



LETTING GO

Peter McInnes explains how companies can approach downsizing without falling foul of employment legislation

The current economic crisis presents challenges to employers which many of them, particularly those flourishing in the heady days of the Celtic Tiger, have never previously encountered. Cost-cutting, restructuring, downsizing - call it what you will - redundancies are now the order of the day. The legal framework surrounding letting staff go has been the subject of much commentary in recent months. A better understanding of the main legal provisions, as well as some practical steps, can help to minimise employers' exposure to legal claims by disaffected employees.

Relevant employment legislation:

- The Redundancy Payments Acts 1967-2007;
- The Protection of Employees Acts 1977-2007;

- The Unfair Dismissals Acts 1977-2007;
- The Employees (Provision of Information and Consultation) Act 2006; and,
- The Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007.

What is redundancy?

Under the Redundancy Payments Acts, 1967 to 2007, a redundancy situation arises when there is a cessation or reduction in business or a restructuring resulting in job losses. It is often assumed that an employer must be on the brink of insolvency in order to validly effect redundancies. However, this is not the case. Redundancy can also be held to occur in a lay-off or short-time situation, which is defined in the same legislation. Lay-off is where employment ceases because the employer is unable to

provide work and it is reasonable for the employer to believe that the cessation of employment will not be permanent. Short time arises where there is a decrease in work so that the employee's pay is less than 50% of normal weekly pay.

Collective redundancies

The procedure for large-scale redundancies is laid down by the Protection of Employment Acts 1977-2007. It is this legislation that gives rise to the concept of 'protective notice', an expression that has no particular legal meaning, but which is commonly used and understood. A 'collective redundancy' means redundancies during any period of 30 consecutive days, where the numbers being made redundant are:

- at least five in a workforce of between 20 and 50 employees;

- at least 10 in a workforce of between 50 and 100 employees;
- at least 10% of a total workforce numbering between 100 and 300 employees; and,
- at least 30 in a workforce normally employing 300 or more employees.

Consultation

Collective redundancy legislation provides that an employer must consult with employee representatives 'with a view to reaching agreement'. The definition of 'representatives' not only includes a trade union, but has been extended to provide that it can include 'a person or persons chosen (under an arrangement put in place by the employer) by such employees from among their number to represent them in negotiations with the employer'.

This definition raises the prospect of elections of employee representatives from the workforce. The legislation does not define, in any way, how those elections are to be conducted. Seeking a representative sample of volunteers from across the workforce followed, if necessary, by a secret ballot, would appear to meet the legislative requirements. If there are no volunteers, there is no requirement to co-opt representatives.

Consultation should take place at the earliest opportunity and, in any event, at least 30 days before notice of dismissal is given. An employer is also obliged to notify the Minister for Enterprise, Trade and Employment, in prescribed form, of the proposed redundancies, at the earliest opportunity, but at least 30 days before the first dismissal takes effect.

Note that, although there is reference in the legislation to a 30-day period, the legislation does not mandate the length of the consultation period, which does not need to last for 30 days, although that time period is in common use. Subject to the limited constraints imposed by the legislation, and subject to the terms of any applicable collective agreement, employers can design the consultation process as they see fit, within reason. Consultation should include the possibility of avoiding the proposed redundancies by reducing the number of employees to be dismissed and the basis on which particular employees are to be made redundant. The fact that there is no requirement to reach agreement with employees does not give employers the right to pay lip service only to the notion of consultation, which should provide a forum for an informed exchange of views.

The Employees (Provision of Information and Consultation) Act 2006 obliges employers, with over 50 employees,

to inform and consult employees on important business issues, such as the structure and probable development of employment, or any decisions likely to lead to substantial changes in work organisation or contractual relations. In reality, this legislation has not been widely used to date. This would seem to be as a result of the fact that, when it was introduced, times were good. Employers are not required to set up a consultation forum unless requested to do so by at least 10% of the workforce. In tougher economic times, and with the greater scope for employee participation in the business that the legislation provides, when compared with collective redundancy obligations, there may be an upsurge in requests for the establishment of consultation bodies under this legislation.

Exceptional collective redundancies

The Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 was introduced in the wake of the Irish Ferries dispute and the so-called 'race to the bottom'. The legislation provides for the establishment of a redundancy panel to deal with collective redundancies to ensure that they are genuine redundancies as opposed to situations where existing workers are replaced by lower paid workers. The panel has not been pressed into action much since its inception.

Individual redundancies

There is no defined obligation requiring consultation in individual redundancies. However, the obligation has been held to exist as part of the general recognised obligation on employers to act reasonably. Where possible, it would be advisable not to present a redundancy as a *fait accompli*. Some form of consultation, which allows the employee time to consider the matter and respond, and have that response considered, before a decision is made, is good practice and should limit the prospect of a successful claim, although there have been a number of cases in which a dismissal by reason of redundancy has been held to be fair by the Employment Appeals Tribunal (EAT) even though the procedures adopted were less than perfect.

Selection

Where selection issues arise, there is nothing to prevent employers using a wide range of criteria such as ability, attendance record, disciplinary record, skill levels, etc., although caution must be exercised in using any personal or subjective criteria, particularly if employees are unaware

that, for example, the fact they have received a disciplinary warning may count against them in a redundancy scenario. That note of caution aside, and while accepting that impersonal criteria such as LIFO (see below) are relatively immune from challenge, the discretion given to employers by the legislation is fairly wide. The 'last in - first out' (LIFO) rule is regarded as old-fashioned and has fallen into some degree of disrepute, as it provides no guarantee of the employer being able to retain the best employees. It does, however, have the beauty of simplicity.

There is current anecdotal evidence, at least, which suggests that some employers are taking advantage of these difficult times to shed difficult or poor performing staff by making them redundant. A sham redundancy is normally fairly easy to spot, and employers should not assume that merely calling something a redundancy will shield them from complaint.

With the potential consequences of unfair selection for redundancy being, most likely, a successful unfair dismissal claim brought before the EAT and a resultant award of compensation of up to two-years gross remuneration, it is well worth employers investing the time necessary to implement a plan that will stand up to scrutiny by third parties. It is critical that a business case to justify the redundancies is clearly mapped out at the earliest opportunity. It is worth noting that it is not the function of bodies such as the EAT to substitute their view of how a business should be run for that of the employer, who takes the commercial risks inherent in running any business. Their function is to determine whether the actions of an employer to a particular situation fall within a 'range of reasonable responses'.

Planning

Adding case law and common law to the legislation, it may appear that employers face a daunting list of legal obstacles to negotiate in making redundancies. However, with careful planning and a clear framework, employers can safely negotiate this difficult and sometimes fraught process.

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