Redundancy - Practical Tips and Traps

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Redundancy In Ireland – Tips and Traps

At first sight Redundancy would appear to be a very straight forward matter. To a certain extent this is a correct statement. Where you have a business which is closing down and everybody is being made redundant the issues are clear. The problem cases arise where the business is not closing down and individuals are being selected for redundancy.

An issue which is arising since the pandemic has been that redundancy now is seen as a cloak to select the underperforming or worst employees. Claims relating to this already are going to the WRC. The other significant issue is fair selection for redundancy. You might think that this comes within the ambit of what I said previously. To an extent it does but in addition it is also a separate heading in itself. A third area of concern, which is again giving rise to cases, are individuals who are either pregnant or on Maternity Leave being selected for redundancy.

In this paper I intent to hopefully walk through matters with you as to whether you are dealing for an employer or an employee.

What is a Redundancy?

This is one of those issues which actually sometimes arises and can cause some difficulties. Section 7 (2) of the Redundancy Payment 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 for 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.

It is important to remember that in a redundancy situation the burden of proof is on the employer to show that it is a valid redundancy.

If the employer cannot show that it is a valid redundancy then in those circumstances it becomes an Unfair Dismissal.

There will be times where the employee who has been made redundant will effectively contend it was an Unfair Dismissal disguised as a redundancy. A case in point is the case of Capaldi –v- C-Step Shoes Limited UD806/1989 where the EAT found om the basis of the evidence before them that the Managing Director did threaten to let the employee go but he could not do so and instead he contrived a redundancy to get rid of her.

There is a significant issue for an employer who tries to manufacture a redundancy situation. If they fail to show it was 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 this is a redundancy they are stuck with that defence of a redundancy if that is rejected as a valid defence.

There are a number of steps which an employer must go through to put in place a valid redundancy and if those steps are not followed or there is a defect in those steps then the employer may well by their actions convert what may have been valid redundancy and may in fact be a valid redundancy into an Unfair Dismissal claim based on fair procedure. The reason for this is that Section 6 (4) of the Unfair Dismissal Act provides that a dismissal shall be deemed not to be unfair of it results wholly or mainly from one of the issues set out in that Section and that includes redundancy of the employee.

However, as I have said in an Unfair Dismissal case the burden of proof is on the employer so if an employee claims that a redundancy was not valid redundancy but was instead a dismissal and claims Unfair Dismissal then in those circumstances the Burden of Proof rests firmly on the shoulders of the employer to show that it is a valid redundancy.

The selection Process

At the start it is imperative for employers to understand that redundancy is not a method by which the best employees are retained and the worst employees are got rid of. Now, to be fair it is probably possible to orchestrate such a situation but it is fraught with difficulties. Get it wrong and the employer can be in multiple Unfair Dismissal cases.

In putting in place a redundancy it is important to remember that there has to be a selection process. That selection process must be impersonal. The

selection relates to the job not to the individual. Provided the selection process is a fair process than 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 an employer where you are dealing with a group of workers doing exactly the same job and where the 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 of 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 be applied to those categories of workers. When it comes to other jobs sometimes certain job attributes are going to be required. So in a company that is a production company you will often need to have production manager. You may need to have an accounts person. You may need to have dispatchers. Now the LIFO rule may not be appropriate in a number of those 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 comprises drivers who are from different countries and different languages which are spoken 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 or a majority of the drivers will understand, In dealing with the accounts section and there is going to be a requirement that there are certain statutory returns trhat are going to have to be made which would require a person to be a qualified accountant then it is reasonable to set out that the job would be done by somebody who would have a particular accountancy qualification. In those types of situations it may well be that the person with the least service will actually be the person retained. What is important in the selection process is that it can be objectively justified if challenged.

In case ADJ16010 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 as to whether it was a valid redundancy was clearly set out in case UD206/2011 where the EAT stated;

“*When an employer is making an employee redundancy, 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 they were unfairly selected for redundancy. The employer must follow the agreed procedure when making the redundancy. Where there are no agreed procedures in relation to selection*

for redundancy, as in this case, then the employer must act fairly and reasonably".

I will deal with this a little bit further in this section of the talk but it is as well to deal with it at this stage now.

In some major and large organisations there will be a policy or procedure sometimes by way of a collective agreement relating to the selection for redundancy and the process which will apply. In the majority of companies and businesses there will be no redundancy selection process or procedures. In those circumstances the employer needs to act fairly.

This may now sound strange but in those circumstances the employer should apply their own disciplinary procedures or the Code of Practice on Grievance and Disciplinary Procedures if they do not have a Disciplinary Procedure or if the Code is more beneficial to the employee. I will hear you sat that this is not a disciplinary matter where somebody is being made redundancy. That is true but in dealing with matters this will ensure fair procedures if these are applied.

So what are the steps and employer should do?

1. The employer should put in place a document setting out the business requirements, what skills will be required, how an individual has been selected for being at risk of redundancy. I use the word "At Risk" on purpose. Simply arriving and telling an employee that they are being made redundant is a way of ensuring a claim for Unfair Dismissal on the lack of fair procedures.
2. Once the group of workers who are "at risk" is identified they should each be written to.
3. The letter to the employee at risk should advise them that they are at risk of redundancy. It is best practice to attach the document prepared by the employer setting out why the employee is at risk of redundancy at that stage.
4. The employee in that at risk letter should be called to a meeting to discuss the situation.
   The employee at that stage must be advised of their right to be represented by a fellow employee or Union official. Now this causes problems with employers who say that they do not recognise a Union. That may well be the position. However, under the Code of Practice on Grievance and Disciplinary Procedures an employee whose job is at risk is entitled to be represented by a fellow employee or Union Official. The fact that a Union Official attends at a meeting does not mean that the employer is recognising a Union for negotiating purposes.
5. At the meeting the employee should be allowed ask any questions which they wish to ask which are reasonable. They must be asked then to put forward their proposals as to how their job could be retained.

6. The employer needs to consider the arguments put forward by the employee.
7. When the employer has considered same and assuming that the employer does not accept those arguments then in those circumstances the employee should be given a letter advising them that they are being made redundant and when the redundancy will take place.
8. That letter should advise the employee of a right of appeal to an Independent Person who is not involved in the process previously.
9. There should be a full appeal and 5,6, and 7 above should apply.

When I mention the issue of an employer it may well be in small organisation effectively there is going to be no appeal process where there will be anybody independent. In those circumstances except in the smallest of organisations it is beneficial to have somebody from outside deal with matters at the initial stage and that the employer then would deal with matters on appeal. In larger organisations where there is a HR Department or there are a number of managers one of them can deal with the matter at the start and it can then go to somebody higher in the organisation to make the final decision.

The issue of the selection for redundancy is an issue which is going to be arising. This issue arose in a case ADJ/00014858. The employee was not successful in that case. However, it is helpful to look at it as regards to the law on this matter. The relevant legislation is Section 6 of the Unfair Dismissals Act, 1977. In relation to the issue of selection for redundancy subsection 3 is the relevant subsection which provides;

"(3) without prejudice to the generality of subsection (1) of this Section, if an employee was dismissal due to redundancy but the circumstances constituting the redundancy applied equally to one or more other employees in similar employment with the same employer who have not been dismissed, and either the selection of that employee for dismissal resulted wholly or mainly from one or more of the matters specified in subsection (2) of this section or another matter that would not be the ground justifying dismissal, or her was selected for dismissal in contravention of a procedure (being a procedure that has been agreed upon by or on behalf of the employer and by the employee or a trade union or an excepted body under the Trade Union Act 1941 and 1977) representing him or has been established by the custom and practice of the employment concerned, relating to redundancy and there were no special reasons justifying a departure from that procedure, then the dismissal shall be deemed, for the purposes of this Act, to be an Unfair Dismissal".

It is also important to look at the provisions of Section 7 Subsection 2 of the Redundancy Payment Act 1967, as amended.

In these cases the question is always going to be whether the employee was properly selected for redundancy. In these types of cases it will be imperative for employers to have the appropriate documentation in place showing the selection process and how it was applied to the employee and how the employee was given fair procedures in relation to same.

This issue was addressed in the case ADJ-00019921 where the Adjudication Officer helpfully set out the case of Williams –v- Comps Air 982 1ICR156 where Browne Wilkinson J in considering the issue of fair selection identified the following general accepted principles governing how reasonably employers will typically act namely;

"The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. Where the selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance records, efficiency at the job, experience or length or service.

The employer will seek to ensure that the selection is made fairly in accordance with these criteria and would consider the representations the union may make as to such selection.

The employer will seek to see whether instead if dismissing an employee he could offer alternative employment".

This case is one where there is an issue with the tests as regards the third namely the issue of matters such as attendance records, efficiency at the job. These are personal rather than issues relating to the job itself. It is important, in my view, trhat when determining whether or not there is a redundancy that any issues which are personal to the employee should not part of the process, as far as practicable. Where they are to be included in the process then the selection matrix needs to be able to show why these issues were taken into account.

On the issue of fair selection, the case of Boucher –v- Irish Productivity Centre 1994 ELR205 was a case which covered the issue of unfair selection. The selection had been carried out without any consultation or interview. The EAT emphasised that those in the group likely to be dismissed should be made aware that such assessment is being made and should be given an opportunity to give their views which should be considered.

In Mulligan –v- J2 Global (Ireland) Limited UD993/2009 in respect of redundancy the EAT stated;

"*In cases of redundancy, best practice is to carry out a genuine consultation process prior to reaching a decision as to redundancy. While in some cases there may be no viable alternative to the making of one or more jobs redundant, whatever consultation process is carried out, the employer who fails to carry pout a consultation process risks being found in breach of the Unfair Dismissal Acts and such a lack of procedures may lead to the conclusion that an unfair selection for redundancy has taken place".*

In JVC Europe –v- Panasi 2011 IEHC279 Mr. Justice Charleton stated;

"*It is made abundantly clear by the legislation that redundancy, while it is a dismissal, is not unfair. A dismissal however can be distinguished as redundancy that is not lawful. Upon dismissal an employer can simply say that the employee was not dismissed for a reason specific to that person but that instead his or her services were no longer required pointing to apparently genuine reasons for dispensing with the services of the employee. In all cases of dismissal, whether by reason of redundancy or substantial grounds justifying dismissal, the burden of proof rests on the employer to demonstrate that the termination of the employment came within a lawful reason".*

Another case that was quoted is that of St. Leger –v- Frontline Distributors Ireland Limited 1995 ELR160 where Dermot McCarthy SC stated;

"*Impersonality runs throughout the five definitions of the Act. Redundancy impacts on the job and only as a consequence of the redundancy does the person involved lose their job. It is worthy to note that the EC Directive on Collective Redundancies uses a shorter and simpler definition "One or more reasons not related to the individuals worker concerned".*

It is important always to remember that the issue of the basis for selecting the employee must again be fully set out. This was emphasised by the Labour Court in the case of Component Distributors (CD Ireland) Limited and Byrnes UDD1854 where the Labour Court said;

"*The Court accepts that the respondent was entitled to restructure the business and reduce the workforce if necessary. While the Court accepts that the respondent was entitled to decide on the most appropriate means of achieving its operational requirements, its entitlement in that regard is not unfettered. The right of the complainant to retain her employment must have*

been taken into consideration. That necessarily obliged the respondent to look at all available options by which this could be achieved".

In Byrnes the Labour Court noted that the claimant had not been supplied with all company documentation as the Board of Management proposals were confidential.

The issue of confidential documentation is allowed but it is important that the employer in those circumstances can demonstrate that they were confidential and there was a good business reason for not disclosing same. This can sometimes be a difficult issue for an employer to prove.

When it comes to restructuring again the whole issue in an organisation as regards fair selection is one that the employer will need to be in a position to demonstrate,. This often happens when you will have two parts of a business merging.

In Edwards –v- Aerials & Electronics (Ireland) Limited UD236/1985 the EAT considered the case in which a Dublin based Managing Director was dismissed following a reorganisation and the employers decision to run the company from Belfast. The EAT held;

"*The claimant has raised major doubts as to whether the redundancy was genuine. We recognise that the function of a full time managing Director no longer exists, but we must direct our minds to the cause and effect relationship between redundancy and dismissal. The issue was whether he was dismissed because the employer had decided to reorganise the structure of the company, or whether the decision was taken to dismiss him for some other reason. In other words, was the reorganisation a cause or a consequence?"*

In that case the EAT held that on balance they were inclined to the view that it was a consequence rather than a cause.

Very often in a selection process you are going to be dealing with a pool of workers. This issue arose in case ADJ-00023219 where in that case the employer relied on the cases UD12/2011 Moran -v- Ernst & Young UD1259/2012 and Mulqueen –v- Prometric Ireland UD206/2011. In that case the Adjudication Officer while accepting there was a financial evidence for the necessity to effect redundancies the Adjudication Officer found no credible evidence was advanced to justify the relevant employee being chosen for redundancy.

No evidence was advanced to demonstrate that the selection was based on an unbiased, objective and transparent matrix of skills and competencies nor indeed was any evidence advanced to demonstrate that this was approached from an objective perspective where a job as opposed to a position was to the forefront of the deliberations on the matter.

No plausible explanation was advanced for the failure to explore part time work or temporary layoff or an alternative option for redundancy. The company failed to justify the very narrow time frame given to the claimant to come up with an alternative solution given the prolonged period allowed for the strategic review and no account appears to be taken of the claimant's limited insight into the financial imperatives during these redundancies.

I will be dealing further with the issue of looking to see if there are alternatives to redundancy. This is an issue which we will look at later on in this talk.

It however must be remembered that the fact that a position may in fact be redundant is not in itself sufficient to mean that the employer will win an Unfair Dismissal case. In Tolerance Technologies Limited –v- Joe Foran UDD1638 is a case where the Labour Court found;

"*The Court, while finding that the respondent's position was redundant also found that the manner of his dismissal as a result was procedurally unfair. The respondent was not consulted adequately. He was not afforded representation and he was denied the opportunity to engage with the company board when he requested the facility in a situation when he was not satisfied with the termination of the employment which had been communicated to him at a meeting on 27th and 28th October 2015*".

A recent case on this matter is the case of Trinity College Dublin and Ahmad UDD2030 where the Labour Court quoted the case of Gillian Free –v- Oxigen Environmental UD206/2011 where the Employment Appeals Tribunal noted;

"*When an employer is making an employee redundant, while retaining other employees, the selection criteria being used should be objectively 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 adopted will come under close scrutiny if an employee claims that he/she was unfairly selected for redundancy…where there is no agreed procedure in relation to selection for redundancy…then the employer must act fairly and reasonably".*

In that case the Court accepted on balance that the requirements of the University for the work the complainant was carrying out had ceased due to the lack of funding for that role and that therefore was the cause of termination of the employment. The Court went on to find that this was a redundancy situation. However, the Court noted that he was no longer on a specified purpose contract and now on a contract of indefinite duration. The Court stated it was clear that sufficient efforts were not made to seek alternative roles for him. The Court could therefore not accept that this dismissal by virtue of fair selection of redundancy had been discharged by the respondent and consequently found that the complainant was unfairly dismissal. In that case an award of €20,000 on top of what was an enhanced redundancy was awarded to the employee.

Ultimately the decision as to whether a redundancy took place because of the manner of the selection process it became an Unfair Dismissal will always be a matter which will ultimately be determined by the WRC or on appeal to the Labour Court.

Where redundancy arises and there is no procedure or custom in place the reasonableness of the selection criteria is usually focused on and tends to be asserted by the objective standards of the way in which a reasonable employer in those circumstances in that line of business at time would have behaved. The issue arose in the case of TUS Community Supervisor and a Local Development Company ADJ-00020033 where the Adjudication Officer pointed to the case of Bunyan –v- United Dominion Trust (Ireland) Limited 1982 ILRM404 where the EAT endorsed and applied the view quoted from NC Watling Co. Limited –v- Richardson 1978 IRLR225 where it was stated;

"*The fairness or unfairness of dismissal is to be judged by the objective standard of the way in which a reasonable employer in those circumstances in that line of business would have behaved. The Tribunal therefore, does not decide the question of whether, on the evidence before it, the employee should be dismissed. The decision to be dismissed has been taken, and our function is to test such decision against what we consider the reasonable employer would have done and/or concluded*".

Considering Suitable Alternative Employment

As part of any redundancy process an employer is obliged to look at alternatives to redundancy.

This may simply be is there other work which the employee could undertake. Are there roles within an organisation which the employee could perform? It is of course not a matter for the employee to come up with an alternative to redundancy. It is a matter for the employer to look to see what alternatives to redundancy were or could be put in place. Again, in any hearing this issue is going to be looked at and it is a matter for the employer to have the appropriate documentation in place. Looking to put in place the reasons subsequent to the redundancy is not the way forward, it is a matter for the employer to have the relevant documentation in place as to what alternative roles were looked at and considered.

In the case of Student Union Commercial Services Limited and Alen Traynor UDD1726 the Labour Court dealt with a situation where the Court held that there was a genuine redundancy situation which existed. You might then think trhat this therefore was the end of the Unfair Dismissal case. Far from it, The Court in this case looked at the case of Mulcahy –v- Kelly 1993 ELR35 where the EAT held that it was well established that there is an obligation on an employer to look for alternatives to redundancy. In the case of Mulcahy –v- Kelly the EAT in that case held;

"*It is well established that there is an obligation on an employer to look for an alternative to redundancy*".

In the Traynor Case the Labour Court pointed out that this duty may involve locating alternative work within the organisation even if this involves dismissing another employee with shorter service. The Court pointed out in Thomas & Beets Manufacturing Limited –v- Harding 1980 IRLR225 that the English EAT found the complainants dismissal unfair because she could have found work as a packer even though this would have meant dismissing a recently employer packer.

The Labour Court pointed out that where there is no agreed procedure in relation to selection for redundancy then the employer must act fairly and reasonably and the Court referred to Section 6 (7) of the Act as amended and sets this out in detail.

In this case the Court was satisfied that the respondent employer did follow a consultation process with the complainant. The Court noted that the company had a number of business units which had fluctuating numbers of staff employed. The Court pointed out that it was presented with no information to demonstrate that the respondent carried out an exercise to consider alternative options or suggestions. The Court went on to say that the Court accepted that had such an exercise been carried out it may not have identified any alternative positions suitable to the complainant, However, the Court pointed out importantly that it seemed still that no such exercise was engaged and on that basis the Court found that the approach adopted by the respondent was somewhat arbitrary and therefore the dismissal of the employee pursuant to Section 6 (7) was unfair. The Court in that case awarded a sum of €12,000 on top of the existing redundancy payment which had been made. This decision of the Labour Court is very similar to the approach taken by the Labour Court in the case of Trinity College Dublin and Ahmad UDD2030 referred to previously.

A UK case on this was a case of Babar Indian Restaurant –v- Rawat 1985 IRLR57. In this case the employer operated three separate businesses. One of which was a restaurant, the restaurant owner closed a frozen food business. He redeployed two of the staff to the restaurant. Mr. Rawat was an employee of the restaurant and was dismissed to make way for the redeployment. It was held that the restaurant was a separate business from the now closed frozen food entity. Looking solely within the restaurant business there were no grounds for redundancy. The claim for Unfair Dismissal was upheld.

In Murphy and Regan Employment Law under redundancy the Adjudication Officer pointed out that in that publication it is stated;

"*For a redundancy selection to be fair, objective selection criteria must be applied to the correct pool of employees. In particular, the pool of selection*

must be reasonably defined and the selection criteria applied by the employer must be applied to all employees in similar employment".

In the Labour Court case of UDD1629 being a case of Kohinoor Limited and Ali the Labour Court gave a detailed overview in relation to redundancy and the selection process. The Court in that case pointed out that it was satisfied that having made the decision to make a number of employees redundant from among a number of chefs carrying out the same or similar duties this was done with the assistance of expert advice and that the company had devised a very detailed selection matrix to decide on the criteria to be used to select those to be made redundant. The Court found that the selection criteria was fair and reasonable. The Court found that redundancy was a reason for dismissal and dismissed the Unfair Dismissal case. This case is a very useful reminder for colleagues as to best practice which should be engaged in when undertaking a redundancy.

I am simply mentioning this at this stage as to highlight the importance of looking for alternative jobs which may mean that somebody else may lose their job. For example, take a business where there are two small supermarkets run by the same employer in a town. They are at opposite ends of the town but not that far apart. The employer decides to close shop number 1 but to retain shop number 2. Both shops have the same number of staff. They have a manager, individuals who take in goods and stack shelves, those who work at the meat and fish counters for example and those who work on the checkout. The work that is undertaken by those in shop number 1 is exactly the same as the work undertaken by those in shop number 2. All of the employees in shop number 1 have longer service than those operating in similar positions in shop number 2. In those circumstances while shop number 1 is going to close it may well be that shop numbers 2's staff at the ones to be made redundant. However, an employer is entitled to look at the future requirements of the business. In the previous example, to put it in some context, let us assume that the particular town is one that had a large number of Irish speakers and polish nationals. Let us assume that the Irish speakers and Polish nationals tend to go to shop number 2 because the butchers on the meat counter speaks Irish and Polish respectively and that there are a number of other staff who are bilingual. In those circumstances the employer would be entitled to say for the purposes of the business going forward, that those particular employees who are bilingual would be retained on a selection process which would identify being bilingual was a skill set which the business would require. The same situation could arise in a Solicitors office where the office is reducing the number of secretaries and support staff. It may be decided that because of remote working and the use of technology that where there were two secretaries acting in the litigation section only one would be required going forward. The longest serving secretary may have spent their entire period dealing with personal injury work. The secretary with less service may have had experience as a legal executive, for example, dealing with debt collection and property repossession. The firm might well decide that it sees in the next number of years that a secretary with that skill set

would be needed as the work might move from personal injury more to debt collection and property repossession. Again, that is a business reason which could be taken into account in the selection process.

The reason I am mentioning these is that if that is being done it is important right at the start of the process when advising an employee that they are at risk to set out how the pool was set out and how they were selected for being at risk compared with somebody else. In the two examples which I have given it may well be that an employee in shop number 1 actually speaks polish or Irish but that business owner never knew that and that it wasn't something that they made people aware of. In the case of the secretary in the Solicitors office they may when working for a pervious firm have been involved in debt collection and property repossession. The reason I am saying this is that it is important that the employee has an opportunity to put forward the best defence that they can to save their job. They can only do so when all the facts are made clear to them. So what can be said is that it is imperative trhat the employer looks for alternatives. That may well involve displacing somebody who may have shorter service or it may involve explaining to an employee who has longer service why going forward the skill sets which they possess may not be skill sets which the business will want going forward but the employee must be given an opportunity to challenge that position.

Offers of Suitable Alternative Employment

The relevant legislation in Section 7 (2) (a) and Section 15 (2) of the Redundancy Payment Acts. The issue which will then arise is whether it is suitable alternative employment.

In case ADJ-00016132 the Adjudication Officer in this case quoted the second edition of Employment Law 19.123 where it is stated;

"*The question of suitability may be determined objectively, whereas the reasonableness of the employee's refusal is subjective and must be considered from the employee's perspective thus the employees perception of the alternative job must be taken into account*".

In that case the Adjudication Officer quoted the case of An Executors of Everest –v- Cox it was found that;

"*The employee's behaviour must be judged from her point of view on the basis of the facts as they appeared or reasonably have appeared to her, at the time the decision had to be made".*

The English EAT case of Hudson –v- George Harrison Limited shows that the arbiter of fact, before making a decision on the reasonableness of the employee's decision to refuse to take up an alternative position can look at the employee's personal circumstances. In that case the EAT stated;

“Section 141 (2) being the English Legislation, question involves taking into account the personal circumstances of the employee. The test is wholly subjective but it includes taking into account those personal circumstances”.

In case ADJ-00026793 the case involves a Security Guard and a Security Company. The complainant contended that he was entitled to a redundancy payment as the respondent removed him from his job on a particular site and failed to offer him reasonable alternative employment. The complainant in this case was a static security Guard. He was informed that there was no work for him on the site he usually worked at. He was given no reason except that the client did not want him there and the respondent offered him alternative work in Limerick which was well away from his home in Galway. Work was offered in Galway but at 50% of the hours, the respondent contended that this was reasonable. The Adjudication Officer referred to Section 7 and Section 15 of the Act, The Adjudication Officer in this case held that the offer of reengagement was alternative employment with very different and less favourable conditions and that it was not unreasonable to refuse the offer. In these circumstances redundancy was awarded.

The Labour Court in the case of Garret Browne –v- Di Simo RPD1014 applied the English EAT case of Cambridge and District Cooperative Society Limited –v- Ruse 1993 IRLR156 where the Labour Court stated;

“*The suitability of the employment is an objective matter whereas the reasonableness of the employee’s refusal depends on factors personal to him and is a subjective matter to be considered from the employee’s point of view”*.

This issue arose also in the case of L Connaughon & Sons Limited and Healy RPD205. The facts are relevant.

The employee was employed as an office administrator in the employers company in their warehouse at Grand Canal Quay Dublin. She lived in Wicklow and travelled to work by train. The company moved the business to Clonshaugh. The employee could no longer commute to work by train. She requested redundancy and was refused. The employer contended that the new location was within 10 kilometres of the previous location and that the employer was willing to collect the employee at the train station at her usual starting time with her return journey each day to leave her back there art her usual time. ‘

In this case the Labour Court held that while there was a move within Dublin there is a difference in terms of place for an employee who commuted by train and then found that her employer was relocating to a place where there was no train link and which is considerably further from her home. The Court said that in the circumstances of the commuting difficulties in Dublin this represented a major change to the terms of her contract which most rational people would regard as a change of such significance as would

affect the employees ability to continue to work for the employer. The Labour Court affirmed the decision to provide redundancy.

The case of Browne & Di Simo RPD1914 which I referred to previously is a case where the Labour Court considered the law in considerable detail.

In that case the employer had been in one location and was offered a position Nutgrove Shopping Centre. The Labour Court correctly pointed out that while the employee was naturally concerned about the potential loss as her earning s were dependent on the amount of business she conducted at no point did the employee endeavour to test out that concern. The Labour Court pointed out that in accordance with Section 15 of the Act there is a facility for her to carry out her work in the new premises on a trial basis while retaining her right of possible redundancy payment. The Court was satisfied that the offer to continue the employment on the same terms and conditions amounted to suitable alternative employment within the meaning of Section 15 of the Act and that the refusal to accept an option of working in Nutgrove Shopping Centre was unreasonable.

A lot of these cases turn on change in location. Of course if a business is moving location that is not of itself a ground for an employer to make an employee redundant. It is a matter for an employee in those circumstances to seek redundancy. Cases involving particular a change in location is always going to depend on how much of an additional commute the employee will be subjected to. Limited commuting times will not result in a redundancy claim being successful, Longer ones will. There is no hard and fast rule in these cases. There is no guide that would say that 5 minutes is ok but 20 minutes is not.

These cases will depend on the particular circumstances of the particular case and often also the particular circumstances of the employee. By this we mean that you could have a situation where one employee travels by bus or train the other employee travels and has a car parking space. The location changes. The employee who travels by public transport and does not have access to car parking has an additional 20 minute walk to get to work. By this we mean that if you have two employees. One who is travelling by public transport and does not have a car and another who has a car and is provided with car parking on site have a change in location that the additional commute time may be exactly the same but the person who is provided with a car and a car parking space may not be in a position to claim redundancy whereas the other individual who is travelling by public transport who has the additional commuting time where they have to walk in foul or fine weather may well have a claim for redundancy.

As we move out of the pandemic issues of redundancy are going to arise. There is no doubt that some businesses will contract. There will be fewer staff employed. Issues will arise in relation to suitable alternative employment. Where an employer proposes reduces salaries or wages or reduced hours or in some cases longer hours the issue will be to look at the

position from the perspective from the employee. For example a business that decides they will want some staff to start earlier in the day but finish earlier and some to start later but finish later may well be in a position that some employees will seek redundancy in those circumstances. The employer might regard it as reasonable to take account of the requirements of customers of clients however the personal circumstances of the employee are ones which will be taken into account in a claim where the employee seeks redundancy.

Problem Cases Which Will Arise

In reading this seminar note today you might have considered that the problem issues have already been dealt with in some depth but in fact they are only the start of the difficulties when it comes to making an employee redundant and I intend to look at some of these.

Making a pregnant employee or an employee who is on Maternity Leave redundant

The Equality Legislation in Ireland is very clear and sets out that the dismissal of a worker who is pregnant or is on Maternity is contrary to the law.

The burden of Proof in such cases is set out in Section 85 of the Employment Equality Acts 1998-2015. The Act now provides for the allocation of the probative burden between the complainant and the respondent in cases coming within its ambit. The Section provides in effect that the complainant bears the initial burden of proof of facts from which discrimination may be inferred. If those facts are established, and if they are regarded by the Court as of sufficient significance to raise an inference of discrimination, the onus passes to the respondent to show that the principle of equal treatment has not been infringed in relation to the complainant.

In cases involving pregnancy or maternity redundancies generally speaking the evidence from the employee will simply be that they were pregnant, or that they were on maternity, and that they were made redundant.

The Labour Court in the case of Teresa Cross (Shanahan) Croc's Hair and Beauty and Helen Ahern Case EDA195 reviewed the law on this matter.

The Court set out that the protection of women during pregnancy had been made clear by the European Court of Justice that since pregnancy is a uniquely female condition. Less favourable treatment on grounds of pregnancy constitutes direct discrimination on the grounds of gender and referred to the decision in the case C-177/88 Dekker –v- Stichting Vormingscentrum Voort Jong Volvassenen. Equality on the grounds of gender is now expressly guaranteed by Article 23 of the Charter of Fundamental Rights of the European Union. The Charter is incorporated in the Treaty on the Functioning of the European Union as a result of the

Lisbon Treaty and has the same standing in all proceedings as current Treaties.

The principle of discrimination on the grounds of pregnancy constitutes direct discrimination on the grounds of sex is now codified in Directive 2006 -54/EC on the principles of equal treatment of men and women (Recast Directive). The Directive provides that Article 2.2 (c) that a less favourable treatment of women relating to pregnancy or maternity leave within the meaning of Directive 92/85/EEC constitutes unlawful discrimination for the purposes of that Directive. The Labour Court pointed out in case C-406/06 Paquay that in accordance with its case law the prohibition on less favourable treatment on grounds of pregnancy comes within the ambit of both the Equal Treatment Directive and the Pregnancy Directive.

In the Paquay case the judgement stated;

"*However, the objective is to arrive at real equality of opportunity and cannot therefore be attained in the absence of measures appropriate to restore such equality when it has not been observed. Those measures must guarantee real and effective judicial protection and have real deterrent effect on the employer*".

In the case of Trailercare Holdings Limited and Healy EDA128 the Labour Court in that case stated;

"*It is abundantly clear from these authorities, and from the legislative provisions of the European Union, that women are to be afforded special protection from adverse treatment and in particular from dismissal on account of their condition, from the commencement of their pregnancy until the end of their maternity leave. The entitlement of that protection is to be regarded as a fundamental and inviolable right within the legal order of the Union which the Courts and Tribunals of the Union must vindicate within the limits of their jurisdiction. It seems equally clear that where a pregnant woman is dismissed during the period of special protection the employer bears the burden of proving on cogent and credible evidence, that the dismissal was in no sense whatsoever related to her pregnancy*".

Article 10 of the relevant Directive effectively provides that total prohibition on the dismissal of pregnant employees except where they are duly substantial grounds. In addition, it provides that the grounds must be set out in writing.

Effectively when it comes to redundancy in the case of a women who is pregnant or is on maternity it would appear that dismissal has to be able to be justified in writing and failure to justify in writing in itself is sufficient to bring the employee into a claim for discrimination under the Equality Legislation. However, in looking at Article 10 of Council Directive 92/85/EEC in the Paquay case the CJEU pointed out that even taking preparatory steps for a decision to dismiss an employee who is pregnant or

on maternity even if not notified to them until after the Maternity Leave ends is in itself a breach of Article 10.

Claiming Redundancy after layoff

This issue is going to arise once the restriction on claiming redundancy in Section 12A of the Redundancy Payment Act 1967 is revoked.

The Legislation in Section 11(2) provides for an employee to claim redundancy where they have been on layoff or on reduced working hours or pay.

The test is whether the remuneration of the employee is less than one half of his or her normal weekly remuneration or his or her hours of work are reduced to less than one half of her or her normal weekly hours.

There are two issues which arise here.

They come under the provisions of Section 12. Normally the employee will furnish what is called an RP9 Form. This is the notice of intention to claim redundancy. In those circumstances the employer is entitled to furnish a counter notice. The counter notice is under Section 13 and it is a notice sent to the employee stating that no later than four weeks after the date of the counter notice the employee will receive a minimum of thirteen weeks full employment and during that period the employee will not be laid off or kept on short time for any week. Effectively it is full time employment.

There is a significant trap here for employers. The notice must be served within 7 days of receipt of the RP9. There is no provision to give an extension.

I raise this specifically as an issue for colleagues to be aware of. Take a situation where an RP9 is sent with a Certificate of Posting on a Wednesday. It arrives on Friday in the post to the employer. The employer contacts you on Monday. You now only have until Friday to get the counter notice actually served on the employee. Therefore where an employer contacts you in relation to an RP9 which they have received it requires immediate attention. In the last recession there was a number of redundancy claims that would run weekly. Regularly the defence was raised that a counter notice was attempted to be served but that they didn't get it served in time. Each and every one of those cases was rejected and the employee was entitled to a redundancy payment.

An Employee Resigning – Can they claim Redundancy – Yes.

The case of Drumcondra Child Care Limited and Szumera RPD1814 is an interesting case concerning the application of the Redundancy Payment Act 1967.

The facts of the case are interesting and were agreed by the parties. The employee was employed as a part time cleaner. She was placed on temporary layoff on 25 August 2017 until 1 January 2018. After a period of four weeks on temporary lay-off the employee wrote to the respiondent terminating her employment with effect from 1 January 2018. The employee contended that pursuant to Section 12 (2) of the Act she was entitled to Statutory Redundancy. The employer contended it had served a counter notice but not within the 7 day time frame.

The Labour Court set out the provisions of Section 12 and 13 of the Act. The Court also helpfully set out the case of Industrial Yarns Limited –v- Leo Greene and another 1984ILRM15 at page 20 where Costello J (as he then was) stated;

"*The Section 12 procedure was amended by Section 11 of the 1971 Act. After the employer has served the Section 11 notice of layoff the employee could now serve one of 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 a redundancy payment). He cannot serve both".

The Labour Court held that the claim fell squarely within the meaning of Section 12 (2) of the Act. The letter sent by the employee to the employer informed the employer, after she had been on a period of enforced layoff of longer than 4 weeks, is to be added in accordance with Section 12 (2) of the Act to be a notice of intention to claim a redundancy lump sum. There will be many employers who will see a letter of resignation coming in and will give a sigh of relief that the employee has simply left and they won't have to pay redundancy. The opposite is the position. It must be remembered to come within Section 12 the employee must not give notice.

A case where an employee lost but at the same time is interesting as to how employees can effectively manufacture a redundancy payment claim arose in the case of Merchandising and Demonstrating Limited and Colley RPD191. There is no issue in this case that anything was manufactured but it identifies how a claim could be. In that case the Labour Court had to deal with a situation where the employee had never been given a contract of employment. The Court looked at Section 11(2) of the Act which described the circumstances of short time within the meaning which could be applied in the particular case as the remuneration was less than half of existing pay under a new proposed arrangement.

However the Court pointed out that the provision was qualified by the time requirement set out in Section 12 of the Act before this could be claimed. The employee had not been on short time for four or more consecutive weeks or for six or more weeks within a thirteen week period and therefore Section 11(2) was not applicable. This was an "if and when" contract. What is an interesting aspect that it was claimed by the employee that she never resigned but indicated simply she would not accept one day work every week. There is a provision in the Redundancy Legislation that if there is a breach of contract when the employee can immediately resign and claim redundancy. This was not actually pleaded in this case.

The other interesting aspect is that the employee would have been better working one day every week for four consecutive weeks and then may well have come within the provisions of Section 11(2) of the Act. Even if the contract at that stage had been an "if and when" contract as held by the Labour Court in this case the employee would still have been able rely on Section 11 if her remuneration was less than half the existing pay that she would have been receiving.

In this case the employee had not got legal advice before resigning and indicates the importance of the employee doping so. If this had been addressed in a different way the employee would probably have been able to get redundancy, quite fairly.

As I have mentioned the issue of a contract being frustrated. This is an issue which arose in case ADJ-200025512 involving a Chef and a Community Service Provider. The Adjudication Officer set out Section 7 of the Redundancy Payment Act in detail. The Adjudication Officer also set out the provisions of Section 9. The relevant Section here is Section 9 (1) (c) where the employee terminated the contract under which he was employed by the employer in circumstances;

"Such that he is entitled to so terminate it by reason of the employers conduct".

In this case the Adjudication Officer held that subsection (c) allows for dismissal to take place where the employee is allowed to terminate their own contract because of the conduct of the employer. The employee considered her new role and location to be unsuitable. The respondent listened to those concerns and made a commitment that it would be considered. The employee it appears had not taken the opportunity for that consideration to take place. The Adjudication Officer stated they could not predict the outcome of that consideration but had no reason to doubt the respondent employer would ensure it would take place when the complainant returned from sick leave. The Adjudication Officer in that case held that the employee had not been dismissed. What is interesting however is that Section 9 (1) (c) of the Act is an issue which employees will look to in the coming months. Let me explain in a little bit more detail as to the type of situation I see

arising. You will have a situation where employers will go for remote/homeworking or blended working. The contract of employment for the employee provides that they will work in a particular office or premises. The employer now seeks to enforce blended working. There will be some employees who will be quite happy to take a redundancy payment and therefore this is an issue employers need to be aware of. Trying to force through a change in a contract may well result in the employee seeking to rely on this provision. The alternative will be that the employer will find the employee simply stating that their contract provides that they will work from the office. They intend to come to the office and they have no intention of doing work from home. The employer may seek then to enforce a form of blended working and this is where the provisions of Section 9 (1) (c) may well be looked at by a number of employees as a way of claiming redundancy.

Where employees can fall foul of the Redundancy Payment Acts

Where an employee moves between organisations then in those circumstances the employee may well find themselves that they have lost employment rights and service.

In case RPD197 being a case of Olejniczak & Glenbeigh Fire and Flood Limited the issue arose as to whether or not the employee had the appropriate service. The employee contended she had been employed by the group from March 2009 until her post was made redundant in May 2018. In May 2017 the employee contended she had been promoted within the group of companies.

There are a number of provisions in the Redundancy Payment Acts which can catch an employee pout in these situations. Section 9 (3) (a) of the Act states that a dismissal under the terms of the Act will not be deemed to have taken place if an employee moves from one part of a group to another, a reengagement took place with the agreement of the employee, the previous employer and the employer. The legislation provides that the employment will not be deemed to be a dismissal if the employee is reengaged by another employer immediately on the termination of the previous employment. What is important however is before the commencement of the period of employment with the new employer the employee must receive a statement in writing on behalf of the previous employer and the new employer which sets out the terms and conditions of the contract of employment with the new employer, specifying that the employees period of service with the previous employer will be regarded by the new employer as service with the new employer and contains particulars of the service mentioned previously. The employee must also notify in writing the new employer that the employee accepts the statement required by that sub paragraph.

Rarely, if ever, does this actually happen.

Where that has not happened, as in this case, the employee was not entitled to redundancy. There is a saving provision in Section 16 which refers to a situation where a person is reengaged by an associated company. In this case the Labour Court looked at the definition of a subsidiary which is set out in the Redundancy Payment Acts and Section 7 of the Companies Act 2014. The Labour Court set out that no evidence was offered to support the idea that the company was a subsidiary of the other or that both were subsidiaries of a third company. The case turned on the fact that the employer in this case contended that the particular company was not part of a group company. It would now appear effectively that employees in cases are going to have to produce evidence themselves that this is a move between a group company or a subsidiary of a group company.

Where an employee believes they are moving from one group company to another group company and we're using that in the broadest terms it is absolutely imperative that the employee has the appropriate contract put in place which complies with the provisions of Section 9 of the Redundancy Payment Acts. If they do not then the employee as in this case can fall foul of the Redundancy Payment Legislation and lose their right to redundancy.

Redundancy where there is a transfer under the Transfer of Undertaking Regulations

The issue of a transfer from one entity to another often arises in the area of redundancy. There are often employees who do not wish to move from one organisation to a new organisation or see it as an opportunity to obtain redundancy. The Labour Court in case RPD1713 being a case of Ardcolum Motor Factors Limited and Gildea is one where the Labour Court held that an employee who refuses to transfer does not become entitled to redundancy under the 1967 Act. A similar approach was taken by the Labour Court in case RPD1710.

This issue also arose in case ADJ18637 involving a legal firm. This involved an employee who worked as a legal secretary in a legal partnership. There were three partners. One partner dissolved the partnership. The managing partner informed the employee in 2015 that she was being made redundant. She was then advised that this individual was starting her own company and invited the employee to work with the new company. The employee joined the firm. In this case the employee had no written contract. No notices under the Transfer of Undertaking Regulations issued. The firm of Solicitors contended there was no redundancy as the employee was not dismissed. The employer relied on the case Symantec Limited –v- Lyons and Leddy 2009 IEHC56 where the High Court had held that a transfer on the same terms and conditions meant that a person had not been made redundant by virtue of regulation 4 (1) of those Regulations.

There is a UK case involving Robert Graham Hynd –v- David Armstrong & 24 Others 2007ECIH16XA158/04 which is authority for the contention that a Partnership comes within the reach of the European Communities

(Protection of Employees on Transfer of Undertaking) Regulations 2003. In that case the Solicitor successfully challenged his dismissal due to redundancy on the dissolution of a Partnership in which he was employed and argued he was entitled to the protection of Regulation 4 when the partners established a new firm. The Court in the UK accepted that the employee was employed by a Partnership and could draw on the regulations to contest this dismissal due to redundancy and assert his right to a transfer into the new company.

The reason I am mentioning this is that the Transfer of Undertakings both stops an employer making an employee redundant but also stop an employee claiming redundancy.

Wages / Salary during Layoff

These cases are most definitely going to arise. The relevant case in Ireland is a case of Law -v- Irish Country Meats (Pig Meats) Limited 1988ELR266 which held that unless there is an express or implied term permitting the layoff without pay then it is a breach of the employee's contract of employment to do so. An implied term would include custom and practice as was set out in the case of Petkevicius –v- Goode Concrete Limited 2014 IEHC66. This issue did arise in a case ADJ/12935. The Adjudication Officer in that case referred to these cases but also to the construction industry where there would have been ups and downs but not in the particular industry in which the claim involved. The Adjudication Officer held that as there was no express term in the contract allowing layoff without pay the employee was entitled to pay.

There will be many employees who do not have a contract of employment. There will be many employees who do have a contract of employment that does not have a specific layoff clause. In those circumstances the employee may well come looking for their wages during the period of layoff. The first issue stated is of course that the claim can only go back 6 months from the date that the claim is lodged. The second is that employers will look to situations where the employer would say that the employer had no option but to lay off the employee due to the regulations brought in by the Government closing the business. It would be my view, and I have discussed this with other employment law Solicitors and Counsel, that Section 5 of the Payment of Wages Act is clear that without a specific lay-off clause the wages must be paid. At the same time where an employer is frustrated from opening their business by the actions of the Government the employer will rely on what we call the "flooded mine". This is the provision of an act of God or in this case an act of Government which restricted the business being able to operate. However, that only applies for the period of time that the business was closed and could not operate. For those who are in or were in essential services and do not have a contract with a specific lay-off clause in it they may be in a more difficult situation as their business was able to open.

The time limit to bring a claim

Normally when dealing with the WRC most practitioners will look at it being 6 months. This issue arose in the case in the case of Brian Cahill trading as Jerpoint Inn and Helen Greene as regards the jurisdiction. The Labour Court in that case pointed out that there appeared to be a misunderstanding in relation to the time limit on claims for redundancy payment. The legal representative for the employer was arguing that the claim as not lodged within six months of the date of termination. The Labour Court pointed out that the limitation period under Section 41(6) of the Workplace Relations Act 2015 applies which is 12 months. Equally, for getting an extension of time it is not for an additional six months but it is for an additional 12 months.

Conclusion

For many, redundancy will be a matter of fact. However, redundancy legislation is complex. There are going to be many disputes. As we come out of the Pandemic there are going to be employees who want to get redundancy where the employer does not want to pay it and does not want to make the employee redundant, Equally, there are going to be situations where an employer wants to make an employee redundant and the employee does not want to be made redundant. Put that into the mix and you can see a considerable amount of litigation arising in this area.

On top of that you are going to have the claims where an employee is made redundant but is not paid their redundancy payment.

There are going to be many genuine redundancies which because of the way in which an employer makes the employee redundant converts into either an Equality claim or an Unfair Dismissal claim.

I unfortunately anticipate a considerable amount of work in the area of redundancy.

It must always be remembered that redundancy while at law being treated as impersonal is very personal. It is personal both to the employee and to the employer. No employer takes on an employee wishing to make them redundant. There will be employers who will be forced to make individuals redundant and it will be the last thing they want to do as they will have had a good working relationship with the employee over many years and will both like and respect the employee. Equally, there will be employees who will want to fight for their job rather than being made redundant. Of course, there are going to be situations where both employers see it as an opportunity of getting rid of what they might regard as a difficult or troublesome employee and there will be employees who will be looking to be made redundant where there is no valid redundancy there but will use the legislation to orchestrate a redundancy claim.

I do hope that the paper today is of some help to colleagues in dealing with what is a complex area of law.