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Collective Redundancy

1 What legislation covers collective redundancy?

The Protection of Employment Act, 1977 Act (as amended)[1] makes it mandatory on employers proposing a collective redundancy: (a) to engage in an information and consultation process with employees' representatives and (b) to notify the Minister for Enterprise, Trade and Employment of the proposed collective redundancy.

As a consequence of the European Court of Justice judgement in Junk v Kuhnel (Case C-188/03), an employer is prohibited from issuing any notice of redundancy during the mandatory employee information and consultation period (required by the l977 Act) and until 30 days have elapsed from the date on which the Minister has been notified[2]. For the avoidance of doubt, the 30 day mandatory information and consultation process and the aforementioned 30 day period from the date of notification to the Minister may run concurrently. However, since it will not be possible to complete the notification to the Minister until the identity of the employees' representatives for the purpose of the information and consultation process has been established, it is conceivable that both periods may not be entirely concurrent in situations where the employer does not ordinarily engage in collective bargaining, does not have an employee representative forum and delays in facilitating the selection/election of employee representatives for the purposes of complying with the provisions of the 1977 Act.

2 What is collective redundancy?

'Collective redundancy' is the making redundant within a period of 30 consecutive days, of a minimum number of employees, that minimum varying with the normal size of the establishment's workforce. The relevant minimum number of proposed redundancies vis-à-vis the size of the overall workforce is as follows:

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[1] The 1977 Act has been amended principally by Protection of Employment Order 1996 (SI 370/1996) and the European Communities (Protection of Employment) Regulations 2000 (SI 488/2000). The Protection of Employment (Exceptional Collective Redundancies) Act, 2007 provides for the insertion of a new Section 16(2) into the Protection of Employment Act, 1977 to give effect to the judgement of the European Court of Justice in Junk v Kuhnel Case C-188/03 (of January 2005) see 3.3.3 below for more details on the effect of this legislation.

[2] An attempt to effect collective redundancies in that period will be an offence and render the employer liable for a fine of €3000, unless the employer can show substantial business reasons for non-compliance e.g. bankruptcy, insolvency or court order.

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1. 5 employees in an establishment employing 21-49 employees.
2. 10 employees in an establishment normally employing 50-99 employees.
3. 10% of employees in an establishment normally employing 100-299 employees, or
4. 30 employees in an establishment normally employing 300 or more employees[3].

3 What is the Information and Consultation Process?

3.1 What are the obligations to enter consultation with employees?

Section 9 of the 1977 Act requires employers to engage in a consultation process with the relevant employee representatives, 'with a view to reaching an agreement'. Similar wording in the equivalent UK legislation has been judicially interpreted as requiring the employer to allow the employee representatives adequate opportunity to consider the employer's proposals and the information given under the various headings outlined above, and to make constructive proposals in response thereto. The employer's obligation in this regard does not extend beyond giving the representatives reasonable opportunity to revert with their proposals having had an opportunity to consider the employer's initial proposals[4].

3.2. Information and Consultation Process with Employees' Representatives

3.2.1 What does the legislation require?

There should be an information and consultation process with employees' representatives commencing not later than 30 days before any individual notice of dismissal is issued[5]. The rationale for the information and consultation period is to give the parties the opportunity to discuss the basis on which particular employees will be made redundant and to consider whether the overall number of employees being made redundant can be reduced (i.e. to discuss possible alternative redeployment/retraining).

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[3] In computing the number employed in an establishment, look at the average number employed in each of the 12 months preceding the date on which the first dismissal takes effect.

[4] "The essential point to my mind is that the consultation must be one where if they wish to do so workers' representatives can make constructive proposals and have time in which to do so." (Blackburne J in Griffin v South West Water Services Ltd [1995] IRLR 15).

[5] On the interpretation of the word 'dismissal' see the discussion below on the Junk v Kuhnel judgement.

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The consultation with the employee representatives and the notification period for the Minister can run concurrently. It is an offence for an employer to issue notice of redundancy to any employees during the 30 day period of consultation with employee representatives. An employer found guilty on indictment shall be liable to a maximum fine of €250,000.

3.2.2 Who are employees representatives?

'Employees' Representatives' are defined as:

- A trade union, staff association or excepted body with which it has been the practice of the employer to conduct collective bargaining negotiations, or
- 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 amongst their number to represent them in negotiations with the employer.

3.2.3 What information must be given to employees representatives?

In the course of the information and consultation process, the employer is expected to provide the following information in writing to the employees' representatives:

1. Reasons for the proposed redundancies
2. Number/categories of employees whom it is proposed to make redundant.
3. Number/categories of employees normally employed.
4. Period over which it is proposed to implement the redundancies.
5. Criteria for the selection of workers to be made redundant.
6. If there is to be a payment other than the statutory redundancy payment, the method of calculating such payment must be set out.

Copies of all information in relation to the above, supplied to the employees' representatives, must be sent to the Minister 'as soon as possible'.

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3.3 Notification of the Minister for Enterprise, Trade and Employment

3.3.1 What is the notification to the Minister?

No Individual notice of redundancy may issue until at least 30 days after notification of the proposed redundancy has been received by the Minister. Notification should be sent by registered post or by hand. Notification should include the following:

- Name/address of the employer, stating whether employer is a company, partnership or sole trader.
- Address of the establishment where the collective redundancies are proposed.
- Total number of persons normally employed there.
- The number/categories of employees whom it is proposed to make redundant.
- The period over which it is proposed to implement the collective redundancies.
- The reasons for the proposed collective redundancies.
- Names/addresses of the trade unions/staff associations representing employees affected by the proposed redundancies.
- Details of the consultations with each trade union (commencement date; progress made etc.)

3.3.2 How long should an employer keep Records of Collective Redundancy?

Records should be kept by an employer for 3 years. The Minister may initiate a prosecution for an offence within one year of the date of an alleged offence under the Act.

3.3.3 What is the European Court of Justice case?

Junk v Kuhnel Case C-188/03

This judgement of the European Court of Justice clarifies the concept of 'redundancy' within the meaning of the Council Directive 98/59/EC and provides a definitive determination of the point in time at which the event constituting redundancy (in a collective redundancy context) occurs. The Court in Junk ruled that the consultation process required by the Directive must take place before employees are given notice of dismissal, rather than after individual notices of dismissal have been issued but before they take effect. This follows from the Court's reasoning that a redundancy, for the purpose of the Directive, means the declaration by an employer of its intention to terminate the contract of employment rather than the actual cessation of the employment relationship upon expiry of the notice period.

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A practical consequence of the Junk decision is that many employers, faced with the prospect of a collective redundancy, are more likely to want to factor into the final redundancy package, a payment in lieu and part/all of the contractual/statutory notice due to the employees concerned rather than protracting the collective redundancy process for any longer than is necessary.

3.3.4 What is the effect of the Protection of Employment (Exceptional Collective Redundancies) Act 2007 and who does it apply to?

The Protection of Employment (Exceptional Collective Redundancies) Act, 2007 provides for the insertion of a new Section 16(2) into the Protection of Employment Act, 1977 to give effect to the judgement of the European Court of Justice in Junk. The new subsection makes it an offence for an employer to issue notice of redundancy to any employees during the 30 day period of consultation with employees representatives provided for in Section 9(3) of the 1977 Act. An employer found guilty on indictment of a breach of Section 16(2) shall be liable to a maximum fine of €250,000.

The Act applies to all persons in employment in an establishment normally employing more than 20 persons.

The Protection of Employment (Exceptional Collective Redundancies) Act, 2007 does not apply to:

- Employees engaged under a contract for a fixed term or for a specified purpose except where the collective redundancies are effected before the completion of such term or purpose
- State employees other than designated industrial grades
- Local Authority officers
- Seamen.

4 How do I make a complaint regarding Collective Redundancy issues?

An employee, or a trade union, staff association or excepted body on behalf of an employee, may present a complaint to a rights commissioner that an employer has contravened Section 9 or 10 of the Act of 1977 in relation to information and consultation of employees.

A complaint to a Rights Commissioner may be made - by giving notice of it in writing. The Rights Commissioner, on receipt of a complaint, will send a copy of the notice of complaint to the employer. The Rights Commissioner will then give the parties an opportunity to be heard by him/her and to present any evidence relevant to the complaint. After hearing the parties,

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the Rights Commissioner will issue a written decision. Proceedings before a Rights Commissioner will be held in private.

The decision of the Rights Commissioner shall do one or more of the following: -

(a) Declare that the complaint was or was not well-founded,

(b) Require the employer to comply with the principal regulations and for that purpose to take a specific course of action,

(c) Order the employer to pay the employee compensation of a maximum of 4 weeks remuneration.

The complaint to the Rights Commissioner must be presented within 6 months of the occurrence of the alleged contravention to which it relates, or where the rights commissioner is satisfied that exceptional circumstances existed which prevented the presentation of the complaint within that period, within a further 6 months.

A party concerned may appeal to the Employment Appeals Tribunal from a decision of a Rights Commissioner. The appeal must be made within 6 weeks of the date on which the Rights Commissioner communicated the decision to the parties. An appeal may be made, by giving notice of the appeal in writing, to the Employment Appeals Tribunal and the Tribunal will copy the notice to the other party concerned. The Tribunal will give the parties an opportunity to be heard and to present any evidence relevant to the appeal. The Tribunal will then issue a written determination, which may affirm, vary, or set aside the decision of the Rights Commissioner.

Where an employer has neither implemented nor appealed the Rights Commissioner's decision, the employee may complain to the Employment Appeals Tribunal. The employee must notify the Tribunal in writing of the complaint. In such circumstances, the Tribunal is empowered to issue a determination without rehearing the case and, if it upholds the complaint, will confirm the decision in its determination.

Failure to appear before the Employment Appeals Tribunal where a subpoena is served and/or failure to produce documentation is an offence liable, on summary conviction, to a fine of up to £1,000.

A party to proceedings before the Employment Appeals Tribunal may appeal to the High Court from a determination of the Tribunal on a point of law and the determination of the High Court shall be final and conclusive.