



EMPLOYMENT  
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SPECIALIST SOLICITORS  
FOR EMPLOYEES

## **An Employee's Guide to Redundancy & Unfair selection for Redundancy**



## ABOUT THE AUTHOR

Seán is the principal of Employment Matters, a boutique employee-focused law firm based in Waterford City but servicing the entire South East as well as Dublin.

Seán is a qualified solicitor with a Masters Degree in Marketing from the UCD graduate school. Seán also holds a Diploma in Commercial Law from the Law Society and a Diploma in the Law of eCommerce.

We are a specialty law firm focusing its practice on the areas of employment law, especially in the areas of Unfair Dismissal, Redundancy Matters, Discrimination, Protected Disclosure, Health & Safety at work, Agency work and Fixed and Part term contracts.

Our clients come to us because of our experience, knowledge, expertise, track record in and out of court, and our reputation for integrity and client satisfaction.

We emphasize practical, reasoned advice in an effort to minimize or prevent legal difficulties. When a client is involved in a dispute, our primary concern is to achieve an expeditious and economic result. When formal litigation or other dispute-resolution proceedings are necessary, we provide aggressive, high calibre advocacy.

In particular, we are focused on providing you with employment law advice and consultancy to help employees prevent or resolve employment issues where conflict has arisen or where there has been a breakdown in the employment relationship.





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## Introduction

Do you know your rights on Redundancy? Is there a downturn in your employer's business due to COVID-19? Have you been asked to sign a waiver or compromise agreement?

It is important in considering a redundancy situation and in particular where one or a number of employees is to be selected for redundancy out of a larger group of employees all engaged for the same purpose that a thorough and comprehensive plan and procedure is followed.

There are many practical issues involved such as:

- The appropriate notice period
- The length of service
- Contractual redundancy payments vs. Statutory payments
- What written policy or guidelines exist

whether there is a well recognized custom or practice within the company whereby redundancy packages are automatically paid as additional ex-gratia payments to the statutory redundancy.

As with all unfair dismissal cases, the onus rests on the employer to prove that the dismissal is not unfair.

Where an employee is dismissed on grounds of redundancy, the dismissal may still be unfair if there has not been adequate consultation or where the employee has been unfairly selected for redundancy.



## WHAT IS UNFAIR SELECTION FOR REDUNDANCY?

Redundancy is a dismissal or termination of a contract of employment by reason of the redundancy or elimination of that particular role and is capable of a challenge if it is unfair.

A redundancy arises where an employee's role ceases to exist, for example in the event that an employer needs to reduce its total number of employees or to close down a department, division, or business completely.

In the case of a reduction in the number of employees, redundancies normally happen either because:

- The work of particular employees is no longer required
- The work of particular employees can be spread around other employees without taking on additional employees







## WHEN DOES A GENUINE REDUNDANCY SITUATION EXIST?

It is for the employer to prove that a redundancy situation exists that justified the dismissal at the date of the redundancy or that it was likely to arise in the immediate future. A genuine redundancy situation exists where dismissal is wholly or mainly attributable to one of the factors set out in section 7 (2) of the Redundancy Payments Act 1967 (as amended by the redundancy payment act 1971) ("the act").

In a challenge to a redundancy selection in the Workplace Relations Commission "WRC", the tribunal will consider whether a genuine redundancy existed in the first instance and for example such a redundancy may be considered a genuine reason for redundancy where it accords with section 7 (2)(c) of the act – "work to be done by other employees or otherwise" or equally reliance may be placed on section 7(2)(e) – "work to be done by an employee who is also capable of doing other work".

However, whether this is in fact the case (that such a situation did or did not pertain at the time to an employee who was made redundant or was likely to arise in the immediate future) will be a matter for the company to prove to the satisfaction of the WRC should proceedings for unfair dismissal be initiated.

Typically in a redundancy situation a company will set about justifying this by providing the relevant accounts and balance sheets that show the impact that the economic slowdown is having on their business that left them with no option other than to seek to make a role or roles redundant.

Therefore financial evidence together with a record of the meetings and discussions that led to the decision to make a role(s) redundant are typically relied on.



It is always important to know if such evidence exists. For example, an employee will often cite that the company is in the process of actively recruiting more staff and that what appears to be occurring is more in the nature of a restructuring of the workforce. Thus any specific verifiable information in relation to the filling of these positions would be helpful.

It is also helpful to verify as to whether positions had been advertised. Often at the outset of a case, we do not have the necessary information to fully assess whether a genuine redundancy situation did in fact exist. However, the onus would rest on the company to prove to the satisfaction of the WRC that it in fact did.

## **WHEN IS AN EMPLOYEE UNFAIRLY SELECTED FOR REDUNDANCY?**

It is important to ascertain if the company had any redundancy policy either that the employee was aware of or that was communicated to him. Such policy may be express or implied by custom and practice.

For example, some companies follow the policy of “last-in, first-out”. In the absence of any stated policy, the onus is on the company to apply objective criteria in selecting a person for redundancy.

A crucial aspect of employment law is that the redundancy applies to the role and not the person. It is important therefore to understand the nature and structure of the organization, the department within which an employee worked, and the roles that each employee undertook in the department.

Like discrimination, unfair selection relates to an employee’s treatment in relation to other employees and it cannot arise in isolation. There is an obligation on the company to consider the full range of persons in a specific role and apply criteria that were objective in selecting the individual as the person to be made redundant. Thus if an individual is the only person doing a specific role, unfair selection may not arise.

It is important to remember that redundancy must be the only or main reason for dismissal. If, as a company indicates that the reason for dismissal was prompted by capacity/capability to perform certain duties, etc, this would be detrimental to their case in that it would show that the real reason was in fact personal to the employee. This can however be avoided by a company where the capability of employees is specifically identified as a criteria in the selection process.

It is important therefore at this stage to establish and confirm whether an employee was ever informed of any dissatisfaction with work performance, capabilities or competence. You might also confirm that there are no other issues of contention or complaint made against the employee during the course of the employment and that there were no allegations or complaints made against the employer or any work colleagues during the course of the employment.



# In a Redundancy situation, did the employer act reasonably and fairly?

There is no statutory requirement for an employer to have consulted with an individual employee prior to that employee being made redundant. However it is now viewed as good industrial relations practice to do so and failure to do so may be utilized to show the unreasonableness of the employer in the circumstances.

Often a company will arrange meetings with employees and give advance warning of the nature of the meeting or the fact that redundancy was being considered. Only when having consulted with the employees effected and sought their views and suggestions in relation to possible redundancy should a company seek to select individuals for dismissal and confirm that a redundancy situation exists. At this stage notice can be given and is normally set out in writing confirming the selection, the procedure which was followed, the criteria used and setting out the terms of the redundancy.

At the consultation stage, there is a requirement to consider alternative work within the company. The employee if at all possible should be given the opportunity to consider alternative work within the company or put forward any proposals in relation to alternative work or alternative or reduced conditions of employment within the company.

It is important to know whether the company gave any consideration to such matters and if they did give such consideration, whether such matters are documented. There is a view that if no consideration was given to alternative work within the company that this would be capable of being viewed as unreasonable by the employer.

## WHAT ARE THE COSTS OF AN APPLICATION TO THE WRC?

Unlike many other forums for legal redress, the WRC does not have the power to award costs.

Therefore each party must bear its own costs. It, therefore, is advisable to always consider the potential exposure to costs at this stage and the fact that whatever the outcome of the case, although the applicant will not be liable for the employer's legal costs before the WRC.

Of course, this also means that even if an applicant is successful he must bear his own costs. It is often easier to quantify the cost exposure before the WRC than in other legal forums which may be helpful for an employee in considering his options.

If counsel is required to be instructed in relation to the WRC hearing the likely fee could be in the region of €1,500 (to include preparation for the hearing, advice on proofs, and one consultation and exclusive of vat at 21.5 %). Any additional work would attract extra fees



## **An employee's entitlement to a reference**

Often a reference is an important issue that must be considered before seeking legal redress. The employee will have to decide on how important a reference may be given the nature of the industry in which he works.

There is no obligation on the company to supply a reference and typically when legal proceedings have issued, references are often reduced to mere factual statements of the dates of service and the roles and responsibilities carried out.

If a matter is to be ultimately settled a more fulsome reference may be negotiated. It is helpful for a reference to state that his position terminated by reason of redundancy and therefore avoid suspicion of misconduct or incompetence.

If the matter goes to hearing the opportunity to acquire a meaningful reference is generally lost.

## **AN EMPLOYEE'S ENTITLEMENT TO A P45**

Every employee dismissed or ceasing employment for whatever reason is legally entitled to a p45. If not provided this should be formally requested and stating that in the event that the company fail to furnish his p45 by return contact shall be made with the revenue commissioners to engage their assistance in procuring same.





## What compensation or redress is an employee entitled to?

Compensation is the most common remedy awarded by the WRC. If successful in an unfair dismissal action an employee may be awarded a maximum of up to two years salary. However, such a high award has only been made on a handful of occasions and should not be expected.

A more realistic result, if the company cannot prove to the satisfaction of the WRC that the dismissal was not unfair, is a sum in the region of 40%-50% of the two years. Therefore one year's salary would be seen as a very good result in most circumstances. The average award of the WRC currently is €11,000.

However, there are two things that must be considered in trying to quantify any amount that may be awarded:

The award is only made for actual loss from the date of dismissal to the hearing of the action and for any projected loss into the future. If an employee was to take up another job or to set up a business on his own account the actual loss would be the loss of salary up to the start of the new job and the differential, if any, of the rate of remuneration between the old job and the new job. There is an obligation on any claimant to mitigate his loss and it is useful for an applicant to be able to demonstrate the manner in which he attempted to do so and this should be recorded and documented by keeping the details of all applications made etc.

Traditionally the WRC's awards are lower in relation to claimants who are younger and have a longer working career ahead of them than older claimants. Regard may also be given to the length of time an applicant has worked with a company.



## DO YOU STILL HAVE A QUESTIONS?

GET IN CONTACT WITH US THROUGH THE FOLLOWING WAY'S

Our dedicated team of Employment Law Specialists are waiting to help you with your query.

The first consultation is of no obligation so call us today on:



1890 88 90 90



[info@ormondesolicitors.ie](mailto:info@ormondesolicitors.ie)



<https://www.employment-matters.ie/>



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The background of the entire page is a dark, textured surface with several large, interlocking gears. The gears are rendered in a light, almost white, color, creating a high-contrast, industrial aesthetic. The gears are of different sizes and are positioned in a way that they appear to be meshing together. The largest gear is on the left side, with its teeth pointing towards the top and bottom. Another large gear is on the right side, partially obscured by the text box. A smaller gear is visible at the bottom center. The overall effect is one of mechanical complexity and precision.

## **DISCLAIMER**

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# EMPLOYMENT MATTERS

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## ABOUT US

How do we know what we're talking about? Well, last year alone we cost Employers all over Ireland over €1 million in payments to disgruntled employees.

Over the last eight years, we've pretty much seen it all, and we know every trick in the book. We've represented employees in the Employment Appeals Tribunal, the Equality Tribunal, the Rights Commissioner Service, the High Court, the Circuit Court and the Labour Court. We've met judges, barristers (both senior and junior counsel), Tribunal chairs, rights commissioners, equality officers, adjudicators, winners, losers, the cook, the baker, the candlestick maker!

We've fought cases under the Unfair Dismissals Acts, Equality legislation, Data Protection Acts, for breach of contract and payment of wages. We've taken injunctions and prevented dismissals, negotiated settlements and compromises and achieved significant compensation awards costing employers a lot of money along the way.

One Client of ours was dismissed by his employer, a well-known hotel chain, for allegedly head-butting a work colleague at the staff Christmas party. We took on his case, although after viewing the CCTV footage provided to us under the Data Protection Acts we weren't particularly confident. However, following three days of hearing in the EAT our Client was awarded €35,000 for unfair dismissal. From his employer's perspective, they've been stung for €35,000 as well as three days of legal fees and the disruption to their business having their HR Director, General Manager, Head of Security and others at the hearing and away from their jobs for three days. Best of all for our Client though was how we made the HR Manager look pretty silly in cross-examination. She was ridiculed for not knowing or admitting to know the importance of a fair procedure in an employment context.

She was humiliated.

To our Client that was pay-back to a degree for how low and small she made him feel when they decided not to listen to his explanation for what had actually happened. You see our Client hadn't headbutted anyone. In fact, he'd been sober that night. But he wasn't particularly liked at work and when there was a scuffle with another member of staff, management saw their chance. They could get rid of our Client who had been a thorn in their side. So, it didn't matter what our Client said or did. No-one was going to listen to him, he'd headbutted someone and had to go...until we showed up.

Last year we represented employees in over 80 cases that went to hearing. We achieved awards of over €1 million, that's in awards alone. One million euro! That's not to mention the other costs of defending the case including of course legal fees and the intangible costs associated.



As I mentioned above though the tables are turning against claimants who are unrepresented or badly represented. It seems to me that the Government in introducing the new WRC process succumbed to the lobbying of big business and presumably part of that was to do with trying to make Ireland as attractive a destination as possible to foreign companies. The key to that often is to water down employment rights and make the employment market and in particular hiring and firing less off-putting for employers. And that is what the WRC has done in my view. So how is that you might ask? Well in my view the following is important in revealing how the system works against Claimants.

Hearings are conducted in the WRC in private. Now you might think that this is a good thing and certainly that's the way it was sold by the Government at the time but in reality there is no logical explanation for this and in fact it could be argued to be unconstitutional.

You see leaving aside the constitutionality of things (whether justice should be seen to be done) what employers hate more than anything is bad publicity.

Any case in the EAT, the Equality Tribunal or the Courts was bad for business. A carmaker doesn't want to alienate half their customers by being accused of discriminating against women. Under the new system, that threat is now gone.

The hearing are held in private and to compound this, the decisions are anonymised. What that means in reality is that even the worst offenders can take a chance at the early WRC adjudication stage and damn the consequences if they lose. We are seeing more and more of these cases running where previously they may have settled.

Secondly, while not a change per se, the fact that the WRC doesn't award costs is certainly more advantageous to the Employer than the Claimant. You see the Employer probably has a lawyer on retainer and they are doing lots of other things for which that lawyer is probably getting well rewarded so its easy for the Employer to get his lawyer into the saddle for a WRC hearing. Not so much for you, a claimant who may not have had to use a lawyer at any time in the past, how do you choose one? who do you choose? who will properly represent you?

Do they know what they are doing?

It should also be mentioned here that of course it's generally cheaper for an employer to retain a solicitor than it is for you because of course the employer gets to claim their VAT back making it about 23% cheaper for them than for you.

Another thing we see frequently is that employers will invariably roll out the big guns in Dublin, magic circle type firms. We've dealt with them all Arthur Cox, William Fry, A&L Goodbody, Matheson and Mason Hayes & Curran in the last year alone. We have also dealt with the mid-tier boutique firms like Daniel Spring & Co., Beauchamps and Byrne Wallace. These firms are all excellent, but do they know any more about the WRC than we do?

Some people come into and tell us that they met a lawyer who balked at the prospect of going up against the big boys and that makes me wonder why? So who do you want on your team? some guy who has never set foot in the Labour Court? or an expert who is well known there and who is respected by the other side?

Unfortunately, litigation is expensive. We're not saying we've got some silver bullet that's going to make all of your problems go away, that there's some magic dust that we'll sprinkle and it'll get the other side to pony up regardless of culpability.