Flynn O'Driscoll Legal Update

Reorganisations and Redundancies

Background

Recent economic turmoil has led many businesses to consider what changes they can introduce in their work place to cut costs and increase efficiencies. We set out below some of the principles to consider when decisions are being made in any such restructuring process so that the employer does not expose itself to an unnecessary legal process or additional costs.

Variation of Pay and other Terms of Employment

Employers seeking to vary what their employees are paid must be aware that they cannot make a unilateral decision to implement pay cuts, or reduce any fee, bonus or commission payment which forms part of ***employees' terms and conditions of employment.***

Other examples of terms of employment which employers sometimes seek to vary are hours of work, number of days of annual leave and existing policies that allow for pay during sick leave and maternity leave. However employers should remember that such ***terms of employment cannot be varied without the agreement of employees*** and they should engage in a consultation with the affected employees prior to introducing changes. These ***contrast with a work practice*** such as rostering arrangements or breaks, which may be changed by an employer if they are not part of any formal agreement.

Employees now have a variety of avenues to address grievances outside of a contractual claim in court and are more likely to submit a claim to a Rights Commissioner under specific pieces of legislations such as the Organisation of Working Time Act, 1977 or the Payment of Wages Act, 1991 which will be heard quite quickly and usually without the associated costs of court proceedings. We find that employees who find themselves out of work tend to take the view they have nothing to lose and they tend to pursue whatever State backed remedies that are available to them (often at no cost to them) but which often

involve significant management time and legal cost for the employer.

Employers are generally reluctant to engage in any consultation or negotiation with employees or their representatives especially where the employees are not represented by a union. However most employees will be aware when their employer is experiencing trading difficulties and we have come across examples of employees collectively agreeing to pay cuts and other cost cutting measures where the alternative is a number of redundancies where any of the employees may be selected. Any such agreements should be documented to avoid disputes arising at a later date.

Redundancies

In any reorganisation an employer may decide to make redundancies where certain positions are cut or the numbers carrying out certain roles are reduced. Redundancies may also be considered where job specifications are changed so that persons with different qualifications and skills are required to fulfil a role or an expanded role within an organisation currently being carried out by a less qualified or skilled employees.

The Redundancy Payments Acts 1967 to 2007 set out the legal basis where redundancy dismissals may be fairly made by an employer. It is very important that any redundancy is genuine and that employees are selected for redundancy in accordance with fair and objective selection criteria. Any employee who has a grievance in respect of a redundancy may bring a claim to the EAT under the Unfair Dismissals Acts, 1977-2001 or the Redundancy Payments Acts, 1967-2003 where he or she has sufficient service of two year's employment with the employer to do so.

Selecting Employees

Where there are a number of employees performing similar functions, an employer must carry out a process of fairly selecting which employees will be made redundant. Identifying correct ***objective selection criteria*** (as seen by a reasonable man) is critical and is an area in which employers frequently go wrong. Objective criteria should be based on measurable facts rather than on individual opinion and usually includes consideration of length of service, performance rating, attendance record and qualifications and skills which are necessary for the positions which are being retained. Employers do not need to undertake selection procedures where only one employee fulfils the role that is proposed to be made redundant.

Consulting with Employees

A number of legal commentators have noted how the EAT is increasingly examining the manner in which employers conduct themselves in relation to consulting with affected employees before a final decision is made in relation to any proposed redundancy. Employers should give consideration to alternative positions within the business and further consider any alternative proposals put to them by the affected employees.

Collective Redundancies

Employers are ***obliged by law*** to **consult** with employees in a collective redundancy situation. A collective redundancy applies where the following numbers are proposed to be made redundant; (a) at least 5 employees from a workforce of 21-49; (b) at least 10 employees from a work force of 50 to 99; (c) at least 10% where the workforce numbers at least 100 employees but less than 300 employees; and (d) at least 30 employees where the workforce numbers 300 or more employees. The consultation process must be initiated with employee representatives at least 30 days before any notice of redundancy is issued and must cover matters such as the reason for redundancy, any potential alternatives and the selection criteria to be applied. Employers are also required to notify the Minister for Enterprise, Trade and Employment at least 30 days before the redundancies take effect. Employers are required to supply employee representatives with certain relevant information in writing relating to the proposed redundancies and copies of this documentation must also be supplied to the Minister. If an employer breaches the time limits and effects dismissal before the expiry of the consultation periods, the employer is guilty of an offence and may be liable on conviction on indictment to a fine not exceeding €250,000. This process is often probed by unions or employees to find a breach of these procedures to put undue pressure on the employer to make additional payments.

Notice Periods

A redundancy does not limit statutory or other employment laws rights an employee may have. Employees remain entitled to their contractual notice or the minimum statutory notice, whichever is longer. Generally employees can waive their right to notice and may accept payment in lieu of notice. In a redundancy situation there is also a period of two week's notice (which runs concurrently with the employee's statutory notice and is not a further two week period) but which cannot be paid in lieu of notice.

Outsourcing

If a decision is made to outsource a business activity and that business activity retains its identity when it is carried on by the new service provider then the TUPE regulations (Protection of Employees (Transfer of Undertaking) Regulations 2003) apply and employees are entitled to transfer to the new service provider on the same terms and conditions of employment which includes length of service. This has cost implications for the new service provider and particular care needs to be taken in this whole area to ensure that exposures are minimised.

This summary is intended to be general in nature and specific legal advice should be taken on each particular situation.

Should you have any queries arising out of the foregoing please contact Alan O'Driscoll or any member of our team, who will be happy to assist.

Alan O'Driscoll

Partner

E: *alanodriscoll@fod.ie*
P: 01 6424260

Dublin:

1 Grants Row, Lower Mount Street,
Dublin 2, Ireland

Phone: +353 1 6424220
Fax: +353 1 6618918

Galway:

Unit 23, Galway Technology Centre,
Mervue Business Park, Galway, Ireland

Phone: +353 91 396540
Fax: +353 91 792649