



Redundancy and Dismissal: Hints, Tips and Solution- Focused

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Overview

- Redundancy & Consultation
- What are the "red lines" of bad practice when handling a redundancy consultation, beyond which the entire process is invalidated?
- “Red Line” - The furthest limit of what will be tolerated

Redundancy Consultation

- Individual & Collective Redundancies
- Down sizing; Right-Sizing; Re-Sizing.
- Statutory obligation to consult in Collective Redundancy situation
- Obligation to consult in Individual Redundancy derives from fair procedures – reasonableness of employer’s conduct is an essential factor to be considered in all dismissals – including redundancy dismissals.
- Reasonableness in context of consultation = **meaningful**.

Redundancy Consultation

Callaghan v Olok Ltd t/a Inish Times (2009)

“In cases of redundancy, best practice is to carry out a genuine consultation process prior to reaching a decision as to redundancy ... the employer who fails to carry out a consultation process risks being found in breach of the Unfair Dismissals Acts. Such a lack of consultation may be seen as unreasonable and in some cases, may lead to the conclusion that an unfair selection for redundancy has taken place.”

Redundancy Consultation

Callaghan v Olok Ltd t/a Inish Times (2009)

“The procedures followed were flawed and unreasonable. It was only at a much later date the respondent finally produced a letter stating the criteria for redundancy selection, and the respondent did not even follow its own stated policy for consultation prior to redundancy, stated in that letter.”

R v British Coal Corporation 1994 –

- Proposals at a formative stage;
- Adequate information on which to respond;
- Adequate time to respond;
- Conscientious consideration in response to the consultation.

Thomas v BNP Paribas -

- 40 years service – senior managerial position.
- Informed job was “at risk” – placed on paid leave – no contact with colleagues or clients.
- Several insensitive administration errors – wrong name on a letter & inaccuracies on critical dates.
- Consultation had been conducted in “*insensitive and perfunctory manner*”.

Part 1

Redundancy Consultation – When to Start?



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Consultation – When to Start?

- When does the obligation arise?
- Protection of Employment Act 1977 (as amended) and a number of sections thereunder:

Obligation on Employer to Consult Employees Representatives.

- *9 – (1) Where an employer proposes to create collective redundancies he shall, with a view to reaching an agreement, initiate consultations with employees' representatives*

Consultation – When to Start?

(2) Consultations under this section shall include the following matters –

- (a) the possibility of avoiding the proposed redundancies, reducing the number of employees affected by them or, mitigating their consequences by recourse to accompanying social measures, aimed, inter alia, at aid for redeploying or retraining employees made redundant*
- (b) the basis on which it will be decided which particular employees will be made redundant.*

(3) Consultations under this section shall be initiated at the earliest opportunity and in any event at least 30 days before the first notice of dismissal is given

Consultation – When to Start?

- The event constituting redundancy consists in the declaration by an employer of his intention to terminate the contract of employment.
- *Dell Case* - the employer had, as it was obliged to do, embarked on consultation when a strategic or commercial decision compelling it to contemplate or plan for collective redundancies had been taken.
- No reason for any different approach in individual redundancies.

Consultation – When to Start?

- The decision that triggers the consultation obligation is rarely the redundancy decision itself.
- It will usually be a decision taken much earlier in the process – for example, a decision to consider restructuring a team or department or to introduce new working arrangements or equipment.
- If you are only consulting about the implementation of the redundancy decision, it is probably too little too late.

Consultation – When to Start?

- There is a difference between saying to someone who may be affected by a proposed decision or course of action, even, perhaps, with detailed elaboration, ‘this is what is going to be done’ and saying to that person ‘I’m thinking of doing this; what have you got to say about that?’
- Only in the latter case is there ‘consultation’.

Consultation – When to Start?

An Employer –v- An Employee (2012)

- EAT did not accept that the employer had acted reasonably and fairly because decision to make the role redundant was taken prior to the commencement of the consultation process.
- Consultation should be “*real and substantial*”.

Consultation – When to Start?

Part 2

Redundancy Consultation – The First Meeting



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First Consultation Meeting

“Your role is being made redundant”.

- Presumption that consultation process will conclude with a dismissal could invalidate entire process.
- Everything is a proposal at the first meeting and during the consultation process.
- **Foran v Tolerance Technologies (2016)** – minimum of consultation; decision as opposed to proposal.

First Consultation Meeting

- Requires true discussion regarding the options available and must not be seen by employees as a sham.
- When the representatives, or individuals, suggest an option to avoid potential redundancies, this should be seriously considered and modelled.

First Consultation Meeting

- Evidence should be retained to confirm this has been done and that all suggestions have been fully explored.
- **Alan Traynor v SU Commercial Services, NUIG (2016)** – consultation process followed but no due consideration given to suggestions or the possibility of making available alternative employment options.

Part 3

Redundancy Consultation – How Many Meetings?



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Consultation Meetings

- The consultation process will require several meetings throughout the consultation period.
- Actual number will be dependent upon the requirements to explore alternatives. Where alternatives are available this may necessitate more meetings to fully explore their feasibility.
- Good practice to allow adequate time for employees to consider and respond and conscientious consideration of response by employer.
- Allowing time is a proactive strategy.

Protection of Employment Act, 1977

- Section 9 of the 1977 Act requires employers to engage in a consultation process with the relevant employee representatives, “*with a view to reaching an agreement*”.
- The consultation must take place not later than 30 days before any individual notice of dismissal is issued.

Protection of Employment Act, 1977

- Similar wording in the equivalent UK legislation has been judicially interpreted as requiring the employer to allow the employee representatives adequate opportunity to consider the employer's proposals and the information given under the various headings in section 6 below, and to make constructive proposals in response thereto.
- The employer's obligation in this regard does not extend beyond giving the representatives reasonable opportunity to revert with their proposals having had an opportunity to consider the employer's initial proposals.

Consultation in case of individual redundancy

- Unlike the provisions which apply to collective redundancies there is no statutory obligation to consult in individual redundancies.
- The case law of the Employment Appeals Tribunal (“EAT”) (now the Workplace Relations Commission (“WRC”)) has however indicated that a two week consultation period is a matter of best practice in individual redundancies.
- However, a level of flexibility will be required.

Consultation

- The general purpose of the consultation period is to consider any proposals on how to avoid the redundancy, such as a pay cut or reduced working hours, and to examine whether there are any alternative positions within a company.
- It is only after the consultation process, that it is confirmed that the position is actually redundant. Until that point, the approach should be that the position is *at risk of*, or being considered for, redundancy.

Consultation –v- Negotiation

- If agreement proves impossible, management has the power to unilaterally impose its will.
- Consultation involves a proposal, asking for views and concerns and taking these into account.
- The difference between negotiation and consultation should be discussed.

Part 4

Takeaways



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Important Do's and Don'ts

- Adhere to your redundancy or management of change policy (if you have one). If you don't have one, make sure you're clear on the process you'll follow.
- Check your employees' contracts – especially if you have employees who have transferred to you under TUPE. Does anyone have any contractual enhanced terms or variances to your standard contracts?
- Check which, if any, affected employees are covered by any union recognition agreements.
- Remember that consultation requirements differ depending on the number of employees who may be made redundant. Follow the collective consultation procedures if appropriate.
- Ensure that your consultation is meaningful – extend your timescale if necessary. Stress that no decisions have been made yet and encourage the employees to put forward any suggestions or comments.

Important Do's and Don'ts

- Document everything in writing – it's your defence to show that you consulted properly, considered alternatives and followed the right procedures.
- If directors are likely to be made redundant, makes sure you check your articles of association.
- Be sure to train those involved with handling the redundancy conversations have had suitable training and support on how to have difficult conversations. Prepare them for the typical scenarios they might face.
- Ensure your selection criteria are objective and free from discrimination. If attendance is a criteria, ensure that maternity/adoption/paternity related absences are discounted.
- Consider your selection criteria very carefully – if you don't have data to backup your views, then try to involve more than one person in the rating of staff.

Important Do's and Don'ts

- Write to each individual to invite him/her to every consultation meeting.
- You may wish to offer the chance to be accompanied by a colleague or union representative at all consultation meetings.
- Remember to consult with those absent from work due to illness, holiday, maternity/paternity/adoption etc.
- Document all meetings fully.

Important Do's and Don'ts

DON'T

- Forget that it is the role that is being made redundant, not the person.
- Pretend that a role is redundant to ease the process of dismissing an unsatisfactory performer.
- Dismiss on grounds of redundancy if you are going to replace in that role.
- Go down the redundancy route without first considering other options eg capping overtime, changing working methods, modifying hours, natural wastage etc.
- Make false promises. Never say that there will be no further redundancies after these cuts – you have no way of knowing this.

Important Do's and Don'ts

DON'T

- Rush through the consultation process to try and save money – you may not do so in the long run!
- Under-estimate the emotional response of someone under threat of redundancy. Expect to have to adjourn meetings and reconvene if employees are too distressed to contribute to the discussions.
- Delay commencing redundancy consultation if you are aware that it is going to happen.
- Ignore any suggestions the employees may make as to ways of avoiding compulsory redundancies.
- Think you know which jobs the “at risk” employees would not be interested in. Ask them for their thoughts. Make available all job vacancies for consideration, even if you think they may not be interested.

Important Do's and Don'ts

DON'T

- Grant garden leave unless it is contained in the employment contract and the employee has officially been served his/her notice.
- Serve notice of redundancy until the consultation period and process is complete.
- Refuse staff who are under notice of redundancy, and who have at least two years' service, reasonable paid time off to attend interviews or secure alternative work.
- Delay in making any redundancy payments.
- Discuss compromise agreements too early in the process.
- Forget that in redundancy situations, even where the person has volunteered for redundancy, you are still dismissing someone.

Questions?





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