
Redundancies, Fair Selection and Equality Issues

As the country eases out of lockdown, many people who have been temporarily laid off are returning to work. Unfortunately, some employers have suffered a huge decline in trade and revenue as a result of the pandemic and are facing uncertain times ahead so they are considering redundancies.

The Temporary Wage Subsidy Scheme has been extended to 31 August 2020. Employers who are affected are likely to want to plan and complete their redundancy processes on or before the date the scheme comes to an end.

What is a redundancy?

In simple terms, a redundancy is a termination of employment not related to the individual but rather their role. There are two important elements which characterise a redundancy dismissal according to the case law: *impersonality* (it is not about the individual but rather the function) and *change*. The change could be a business closing down completely or in a particular location. However, the most common redundancy situations we advise upon are where there is less work to do and therefore fewer employees required to do it or the employer has decided to do the work in a different way meaning fewer employees are required. In those cases, the employer needs to work out who to select for redundancy and how to ensure that selection is fair.

Why is it important to ensure it is a redundancy?

Redundancy is a potentially fair reason for dismissal but may still give rise to claims for unfair dismissal if it is not a genuine redundancy situation and/or the employer does not follow a fair procedure when making an individual redundant.

Employees with one year's continuous service are entitled to claim unfair dismissal for which the maximum compensation is two years' gross remuneration so getting this wrong can be expensive.

When carrying out individual redundancies, employers are expected to:

- apply fair and objective methods of selection;
- consult with the affected employees for a reasonable period of time; and
- seek alternatives to redundancy such as redeployment.

How should selection for redundancy be carried out?

This depends on whether the role is a stand-alone, unique one or whether a number of employees do the same or a similar role. A stand-alone role may be identified as being removed from an organisational structure or an entire layer of management may be removed. In these circumstances, there may be nobody else carrying out the same role and so there will be no need to apply selection criteria – it will be clear that the individual is at risk. Be careful though: where two roles are merged into one creating a new role, it will be important to give both

employees in the existing roles a chance to apply for the new role rather than simply appointing one of them to it.

If you are going from 8 employees doing the same job to 5 employees doing the same job, all 8 employees should be in the pool for selection and they should be scored against fair and objective criteria to decide who is selected for redundancy.

What is fair and objective is not as simple as it seems. Clearly measurable targets and KPIs are seen as objective. Do all members of that team have a specific sales or revenue target? Are they required to generate a certain amount of new business or clients? This can be a useful means of assessing relative performance for the purposes of a redundancy exercise but you have to be careful not to discriminate against women who may have been on maternity leave for half the year or somebody who has had a period of disability-related sick leave.

Some employers like to use the most recent appraisal rating as a factor but the appraisal system has to be fair and robust if you want to rely on it.

Time-keeping and attendance is often seen as an objective measure but it can discriminate against parents with childcare responsibilities and employees with disabilities, for example.

So the issue of fair selection can be more complex than it first seems. It is very important to ensure that selection for redundancy does not discriminate whether directly or indirectly against employees on any of the protected grounds in the Employment Equality Acts. These are:

- Gender (including pregnancy and maternity leave)
- Civil status
- Family status
- Sexual orientation
- Religion/Belief
- Age
- Disability
- Race
- Membership of the Traveller community

Pregnancy and Maternity Leave

Women who are pregnant are not automatically protected from being made redundant but dismissing a pregnant woman can give rise to claims of automatic unfair dismissal and discrimination on the gender ground under Irish law.

The European Court of Justice has previously confirmed that as a matter of EU law, employers can dismiss pregnant women as part of a collective redundancy, if national law allows. Employers do not need to specify additional grounds to dismiss pregnant women other than those justifying the collective dismissal. However, the underlying Directive prohibits pregnant workers from being dismissed **barring exceptional circumstances**.

As a result, employers must be very careful to document the reasons for the redundancy and the selection of a pregnant woman and none of the reasons should have any link to the individual's pregnancy or forthcoming maternity leave. As this is difficult to prove, many employers prefer to ring-fence pregnant women from dismissal during a collective redundancy process. This is lawful because employers may afford pregnant women and women on maternity leave more favourable treatment than other employees.

Under the Maternity Protection Act 1994 dismissal (for redundancy or otherwise) of an employee who is on maternity leave will be considered void and the employment will be extended by the period of such absence as they are on protective leave until the end of the maternity leave period. An employee may still be made redundant on return to work from maternity leave.

Our advice to employers is that it is important to include women who are on maternity leave and who are in scope for redundancy in communications about the potential redundancy while making it clear that no final decisions will be taken before their return to work. They should be given the option of engaging with the employer at the time other staff are made redundant or choosing to wait until they return from maternity leave. Otherwise they are left in the dark and cannot consider alternative employment which may be available at the relevant time.

Gender

The evidence we are seeing suggests that more women than men have taken on the majority of childcare and home-schooling responsibilities during the pandemic and as a result many have taken parental leave, reduced their hours or agreed to be laid off during the pandemic. If employers automatically make the people who have been away from work or have been less visible redundant, it will affect more women than men and could give rise to complaints of indirect gender discrimination.

Family Status

Both men and women have been affected by the extraordinary situation with childcare and schools being closed during the pandemic. If selection for redundancy is linked to or affected by having taken time off or reduced their hours to look after their children, it could give rise to complaints of discrimination on the ground of family status.

Disability

Employees with underlying health conditions may have taken time off work due to the risk of COVID-19, especially if they were in public-facing/frontline roles. These employees will be protected on the ground of disability from any less favourable treatment as a result and their absence from the workplace should not be counted against them in any redundancy selection process.

Likewise, staff who are known to have contracted COVID-19 and who may have taken sick leave should not be put at a disadvantage because of this.

Age

Treating older employees who may have taken time off due to the risk of COVID-19 in the workplace less favourably when it comes to redundancy selection could also give rise to a discrimination claim. More generally, older employees may argue they are being targeted more heavily in redundancy exercises than their younger counterparts.

Protection against Dismissal for taking Statutory Leave

Other than women on maternity leave, there is no absolute prohibition in Irish law against the dismissal of certain employees. However, the *Unfair Dismissals Acts 1977-2015* provides that dismissing an employee for availing of rights to maternity leave, adoptive leave, paternity leave, carer's leave, force majeure leave or parental leave gives rise to an automatic unfair dismissal claim for which no minimum service period is required. This may be particularly relevant to selection for post-COVID redundancies.

This article is an overview of some issues employers need to consider when making redundancies. It is not legal advice. Please get in touch for expert, tailored employment law advice in relation to your organisation.

The team at CC Solicitors are experienced specialist legal advisers. If you need assistance in relation to a redundancy process and/or selection, please do not hesitate to contact one of the team.

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