Employment Law Update 2020

9 December, 2020
Event starts at 1.00pm
Today’s Speakers

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Remote Working

Deirdre Malone

9 December 2020
Remote Working into the future

- Covid Resilience Plan – Living with Covid
  - Levels 1 to 5 until May 2021 - staggered attendance
- Post Covid Remote Working
  - WDC/NUIG Study (May 2020)
  - 7241 respondents
  - 51% never worked remotely before
  - 83% wish to continue remote working post Covid
Flexible Working


• Published December 2019.
• Prevalence of remote working was growing - flexibility.
• Associated with longer working hours, work intensification and interference with personal life.
• Mindset and culture = vital tool for business in introducing remote working policies.
• Lack of a clear framework or awareness of the options available presents a barrier to remote work.
• July/August 2020 – Public Consultation on Remote Working Guidance
Consultation Summary
Guidance for remote working

• 520 submissions
• No guidelines yet – live link on dbei.gov & remote working checklist
• Key areas of consideration:
  1. Conditions and Internal Policies
  2. OWTA
  3. H&S – general and mental health
  4. Equality
  5. Training
  6. Cybersecurity
  7. Data Protection
Develop a National Strategy on Remote Working (from home or from co-working spaces).

- Promised by year end 2020.
- Remote working/blended working to be “part of the norm”, based on choice.
- Examine tax and expense arrangements to encourage more people to work remotely.
- Support increased flexibility and choice in childcare to assist parents’ changing needs.
- Ensure change to the “always on” culture.

- **DBEI Remote Working Checklist for Employers:**

1. Employment Conditions and Policies

- Contracts
- WFH Policy
- Full Employee Handbook review
- Employee base?
- Review date
2. OWTA

- Privacy Policy
- Extent of monitoring
- Time & attendance records
- Taking breaks?
- Setting expectations
Focus on the Right to Disconnect

- **France** – since 2017, employers ≥ 50 must set out non-working hours when employees are not required to send or receive emails

- **Germany** – employer policies (such as Volkswagen) restrict emails at certain times

- **Spain** – employer policies must provide a right to disconnect from electronic communications outside of the working day

- **Ireland** – WRC Code of Practice

- **Ireland** - Banks and Law Firms adopting approach such as Mindful Business Charter
  - Four key pillars
  - Respecting Rest Periods
  - Smart Meetings and Emails
Work-Life Balance

EU Directive on Work-Life Balance

- Focus on supporting a work-life balance for parents and carers.
- Parental, paternity and carer’s leave.
- Right to request flexible working arrangements for carers and working parents (to 8 years old).
- Implement in Ireland by August 2022.
- Many employers already putting flexible working policies in place.
- Policy should be clear on right to refuse and objective justification for decision.
3. Health and Safety

**General Health & Safety**
- Ergonomic assessments
- Safety Statements
- Insurance
- Training

**Mental Health**
- Wellbeing support
- Training for managers in leading remote teams
4. Equality

- Review policies – e.g. harassment/sexual harassment to include remote working options
- D&I
- Fair and transparent application process
- Access to promotion/training
- Remote onboarding
5. Training

• Managers

• Team members

• Content:
  ❑ Time management
  ❑ Online communication
  ❑ Wellbeing
  ❑ Disconnecting
6. Data Protection

• Policy Review
• Protecting personal data remotely
• Controlling data
• Additional training/DPIA
• Employee base
7. Cybersecurity

• Training
• Encrypted devices
• Risk assessments
HSA Guidelines

- October 2020
- Helpful Checklist
- Competent Persons
- Risk Assessments

- **Health and Safety Authority guidance**
  
  [https://www.hsa.ie/eng/Publications_and_Forms/Publications/Latest_Publications/guidance_on_working_from_home_for_employers_and_employees.92208.shortcut.html](https://www.hsa.ie/eng/Publications_and_Forms/Publications/Latest_Publications/guidance_on_working_from_home_for_employers_and_employees.92208.shortcut.html)
HSA Guidelines

- Employer and Employee responsibilities
- Policy
- Workstation Requirements
- Training
- Environment
- Work related stress
- Sensitive risk groups
- Communication
Alternatives to Redundancies

1. Pay Cuts/Deferrals
2. Short-Time/Layoff
3. Statutory Leaves
4. Financial Supports
Other Alternatives

5. Removal of overtime
6. Flexible working such as job sharing/part-time arrangements
7. Retraining and redeployment through restructuring
9. Secondment and sabbaticals/career breaks
10. Reduction of discretionary benefits such as removal of sick pay
11. Contractual benefits such as health insurance, pensions
12. Early retirement
13. Consideration of use of contract workers and fixed term contracts
1. Pay Cuts or Deferrals

- Both short term measures to help cash flow
- Contractual entitlement – cannot be varied without express and informed consent – consultation
- Legal risks:
  - Payment of wages – unlawful deduction, reasonable compensation not exceeding the amount of the deduction
  - Constructive dismissal – fundamental change to working conditions, high onus
  - Breach of contract – civil courts, damages limited, cost is high
2. Lay off or Short-time

- **Lay off**
  - cessation of employment where unable to provide work
  - temporary in nature (employer’s belief it will be not permanent)

- **Short time**
  - reduced hours working only part of a week
  - receiving proportionately reduced pay

- **Pay**
  - Redundancy Payments Legislation does not provide for a statutory reduction in pay for Lay-off and Short time. Must be reserved right in the contract.

- **Form RP9 Process**
  - right to claim redundancy
  - working less than half contracted hours, half pay
  - > 4 weeks or 6 in 13 weeks
  - suspended until 31 March 2021
3. Statutory Leaves such as Parental Leave

- **Short term** leaves
  - such as force majeure leave
  - parents leave (increasing from 2 to 5 weeks)

- **Longer term** leaves such as
  - parental leave (increased from 22 to 26 weeks)
  - adoptive leave and carer’s leave

- Inviting employees to consider availing of such statutory leaves

- Subject to their qualification under the applicable statutory leave rules
  - E.g. Parental leave for employees with children
  - E.g. Carer’s leave for employees with elderly or sick parents

- Employers may agree to reduced notification periods
4. Financial Supports

- **Income Supports**
  - Employment Wage Subsidy Scheme
    - operated by Revenue
    - replaced the TWSS and will run until 31 March 2021
  - Short-time Work Support
    - Form of Jobseeker’s Benefit

- **Loans and Grants**
  - COVID-19 Credit Guarantee Scheme – unsecured loans
  - COVID-19 Business Loans – Microfinance Ireland zero interest

- **Rates waiver and tax measures**
  - Commercial rates waiver
  - Reduction in standard rate of VAT (23% to 21%), hospitality (13.5% to 9%)
Other options

- Removal of overtime
- Flexible working such as job sharing/ part-time arrangements
- Retraining and redeployment through restructuring
- Secondment and sabbaticals/career breaks
- Reduction of discretionary benefits such as removal of sick pay
- Contractual benefits such as health insurance, pensions
- Early retirement
- Reducing use of contract workers and Non-renewal of fixed term contracts
Genuine redundancy

5 different scenarios that come within the definition of a redundancy:-

- Cessation of business
- Work ceasing or diminishing
- Reduction of workforce
- Work undertaken in a different way for which employee not sufficiently trained/qualified
- Role carried out by others capable of doing other work for which the employee is not sufficiently trained/qualified
Genuine redundancy

Statutory definition considered in

St Ledger -v- Frontline Distributors Ireland Limited [1995]

2 important characteristics:

1. Impersonality i.e. it is the position and not the person that is redundant

2. Change, e.g.
   - complete shutdown
   - reorganisation / rationalisation
   - change in the way the work is done (qualitative change)
Genuine redundancy

Case-law has determined the following to constitute genuine redundancy situations:

• distribution of a high-cost general manager’s functions amongst a lower tier of management (Lillis -v- Kiernan)

• greater portion of employee’s duties diminished, work undertaken in a new way and excessive time required to retrain employee (Byrne -v- Trackline Crane Hire Ltd)
Selection for redundancy

- Contract, collective agreement, redundancy policy, custom and practice?
- Stand alone position – No selection issues arise
- Selection from pool – numerous employees undertaking same role, LIFO – “Last in first out”, Selection matrix
- Selection on objectively factors, e.g. skills, qualification and experience
- Beware subjective factors e.g. disciplinary record, absenteeism
- Not based on any of the discriminatory grounds
Consultation obligations

- No specific consultation obligations in legislation – apart from collective redundancies.
- Best practice - 2 week consultation period.
- Key features - sufficient opportunities to consult employees in 1:1 meetings; information as to the necessity for redundancy; why role has been identified as being at risk and the selection criteria that will apply.
- Consider any proposals on how to avoid the redundancy and/or examine whether there are any alternative positions.
- Position is “at risk” until the consultation period has completed and a decision is made in relation to the redundancy.
Why consult?

- Fundamental principle of natural justice that an employer must follow fair process in effecting “dismissal”.

- Unfair Dismissals Act provides that WRC will take account of the employer’s conduct in effecting a dismissal when deciding whether dismissal was fair.

- WRC - if the process followed by an employer was unfair, then the dismissal itself is automatically unfair. This will include a failure to consult with employees. Appeal to redundancy should also be offered.
Suitable Alternative Employment

• T&Cs should not differ substantially from original role – depends on circumstances.

• All available vacancies within organisation considered and assessed – preserve employment where possible.

• Failure to offer alternatives may lead to a successful dismissal claim – no obligation to create position.

• May disentitle an employee to redundancy payment if suitable offer is unreasonably refused.

• 4 week “trial” period under Acts - O’Connor -v- Ormond Printing Co – longer period “would [not] necessarily disentitle an employee”
Statutory payment

- Statutory redundancy payment (tax free to employee);
- Two week’s pay per year of service, plus,
- One bonus week.
- Gross weekly wage at date of dismissal – currently capped at €600.
- Notice – At least 2 weeks statutory notice, check contractual notice.
- Employees are entitled to the longest period of notice.
- Payment in lieu of notice (PILON) if reserved in contract of employment.
Who is entitled to Redundancy?

- Employee aged 16 and over - 66 year upper limit no longer applies
- 104 weeks continuous service
- Applies to part time, full time and fixed term employees
- Protective leave will not break “continuous service”
- Once continuous service established, employee must have ‘reckonable service’ for purposes of calculating the exact payment
- Department of Employment Affairs and Social Protection - Redundancy calculator
Reckonable service

None of the following – occurring in 3 year period prior to redundancy

• Absence in excess of 52 weeks by reason of an occupational accident/disease
• Absence in excess of 26 weeks by reason of any illness not referred to above, i.e. portion in excess deducted.
• Absence by reason of lay off by the employer
• Absence by reason of a strike. For e.g. 4 years (208 weeks) continuous service but 12 weeks on strike = 196 weeks reckonable service
Collective Redundancies

- Protection of Employment Act 1977
- Occurs when in any period of 30 consecutive days, number of dismissals by way of redundancy is:
  - 5 employees, where 21-49 are employed
  - 10 employees where 50-99 are employed
  - 10% of the employees where 100-299 are employed or
  - 30 employees where 300 or more are employed.
- “The average of the number so employed in each of the 12 months preceding the date on which the first dismissal takes effect.”
Collective Redundancies

1. Obligation to Consult

- Notify and consult with employee representatives at least 30 days before first redundancy/dismissal takes effect on the following matters;

- Reason for collective redundancies; Number and categories of employees proposed and those normally employed; Information relating to agency workers engaged; Period of time to effect the proposed redundancies; Selection criteria; Method for calculating any redundancy payments if different from the legislation.
Collective Redundancies

2. Obligation to Inform the Minister

- Employer is also obliged to notify the Minister for Employment Affairs and Social Protection in writing of the proposals at least 30 days before notice of dismissal is given.

- Collective redundancies cannot take effect before the expiry of the 30-day consultation period which commences on the date the Minister is notified.
Remedies

- Employee who has been made redundant can challenge genuineness of redundancy or selection (or both) under Unfair Dismissals legislation.

- Claim to WRC – Labour Court on appeal

- Re-instatement/re-engagement or compensation (up to 2 year’s remuneration).

- No provision for the award of costs.

- Claim within 6 months – or 12 months (reasonable cause)
Remedies

• Beware! Where employee is of the view that the “redundancy” is motivated by performance or conduct issues, discrimination or health & safety or whistleblowing allegation.

• Interim relief – Protected Disclosures Act 2014

• Discriminatory dismissal – Employment Equality Acts

• Penalisation – Health & Safety

• Trade dispute – Industrial Relations Acts
Injunction

- Wrongful dismissal to Circuit Court or High Court, including claim for injunctive relief: Shortt v Data Packaging Ltd (1994) ELR 251

- In 2004, two High Court decisions not entitled to restrain dismissal at common law where reason for dismissal is ‘no fault’ redundancy:
  - Sheehy -v- Ryan and Moriarty and Orr -v- Zomax Limited
  - As Plaintiffs not dismissed for reasons of competence/conduct, only entitlement was their notice periods.
  - If Plaintiffs wished to challenge the fairness of their redundancies, they should have brought a claim for unfair dismissal.
Injunction

• Followed in Nolan v Emo Oil Services Limited and O’Mahony v Examiner Publications (Cork) Limited and ors

• Underpins settled legal position that the High Court is not the forum to challenge the alleged fairness or otherwise of a redundancy and Court will not interfere where a statutory remedy is available.

• **Tip:** Make sure that all grievances, complaints and disclosures are closed out.
Practical takeaways

• It is the role that is being made redundant, not the person.

• Don’t use a redundancy to ease the process of dismissing an unsatisfactory performer.

• You cannot use redundancy if you are going to replace in that role.

• Have you considered other options prior to going down the redundancy route e.g. capping overtime, changing working methods, modifying hours etc.

• Don’t 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 or go out on sick leave.
Practical takeaways

- Avoid rushing the consultation process to try and save money – you may not do so in the long run!

- Consider all suggestions the employees may make as ways of avoiding compulsory redundancies.

- Don’t second guess which jobs an “at risk” employee would be interested in. Ask them for their thoughts. Make available all job vacancies for consideration, even if you think they may not be interested.

- Employees who are under notice of redundancy, and who have at least two years’ service, are entitled to reasonable paid time off to attend interviews or secure alternative work.

- Only serve a notice of redundancy when the consultation period and process is complete.
Questions?

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