

AN OVERVIEW OF REDUNDANCY LAW IN IRELAND



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The Employment Law issues which arise during a redundancy situation can be broadly categorised as follows:

1. Definition of Redundancy;
2. Redundancy payments;
3. Collective redundancies;
4. Exceptional Collective Redundancies;
5. Redundancy procedures and notice; and
6. Redundancy and unfair dismissal;

1. DEFINITION OF REDUNDANCY

1.1 Statutory Definition

The primary legislation in this area of the law are the *Redundancy Payments Acts, 1967 to 2007* (the “*Redundancy Acts*”). A “redundancy” situation is defined as occurring when there is a dismissal of an employee by an employer, not related to the employee concerned, and the dismissal results “*wholly or mainly*” from one of the following situations¹:

- (a) Where an employer has ceased, or intends to cease, to carry on the business for the purposes for which the employee was employed by him, or has ceased or intends to cease to carry on that business in the place where the employee was so employed²; or
- (b) Where the requirements of that business for an employee 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 diminish³; or
- (c) Where 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 employers or otherwise⁴; or
- (d) Where an employer has decided that the work for which the employee has 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 trained⁵; or
- (e) Where an employer has decided that the work for which the employee has been employed (or had been doing before his dismissal) should henceforth

¹ Section 7(2) of the Redundancy Payments Act 1967

² *Ibid.* s.7(2)(a)

³ *Ibid.* s.7(2)(b)

⁴ *Ibid.* s.7(2)(c)

⁵ *Ibid.* s.7(2)(d)

be done by a person who is also capable of doing other work for which the employee is not sufficiently qualified or trained⁶.

Section 7(2) is a very broad definition of redundancy and confers a redundancy situation on a wide variety of terminations of employment. Business closures, restructurings and a change of job requirements are three examples of where a redundancy can occur.

The Employment Appeals Tribunal ("EAT") in *St Ledger v Frontline Distributors Ireland Ltd*⁷ emphasised that there were two important characteristics in the statutory definition of redundancy, namely impersonality and change. The EAT held:

"impersonality runs through the five definitions in the [Redundancy Acts]. Redundancy impacts on the job and only as a consequence of the redundancy does the person involved lose his job.

Change also runs through all five definitions. This means change in the workplace. The most dramatic change of all is a complete closedown. Change may also mean a reduction in the needs for employees, or a reduction in number. Definition (d) and (e) involve change in the way work is done or some other form of change in the nature of the job. Under these two definitions, change in the job must mean qualitative change. Definition (e) must involve, partly at least, work of a different kind and that is the only meaning we can put on the words "other work". More or less work of the same kind does not mean "other work" and is only quantitative change."

Section 7(2)(a) was examined by both the High Court and Supreme Court in *Bates v Model Bakery*⁸. Following the refusal of the defendant employer to increase the plaintiff's pay in line with a Labour Court recommendation, the plaintiffs issued strike notice and followed through with strike action. The defendant argued that it informed the plaintiff's that continued action would result in the closure of the business. The defendant then issued a letter to the plaintiffs stating that they had, in effect, frustrated their contracts and that as a result the bakery would be forced to close down. It argued, on that basis, that the employees were not entitled to any redundancy payments under the *Redundancy Acts*.

The EAT upheld the decision not to pay any redundancy. It held that the plaintiffs had not followed a grievance procedure available to them and that this disentitled them to redundancy payments.

On appeal to the High Court, the EAT decision was reversed. The Court held that the plaintiff's employment was terminated by the closure of the bakery which brought a redundancy situation into existence. The High Court's decision was upheld by the Supreme Court. The letter that issued to the plaintiffs, which

⁶ *Ibid.* s.7(2)(e)

⁷ [1995] E.L.R. 160

⁸ [1993] I.L.R.M. 22

mentioned the decision of the defendant to close, was considered to be within the parameters of section 7(2)(a) and constituted a dismissal.

Redundancy can arise as a result of a restructuring of a business. In *Lillis v Kiernan*⁹ the claimant was a former general manager of the respondent's pig farming business and was made redundant after a business restructuring. As the claimant's wages were significantly higher than other managers, the respondent had decided to re-distribute the general manager's functions among the regular managers of the business, which resulted in the claimant losing his job. Crucially, the claimant was not replaced and at the time of the hearing, there was no general manager within the respondent organisation. The EAT held that a redundancy had occurred under section 7(2)(c) of the Redundancy Acts.

In cases where an employee's role has changed so much as the employee is now no longer able to do the job he was initially hired for, a redundancy can occur. In *Byrne v Trackline Crane Hire Limited*¹⁰ the respondent company operated a crane hire business with cranes of different sizes. The employer made the claimant redundant as the crane he could operate was no longer profitable and it would take an excessive amount of time to retrain the plaintiff on the new cranes. The EAT agreed, stating that the claimant's position "no longer existed", as the greater part of his employment with the company had been driving one particular type of crane, which had to be sold.

In *St Ledger v Frontline Distributors Ireland Ltd*, referred to above, the EAT made an important distinction between ability and training. In a redundancy situation, it would be irrelevant to determine that someone was better able to do a task. To hold otherwise would be to deny the essential impersonality of redundancy.

In this case, the claimant employee was a warehouse supervisor dismissed and replaced by another employee who was better able to perform the claimant's work, insofar as he did not need the help of a part-time worker. The nature of the work was the same, but the volume increased, which the respondent maintained constituted "other work". The new employee was better able to handle this increased workload. The employer sought to rely on section 7(2)(e) referred to above, that the work being done by the employee should be done by a person capable of doing other work, for which the employee to be made redundant was not sufficiently qualified or trained.

The EAT found the requirements of change and impersonality were not satisfied and that a redundancy situation did not exist. The employee had been replaced with another employee based on ability rather than training, denying the essential impersonality of redundancy. Separately, the EAT held there was no change in the work required to be done. More or less work of the same kind does not amount to a change in the work.

⁹ EAT, 22/06/2004

¹⁰ EAT, 02/05/2003

The EAT reinforced this decision in the decision of *Lefever v The Trustees of the Irish Wheelchair Association*¹¹. The claimant was a supervisor for an annual scheme run by the respondent and funded by FÁS. At the end of the first year of the scheme, the claimant 'rolled-over' into the supervisor position for the second scheme. She was not hired for the third year of the scheme. The position was advertised and she did not get the job. The EAT held that that qualifications or training should be the deciding factor rather than personal qualities. It added that the important issue in determining whether or not there was a redundancy situation is whether there is a qualitative change in the nature of the scheme and therefore in the nature of the supervisor's role.

It is important to remember that only an employee can be made redundant. In *Young v Bounty Services (Ireland) Ltd*¹² the claimant accepted, at the time she was hired, that she would be responsible for the payment of her own PAYE and PRSI. On the other hand, she received a number of additional benefits such as holiday pay and sick pay. When the company reorganised, resulting in the claimant losing her job, the company refused to pay her a redundancy payment, stating that she was an independent contractor and not an employee.

The EAT held that, having looked at the entirety of the employment relationship, the claimant was an employee, despite being responsible for her own taxes. Accordingly, she was entitled to a redundancy payment.

In the recent case of *Scully –v- Largan Developments Limited*¹³ the claimant, who mainly performed store duties for his construction company employer, was dismissed on the grounds of redundancy, given the downturn in the construction sector. Agency workers were engaged at the same time as the dismissal, to perform general operative duties which he was able and willing to perform.

The claimant had done this work in the past and could have done it on this occasion. The claimant's efforts to appeal or discuss the respondent's decision to make him redundant were ignored by the respondent. On this basis, the EAT deemed the dismissal to be unfair and awarded the claimant Eur14,300. It also found that the selection of the claimant for redundancy was unfair, as other employees with less service were kept on by the company and transferred to another site.

However, in another situation it may be the case that engaging agency workers (who after all would not be employees of the respondent company) is a reduction in the number of persons employed and that therefore there would have been a genuine redundancy within the meaning of Section 7(2)(c).

1.2 Lay-Off and Short-Time

Redundancy can also be held to occur in a lay-off or short-time situation. Lay-off is where an employee's employment ceases because the employer is unable to

¹¹ [1996] E.L.R. 220

¹² [1993] E.L.R. 224

¹³ Case No UD 10/2007, Chairman: Margaret Levey BL. 18th June 2007

provide him with work and it is reasonable in the circumstances for the employer to believe that the cessation of employment will not be permanent and the employer gives such notice to the employee prior to the cessation. Short-time arises where there is a decrease in the employee's work so that the employee's pay is less than 50% of his normal weekly pay¹⁴.

If an employee has been laid-off or kept on short-time for four or more consecutive weeks or for a series of six or more weeks (of which not more than three are consecutive) within a period of thirteen weeks, then the employee may be entitled to a redundancy payment. In these cases, the onus is on the employee to claim a redundancy payment after the expiry of either period outlined above or not later than four weeks after the end of the lay-off or short-time.¹⁵ If the employer disputes the claim for redundancy, he must issue a notice stating that he will be able to provide at least thirteen weeks work to the employee within four weeks of receipt of the claim from the employee. The employee must receive that notice within seven days of the date of the employee's claim for a redundancy payment.¹⁶

It is unclear whether an employer has a right to lay off an employee without pay. In *Lawe v Irish Country Meats (Pig Meats) Ltd*¹⁷ the Circuit Court held that the fundamental obligation of an employer is to pay the agreed remuneration to an employee in return for an agreed period of work. The plaintiff was laid off without pay for a number of days but later resumed work. The company contended it had a right to do this at common law. The only reason the plaintiff returned to work was the acceptance by the workforce of a restructuring package designed to save the company. Had this not been signed, the lay-off would have led to a redundancy. However, this did not happen and the Court held that this was not a situation in which the defendant was entitled to lay off without pay. An employer may be entitled to lay-off without pay in very limited circumstances which may be established through custom or general usage. There was no custom and practice applicable here and there is no general right of a company to lay-off without pay. The plaintiff was awarded the money owed.

In *Darcy -v- McLoughlin Painting Contractors Limited*¹⁸, the claimant was informed that he was to be put on temporary lay off on the 25th August 2006. At a meeting in November 2006, the respondent told the claimant that the lay-offs would be indefinite and anyone who wanted to apply for voluntary redundancy could do so. The respondent also advised them that they would not be entitled to payment in lieu of notice if they applied for voluntary redundancy.

Under S 5(2) of the Minimum Notice and Terms of Employment Act 1973 an that employee who applies for voluntary redundancy in accordance with the above procedure disentitles himself to statutory notice. This posed a significant loss to the claimant, who had worked with the company for 14 years.

¹⁴ Section 11

¹⁵ Section 12

¹⁶ Section 13

¹⁷ [1998] E.L.R. 266

¹⁸ Case No.: MN 94/2007

The Tribunal was critical of the respondent's failure to keep its laid-off employees notified about what was going on and what their realistic prospects were between the time they were informed of the temporary lay off in August 2006 and the meeting which took place in November 2006.

The Tribunal held, however, that the lay off was a genuine one, and not a scheme by the employer to avoid paying notice entitlements. As a result, the claimant had been paid his full entitlement and therefore his claim under the Minimum Notice and Terms of Employment Acts 1973 to 2001 failed.

Despite the broad definition of redundancy contained in the *Redundancy Acts* it is important to remember that not every situation in which a person ceases to be employed results in an automatic entitlement to a redundancy payment. In particular, resignation and dismissal by reason of misconduct may disentitle a potential claimant to a redundancy payment under the *Redundancy Acts*. Also, there may not be a dismissal in accordance with the Acts.

1.3 Dismissal by Reason of Misconduct

Section 14 of the *Redundancy Acts* permits an employer to terminate a contract of employment by reason of the employee's conduct. No notice is necessary.¹⁹ Alternatively, the employer may give shorter notice than would otherwise be acceptable.²⁰ A statement in writing may also accompany the notice (if given) which recognises the right of the employer to terminate the contract without notice.²¹

This manner of termination does not entitle a dismissed employee to a statutory redundancy payment. Such an employee may be entitled to or may receive an *ex gratia* payment from the employer but it is important, in such an event, to remember that this is outside the statutory framework.²²

It is important to remember that this provision does not entitle an employer to create a misconduct situation for the purposes of avoiding payment. The misconduct must be genuine and proper disciplinary procedures followed. If an employee is issued with notice of redundancy and, subsequent to that, is dismissed by reason of his misconduct, section 14 does not apply. The initial redundancy notice must be followed²³

1.4 Resignation

An employee who resigns is generally not entitled to a redundancy payment. The reason for this is that the job continues to exist after the employee leaves. Furthermore, the employee made the decision to end the employment relationship.

¹⁹ Section 14(1)(a)

²⁰ Section 14(1)(b)

²¹ Section 14(1)(c)

²² In relation to *ex gratia* payments in general please see section 2 below

²³ Section 14(2)

In *Collins v Excel Property Services Limited*²⁴ the claimant resigned from her employment as a school cleaner. The respondent company had lost the contract to clean the school at which she had worked. However, by virtue of the Acquired Rights Directive²⁵, the claimant continued in the employment of the new company which won the cleaning contract. The claimant felt that the cleaning equipment provided by the new contractor was of a lesser standard than the equipment provided by the respondent. She resigned her job and claimed redundancy payments from the respondent. The EAT held that the employee had transferred to the new contractor under the terms of the Acquired Rights Directive and as a result there was no case against the respondent. Furthermore, the EAT stated that there was no redundancy situation as the job continued to exist in so far as the school still needed cleaning.

1.5 Disentitlement to Redundancy

There must be a dismissal of an employee for the Redundancy Acts to apply. If the employee's employment is either renewed or the employee is re-engaged by the same employer under a new contract and essentially the terms and conditions do not differ greatly from the previous contract, there would be no dismissal. Similarly, if the employee is engaged by another employer immediately on the termination of the previous employment on the same terms and conditions, there will be no dismissal.²⁶ There must be agreement between the employee, the previous employer and the new employer for this to apply and the employee's continuity of service will be carried over into the new employment.

In situations where an employer is considering redundancies, consideration must first be given to alternative employment within the organisation for employees who would otherwise be made redundant. If the employee is offered alternative employment on a different contract at the same location and the same or improved terms²⁷ and conditions to come into effect on or before the day of the proposed redundancy and the offer is unreasonably rejected the employee shall not be entitled to a redundancy payment.²⁸

If an offer of a new employment contract is made to an existing employee to be re-employed on terms and conditions wholly different to his existing contract of employment, the new contract constitutes an offer of suitable employment and will take effect no later than four weeks after the termination of his previous contract and the offer is unreasonably refused, the employee shall not be entitled to a redundancy payment.²⁹ Where an employee who has been offered suitable employment undertakes such a "new" role for a period no more than four weeks, and then refuses the role, such temporary acceptance will not amount to an unreasonable refusal.

²⁴ EAT, 31 December 1998

²⁵ Directive 77/187/EEC

²⁶ Section 9(2)

²⁷ Section 15(1)(b)

²⁸ Section 15(1)

²⁹ Section 15(2)

A frequent question coming before the EAT is the issue of change of location of employment. The EAT will focus on the employee's particular circumstances in determining whether the practicalities of travelling to the new location render it a reasonable alternative. In *Blade v Kerry Co-op Ltd*³⁰, the claimant was a driver and following a reduction in the number of drivers, had to change his work schedule from Tuam to Galway as a relief driver. The EAT held that even though there was a mobility clause in the union agreement applying to him, this could not be the defining issue where there was a reduction in drivers. A more recent decision of the EAT held that Skerries was not the same place as Swords³¹.

2. REDUNDANCY PAYMENTS

There are essentially two types of redundancy payments, statutory redundancy payments and *ex-gratia* redundancy payments. Statutory redundancy payments are payments to which employees who satisfy certain criteria are legally entitled. *Ex-gratia* redundancy payments are additional discretionary payments to employees over and above their statutory entitlements.

There are certain conditions that an employee must fulfil before being entitled to a statutory redundancy payment. These are as follows:

- The employee must work or have worked under a contract of service or of apprenticeship or under any other contract whereby an individual agrees with another person, who is carrying on the business of an employment agency within the meaning of the Employment Agency Act 1971, and is acting in the course of that business, to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract) whether the contract is express or implied and, if express, whether it is oral or in writing;
- The employee must be over 16 years of age;
- The employee must have been continuously employed for 104 weeks; and
- The employee must have been dismissed within the statutory definition of redundancy.³²

An employee who fulfils the above conditions, and who has been dismissed by reason of redundancy, is entitled to a statutory redundancy payment, calculated as follows:-

- Two weeks' normal remuneration for each year of continuous and reckonable service over 16 years of age; plus

³⁰ RP 90/98

³¹ *Early v Floorstyle Contracts Ltd* 2003

³² See above, section 1

- The equivalent of one week's normal weekly remuneration.

Where an employee is offered suitable alternative employment by his employer, and unreasonably refuses to accept this offer, the employee may not be entitled to a statutory redundancy payment (please see Section 1.3 above).

2.1 Continuous Employment

The requirement that a person must be employed for 104 weeks was examined in *Gormally v McCartin Brothers*³³, where the claimant had been made redundant 2 days short of the period required to obtain a statutory redundancy payment. The 2 days fell on a weekend and the claimant did not generally work the weekend in his standard working week. The claimant challenged the decision not to pay him a statutory redundancy payment.

The EAT agreed with the claimant and ordered payment of the statutory amount. The EAT held that the meaning of 'week' in the Redundancy Acts related to a working week and not to a 7 day period beginning on a Monday. It was important that the claimant did not generally work on Saturdays and Sundays. The EAT held that in order to be entitled to a statutory redundancy payment, the employee in question must have been in continuous employment for 104 working weeks. What a working week would be is a matter to be judged on the facts of each case.³⁴

2.2 Reckonable Service

Reckonable service is the amount of time within the period of continuous employment that will be used to calculate the redundancy payment of a redundant employee. This is relevant if there has been a prolonged absence of an employee from the place of employment which may reduce the amount of the payment. This can occur if the employee was sick for a long period of time or if there was industrial action of some sort which would reduce the amount of time used to calculate the redundancy payment.

Schedule 3 of the *Redundancy Acts* provides a calculation method for reckonable service.

2.3 Average Weekly Wage

Section 3 of the *Redundancy Acts* defines 'normal weekly remuneration' for the purposes of calculating a redundancy payment. The general rule is that the normal weekly remuneration is the basic pay the employee receives every week.

In addition to this, there is provision for overtime, bonuses and commission which an employee is likely to receive in addition to his basic wage. In certain sectors of

³³ EAT, 20 February 1981

³⁴ This ruling is in respect of weekly paid employees. The EAT did not extend this ruling to workers whose remuneration is expressed as an annual salary. It is likely, however, that similar principles would apply.

the labour force, such as sales, these elements may provide a significant boost to an employee's wage.

Overtime is calculated by reference to the amount of overtime received by an employee in the 26 week period ending 13 weeks before he was made redundant. This figure is divided by 26 and added to his basic wage in order to obtain his 'normal weekly remuneration'. The reason for calculating overtime in this period is that the employer may know that redundancy is likely and overtime may not be available in the short term leading up to a redundancy if a business is struggling or is financially stretched.

2.4 Calculation of Statutory Redundancy Payment

There are various complex rules for the calculation of a statutory redundancy payment, which is based on normal weekly remuneration defined as earnings (to include any regular bonus or allowance which does not vary in relation to the amount of work done and any payment in kind). The weekly wage which is to be used for the calculation of statutory redundancy is the wage applying on the date that the employee is declared redundant, but is subject to a ceiling of €600.00 per week.³⁵

It is generally expected that an employer will pay an employee monies over and above the statutory minimum although, subject to the following comments, there may well be no legal compulsion to do so. These are generally referred to as *ex-gratia* payments.

In unionised employments, in particular, there may well be a written agreement dealing with the question of redundancy payments. If such an agreement exists, it is likely that the employer will be bound by its terms and will be obliged to pay the levels of redundancy set out in that agreement.

Even if there is no written agreement, but there is either an oral agreement as to the level of redundancy payments the employer will make or where the employer has previously adopted a particular policy (albeit unwritten) in relation to the question of redundancy payments, then the employer may find itself under pressure to honour that oral agreement or previous policy decision. However, in reality it can be difficult for employees to successfully assert an enforceable right to a particular level of redundancy pay.

If the employer has had occasion to make employees redundant in the past, it will most likely prove difficult to persuade employees to accept anything less than the level of redundancy payment previously paid. An employer should always therefore check its records to see if it has set any precedents for itself on this in relation to the question of redundancy. In the event that an employer has never paid redundancy

³⁵ The Department of Enterprise Trade and Employment has a useful redundancy calculator. It is available at <http://www.entemp.ie/employment/redundancy/calculator.htm>

payments before, then the level of *ex-gratia* redundancy payments will be dictated by negotiation or on application to the Labour Conciliation Service or the Labour Court.

The level of *ex-gratia* redundancy payments varies greatly. It is always advisable to do some research into recent packages paid by employers in the same, or similar, industry sector.

Caution must always be exercised in redundancy negotiations to ensure that either the statutory lump sum is paid separately, or to specify that amount separately in any agreement, so that the employee knows what the statutory payment is. If an employer anticipates that an employee may attempt to bring a claim under the *Unfair Dismissal Acts* (see section 6 below) it is good practice to only pay statutory redundancy as the EAT has, in the past, ignored *ex-gratia* payments made on redundancy when calculating compensation due to an employee, which could have the effect of the employer being forced to pay the same amount twice.

Statutory redundancy payments, i.e. that part of any severance package to which a redundant employee is entitled to under the *Redundancy Acts*, are tax-free. However, Irish tax legislation provide certain further allowances for employees on termination of employment. There are a number of methods of calculating a tax free lump sum on termination of employment, the most common of which is known as the "*basic exemption*". This provides that the first €10,160.00 of a termination payment, together with €765.00 for each complete year of service, may be paid tax-free.

3. COLLECTIVE REDUNDANCIES

The procedure for large scale redundancies is laid down by the *Protection of Employment Act 1977* (as amended³⁶) (the "*1977 Act*").

The *1977 Act* sets down certain procedural requirements that an employer must follow in the event of collective redundancies. Unlike the *Redundancy Acts*, the *1977 Act* does not discriminate against employees without a specified amount of service and applies equally to all employees.

Collective redundancies mean dismissals arising from redundancy during any period of 30 consecutive days, where the numbers being made redundant are³⁷:

- at least 5 in an establishment normally employing more than 20 and less than 50 employees;

³⁶ By, *inter alia*, the Protection of Employment Order (S.I. 370 of 1996) and the European Communities (Protection of Employment) Regulations 2000 (S.I. 488 of 2000)

³⁷ Section 6(1) of the 1977 Act

- at least 10 in an establishment normally employing at least 50 but less than 100 employees;
- at least 10 per cent of the number of employees in an establishment normally employing at least 100 but less than 300 employees; and
- at least 30 employees in an establishment normally employing 300 or more employees.

3.1 Notification to the Minister

An employer is obliged to notify the Minister for Enterprise, Trade and Employment (the "Minister") of the proposed redundancies at the earliest opportunity, but at least 30 days before the first dismissal takes effect.³⁸

The *Protection of Employment Act 1977 (Notification of Proposed Collective Redundancies) Regulations 1977* (the "1977 Regulations") sets out the information that must be included in the notification to the Minister:-

1. the name and address of the employer indicating that the employer is a company;
2. the address of the premises where the collective redundancies are proposed;
3. the total number of persons normally employed at that premises;
4. the numbers and description or categories of employees whom it is proposed to make redundant;
5. the period within which the collective redundancies are proposed to be effected, stating the dates on which the first and final dismissals are expected to take effect;
6. the reasons for the proposed collective redundancies;
7. the names and address of the trade unions or staff associations representing employees affected by the proposed redundancies and with which it has been the practice of the employer to conduct collective bargaining negotiations;
8. the date on which consultations with each trade union or staff association commenced and the progress achieved at those consultations to the date of notification; and
9. employers must also provide the criteria for selection of redundancy and the method of calculating redundancy payments other than the statutory redundancy payment.

³⁸ Section 12 of the 1977 Act

It is important to note that collective redundancies cannot take effect before the expiry of the 30 day period beginning on the date of the notification of the Minister. Given the wording of the relevant section of the legislation, it is arguable that the Minister, or an individual employee or group of employees, could apply to the courts for an injunction preventing the redundancies until the necessary consultations had taken place.

3.2 Consultations

The 1977 Act provides that an employer proposing to create collective redundancies must initiate consultations with employee representatives "*with a view to reaching agreement*". The definition of the word 'representatives' not only includes a "*trade union, staff association or excepted body with which it has been the practice of the employer to conduct collective bargaining negotiations*" but has been extended to provide that "*in the absence of such a trade union, staff association or excepted body, a person or persons chosen (under an arrangement put in place by the employer) by such employees from among their number to represent them in negotiations with the employer.*"

Consultation should take place "*at the earliest opportunity and in any event at least 30 days before the first dismissal takes effect.*" The subject matter of the consultation should include the possibility of avoiding the proposed redundancies by reducing the number of employees to be dismissed and the basis on which particular employees are to be made redundant.

On 27 January 2005 the European Court of Justice decided in *Junk v Wolfgang Kuhnel*³⁹ that a redundancy took effect when the redundancy notice issued, not when the notice period expired and the employment ceased, as had previously been assumed. The effect of the judgment is that the consultation process must have completed before any redundancy notices can issue to the employees.

This judgment has very important ramifications for employers considering redundancy as it essentially adds thirty days to the redundancy timetable. Where the 1977 Act or any EU Directive or Regulation deals with redundancies it must always be remembered that the redundancy takes effect when the redundancy notice issues and not when the first dismissal occurs.

The *Junk* judgment also emphasise that Article 2 of Directive 98/59/EC⁴⁰ imposes an obligation on employers to negotiate with employee representatives or trade unions. It appears that any employer who has decided to go ahead with redundancies irrespective of the views of the employees will now be in breach of his obligations under European Law. There is now a positive obligation on employers to engage with representatives with a view to reaching an agreement. This will require changes and compromises from both sides to the negotiations.

³⁹ Case C-188/03, ECJ, 27 January 2005

⁴⁰ This Directive replaced the amended 1977 Directive.

The employer is obliged to provide the employee representatives with all information in writing in relation to the proposed redundancies including⁴¹:-

- the reasons for the proposed redundancies;
- the number and descriptions or categories of employees whom it is proposed to make redundant;
- the number of employees, and description of categories, normally employed;
- the period in which it is proposed to effect the redundancies;
- the criteria proposed for the selection of the workers to be made redundant, and
- the method of calculating any redundancy payments other than those methods set out in the *Redundancy Acts* or any other relevant enactment for the time being in force or, objects thereto, in practice.

A complaint may be made to a Rights Commissioner that an employer has not met the requirement to inform or consult. A complaint may be made by either a recognised trade union, or an elected representative of the employees or, where there was neither a recognised trade union nor an elected representative, by any affected employee.

Where a Rights Commissioner finds a complaint justified he or she will make a declaration to that effect, can require the employer to comply with the requirements of the Regulations and may also make an award of compensation to the affected employees up to a maximum of four weeks' pay per affected employee.

The obligation to consult with employee representatives is an obligation to consult "*with a view to reaching agreement*". If an employer chooses to announce the number of employees who are to be made redundant, and only then commences consultations with the Union/employee representatives, it may well be in breach of consultation obligations under the *1977 Act*. The consultation process is not meant to be confined only to the question of the level of the redundancy package. It is also intended to address possible alternatives to redundancies. Announcements about redundancies which are made before the consultation process starts should, wherever possible and commercial considerations permitting, be referred to as proposals to implement redundancies.

The Minister may request the employer to enter into consultations with the Minister or with an officer authorised by the Minister in order to seek solutions to the problems caused by the proposed redundancies. Authorised officers are usually civil servants of the Department of Enterprise, Trade and Employment and they have the

⁴¹ Section 10(2) of the 1977 Act

power to enter an employer's premises and make enquiries to be satisfied that the employer has complied with the provisions of the legislation.

In addition to the power of the Rights Commissioner to make an award, failure to comply with the above obligations is also a criminal offence punishable on conviction by a fine of, in most cases, a maximum of €5,000.⁴² Where the failure relates to the non-observance of the 30 day time period from the date of notification to the Minister, the fine is a maximum of €250,000.⁴³ While failure to comply with the provisions of the 1977 Act is a serious matter, it is fair to say that prosecutions have been rare.

4. EXCEPTIONAL COLLECTIVE REDUNDANCIES

The Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 ("the 2007 Act") came into force on 8 May 2007. The Act takes account of the arrangements agreed by the social partners in *Towards 2016*⁴⁴ in an effort to avoid the use of redundancy and outsourcing as a means of job displacement in the wake of the Irish Ferries dispute. The new measures were also necessary to give effect to the decision of the European Court of Justice (ECJ) in the *Junk* case, in relation to the time limits for employers to consult with employee representatives in advance of proposed collective redundancies (please refer to Section 3.2 above).

Section 4(1) of the 2007 Act provides that proposed dismissals are "exceptional collective redundancies" if they are of the kind referred to in section 7(2A) of the *Redundancy Acts*⁴⁵. This provides that a dismissal by reason of compulsory collective redundancy, shall not be deemed a redundancy, where the dismissed employees are replaced by new workers effectively doing the same job and performing the same tasks and where the new workers' terms and conditions of employment are materially inferior.

The 2007 Act does *not* apply to the employment of agency workers for temporary or recurring business needs, or the use of outsourcing or restructuring other than those set out in the definition⁴⁶

Where uncertainty arises in relation to whether an exceptional collective redundancy situation arises proposals to create collective redundancies can be referred to a Redundancy Panel ("the Panel") either by the employee representative, or by the employer, at any time during the 30 day statutory consultation period by notice in writing. The three-member Panel consists of a Chairman and members nominated by employee and employer bodies, ICTU and IBEC respectively⁴⁷. The

⁴² Section 11 of the 1977 Act as amended by Section 13 of the 2007 Act

⁴³ Section 14 of the 1977 Act as amended by Section 10 of the 2007 Act

⁴⁴ *Towards 2016 – Ten Year Framework Social Partnership Agreement 2006-2016*

⁴⁵ As inserted by S16 of the 2007 Act

⁴⁶ Section 4(2) of the 2007 Act

IBEC respectively⁴⁷. The role of the Panel is to ensure that collective redundancies are genuine redundancies, as opposed to situations where existing workers are replaced by lower paid workers.

The Chairman of the Panel will then invite the parties involved to make submissions to the Panel. If the Panel decides that the proposed redundancies constitute exceptional collective redundancies, it may request the Minister to refer the matter to the Labour Court⁴⁸. The Labour Court must then hold a hearing in relation to the matter and may issue an opinion to the Minister who will notify the parties of the Labour Court's opinion. No appeal lies from the Labour Court⁴⁹.

If the Labour Court holds that the redundancy in question constitutes an exceptional collective redundancy, and the employer applies to the Minister for a rebate under the Redundancy Payments Act 1967, the Minister can refuse to pay the 60% rebate to the employer based on the Labour Court opinion⁵⁰. Importantly, if the Minister refuses to pay the rebate, the exemption from income tax referred to earlier in respect of lump sum payments made to dismissed employees is lost.

As stated previously in the *Junk Case*⁵¹, the Court of Justice ruled that the consultation process required by Directive 98/59/EC must take place before employees are given notice of dismissal. Accordingly, s.12 of the 2007 Act amends s.9(3) of the 1977 Act to provide that the consultations must be initiated at least 30 days before the first notice of dismissal is given⁵².

In the event that (collective) redundancies are effected by an employer before the expiry of this 30 day period, the employer may be liable to a fine, which has been increased by the Act to an amount up to €250,000⁵³

Where the Labour Court holds that an exceptional collective redundancy situation exists and employees are dismissed in any event, it is open to an affected employee to claim unfair dismissal. In those circumstances, employees may be entitled to compensation of up to four years' remuneration for employees with under 20 years service and up to five years' remuneration for those with over 20 years service.

Previously, an employee had to be between the ages of 16 and 66 to qualify for a statutory redundancy payment. The Act removes the upper age cap of 66 years for individual and collective redundancies⁵⁴.

⁴⁷ Section 5 of the 2007 Act

⁴⁸ Section 7 of the 2007 Act

⁴⁹ However, the EAT can make a decision on any question referred to it under Section 39 of the Redundancy Payments Act 1967

⁵⁰ Section 9 of the 2007 Act

⁵¹ Case C-188/03 *Junk v Kuehnel* [2005] E.C.R. I-855

⁵² Section 12 of the 2007 Act

⁵³ Section 10 of the 2007 Act

⁵⁴ Section 15 of the 2007 Act

5. REDUNDANCY PROCEDURES AND NOTICE

5.1 Notice:

A redundancy situation does not reduce or limit any statutory or other employment rights an employee may have. Employees remain entitled to either their contractual termination notice or minimum notice laid down by the *Minimum Notice and Terms of Employment Acts 1973 - 2001*. These minimum periods of notice apply if there is no notice provision in an employee's contract of employment or if the contractual notice is less than the statutory minimum. The relevant periods of notice are as follows:-

13 weeks to 2 years service - 1 week

2 to 5 years service - 2 weeks

5 to 10 years service - 4 weeks

10 to 15 years service - 6 weeks

15 or more years service - 8 weeks

These are minimum periods of notice only. Confusingly, the *Redundancy Acts* also apply a different and over-riding minimum notice period of two weeks to employees with a minimum of two years service, which minimum period cannot be paid in lieu (see paragraph 5.2 below).

At common law, it is possible that an employee who has no express contractual period of notice may be entitled to assert a right to "*reasonable notice*" in excess of the statutory minimum due to factors such as length of service, seniority etc. Ultimately, the courts are empowered to determine what period of notice is reasonable.

On termination of employment, an employee may waive his or her right to notice and may accept payment in lieu of notice, with the employer's consent (subject in the case of dismissals by reason of redundancy of an employee with at least two years notice to that two week minimum which cannot be waived). Failing that, an employee is entitled to stay on and work during the notice period, even if there is no work for the employee to do.

An employer must, however, remember that the *1977 Act* as interpreted by the European Court of Justice in the *Junk* case prohibits the giving of redundancy notice until at least 30 days have expired from the date the consultations began and the employment actually ceasing until at least 30 days have expired from the date notification, in the form prescribed, was given to the Minister for Enterprise, Trade and Employment.

During the notice period, it is important to remember that the employee is entitled to normal pay and other rights, such as sick leave, pension contributions or use of company car, on the basis that the employee is available and willing to work even though work may not be provided.

The *Redundancy Acts* also provide that employees must be given reasonable time off during the two weeks immediately prior to their dismissal to facilitate them finding new employment or training for future employment.

5.2 Redundancy Procedure:

As regards the redundancy procedure, an employer who proposes to dismiss an employee must give that employee statutory notice of the termination of employment by reason of redundancy. This statutory notice must be given on the requisite form - part A of Form RP50 which should be completed and a copy given to the employee. A copy of this form is available from the Department of Enterprise, Trade and Employment's website - www.entemp.ie. Redundancy notice must be given to the employee at least 2 weeks before the date of dismissal. This notice period cannot be abridged by means of a payment in lieu of notice but can run concurrently with any contractual or statutory minimum notice entitlement.

This statutory notice for redundancy only applies to those employees who are entitled to a statutory redundancy payment (i.e. those who have more than 2 year's continuous service).

On the day of dismissal, the employee must certify receipt of the statutory redundancy payment. This is done on part B of the Form RP50 which should be signed by both the employer and employee and then copied to the employee together with the statutory lump sum payment. The Minister may make a payment to an employer from the Social Insurance Fund amounting to 60% of the statutory lump sum paid to an employee. The claim is made by submitting the original RP50 to the Minister within 6 months of the date of payment of the redundancy lump sum.

It is important to note that employers can try to limit any further action a redundant employee can take by entering into severance agreements at the time of redundancy. In *Fowler v Hardware Distributors Dublin Ltd*⁵⁵ the claimants both signed documents accepting the terms of the redundancy. This document excluded the possibility of further action under any employment legislation. By a majority decision, the EAT held that the agreement was in full and final settlement of any employment related claims the claimants may have had and as a result the Tribunal had no jurisdiction to hear the claims.

Such an agreement is not always proof that the employee will have lost all possibility of a claim under employment legislation arising out of a redundancy. In *Shortt v Data Packaging Limited*⁵⁶ the employee signed a severance agreement. He

⁵⁵ [1996] E.L.R. 240

⁵⁶ [1996] E.L.R. 7

claimed in the EAT that he had signed under duress and as such, the EAT was entitled to hear the case. The EAT agreed with him. In particular, the claimant claimed that a representative of the defendant had suggested to him that he would not get his money unless he signed the document. The EAT held that this had essentially deprived the claimant of the exercise of his own free will.

If an employer seeks to put a severance agreement in place, it is important that the redundant employees are voluntarily signing it and that they know and understand the contents thereof. The employee should obtain, and the agreement should provide for, independent legal advice or advice from some other qualified person, such as a trade union representative.

6. REDUNDANCY AND UNFAIR DISMISSAL

The *Unfair Dismissals Acts, 1977 to 2001* (the "UD Acts") provide that a dismissal of an employee shall be deemed for the purposes of the UD Acts, not to be an unfair dismissal, if it results "*wholly or mainly*" from the redundancy of the employee. Redundancy may therefore be an absolute defence to a claim for unfair dismissal, but the employer must strictly adhere to the definition of redundancy if the EAT is to hold in its favour. Redundancy defences will be closely scrutinised by the EAT.

Where an employee has been dismissed on redundancy grounds and believes that it was not a valid redundancy, or the manner in which the dismissal was effected was unfair or unreasonable, or that he was unfairly selected for redundancy, provided that he has, in most circumstances, at least twelve months continuous service, he will be entitled to bring an application before the EAT for unfair dismissal. The EAT is a quasi-judicial body which deals with most statutory employment rights cases in Ireland. It is, compared to the civil courts, relatively fast and inexpensive. The EAT has the power to award costs if either party's conduct in the case is such as to merit an award of costs against it, but this power is virtually never used in practice.

The onus is on the employer in cases before the EAT to show that a genuine redundancy situation existed and that the employee was not unfairly selected for redundancy.

If the EAT finds that either there was no genuine redundancy situation, or than an employee was unfairly selected for redundancy, or that it was otherwise an unfair dismissal, it has the power to order that the employee be:

1. reinstated to the same position as if no dismissal had taken place, with compensation for lost benefits, no loss of rights, and on the identical terms and conditions of employment as the employee was previously employed under; or
2. re-engaged with no compensation for loss of benefits, although not necessarily in the same position or on identical terms; or

3. awarded compensation of up to a maximum of two years gross remuneration i.e. not only basic salary, but also including a cash equivalent to all benefits received by the employee as part of his remuneration package, including such matters as pension rights and car allowances, etc.

Compensation is the most common form of award made by the EAT. The EAT is generally reluctant to force an employee on an unwilling employer, or vice versa. The level of compensation awarded by the EAT depends on the employee's actual financial loss suffered as a result of the dismissal and is subject to the employee's duty to mitigate his loss by actively seeking alternative employment. The EAT is also entitled to take into account any contribution by the employee to his own dismissal, in a similar fashion to the concept of contributory negligence in the civil courts.

In *Hurley v Royal Cork Yacht Club*⁵⁷ the EAT decided that a redundancy situation did not exist and looked at whether the claimant's preferred remedy of reinstatement was viable. The respondent company objected to reinstatement. The EAT, whilst conscious not to force incompatible parties to work together, noted that it would be practicable for the plaintiff to resume work, a number of club members had given evidence in support of his position at the hearing, and the committees running the club were changed annually and therefore the personal differences between the plaintiff and the committees would be less than with an unchanging board of directors. In this case, the EAT ordered reinstatement.

A dismissal will be deemed to be unfair if it arises from the redundancy of the employee where the selection of the employee for redundancy is contrary to normal selection procedures or in breach of an agreed procedure. Selection only arises where the employee is employed in similar employment to one or more other employees with the same employer who are not dismissed. Hence, those who are employed in "stand alone" positions, particularly in management, normally find it very difficult to argue that they were unfairly selected for redundancy. Unfair selection will be looked at below under paragraph 6.2.

Redundancy law exists in order to make provision for employees who are genuinely being made redundant and where employers are not merely making way for an alternative employee to do the same job. It is a key principle of the law of redundancy that the job no longer exists and the redundancy is not personal to the employee. This was evident in *Kenny v Beacain (Rea na Doire) Teo*⁵⁸ where the company made an employee redundant and replaced him with a new worker. The plaintiff was a mushroom picker and the company stated that it was making losses and needed to reduce the number of staff. It had, however, employed two new managers immediately prior to making the plaintiff redundant and employed a new worker effectively replacing the plaintiff. The EAT held that this was impermissible and that a genuine redundancy situation did not exist.

⁵⁷ [1999] E.L.R. 7

⁵⁸ [1992] E.L.R. 107

6.1 Case law for unfair redundancy

The EAT will closely scrutinise a redundancy defence. In *Keenan v Gresham Hotel Company Limited*⁵⁹ the company dismissed employees on the grounds that its workforce requirements were “expected to cease or diminish”. The EAT held that the company must establish that this was due to occur either at the time of, or shortly after, the redundancy. In other words, an employer cannot simply suggest that its workforce requirements will cease or diminish at some distant time in the future. Otherwise, an employer might seek to minimise its employees’ redundancy entitlements by serving the RP50 on them prematurely.

Another case where the EAT was willing to strike down a purported redundancy was *Melroy v Floraville Nurseries Ltd*⁶⁰, where the EAT was not satisfied on the evidence that a genuine redundancy existed. Whilst a particular part of the employee’s duties had diminished, the remaining areas of work where she was employed, and for which other employees were hired on a part-time basis, continued.

If the dismissal is not *wholly or mainly* attributable to redundancy, it will be an unfair dismissal. In *Daly v Hanson Industries Ltd*⁶¹ the EAT held that whilst there was “a redundancy element” in the circumstances before it, the dismissal did not result “mainly” from it. The EAT noted that another significant aspect to the dismissal related to the fact that the claimant had earlier in the day given evidence before the EAT in a claim by the former general manager of the company.

It is not possible to use features specific to the employee to make that person redundant. The requirement for impersonality was clearly illustrated by the EAT in *Moloney v Deacon*⁶². The claimant had been made redundant by the defendant. In submissions made by the respondent, one of the documents tendered to the EAT by the defendant was a note of reasons for the redundancy. This note included reasons such as the unsatisfactory completion of a probationary period and it also referred to a final warning letter. The EAT held that there had not been a valid redundancy as the reasons for the dismissal were specific to the claimant and as such were not impersonal. This could not therefore constitute a redundancy.

Although redundancies may come about following a re-structuring of a business, a restructuring of a business cannot be used to engineer a redundancy situation. In *Reddin v Harrison*⁶³ the respondent ran a number of shops, each a separate business entity. Employees regularly worked in a number of different shops as required. The claimants were registered as being employees of one of the shops. That shop ceased trading and the claimants were made redundant, despite assurances from the respondent that they would continue to work in the other shops and notwithstanding that other shops owned by the respondent were advertising vacant positions at the time. The EAT held that the claimants were essentially employed

⁵⁹ UD 478/88

⁶⁰ UD 703/1993

⁶¹ UD 719/1986

⁶² [1996] E.L.R. 230

⁶³ [1992] E.L.R. 245

by the Harrison family and that there was continuity of employment, even though the location of employment was alternated every so often. A genuine redundancy situation did not arise and the claimants were, accordingly, unfairly dismissed.

In *Daniels v County Wexford Community Workshop (New Ross) Ltd*⁶⁴, the company engaged an outside consultant to improve its operation and this consultant recommended the appointment of a manager with a third level qualification. The existing manager did not have a third level qualification and insisted she was more than qualified to continue in her role given her extensive experience and service. The company offered her a new position under the same conditions of employment, but the claimant was unhappy with one aspect of the new job and refused it. She was made redundant to be replaced with a new person with third level qualifications which was deemed a valid redundancy on the "qualification" ground.

6.2 Reasonableness

Prior to the enactment of the Unfair Dismissals (Amendment) Act, 1993, there was no requirement on an employer to consult with an employee in a "single" (as opposed to collective) redundancy scenario or to follow the rules of natural justice. This was confirmed by the Supreme Court in *Hickey v Eastern Health Board*⁶⁵, which confirmed that the rules of natural justice relevant to a dismissal for misconduct were irrelevant. The plaintiff had complained that she received no hearing prior to the decision to make her redundant and therefore the decision to make her redundant was tainted.

The Supreme Court decided that the decision to make her redundant was not arbitrary and as the plaintiff was not dismissed for fault or failure to perform her duties properly, the rules of natural justice relevant to dismissal of a person for misconduct did not apply to the case.

However, the 1993 Act provides that reasonableness of an employer's conduct is now an essential factor to be considered in the context of all dismissals, including redundancy dismissals. Section 6(7) of the 1997 Act (as inserted by the 1993 Act) provides that "*in determining if a dismissal is an unfair dismissal, regard may be had...to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal*".

In *Roche v Richmon Earthworks Limited*⁶⁶, the claimant was made redundant following a reorganisation and contested the circumstances surrounding the redundancy, given she was given no prior notification, discussion or consultation. The EAT agreed that the dismissal was unfair and added that "*the failure to hold any selection process or consultation with the claimant rendered it so*".

⁶⁴ [1996] E.L.R. 213

⁶⁵ [1991] 1IR208

⁶⁶ UD 329/97

In light of this requirement that employers act reasonably in redundancy dismissals, one would advise that some sort of "hearing" should take place with the employee where notification and/or consultation should take place before the decision is made.

Another feature of the reasonableness requirement is that employers should not immediately opt for redundancies without looking at possible alternatives. This might include offering alternative employment and, where qualifications or training are the criteria, an employer should also carefully consider whether the employee may be retrained.

In *O'Brien v Smurfit (Ireland) Limited*⁶⁷ the claimant was area manager for the respondent company. The company claimed that it was facing trading difficulties and the claimant was dismissed on the grounds of redundancy. In or around the same time, a vacancy arose within the company for the position of a sales representative. The company did not offer this position to the claimant and when defending an unfair dismissals claim, it confirmed that it did not believe the employee was suitable for the sales position. The EAT held that there was no genuine redundancy situation within the company. It found that the company had merely assumed the claimant did not satisfy the requirements for the sales job. It neither offered the job to the claimant nor discussed it with him. In fact, the claimant may have satisfied their requirements. If further training was required, it would not have caused too onerous a burden on the employer to provide such training.

In *Mulvihill v. Castlebar Social Services Limited*⁶⁸, the respondent was successful in defending the unfair dismissals claim not only because it proved a genuine redundancy situation existed, but also on the basis that at all times the employees were fully appraised of the situation, and were consulted in respect of potential redundancies, which ultimately materialised.

Accordingly, employers are advised to have a redundancy procedure in place even when only a single or small number of individuals are being made redundant and collective consultation rules do not apply. In such circumstances the form of that consultation, and the timing involved will vary depending on the circumstances.

- The employer could inform the employee of the proposal to make the position redundant (such as the reasons for the change and the proposed process for effecting the change);
- Seek the employee's feedback on the proposals, particularly as to any options for redeployment;
- If there are a number of employees in similar employment, the consultation process will need to include a selection stage.

⁶⁷ 1994

⁶⁸ Case No: UD298/2004

6.3 Fair Selection for Redundancy:

There is a distinction to be drawn between the decision to dismiss employees within the statutory definition of redundancy and the next hurdle of selecting the employee/s. Whilst the redundancy affected the *job*, selection applies to the *people*.

If an employee is dismissed due to redundancy, but the circumstances constituting the redundancy applied equally to one or more employees, in similar employment, with the same employer, who are not dismissed and either:

- the selection of an employee for dismissal resulted wholly or mainly from one or more of the following matters:
 - (a) the employee's membership of a trade union or engaging in trade union activity;
 - (b) the religious or political opinions of the employee;
 - (c) civil proceedings whether actual, threatened or proposed against the employer, to which the employee was or will be a party or is likely to be a witness;
 - (d) criminal proceedings against the employer, whether actual, threatened or proposed in relation to which the employee has made, proposed or threatened to make a complaint or statement to the prosecuting authority or to any other authority connection with or involved in the prosecution of the proceedings or which the employee was or is likely to be a witness;
 - (e) the race, colour or sexual orientation of the employee;
 - (f) the age of the employee;
 - (g) the employee's membership of the travelling community;
 - (h) the pregnancy of the employee; or
- he or she was selected for dismissal in contravention of an agreed procedure (one that has been agreed between the employer and the employee or a trade union or which 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 purpose of the UD Acts, to be an unfair dismissal⁶⁹.

⁶⁹ Section 6(3) of the UD Acts

If there is no agreed procedure or custom or practice in the employment and the selection for redundancy does not result wholly or mainly from one of the grounds deemed unfair referred to above, the EAT will ask whether the employer has acted reasonably in all the circumstances⁷⁰. The EAT will look at the reasonableness of the selection and the reasonableness of the manner of dismissal.

Where there are two or more employees engaged in similar employment, the employer is obliged, in the absence of criteria specifically agreed with the trade union, to adopt some sort of objective criteria for differentiating between one employee and another. Failure to do so may render the dismissal unfair. In theory, there is nothing to prevent employers using any of a wide range of objective criteria such as capability, length of service, attendance record, disciplinary record, skill levels, etc. All things being equal, and with no objective criteria to select between one employee and another, an employer will be expected to resort to the "last in - first out" (LIFO) rule.

The key issue for an employer is to ensure that the criteria chosen can be verified by reference to company data and that they are applied consistently across the company. The employer must be able to demonstrate that a particular employee had been compared to others who might have been made redundant and had been selected fairly on the basis of the pre-determined criteria. If there is a procedure for the selection for redundancy within the employment, the employer must be able to show that the procedure was applied to each employee who has been made redundant. If the employer departs from the procedure, he must show special grounds for justifying that departure.

Custom and practice will vary between industries and sectors of industries. For instance, LIFO is commonplace in the manufacturing industry, but not in the building industry.

The employer must ensure that the selection has been made from the correct pool of labour. Sound selection criteria applied to the wrong group would be likely to be an unfair dismissal. The employer has the discretion to decide the appropriate pool, the main criterion being that any such selection must be reasonable.

Where an employee claims unfair selection for redundancy, an employer must be able to objectively justify the criteria chosen and the rating under each criterion of the employee selected. In *Boucher v Irish Productivity Centre*⁷¹, the EAT accepted that the employer had to select five workers for redundancy from a group of individuals with different skills and contributions to make to the company. The EAT said that in the selection of each individual employee, it would examine the assessments involved and would need to be satisfied that reasonable criteria were applied to all employees concerned and that the selection of the individual in the context of such criteria was fairly made. It also highlighted that in a general

⁷⁰ *Clehane v Gouldings Chemicals Ltd* UD280/1987

⁷¹ [1990] E.L.R. 205

redundancy situation, the individual employee must still have the right to be fairly assessed for selection.

In *Boucher*, the employer referred to various criteria used to justify retaining a balance of skills, which was accepted as being a valid requirement of the company, but the variables used, such as income earned, credit for research, time and versatility etc. were not put to each of the claimants as part of the selection process. Nor were they aware of the selection criteria and they therefore could not make a constructive contribution to the process. The dismissals were deemed unfair.

Compare this 1990 *Boucher* decision with the Supreme Court decision a year later in *Hickey v Eastern Health Board*⁷² referred to above. In *Hickey*, the Court held that the right to be heard enshrined in natural justice did not apply in a redundancy situation. However, the *Hickey* case did not involve selection for redundancy but rather the simple fact of one employee's function being redundant. In that case, the employer did not have to look at selection criteria to be applied in a selection process. As stated above⁷³, the 1993 Act imposed the "reasonableness" requirement on redundancy dismissals, which is in keeping with the view taken by the EAT in *Boucher*.

6.4 Case law for unfair selection

In the case of *Dawson v Eir Imports Limited*⁷⁴, it was established in evidence that there was no "last in - first-out" rule in operation in the employment nor was there any union/management agreement. The employee was selected on the basis of her competence, having been determined not to be as competent as other members of the staff. The EAT laid down the following principle:

"Following an assessment of the comparative performance of all similar staff the claimant was selected. The respondent retained the employees who he thought could best contribute to the company. The claimant's performance was judged to be weakest. The criteria used in the absence of any other procedures were appropriate in the circumstances. The respondent was competent to make the assessment having regard to the small number of staff and his close contact with them. The principles of natural justice did not require the respondent to give the claimant (employee) details of this assessment and his not doing so resulted in no injustice."

In *Kirwan v Iona National Airways Limited*⁷⁵, the claimant was selected for redundancy due to alleged slow productivity. However, the selection was deemed unfair given that his low productivity was never addressed to him and he was not advised that such productivity might impact on his future with the company.

⁷² [1991] 1IR208

⁷³ Para 5.1

⁷⁴ UD 616/93

⁷⁵ UD 156/87

In *Bradley v Kilsheelan Technology International Limited*⁷⁶ the Tribunal considered that selection criteria for redundancy agreed by staff by secret ballot was a fair selection procedure. The company had previously entered into a collective agreement with the union which provided that in the event of redundancies, a policy last in, first-out would apply. However, new criteria for the selection of staff for redundancy were accepted by a majority of voters by way of a secret ballot and the EAT held the company applied a fair and proper procedure in its redundancy process.

In *Hackett v Banberry Trading Company Ltd*⁷⁷ the EAT held that the respondent's use of LIFO in order to select a candidate for redundancy made good commercial sense.

⁷⁶ *Bradley v Kilsheelan Technology International Limited* 6 June 2005

⁷⁷ *Hackett v Banberry Trading Company Ltd* 25 July 2006