. If the business is struggling financially, can it withstand the inevitable 'teething' period as the redeployed employees find their feet in new positions?
- Is the redeployment intended to be temporary or permanent? Is there to be a probation or trial period for the redeployed employee? Will the employee require retraining?
- What effect will the redeployment have on the employee's long-term career, training and promotional prospects? Will there be a feedback or 'buddy' system for the employee to report back his or her progress or concerns?

Pay cuts

While it is reported that a vast number of pay cuts have been made in the past 12 months, the fact remains that, if pay cuts are imposed without consent, they are unlawful. In that situation, the employer is at risk of litigation, particularly by way of a claim that the pay cut is an unlawful deduction from wages,

MAIN POINTS

- Advising clients on redundancy
- What the Employment Appeals Tribunal says
- Implementing redundancies, selection, and alternatives

REDUNDANCY – WHAT DOES IT MEAN?

The statutory definition of redundancy is found in the *Redundancy Payments Act 1967*. A 'redundancy' occurs where:

- An employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed by him, or has ceased or intends to cease to carry on that business in the place where the employee was so employed, or
- Where 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, or
- Where an 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, or
- Where an employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforth be done in a different manner for which the employee is not sufficiently qualified or trained, or
- Where an employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforth be done by a person who is also capable of doing other work for which the employee is not sufficiently qualified or trained.

SELECTION CRITERIA – WHO'S FOR THE CHOP?

Irish legislation does not provide any specific guidance to an employer in terms of selection criteria. However, the Employment Appeals Tribunal tends to closely scrutinise the criteria used. It is essential that the employer is able to objectively justify the criteria chosen and the manner in which those criteria were applied.

Criteria should be based on measurable data rather than on individual opinion, and might include:

- **Length of service.** 'Last in, first out' (LIFO) has fallen out of favour somewhat in recent years. It is seen now as being a somewhat crude means of selection, which does not take into account the requirements of the role or the attributes of the candidates. However, length of service may be useful as one of the selection criteria, although employers need to be conscious of the possibility of LIFO infringing rules regarding age discrimination, as set out in the *Employment Equality Acts 1998 to 2007*.
- **Performance rating.** Employers often seek to use performance ratings as a basis for selection. However, unless it can be shown that the performance ratings were applied as part of a fair and consistent appraisal process, with supporting

documentary evidence, it is doubtful that this criterion would satisfy the requirement of objectivity and impersonality.

- **Attendance records.** If attendance records are being considered, care must be taken to ensure that poor attendance is not because of a reason that could leave the selection open to a claim of discrimination under the *Employment Equality Acts*. For example, have frequent absences been caused by an ongoing disability or illness, or because of childcare issues or maternity leave?
- **Qualifications and training.** The qualifications or training being examined should be relevant to the role in question and should be verified.
- **Relevant experience.** Similarly, the employer must determine what is the most relevant experience for any new role and assess all employees equally.

Disciplinary records should **not** be used as a means of selection, and nor should poor performance that has never been addressed with the employee, notwithstanding that many employers will often want to rely on such matters.

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contrary to the *Payment of Wages Act 1991*. Similarly, removing benefits such as payment for overtime or guaranteed bonuses could fall foul of that act.

It has surprised many lawyers that, to date, there has been very little litigation arising out of the recent pay cuts and contract changes, notwithstanding that written consent to the changes has not usually been obtained. It may be that most employees are willing to accept a reduction in benefits in order to retain the job and help the business survive. However, an island ferry operator in Co Cork recently had to reverse pay cuts following the threat of strike action by employees. It may be that there will be similar industrial relations trouble in other sectors in the coming months.

Terminating non-permanent contracts

Non-renewal of fixed-term contracts of employment is one way of reducing headcount as an alternative to redundancy. However, great care must be taken to ensure that employers do not breach the *Protection of Employees (Fixed Term Work) Act 2003* and the obligation in that act not to treat fixed-term employees less favourably than comparable permanent employees. In the context of redundancy, this obligation will be particularly relevant in terms of selection for redundancy.

Many employers operate on the mistaken assumption that it is easier to renew successive fixed-term contracts than to make an employee permanent – and then make that employee redundant if it is ultimately necessary. However, the non-renewal of a fixed-term contract at the end of the contract

period can fall within the definition of redundancy. Therefore, if the fixed-term employee has more than 104 weeks of continuous service, he will be entitled to a statutory redundancy payment. If there is a more generous redundancy package on offer to permanent employees, this will also have to be paid to the redundant fixed-term employee.

It is inevitable that we will see more redundancy and recession-related litigation in the coming months. Employers need to be given careful guidance throughout the redundancy process to ensure that their chances of defeating such litigation are enhanced. In addition, in what can be an emotionally difficult time for employers and employees alike, creative but lawful alternatives to redundancy need to be considered. **G**

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LOOK IT UP

Cases:

- *St Ledger v Frontline Distributors Ireland Limited* [1995] ELR

Legislation:

- *Employment Equality Acts 1998 to 2007*
- *Payment of Wages Act 1991*
- *Protection of Employees (Fixed Term Work) Act 2003*
- *Redundancy Payments Act 1967*