Selection – Risks and Strategies Associated With Selection and Non-selection

Start with the end in mind…

Whenever an organisation is contemplating any decision in respect of an employee, consideration must be given to where this could end up and what the likely outcome of a third-party hearing will be. The potential for claims exists with regard to all employment rights legislation (Payment of Wages, Equality and Unfair Dismissals in particular), the law of contract and injunctive relief, as well as Industrial Relations legislation (usually a voluntary process with non-enforceable recommendations).

We are in times of very significant change, with social distancing and a recession requiring most organisations to re-assess their business model in order to "right size" and ensure it is maintains competitiveness. This may involve changes to numbers employed, roles and responsibilities, remuneration and conditions of employment.

It is impossible to avoid all risks as every decision, that involves any change, will have an element of risk. From an organisational perspective it is important to understand that risk, prior to making the decision, and put in place strategies to minimise the risk.

This paper will focus on change that must be implemented without agreement which means it will be more open to third party challenge. When change must be forced and every member of staff are not impacted in exactly the same way then the organisation has to decide between employees to determine who will be impacted by what change.

The focus of this paper will be on the issue of "selection". Remember, there are always two possible sources of claim when it comes to selection, the employee who was selected but did not want to be, and the one who was not selected but did want to be.

The issue of selection will be considered within the context of several pieces of key legislation. If you apply any change to some employees and not to others, then the question of selection will arise.

Unfair Dismissals

The **Unfair Dismissals legislation** provides for redundancy to be used as a legitimate defence against a claim for unfair dismissal. Redundancy is a form of dismissal, a position is made redundant and an individual is dismissed by reason of that redundancy. Most claims involving redundancy are taken under the Unfair Dismissals legislation. Claims under the Redundancy legislation are usually taken when the claimant is seeking their statutory redundancy rights

and the employer is claiming it is not a redundancy. It is relatively easy to present a case to justify a genuine redundancy as the various definitions of what constitutes redundancy are very broad.

In general, an employee must have 52 weeks continuous service to qualify to take a case under the Unfair Dismissals legislation and 104 weeks for Redundancy. Redundancy is not and cannot be used as a means of getting rid of problem employees who should have been properly managed through the disciplinary process.

It is also important to remember that dismissals (other than constructive dismissals) are automatically deemed to be unfair until such time as the employer proves that they are not unfair (guilty until proved innocent). There are two requirements to prove a dismissal is not unfair, there must be a legitimate reason to justify the decision to dismiss and the employer must also demonstrate that they have acted reasonably by following proper procedures.

S5 of the Unfair Dismissals states *"in determining if a dismissal is an unfair dismissal, regard may be had …. to the reasonableness or otherwise of the conduct (weather by act or omission) of the employer in relation to the dismissal."* This applies to all dismissals including redundancy, a proper process must be carried out.

A General Guide

Here is a general guide as to what will be expected, by third parties, in respect of organisations implementing redundancies. Remember, even with genuine redundancies, if reasonable procedures are not applied a finding of unfair dismissal is likely.

The following **process** is designed to minimise the risk under all areas of employment legislation. However, a forced change, regardless of how good and reasonable the process, can still leave the organisation exposed under the employment contract.

1. Consultations should take place with employees, who are within scope of possible redundancy, before any final decisions are made. Employees should be informed that their positions are at risk and the reasons why they are at risk. The employees should be given an opportunity to contribute suggestions to avoid or minimise the number of redundancies. Consideration must be given to other measures/options such as changing roles (especially if any new roles are being created), reductions in pay, lay-off and short time working. It may be difficult for an employer to justify redundancy while government employment supports remain in place. Redundancy should not come as a surprise, there should be warning in advance of the final decision.

2. The organisation will have to provide objective criteria to justify who is within and outside the scope of this exercise. An issue can arise here when an employee within scope can point to other positions that they are competent to perform, or would be with a reasonable amount of re-training.

3. The company must be seen to have considered any suggestions put forward by the staff, or their representatives, and give them considered responses.

4. Voluntary redundancy will have to be considered in the first instance and sound reasons given if this approach is not chosen.

5. The employees, within scope, should be informed of the selection criteria to be used and allowed an opportunity of inputting their suggestions. The employer must establish that the criteria are relevant to the position and that they will be applied fairly. Remember redundancy is impersonal and applies to the position, not the person. Full time, part time, fixed term, agency staff etc all must be included in the same process. Last in first out, is impersonal and the easiest to defend, deviating from this will need to be justified. Employers may argue based on the competencies needed for the business going forward, but remember, the organisation will have to be able to prove this to the satisfaction of the third party.

6. There must be an appeal process made available to employees to challenge the original decision. This should be independent and objective.

In defending a claim of unfair dismissal third parties will consider what happened elsewhere within the organisation, as such, consistency is also important.

Equality

For all changes, other than termination of employment, be that redundancy or other reasons for dismissal, equality and discrimination are the main areas of concern or risks for employers when it comes to selection.

In considering changes and selection of those who will be impacted it is important that the organisation identifies all those who may be covered by this legislation and ensure objective grounds apply to justify their decisions and that they can defend any challenge under equality legislation including the whole area of "reasonable accommodation".

The principles and procedures described above also apply to changes other than termination. It is important to note that a contract of employment is legally enforceable and can only be changed through the agreement of both parties, that applies to each employee. Ultimately, when a claim has been made the responsibility rests with the employer to prove that discrimination did not take place.

" disability" (under S.2(1) of the Employment Equality Acts 1998 – 2015) means—

> (*a*) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body;

(*b*) the presence in the body of organisms causing, or likely to cause, chronic disease or illness;

(*c*) the malfunction, malformation or disfigurement of a part of a person's body;

(*d*) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction; or

(*e*) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour, and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person.

Discrimination for the purposes of this Act, under S.6(1) of the Employment Equality Acts 1998 – 2015)

For the purposes of this Act and without prejudice to its provisions relating to discrimination occurring in particular circumstances discrimination shall be taken to occur where —

(*a*) a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in *subsection (2)* (in this Act referred to as the ' discriminatory grounds ') which —

(i) exists,
(ii) existed but no longer exists,
(iii) may exist in the future, or
(iv) is imputed to the person concerned.

(*b*) a person who is associated with another person —

(i) is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation, and
(ii) similar treatment of that other person on any of the discriminatory grounds would, by virtue of *paragraph (a)*, constitute discrimination.

As between any 2 persons, the discriminatory grounds (and the descriptions of those grounds for the purposes of this Act) are—

(*a*) gender
(*b*) civil status
(*c*) family status
(*d*) sexual orientation
(*e*) religious belief
(*f*) *age*
(*g*) *the disability*
(*h*) race, colour, nationality or ethnic or national origins

(*i*) traveller community

Like Work S 7. (1)

When change is taking place it sometimes causes people to re-assess their current circumstances as well as considering any proposed changes. The issue of like work can come under the microscope and even where nothing changes claims may arise. If two people are doing the same work, or work of equal value, the employer could be called up on to justify any difference in pay and conditions of employment within the context of equality legislation.

S.8 (6) sets out potential areas where discrimination could exist.

"Without prejudice to the generality of *subsection (1)*, an employer shall be taken to discriminate against an employee or prospective employee in relation to conditions of employment if, on any of the discriminatory grounds, the employer does not offer or afford to that employee or prospective employee or to a class of persons of whom he or she is one—"

(*a*) the same terms of employment (other than remuneration and pension rights);
(*b*) the same working conditions; and
(*c*) the same treatment in relation to overtime, shift work, short time, transfers, lay-offs, redundancies, dismissals and disciplinary measures.

As the employer offers or affords to another person or class of persons, where the circumstances in which both such persons or classes are or would be employed are not materially different.

Redress under equality legislation can be substantial and involve correction for the future and up to three years retrospection in the form of arrears of remuneration. A claim may also arise for discriminatory dismissal under the equality legislation. Claims for unfair dismissal and discriminatory dismissal cannot both be pursued.

Conclusion

Any changes should be done through agreement, if possible, and individuals should be asked to confirm their agreement in writing. Very often, in times of rationalisation, people are prepared to accept change, even involving loss of pay or benefits, as they can understand the reasons why it is necessary and the alternative of not accepting the change is even worse on the employee.

Get the communications and procedures right. There should be no surprises and everyone should have the opportunity of inputting prior to any final decision.

The criteria for selection must be relevant. You cannot make things up to suit candidates or introduce new elements that were not there in the past or a clear need cannot be established for the future. Once you are happy that the criteria have stood up to internal challenge, and

you can demonstrate relevance to a third party, it is most important that you establish a process whereby you can demonstrate independent and fair application of the criteria.

This paper has dealt with the area of selection and advices should be sought on other areas of employment legislation and industrial relations when contemplating any change, especially when it is not done through agreement.

Finally, if redundancies are implemented on a voluntary basis the organisation usually maintains sole right of acceptance of any applicants. This does not mean they are risk free from claims from those who were not accepted.

If you would like to talk to us about any of the above issues or about engaging your people through the period ahead, please get in touch with me at brendan.mccarthy@stratis.ie or any one of our Partners.

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