Law Society of Ireland

Redundancy in Ireland

5th April 2019

Presented by Richard Grogan
Richard Grogan & Associates Solicitors
9 Herbert Place
Dublin 2
www.grogansolicitors.ie
Mobile: 087-2868563

These notes are intended to do no more than refresh the memories of those attending the Seminar. While every care has been taken in preparing these notes to ensure their accuracy as of 5th April 2019 they cannot be exhaustive and are no substitute for a detailed examination of the relevant Statutes, cases and other material when advising clients on a particular matter. No responsibility can be accepted by the writer or the Law Society of Ireland, for acting or refraining from acting in reliance on anything contained in these notes. No part of these notes may be reproduced in any form without prior permission Richard Grogan of Richard Grogan & Associates.

In some ways Redundancy maybe seen as the poor relation when it comes to cases for compensation for an employee losing their employment. The compensation under the Redundancy Payment Act is limited to a figure of 2 weeks wages per year of service plus 1 week. The maximum award is based on a maximum salary of €600 per week.

An employee who is employed for 4 years and earns €500 per week gross will receive a figure of €4,500 as Redundancy. An employee who earns €1,000 a week will not receive €9,000. The employee will receive €5,400. The reason for this stated previously, is that the award is capped at a figure of a notional salary of €600 per week.

Saying this for some employees Redundancy can be a very attractive option. An employee who is dismissed under the Unfair Dismissal Legislation must be able to show they have suffered an economical loss. If they have no economical loss the maximum compensation is 4 weeks wages. Therefore an employee who immediately obtains new employment or who is out ill and is unable to obtain work may well prefer to try to see if they have a Redundancy Case.

There will be times when practitioners will meet a client and the issue will be whether the employee has been dismissed being an Unfair Dismissal or been dismissed by reason of Redundancy. In such cases it is important to issue both an Unfair Dismissal Claim and a Redundancy Payment Act Claim. The claims can state;-

"Claiming my dismissal was an unfair dismissal. If it was not an Unfair Dismissal it was a Redundancy"

In the Redundancy Claim stating;-

"I was dismissed by reason of Redundancy. If it was not a Redundancy it was an Unfair Dismissal."

Both claims should issue at the same time.

This issue was dealt with comprehensively in a case of Top Security Limited and Dan Bolger RPD184. The facts of the case are interesting. In this case the employee issued an Unfair Dismissal Case and that was dealt with by the WRC and a decision issued. Subsequently the employee sought to bring a Redundancy Claim.

The Labour Court in that case helpfully pointed out the case of In Re Vantive Holdings [2010] 2 IR. Where Chief Justice Murray cited with approval the following summary of the Rule in Henderson - v - Henderson stating;-

"The rule in Henderson -v- Henderson is to the effect that a party to Litigation must make its whole case when the matter is before the Court for Adjudication and will not afterwards be permitted to re-open the matter to advance new grounds or new arguments which could have been advanced at the time. Save for special cases, the plea of res judicata applies not only to issues actually decided but every point which might have been brought forward in the case. In its most recent application this rule is somewhat mitigated in order to avoid rigidity by taking into consideration circumstances that might otherwise render its imposition excessive, unfair or disproportionate. Viewing it through the prism of Estoppel and res judicata rule in Henderson -v- Henderson strictly speaking applies to proceedings between parties where those proceedings determine the rights or obligation between those parties. It is intended, inter alia, to promote finality in proceedings and protect a party from being harassed by successive actions by another party where the issue between them either were or could have been determined with finality in the first proceedings."

The Court went on to quote "*the case of*" Cummingham and Intel [Ireland] 2013 IEHC207 where Hedigan J stated;-

"All matters and issues arising in the same set of facts or circumstances must be litigated in one set of proceedings save for special circumstances this is a rule that is of benefit to both plaintiffs and defendants, to the Courts themselves and thus to the public interest."

The Labour Court in this case stated that the Labour Court must ensure that process is not abused by fragmenting litigation and relitigating the same set of facts at different times when both set of proceedings could have been brought in the first instance thereby avoiding unnecessary costs and inconvenience. The Court went on to state that the cause of action in the Redundancy proceedings was dealt with in the Unfair Dismissal proceedings by the decision of the Adjudication Officer and consequently the complainant was estopped by that decision from seeking to relitigate that cause of action again.

I only mention this matter at this stage as in various cases before the WRC this issue of issuing both claims is sometimes raised and it is for the very reasons set out in the decision of the Labour Court why both claims should issue. There was a time in the EAT where a person may bring a Redundancy claim to be met with a defence that it wasn't a Redundancy they were simply dismissed. The converse also applied in Unfair Dismissal cases namely that the defence was that it was a Redundancy. It would be my view that unless you have clear documentation, in writing, from an employer that either specifies that it is a Redundancy or an Unfair Dismissal that regardless as to what your client tells you it is it is far better to issue both sets of proceedings.

There is another reason for this in that in theory an employee can obtain both an Unfair Dismissal Award and a Redundancy Award. In the past we would have had cases during the recession where an employee would have been dismissed and it would have clearly been an Unfair Dismissal and a number of months later the company would have gone into liquidation with all other employees being made Redundant. In those circumstances it was the practice of the EAT where they found an Unfair Dismissal occurred only to give compensation for the period, under the Unfair Dismissal Legislation up to the date that the company went into liquidation and thereafter to award the balance as a Redundancy Payment under the Redundancy Payment Acts.

This issue arose in a case of ADJ 6787 where the Adjudication Officer in this case took some time to set out the legislation and set out that an employee cannot seek compensation both under the Unfair Dismissal and Redundancy Legislation that this had been addressed in the case of Cusack -v- Dejay Alarms Limited UD1157/2004 which compensation may not awarded twice on the grounds that the employee was dismissed by reason of Redundancy and for Unfair Dismissal. This was re-enforced in the case UD1114/2012. However in this case the Adjudication Officer pointed out correctly in my opinion that Redundancy can be awarded as part of the employee's compensation for Unfair Dismissal. This was certainly the practice in the EAT. In this particular case the Adjudication Officer held that there had not been a Redundancy and awarded compensation for Unfair Dismissal.

In situations where a loss would have terminated once the company went into liquidation it may at that stage effectively become a Redundancy situation. I will be dealing with this issue later relating to Taxation but from an employee's perspective for a case be deemed to be partly Redundancy and partly Unfair Dismissal can be helpful from a tax perspective as a Redundancy Award is exempt in total from tax where as an Unfair Dismissal Award is subject to tax.

There has been some strange decisions coming out of the WRC in relation to Redundancy. Some of those decisions are indicated as in case ADJ 7973 that the entitlement to the Redundancy payment was subject to the employee fulfilling the Social Welfare requirements in relation to PRSI contributions. This certainly would not be our understanding of the legislation. Our understanding of the legislation is that the employee needs to have been in "insurable" employment. It has nothing to do to with whether the contributions were ever paid or not. Our view would be supported in a case ADJ 7291 where the Adjudication Officer in this case set out the test for determining the entitlement to Redundancy Payments. The Adjudication Officer pointed out that the relevant test is whether the individual was;-

"An employed contributor in employment which was insurable for all benefits under the Social Welfare Act, 1952-1963, immediately before the date of termination of his employment"

In such circumstances the Adjudication Officer held that the employee was entitled to Statutory Redundancy.

Our reading of the legislation is that it does not matter whether the employer paid the actual contribution. The issue is whether the employee was in insurable employment. In the particular case ADJ 7291 the Adjudication Officer pointed out that all parties believed that the contributions had been paid. In my view that is helpful but it is actually not the relevant test to determine whether an individual is entitled to Redundancy as it is simply being in insurable employment.

I would point out that there are difficulties currently with the Department of Social Protection in relation to the payment of Redundancy where contributions have not been paid. In such circumstances it is necessary when claiming from the Social fund for the employee to engage with the Social Welfare Office based in Donegal being the Records Section. The employee must produce what evidence they have in relation to payment and then to apply to have the matter rectified by providing notional credits. Of course payslips are the best proof as would P60's but they are generally not available where the employer has not been paying the contributions. Evidence of payment into a bank account or lodgements to bank accounts or any documentation which would indicate that the employee was in employment at various stages will be accepted. Where issues cannot be resolved with the Department then it is necessary to bring a case to the WRC and in certain circumstances on appeal to the Labour Court. There is a requirement that a consent is obtained from the Minister for such a case to be brought. The reality is that getting such consent is virtually impossible. They do not by which I mean the Department, hand them out readily. You may well have to write to say that unless the said consent is forthcoming that Judicial Review will issue. A claim cannot be brought to the WRC or an appeal to the Labour Court without that consent having been forthcoming.

I thought it was useful to set out some of the issues which regularly arise before getting into the body of the paper and effectively set out some of the more common traps which do catch out employers and employees.

What is Redundancy?

This is one of those issues which actually sometimes arises and can cause some difficulties. Section 7 (2) of the Redundancy Payments Act 1967 as amended by Section 4 of the Redundancy Payment Act 1971 sets out that a person who is dismissed shall be deemed to be dismissed by reason of Redundancy if his or her dismissal results *" wholly or mainly"* from one of the following;-

(a) The fact that the employer has ceased or intends to cease to carry on the business for the purpose of which the employee was employed by him, or has ceased or intends to cease to carry on that business in the place that the employee was so employed, or,

(b) The fact that the requirement 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 expected to cease or diminish, or,

(c) The fact that his 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,

(d) The fact that his 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 of which the employee is not sufficiently qualified or trained, or,

(e) The fact that his 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 capable of doing other work for which the employee is not sufficiently qualified or trained.

There will be times where the employee who has been made Redundant will effectively contend that it was an Unfair Dismissal disguised as a Redundancy. This is one of the reasons why sometimes it is necessary to bring, as I said before, both a Redundancy and an Unfair Dismissal Case. A case in point is a case of Capaldi -v- C-Step Shoes Limited UD 806/1989 where the EAT found on the basis of the evidence before them that the Managing Director did threaten to let the employee go but he could not do so instead he contrived a Redundancy to get rid of her.

It is a fact that Redundancies are sometimes manufactured, if I can call it that to set out a situation where by an employee who the employer wishes to get rid of and who cannot get rid of them tries to contrive a Redundancy.

With new Data Protection Legislation and the use of laptops and emails and text messages where such Redundancy situations are manufactured it is often relatively easy to acquire the evidence to show that it was not a valid Redundancy.

Many years ago a Senior HR Director said to me that when dealing with Redundancies his approach was to get out a piece of paper draw the new structure and then put it through a sieve to see if the employees that he

wanted to get rid of fell through the gaps. If that did not happen he shredded the piece of paper and went back to the drawing board. His approach was that until such time as a robust process was there on paper nothing was committed to anything which could be recovered. This may sound cynical but certainly it does happen. I simply mention it for the fact that where a Redundancy is challenged the Burden of Proof is not on the employee to show that it was an Unfair Dismissal but actually on the employer to show that it was a valid Redundancy.

There is a significant issue for an employer who tries to manufacture a Redundancy situation. If they fail to show that it is a valid Redundancy then it is effectively an Unfair Dismissal. The employer then does not have the option of running it as an Unfair Dismissal case on the basis that the employee may have contributed to their own dismissal. If an employer nails their colours to the mast that is was a Redundancy they are stuck with it if they defence of a Redundancy is rejected.

The Redundancy must be wholly or mainly.

This really follows on from the last section. The Redundancy must be the main reason for the dismissal.

This was seen in a case of Daly -v- Hanson Industries Limited UD 719/1986. In this case the EAT found there was a Redundancy element. This is a case however where the employee was dismissed on a Redundancy ground just after she had given evidence before the EAT in a claim by a former employee of the company. In this case the EAT set out that the defence of an employer may be tested in two ways namely;-

(a) Was the Redundancy genuine, or did the dismissal take place under the cloak of Redundancy

(b) Was there a cause in effect relationship between the Redundancy and the dismissal now as Desmond Ryan in his book *"Redmond on Dismissal Law"* at paragraph 17.11 Section 6 (4) of the Unfair Dismissal Act 1977 provides that for Redundancy defence it is expressed to be *"without prejudice to the generality of subsections (1) of section 6."*Therefore if a cause in effect relationship has been shown the WRC is still required to have regard to all the circumstances in considering whether the dismissal was unfair.

Where a reorganisation or a restructuring is taking place it is important to make sure that the employer is dealing with this as a valid Redundancy. It is important that other factors must not be taken into account. Redundancy is the job going. And the theory of the law is that it is impersonal. It has nothing to do with the employee it is solely to do with the job. Of course from an employee's perspective it is personal to them.

Employers very often will raise the issue as to whether they can retain the best employees. The answer is no. It is the job and therefore the selection process must be wholly or mainly due to a Redundancy.

When do Redundancy's normally arise?

Reorganisation.

Reorganisations often result in Redundancy. It is the one that causes the greatest problems for employers as employers invariably want to retain the *"best workers".* Fairness will be raised in the selection process. For those more used to dealing with Unfair Dismissal they would be use to the provisions of Section 6 (1) of the Unfair Dismissal Act 1977 where the issue is;-

"Having regard to all the circumstances."

In a Redundancy situation the requirement is of;-

"Substantial grounds justifying the dismissal"

This was looked at in the case of Philips -v- International Health Board (Ireland) Limited UD 331/1993 where even though the employee had been able to show that for a number of factors could have been deemed to be unfair it was a genuine Redundancy and therefore the employer had discharged the onus of proof. So even if there is provisions relating to consultation or failing to be transparent if it is a genuine Redundancy and the employee is fairly selected they are unable to challenge a Redundancy.

Redeployment.

The issue of redeployment between different sites or different offices or premises of an employer or where an employer intends to move from one location to another often raises issues of Redundancy.

Where an employer is intending to change the job of the employee either from one location to another or within the organisation the issue then arises to whether the employee has been offered suitable alternative employment. The law in this issue is set out in Section 15 of the Act. There is a disentitlement to Redundancy for refusing to accept alternative employments. An employee is not entitled to a Redundancy payment if he has been offered to be reengaged or employed under a new contract of employment and those terms and conditions would not differ from a corresponding provisions of the contract inforce immediately before the termination of the contract or the employee has unreasonably refused the offer. Equally an employee will not be entitled to a Redundancy Payment if the employer has made to him in writing an offer to renew the employee's contract of employment or to reengage him under a new contract where

there are changes the offer constitutes an offer of suitable employment in relation to the employee. And that the employee has refused same. There are time limits involved. This issue was looked at in a case of Cinder Limited and Celina Byrne RPD 1811. In this case there was a proposal to move the employee from one particular store to another store. The Court in that case accepted that the employee had at all times had acted in a bona fide manner in the attempts to retain the employee and by offering a number of options to do so. The Court helpfully pointed out in that case that where the employee had been employed in a standalone shop being asked to work in a concession shop would not have been suitable alternative employment. However in that particular case the employee also refused an offer of employment in a standalone shop on the basis that the employee contended it would ultimately cease to operate. The Court held that it was not reasonable for the employee to draw any such inference and there was no sufficient difference in the working environment she would have enjoyed in Wicklow Street and that which she had experienced for the previous 20 years or so working for the employer in different premises. The Court also noted that the employee would not have suffered any disadvantage with regard to her commute between her home and her work if the option had been accepted and on that basis the Labour Court set aside the decision of the Adjudication Officer.

The case is useful in pointing out that suitable alternative employment similar to the employment that the employee has been involved in is offered and the employee refuses same then the employee will not be entitled to Redundancy. Equally where an employee could show that for example their commute to and from work was substantial increased then an offer of employment which may be equivalent to the previous employment but in a different location may actually be a ground for claiming Redundancy. By this I mean that if an employee worked in Swords and was a 5 minute walk from their place of employment and the employer proposed to move to Blackrock and the employee refused even though the job they may have been doing as for example a receptionist in both locations maybe exactly the same the impact on the employee as regards having to travel instead of a 5 minute walk to go to a Dart Station and go to Blackrock which would be a substantially increased commute may well be a ground to justify the employee refusing and seeking Redundancy.

Issues do arise in relation to redeployment where an employee may temporarily or under protest agree to take up a new job. The fact that the employee agrees to do so may not disentitle the employee to Redundancy. Section 15 (2a) of the Act that provides where an employee who has been offered suitable employment and has carried this out for a period of not more than 4 weeks refuses the offer the temporary acceptance of the employee shall not solely constitute an unreasonable refusal for the purposes of Section 15.

You can also have situations where an employee's remuneration is reduced substantially. Many employee's may when there is a reorganisation or

redeployment find that their salary is substantially reduced. Where an employee's salary is substantially reduced to less than one half of the normal weekly remuneration or the hours of work are reduced to less than one half of the normal weekly hours and the employee temporarily accepts the reduction in remuneration of hours of work and even indicates his acceptance to his employer that temporary acceptance for a period not exceeding 52 weeks. This shall not be taken to be an acceptance by the employee of an offer of suitable employment in relation to him or her. This is specifically set out in Section 15 (2b).

Selection Process.

In putting in place a Redundancy it is important that there is a selection process and that selection process must be impersonal. As I have said before in this paper Redundancy is an impersonal process. It relates to the job not to the individual. Provided the selection process is a fair process then in those circumstances the Redundancy will stand as a fair selection.

The standard process being LIFO being "Last In First Out" is the oldest selection process. It is not open to challenge on the selection ground. Saying this LIFO is a very blunt instrument. It may be applied without impacting on an employer where you are dealing with a group of workers doing exactly the same job and where there roles are interchangeable.

In the majority of Redundancy situations the employer will need to look at what jobs the employer will require going forward and what qualifications for those jobs the employer will require. There is no reason why an employer cannot have combinations. For example if an employer has a production line along with office facilities and drivers and decides that the business does not need as many operatives and as many drivers then LIFO can easily be applied to those categories of workers. When it comes to other jobs sometimes certain jobs are going to be required. So in a company that is a production company you will often need to have a production manager. You may need to have an accounts person. You may need to have dispatchers. Now the LIFO Rule may not be applicable in a number of these jobs. Those who organise the trucks to go out with product and are in contact with the truck drivers may if you have a multicultural workforce which comprised drivers and you are only going to have one dispatcher going forward it may be reasonable to set out that the dispatcher will have a language that the drivers will understand. If dealing with the accounts section and there is going to be a requirement that there are certain statutory returns that are going to have to be made which would require the person to be a qualified accountant then it is reasonable to set out that the job would be done by somebody who would have particular accountancy qualifications. In those type of situations it may well be that the person with the least service will actually be the person retained.

What is important is that the selection process can be objectively justified if challenged. In case ADJ 16010 the Adjudication Officer had to deal with an

Unfair Dismissal Case where it was claimed the employee had been made Redundant. The Adjudication Officer in that case helpfully set out that the test that a valid Redundancy was quoting the case of UD 206/2011 where the EAT stated;-

"When an employer is making an employee Redundant, while retaining other employees, the selection criteria being used should be applied in a fair manner. While there are no hard and fast rules as to what constitutes the criteria to be adopted nevertheless the criteria to be adopted will come under close scrutiny if an employee claims that they were unfairly selected for Redundancy. The employer must follow the agreed procedures when making the Redundancy. Where there are no agreement procedures in relation to selection for Redundancy, as in this case then the employer must act fairly and reasonably."

Being a problem issues.

In the talk today I think it is useful to look at the cases which cause the greatest problems.

As I set out at the start sometimes an employee will actually want Redundancy this can often arise in cases where the Transfer of Undertaking Regulations arise. For example in case RPD 1713 being a case of Ardcolum Motor Factors Limited and Gildea the Labour Court in that case held quoting a case of Symantec Limited -v- Leddy and Lines 2009 IAC 256 where Edwards J determine when a Transfer of Undertaking within the meaning of the regulations occur an employee who refuses to transfer does not therefore become entitled to a Redundancy Payment under the 1967 Act. An employee who does not transfer has no entitlement to Statutory Redundancy Payments from the Transferee Company. In both situations the employee's job is deemed to continue to be in being. A similar approach is taken in cases RPD 1710.

However when looking at the issue of Redundancy or continuity of service case ADJ 12160 is interesting.

The employee worked as a steel fixer for the respondent company from 4th May 2015 to 19th May 2017 earning €700 net per week. The employee contended that his employment was transferred to an agency on the 19th May 2017 and that the employment terminated on the 11th August 2017. The employee applied for a lump sum Redundancy payment from the respondent company who would have been if I can say it like this their first employer. The employer in this case contended that the employee was offered new employment but refused it. The company submitted that there was no cessation of employment to justify a claim for Redundancy. The employer contended that the employee had gone from the respondent to an agency following a period of lay off following an application for Job Seekers Benefit and that he resigned from employment during the period of lay off

which contravened the protections contained in Section 12 of the Redundancy Payment Acts.

The Adjudication Officer in this case looked at a situation where the employer contended that the employee had transferred seamlessly to the agency.

The Adjudication Officer in this case looked at Section 9 (3) of the legislation which provides whether an employer shall not be treated for the purposes of this part of having been dismissed if;-

1. He is re-engaged by another employer immediately on the termination of his previous employment. That would of appeared to have happened here,

2. The re-engagement takes place with the agreement of the employee, the previous employer and the new employer. There was an issue in this case whether this actually occurred but for argument sake let's say it did,

3. Before the commencement period of employment with the new employer the employee received a statement in writing on behalf of the previous employer and the new employer which,

(a) Sets out the Terms and Conditions of the employee's Contract of Employment with the new employer,

(b) Specifies that the employee's period of service with the previous employer will for the purposes of the Redundancy Payment Acts be regarded by the new employer as service with the new employer,

(c) Contains a statement as mentioned (b) above and,

(d) That the employee notifies in writing to the new employer that the employee accepts the statement required by this sub paragraph.

What is clear from this particular case is that this did not occur namely the requirements set out at 3 above. In this case only a P45 issued. It would be my view that if there is a transfer to avoid a claim by an employee bringing a claim under the Redundancy Payment Acts that all of these conditions in section 9 sub section 3 of the Redundancy Payment Acts must be complied with. Where they are not as it was found that this particular case the employee is entitled to Redundancy. In this case the time was the period he started with the respondent employer up to the date his employment transferred to the agency.

This may seem very hard on an employer but this is what is set out in the legislation. Unfortunately the Redundancy Payment Legislation is one of those pieces of legislation which is not always checked when a transfer takes place.

Fixed Term Contracts.

There is a view with some employers because an employee is on a fixed term contract that in those circumstances the employee is not entitled to Redundancy. This issue was addressed by the Labour Court in case RPD 1812. This is a case of Smorgs Roi Management Limited and Buckley. In that case the Labour Court held that the employee worked on a series of uninterrupted fixed term contracts from November 2014 to October 2017. And the Court found no merit in this submission that the fixed termination of the successive fixed term contracts disqualified the employee from qualifying for Redundancy under the 1967 Act. The Court set out that is was settled law that the combined effect of Section 7(2) (b) and Section 9(1) (a) of the 1967 Act makes it clear that the termination of employment in these circumstances constitute a Redundancy which qualifies the employee to receive Redundancy Pay within the meaning of the Act.

Effectively once an employee has 2 years' service they are entitled to a Redundancy Payment if the contract is terminated by reason of Redundancy even where those Fixed Term Contracts will provide that the Unfair Dismissal Legislation does not apply. There is no opt out from the Redundancy Legislation. Therefore an employee placed on a Fixed Term Contract of 3 years at the end of that period is entitled to Redundancy even where the contract would have provided no right to claim under the Unfair Dismissal Legislation.

Lay-Off and Counterclaim.

The issue of a lay-off and counterclaim is one of the issues which causes the greatest difficulty for employers particularly.

Maybe a way of dealing with this is to deal with a relatively recent case being the case G4S Secure Solutions (Ireland) Limited and Stanek being RPD182. In this case the employee claimed that following a period of lay-off he was entitled to claim for a Redundancy Payment in accordance with Section 12 (1) (b) of the Act.

The employee contended that he had been on lay-off for a period of excess of 4 weeks in late 2016.

The Labour Court pointed out that it is a condition precedent to an entitlement to claim Redundancy in accordance with the Act under Section 12 (1) (b) that there was in fact a period of lay-off.

The employee claimed he received a phone call on the 3rd November when he was advised that the upcoming rosters up to the end to and including the 20th November were cancelled. The employee contended that this amounted to a notice in according with Section 11 (1) (b) of the Act. He contended that no further offer of hours of employment was received before the employment terminated on or about the 21st December 2016. The employer did not dispute the phone call. The Court set out the provisions of Section 11 in full. The Court pointed out that the provisions provide that there is a requirement to notify the employee and that subsection 3 specifically states:-

"in this section reference to the delivery of a notice shall, in relation to a notice, not required by this act to be in writing, to be construed as including the reference to the oral communication of the notice."

The Court held that on the plain reading of the legislation the phone call notified the employee of a cessation of his employment and that the employee was on a period of lay-off following the phone call in November 2016. In this case the employer had contended that the employee was notified that the employer did not believe that this cessation would be permanent even so the employee was held to be on a period of lay-off following the phone call on the 3rd November.

An issue then arises in relation to the entitlement for an employee to claim Redundancy. This arose in case ADJ 12935 in this case the company got into trading difficulties. It did however continue to operate. It made plans to move to a new location which required planning permission. It was expected that this would occur but it did not happen. The employee was placed on temporary lay-off on August 25th. The employee in this case sent out a letter stating she had been on lay-off since August 2017 and that she was giving notice to terminate her employment as stated her last day of employment was to be the 1st January 2018. The Adjudication Officer in this case pointed out that the relevant provisions of Section 11 and 12 of the Redundancy Payment Acts amended specifically provides that an employee must give the notice of intention to claim Redundancy in respect of the lay-off of short time. Part B of the RP9 notice form provides one means to do this. It is not actually necessary to use the RP9 Form. Any document in similar form would do. In this case the employee did not indicate in their notice an intention to claim the Redundancy Payment. The Adjudication Officer said that a clear and simple statement of intention to resign does not comply and actually indicates a voluntary resignation.

Now once the appropriate notice is given the employer has a right to give a counter notice. This is specifically provided for in Section 13. This is however one of the most contentious pieces of legislation when it comes to

employer's. A case in point would be the case G4S Secure Solutions and Sonic RPD 186.

In this case the employee submitted that the lay-off started on the 3rd November 2016 and continued for more than 4 weeks. On the 14th December 2016 a notice in writing was sent to the employer in accordance with Section 12 (1) (b) of his intentions to claim Redundancy Payment in respect to the lay-off. He submitted on the 21st December he wrote to the employer to advise as no counterclaim had been received from the employer in accordance to section 13 (1) (b) he was proceeding to claim Redundancy. The employer submitted that efforts had been made from the 15th November onwards to contact the employee by phone but these efforts were unsuccessful because he was uncontactable.

The employer did accept a notice of intention to claim had been received from the employee. The employer also accepted that no counter notice in writing and this is the relevant bit in writing had issued to the appellant in the time frame specified in section 13 (2). The Court pointed out that the Act is very clear in respect of the matters before the Court and that the employer had not fulfilled the requirement of the Act in Section 13 (2). You therefore have a situation where a lay-off can be oral but a counterclaim must be in writing and it must be served in 7 days. There is no extension.

The issue that happens is what happens if a counter notice is actually served within the Statutory period. If a counter notice is served then in those circumstances the employer is obliged to provide the employee within 4 weeks with 13 weeks continuous employment. If that is not done we would be of the view that the employee would be able to lodge a further claim for Redundancy and in affect claim 13 weeks' wages on top.

Payment of Wages during Lay-Off.

It is sometimes believed that simply placing an employee on lay-off means that the employer does not have to pay the employee. That is what most employers believe. In the case of Law –v- Irish Country Meats (Pig Meats) Limited 1988 ELR 266 it was held that unless there is an express or an implied term permitting the lay-off without pay then this is in breach of the employees Contract of Employment. An implied term would include custom of practice. This was set out in the case of PetKevicious -v- Good Concrete Limited 2014 IEHC 66. In case ADJ 12693 in looking at this case the Adjudication Officer set out that the case related to the construction industry where there would be ups and downs rather than the type of industry that the employee was in that particular case. The Adjudication Officer held that as there was no express term the employee was entitled to payment in that case the Adjudication Officer held that as the employee was still under a contract of employment the employee was entitled to payment during this period also. This raises significant issues for employers.

Contracts of Employment do need to cover provisions of lay-off without pay. If a contract has a provision that an employer is entitled to lay-off an employee without pay then is those circumstances the employer is entitled not to pay. If the employer does not have such a clause then the employer has the obligation to pay. There would however be the exceptional circumstances situation. For example if premises flooded or were destroyed by fire or some other reason that was highly unusual then in those circumstances even without a clause entitling to lay-off without pay the employer would be entitled to lay-off without pay. But let us look at a situation where a premises is damaged by flood. The employer is advised that it is going to take 4 weeks to dry out the premises and make them fit for business again. In such a case even if there is no provision for lay-off without wages the employer is entitled to lay-off the staff and not to pay them because that would be an exceptional situation. If however the employer decides that instead of just drying out the premises and getting them back operational to put in place improvements that would take a further 6 weeks then that further 6 weeks would not be exceptional circumstances and the employees would be entitled to be paid during that period.

It is therefore imperative that Contracts of Employment have a specific provision allowing for lay-off without pay.

Resignation

An issue then arises in relation to the entitlement for an employee to claim Redundancy where an employee resigns. This arose in case ADJ 12935 in this case the company got into trading difficulties. It did however continue to operate. It made plans to move to a new location which required planning permission. It was expected that this would occur but it did not happen. The employee was placed on temporary lay-off on August 25th. The employee in this case sent out a letter stating she had been on lay-off since August 2017 and that she was giving notice to terminate her employment as stated her last day of employment was to be the 1st January 2018. The Adjudication Officer in this case pointed out that the relevant provisions of Section 11 and 12 of the Redundancy Payment as amended specifically provides that an employee must give the notice of intention to claim Redundancy in respect of the lay-off of short time. Part B of the RP9 notice form provides one means to do this. It is not actually necessary to use the RP9 Form. Any document in similar form would do. In this case the employee did not indicate in their notice an intention to claim the Redundancy Payment. The Adjudication Officer said that a clear and simple statement of intention to resign does not comply and actually indicates a voluntary resignation.

Now it might be thought if an employee resigns that in those circumstances an employee will not be entitled to Redundancy. This is not absolutely correct. The case in point of Drumcondra Child Care Limited and Szumera case RPD 1814. Which was the appeal of ADJ 12935

After a period in excess of 4 weeks on temporary lay-off the employee wrote to the employer terminating her employment with affect from 1st January the employee submitted that under the Provisions of Section 12 (2) of the Act she was entitled in the circumstances to a Statutory lump sum. The employer contended that it served a counter letter on the employee offering her a period of continuous employment but that this was not done within the timeframe of 7 days of receipt of the intention to claim.

In this case the employee did not serve a Notice to Claim a Redundancy Payment. The employee relied on the provisions of Section 12. This it was considered and referred to by the Court in the High Court in the matter of Minimum Notice of Terms of Employment Act 1973 Industrial Yarns Limited -v- Leo Green Arthur Manly [1984] ILRM 15 at page 20 where Costello J stated;-

"The Section 12 procedures were amended by Section 11 of the 1971 Act. After the employer has served the Section 11 Notice of Lay-Off, the employee can now serve one of the two notices either;-

(a) a Notice of Intention to Claim Redundancy or,

(b) a Notice Terminating his contract (which is deemed to be a notice to claim Redundancy Payment). He cannot serve both."

In this case the Labour Court held that the claim fell within Section 12 (2) of the Act.

The Provisions of Section 12 (2) of the Act can catch employers out and sometimes representatives. Where the employee has been on lay-off broke 4 weeks and simply sent the letter terminating their employment that is actually a notice claiming Redundancy also. The resignation letter does not actually need to state that they are claiming Redundancy. It is by virtue of the Act effectively implied into the termination letter. The case is interesting in that this matter had previously been before an Adjudication Officer who had held that there was a requirement to claim Redundancy. The issue of a requirement to claim Redundancy is still being issued in WRC cases. The decision of the Labour Court was very clear. The Labour Court reviewed the legislation in full and I would say that this is a trap which some employees can catch the employer in because the employer would expect to get the Form RP9 where they can give a Counter Notice. Where an employer receives such a notice simply of resignation the employer can counter it by giving a Counter Notice under Section 13.

An Employee Anticipating the Expiry of the Employers Notice.

This is unusual but it does apply at times. This applies when an employer gives notice to an employee to terminate the Contract of Employment and at a time within that period of notice the employee gives a notice in writing to the employer to terminate the Contract of Employment on a date earlier than the date on which the employers notice is due to expire then the employee shall for the purposes of the act been taken to be dismissed by his employer and the date of dismissal in relation to that dismissal will be the date on which the employees notice expires. If before the employees notice is due to expire the employer gives the employee notice in writing requiring the employee to withdraw the notice terminating the Contract of Employment and to continue in the employment until the date on which the employers notice expires and stating that unless he does so the employer will contest any liability to pay the employer Redundancy Payment and the employee reasonably refuses to comply with the requirement of that notice the employee shall not be entitled to a Redundancy Payment. An employer cannot of course agree to the earlier date and this does not affect the employee's entitlement to Redundancy.

The Provisions of Section 10 of the Act are sometimes attempted to be used by employee's there is a long notice period, where they would still be in employment, and where they have obtained a new job. Some Employer's tend to fall into the trap that because the employee serves a notice to terminate their employment at an earlier date then effectively the employee has resigned and lost their right to Redundancy then the employer in those circumstances would be incorrect. Some employers will in time seek to give a long notice period where the employee's will continue to be in employment in the hope that they will avoid a requirement to pay Redundancies where the employee's will go looking for new work and will get a job before the notice period expires and would simply resign. The Provisions of Section 10 are ones that the employer's need to be aware of as otherwise they can still be caught with a Redundancy claim.

Conclusion.

As I said at the start Redundancy is often seen as the poor relation when it comes to termination. I hope from this paper it would be seen at times it is actually beneficial for an employee to get a Redundancy Payment as opposed to an Unfair Dismissal Award. There would be times where employees are on lay-off, they obtain a new job and they are delighted to get an opportunity to send in a form requesting Redundancy. The time limit for an employer to give a Counter Notice is so tight that often it is missed. Unlike other provisions and Legislation there is absolutely no right for an extension regardless of the circumstances. Therefore for example if a factory closes for

2 weeks in August and an employee knows that there is a post box and serves the relevant notice on the employer to be delivered in the ordinary course of post on the Tuesday after the August Bank Holiday knowing that the factory is closed for 2 weeks there is no way in which the employer will get the notice by which I mean see it and have an opportunity to furnish a Counter Notice. That is not a problem for the employee it is a problem for the employer. The same applies close to the Christmas period when offices and factories tend to close.

For colleagues dealing with Unfair Dismissal Claims if a resignation letter comes in or a Notice to claim Redundancy comes in where employees have been on lay-off it is imperative that the Counter Notice is to be served it is done so immediately and within the Statutory Period by sending it in by post. The legislation does indicate that it has to be delivered within the 7 day period so you have to take into account the time for a letter to be delivered. When dealing with a company who is placing individuals on lay-off it is important that the management of the company are aware of the Provisions of Section 13 of the Act as regards keeping relevant Counter Notices. It is equally probably important that not only are management aware but the person who opens the post, during periods that any employees maybe on lay-off, is also aware of their obligation to make sure that somebody in management receives it immediately a Notice to claim Redundancy is delivered and that their representatives are contacted by the company immediately so that appropriate decisions can be made as to whether a Counter Notice should be served or not. If acting for employees there are a number of opportunities to claim Redundancy in a way where the employer will not think of serving a Counter Notice or will not have the opportunity to do so. That may sound cynical. But that is the Law. It is for the employer's representatives to make sure that they advise their clients of the nuances of the legislation.

Redundancy is one of those areas that I have been dealing with more years than I would wish to recall. I have dealt with both for employers and for employees. When I started in the area of Redundancy I was in a large Accountancy Firm and when we started this work we were advising on Redundancies. In dealing with HR Personnel we then went to downsizing. The jargon then changed to rightsizing of. It then changed again to re-engineering the workforce and now back to straight Redundancy. I was asked once by a trainee solicitor about 15 years ago when the firm I was with was dealing with a large Redundancy for an employer as to why in all the correspondence that were going out we referred to it as re-engineering the workforce. I was asked what was the difference between a Redundancy and re-engineering the workforce. The other Partner and myself started to laugh and it was given over to me to answer and the answer was it was about €200 an hour extra in fees in re-engineering the workforce as opposed to doing a Redundancy. When the recession hit in and around 2008 a lot of the HR jargon went and we reverted from re-engineering the workforce back to plain Redundancy.

I would finish on this point by saying that we are seeing at the present time in the cases going to the WRC and we do review them on a very regular basis a significant increase in Redundancy claims. We would also see them in the office. A lot of these claims going through now are ones which are being challenged. A significant number of these do not go for full hearing. There is currently as we have come out of a recession companies with money who are anxious to get rid of the employees that they no longer wish to have. They cannot do an Unfair Dismissal and therefore call it a Redundancy. When the bluff is called there is often a fund there to give an enhanced Redundancy Payment. A considerable number of the current Redundancies are not legitimate Redundancies. They are getting rid of workers who are maybe not as productive or as integrated into the organisation as the organisation would want. After transfers or mergers we are certainly seeing an increase in Redundancies sometimes for very Senior Officials which are not Redundancies but merely a clean out or clear out of employees the employer does not want.

If putting in place a Redundancy and even a valid Redundancy there are good commercial grounds for giving some form of an enhanced Redundancy. If you give an enhanced Redundancy then it is possible to put in a settlement agreement which excludes any claim being brought under any other Act. Because there is an enhanced payment it is what is termed "*consideration"* for the employee giving up these other rights. It would always be our advice in those circumstances to provide for the employee to get Independent Legal Advice. A fee should be paid. The going rate going is currently between €300 and €500 plus vat. Very few offices will agree to give the advice for €300. So you are really at a figure of €400 to €500 plus vat the clause should provide that on receipt of an invoice addressed to the employee but marked payable by the employer that the fee will be paid directly to the Solicitor in issuing the invoice within a set number of days and that the agreement should be witnessed by that Solicitor. In those circumstances the employee will not be able to come back with a claim under any other Act as consideration will have been paid, they will have received Legal Advice and they are bound then by the agreement.