

Redundancy, Temporary Wage Subsidy Scheme, Senior Employees, and, those Returning from Maternity Leave

You might wonder why we would lump all of these four together. There is a very good reason and we will try and set it out here.

Under the Temporary Wage Subsidy Scheme (“TWSS”) an employer going into the Scheme completes a declaration, to the Revenue saying it is not their intention to make any of those on the TWSS redundant. Now senior employees earning more than €75,000 are not eligible to join the Scheme. Women returning from maternity leave who are not on the payroll on 29 February could not join the Scheme until recently. There may also be some men who would have been on parental leave who may not have been on the payroll on that date equally. However, there is a significant number of women who would be in that position of not being on the payroll on the 29 February.

Take a situation where an employer is intending that they, when opening, will have to reduce the number of employees. The employer now is in a very difficult situation. If the employer complies with the Revenue position the first people to be really considered for redundancy will be those who are earning over €75,000 and those who would not have been on the payroll which in this case would be women returning from maternity leave but now are covered. Let’s take a situation where you have a company that has a unit which has ten people doing the same work. One employee is older and has been on a higher salary on the basis of annual increments. There is one employee who came back from maternity leave but could not be put onto the Temporary Wage Subsidy Scheme as they earn over €75,000. The employer works out that they are only going to need eight employees in that unit. Applying the Revenue rules the older employee and the woman returning from Maternity Leave being paid over €75,000 would be the two individuals who should be given redundancy. That covers the Revenue. However, from an employment perspective dismissing either would leave the employer open to an equality claim on the ageism ground and the gender/family status ground from the two individuals.

The Labour Court have constantly held as have the Revenue through the Appeal Commissioners that the Labour Court is not bound by decision of the Revenue or the Appeal Commissioners and that the Revenue/the Appeal Commissioners are not bound by a decision of

the Labour Court. There is therefore a standoff. Employment law says one thing. The Revenue law says something else.

If the employer ignores the Revenue rules and applies the normal redundancy rules and equality legislation the employer could well find themselves in a situation of a reclaim from the Revenue in respect of those who were made redundant who had been on the TWSS. There is even a question that the employer would have a reclaim in respect of all of those workers who are on the TWSS because the employer will effectively have broken their statement of intent to the Revenue by making two people on the TWSS redundant when there was others not on the TWSS who could have been made redundant. From an employment perspective redundancy is the job not the individual and it's hard to argue that issues under the TWSS being Revenue rules would trump the employment legislation.

So there is a Mexican standoff. There is of course a solution and that is that in those circumstances the Revenue rules should be amended so as to provide that the employment law applies being the normal employment law provisions as regards selection and that if on a normal selection basis somebody would have been selected for redundancy who was on the TWSS and a person who was not on the TWSS would be retained then in those circumstances Revenue would neither seek a refund of the TWSS subsidy to the employer nor the interest on it.

The reality is this is going to become a problem. It is a problem which we have highlighted. We highlighted this issue on RTE on the Sarah McInerney Show on 18 May and in an interview with TheJournal.ie.

We doubt that this issue is going to be addressed but we have raised it.