

Redundancy and Dismissal Conference

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What are the red lines of bad practice when it comes to putting together a redundancy selection process?

THE GOOD NEWS IS THAT YOU'VE
BEEN INVITED TO A LEAVING PARTY
THE BAD NEWS IS..IT'S YOURS

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3 Key Steps

- Unfair Dismissals Acts 1977 to 2015: Redundancy is a fair ground for dismissal.
- Employers contemplating redundancy should ensure that **3 KEY STEPS** are followed:
 1. Establish that a “genuine redundancy situation” exists (***Gammell v Pall Ireland*** [UD1057/2007]);
 2. Apply a fair and reasonable selection process (***O’Kelly v Xsil Limited*** [UD1086/2007]);
 3. Follow correct procedures to effect the redundancy (Section 6(7))

Plan carefully. Onus is on the employer!

Is there a genuine redundancy situation?

STEP 1: Establish that a Genuine Redundancy Exists

Section 7(2) Redundancy Payments Acts 1967 to 2014: a dismissal by reason of redundancy occurs where the dismissal is attributable wholly or mainly to:

- the fact that the employer has ceased, or intends to cease, to carry on the business for the purpose for which the employee was employed, or has ceased or intends to cease, to carry on that business in the place where the employee was so employed, or
- the fact that the requirements 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 are expected to cease or diminish, or
- the fact that the 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

Is there a genuine redundancy situation? (Step 1 continued)

- the fact that the employer has decided that the work for which the employee has been employed (or had been doing before his dismissal) should henceforward be done in a different manner for which the employee is not sufficiently qualified or trained, or
- the fact that the employer has decided that the work for which the employee has been employed (or had been doing before his dismissal) should henceforward be done by a person who is also capable of doing other work for which the employee is not sufficiently qualified or trained.

STEP 2: Apply a fair and reasonable selection process

- When does a selection process arise? Stand alone position or not? Are employees doing like/similar work? Where positions are interchangeable, a wide pool may be appropriate. Answer might not be immediately obvious.
- Identify a redundancy selection pool - ***Boucher & Others v Irish Productivity Centre*** [1994 ELR 205]
- Draw up the selection criteria/matrix
- What are “good” and “bad” selection criteria?
- How does an employer apply these criteria fairly?

What are “bad” selection criteria? There are 3 red lines:

1. Criteria that contravene agreed redundancy procedure, policy and there was no special reason to depart from it (e.g. employer handbook/contract/agreed with union) or custom and practice of the employment. ***Michael Murray v ISS Limited UD1143 2015***
2. Criteria that are based on unlawful grounds – including:
 - Unfair Dismissals Acts: prohibits selection for redundancy based on trade union membership/activity, bringing civil/criminal proceedings, pregnancy or religious/political beliefs; and
 - Employment Equality Acts 1998-2015: prohibits selection for redundancy that is based on nine grounds: (e.g. gender, civil status, family status, age, disability, religious belief, race, sexual orientation, membership of travelling community).

3. Applying selection criteria that are objectively applied in a fair manner.

Gillian Free v Oxigen Environmental (UD206/2011):

“Where 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, these will come under close scrutiny if an employee claims he/she was unfairly selected for redundancy”.

Examples of selection criteria

- Skills/knowledge
- Qualifications and Training/Relevant educational qualifications
- Relevant experience
- Length of service - Last in first out (LIFO) or First in first out (FIFO)
- Performance and ability
- Flexibility
- Attendance records
- Time-keeping
- Disciplinary records
- Future potential
- Cost
- Adherence to company values

Risks associated with selection criteria

- If fair selection criteria are unfairly applied the dismissal will be unfair
- Selection criteria based on an employee's personal characteristics but which are overly subjective (In ***Graham v ABF Ltd*** (1986) IRLR 90, “*attitude to work*” was considered to be “a highly relative term involving personal and subjective judgments” and dangerously ambiguous and vague”
- Selecting on grounds of employees status as part-time or fixed-term status
- Absence for pregnancy-related illness, maternity or other family friendly leaves should be discounted
- Where an employee's absence is connected with a disability, selection for redundancy on grounds of attendance records may amount to disability discrimination

Consultation Process

- Employers should disclose individual provisional scoring to the employee before finalising it, explaining how it was arrived at and give the employee an opportunity to challenge/comment on it:

(Boucher & Others v Irish Productivity Centre)

- Before the decision on whether the employees will be made redundant the employer should consider alternatives to redundancy:

(Internal Sales Specialist v Respondent (ADJ-00013173, August 2018)

Practical Tips/Conclusion

- Ensure the 3 key steps are followed
- Apply selection criteria that can be objectively justified, are reasonable and applied in a fair and consistent manner
- One size may not fit all - different selection criteria may be applied depending on the roles being selected for redundancy
- Avoid subjective criteria if possible
- Avoid potentially unlawful/discriminatory grounds
- Consult fully with employee(s), consider alternative employment and address all reasonable queries
- Be alive to data subject access requests!

Thank you

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