



## **Dismissal by Reason of Redundancy and the Redundancy Payment Acts 1967-2007<sup>1</sup>**

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The objective of this article is to provide an overview of the law relating to the dismissal of employees by reason of redundancy – focusing on the obligations imposed upon the employer and the rights of the employee.

### ***Introduction***

The current economic downturn has resulted in redundancy numbers reaching volumes not seen since the 1980s. Figures from the Department of Jobs, Enterprise and Innovation show that redundancies peaked in 2009 when they totalled 77,001: an increase of almost 500% on the 2001 figures.

Between January and July 2011, approximately 29,738 employees were made redundant – of these employees 62% were male, compared to 38% female<sup>2</sup>. In 2012 over 33,000 workers were made redundant, and this trend is set to continue into 2013 with provisional redundancy figures from the Redundancy Payments Section of the Department of Social Protection for January 2013 of 2230 workers. In addition Minister Brendan Howlin announced another 2,500 voluntary redundancies from public sector employment in 2013, the EBS announced 200 redundancies in January 2013 and the Irish Bank Resolution Corporation (IBRC) (formerly Anglo Irish Bank) was put into liquidation, resulting in another 850 job losses in February 2013.

In 2009, Ger Deering, the Director of the National Employment Rights Agency (NERA), reported that they had experienced a huge upsurge in enquiries about the issue of redundancy. He commented that NERA staff were stretched as they attempt to deal with over 600 calls per day, over half of which are in some way related to redundancy, and approximately 40% coming from employers themselves<sup>3</sup>.

Similarly, the Employment Appeal Tribunal (EAT) has noted the same trend. In 2011 redundancy claims accounted for the bulk of the work of the Tribunal, accounting for 31%<sup>4</sup> of the total cases referred<sup>5</sup>. In their 2011 Annual Report Kate T. O'Mahony, Chairperson of the Tribunal, noted that due to the increase in redundancy appeals referred to it over recent years, the Tribunal took the initiative to stream the hearing of redundancy claims in areas of high demand. As a consequence of

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<sup>1</sup> The law relating to redundancy was significantly altered in 2003, almost some 35 years since the original Act was enacted. Under pressure from the trade union movement and in an attempt to bring Ireland into line with European provisions, the government committed under the "Sustaining Progress" programme to introduce amendments to the statutory redundancy payments scheme. This resulted in the enactment of the Redundancy Payments Act 2003.

<sup>2</sup> According to statistics from the Irish National Organisation of the Unemployed - [http://www.inou.ie/policy/statistics/redundancies/&\\_figures=national&\\_year=2011](http://www.inou.ie/policy/statistics/redundancies/&_figures=national&_year=2011)

<sup>3</sup> Source: Sunday Business Post, Sunday March 29, 2009 – "Reading into Redundancy Entitlements" - by Dick O'Brien - <http://archives.tcm.ie/businesspost/2009/03/29/story40586.asp>

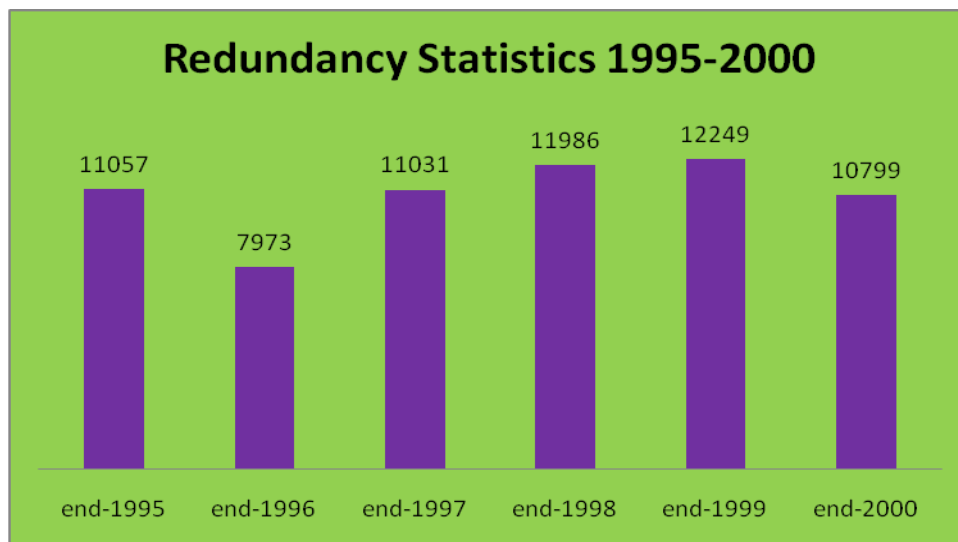
<sup>4</sup> This represents a slight decline from 33.5% in 2010.

<sup>5</sup> Unfair Dismissal accounted for 25% of cases referred and Minimum Notice claims accounted for 24% of cases referred.

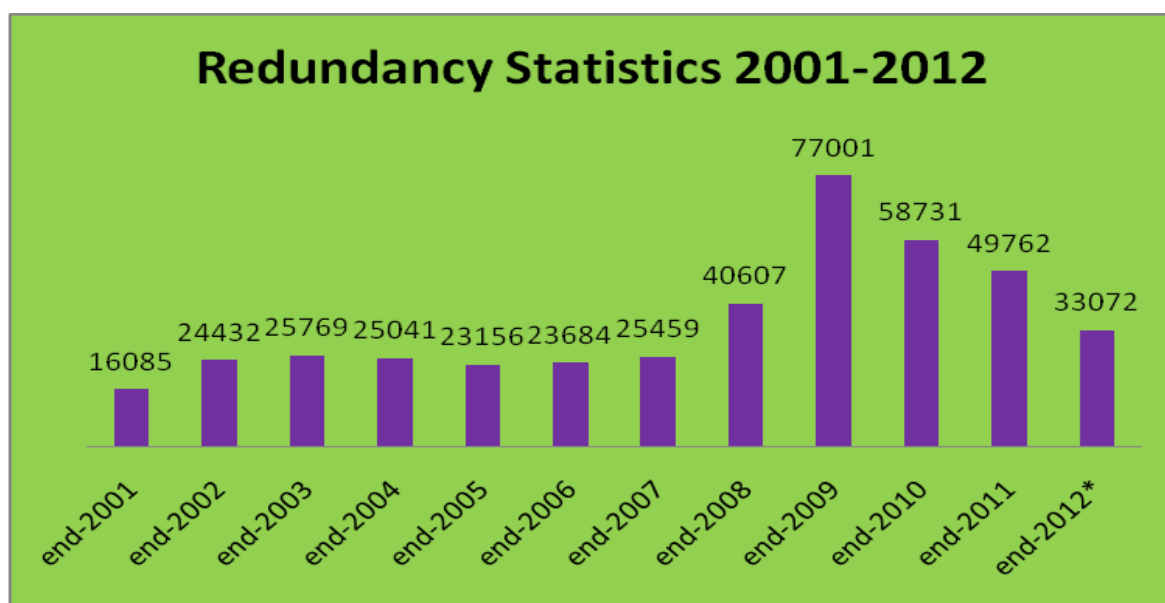
this scheme, the Tribunal disposed of 2,431 redundancy appeals, 1,000 more cases than were disposed of the previous year.

The Tables below illustrates the trend in redundancies from 1995-2000 (Table 1) and from 2001-2012 (Table 2):

**Table 1**



**Table 2**



*\*2012 figures are provisional*

*Source: Department of Social Protection*

### ***Purpose of Redundancy***

There are two major purposes behind the law relating to redundancy. The first purpose is to encourage employers to consider alternatives to dismissing their employees, and the second is to ensure that where employees have been dismissed on the grounds of redundancy that they should have at least a minimum level of payment to sustain them until hopefully they can regain employment. Therefore to mitigate the hardship of losing employment, the combined Redundancy Payment Acts provide for the making of redundancy payments in certain circumstances. In order to be awarded a redundancy payment, the employee must comply with the relevant eligibility criteria.

### ***Statutory Definition***

Redundancy is defined in Section 7(2) of the Redundancy Payments Act 1967, as being a dismissal attributable wholly or mainly to:

- A. The fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of 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 employed, or
- B. The fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where they were so employed, has ceased or diminished or is expected to cease or diminish, or
- C. The fact that the employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should hence forward be done in a different manner for which the employee is not sufficiently qualified or trained, and/or
- D. The fact that the employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforward be done by a person who is also capable of doing other work for which the employee is not sufficiently qualified or trained, and/or
- E. An employee terminates his or her contract of employment because of the conduct of the employer. For example, where an employer unilaterally alters the terms of the contract or acts in a manner that is so unreasonable that the employee has no option but to resign. In this situation the burden of proof is placed upon the employee to demonstrate that their action was justifiable before the entitlement for redundancy is sustained, and/or
- F. An employee gives written notice of termination of his/her contract of employment where he/she has been laid off or kept on short-time, and/or
- G. Where a redundancy situation exists within a company and the employer asks for volunteers, an employee who volunteers is entitled to redundancy provided he/she satisfies the eligibility criteria prescribed under the legislation, and/or
- H. The employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee has been employed (or had been doing before his dismissal) to be done by other employees or otherwise.

## ***Redundancy and Employer Obligations***

Employers are subject to the following obligations when considering redundancies:

### ***1. To Ensure that a Legitimate Redundancy Situation Exists***

In cases of dismissal by reason of redundancy it is imperative for the employer to prove that the redundancy is in fact a legitimate redundancy and that the decision to dismiss was fair in all circumstances.

To prove the existence of a genuine redundancy situation an employer must demonstrate that the employee's job ceases to exist, and the employee is not replaced. This can arise for a number of reasons including rationalization, reorganisation, not enough work, the financial state of the business, business closures etc.

In *St Ledger v Frontline Distribution Ireland Ltd (1995)*<sup>6</sup> the claimant was employed as a warehouse supervisor, and was dismissed by reason of redundancy and replaced by another worker who his employer claimed was better trained to do the work. The replacement worker had passed an examination which, with further study, might lead to a diploma. When their job specifications were compared the only differences between the claimant and the replacement worker were that the replacement worker reported to a different person and that he was able to do certain work without the assistance of a part-time helper. Accordingly, the Tribunal was satisfied that the nature of the work did not change, nor did the manner in which it was done. Therefore there was no redundancy within the meaning of either definition 7(2) (d) or (e) of the Redundancy Payments Acts and the Tribunal determined that the claimant had been unfairly dismissed.

In *Kathleen Concannon v Robnev Ltd, T/A The Whistle Shop (1998)* the Tribunal ruled that there was not a genuine redundancy situation (despite the employer's allegation regarding a downturn in the business) as some ten days prior to the termination of the claimants contract, a former employee was re-employed, and after her termination another person was recruited to the same position that she held.

Similarly, in *Shanley v IT Alliance (2003)*<sup>7</sup>, Shanley was a business development manager and a minority shareholder in the respondent company. The company was undergoing a restructuring and rationalisation programme and the respondent decided that another employee with fewer years' service with the company was better suited to the job of business development manager. The claimant brought an action against the respondent claiming that this was not a genuine redundancy. The Tribunal found that the role and work performed by the claimant were not made redundant as these continued to be performed following his departure from the company and awarded him €38,000 compensation.

### ***2. To Offer an Employee Suitable Alternate Employment, Where Available***

In the case of a genuine redundancy if a suitable alternative position exists, the employee may be obliged to accept this position. There has been much litigation regarding what constitutes 'suitable alternative employment'. In effect, whether an offer of employment amounts to suitable alternate employment will depend on the terms and conditions of the employee's existing position and the terms and conditions of the alternate position being offered. In *Modern Injection Moulds Ltd v Price*

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<sup>6</sup> UD 56/94, [1995] E.L.R. 160.

<sup>7</sup> UD 467/2002.

(1976)<sup>8</sup> a redundancy situation arose and the company proposed instead of dismissing Price to offer him a position as shop foreman, with fewer shifts. No information was given to Price about the overtime prospects of the new job and after giving it consideration he rejected the offer and claimed he had been unfairly dismissed. Justice Philips ruled that this was not a suitable alternate position and that Price was entitled to redundancy. He further added that:

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<sup>8</sup> ICR 370.

*“... in as much as there is this obligation on the part of the employers to try and find suitable alternative employment within the firm, it must follow that if they are in a position pursuant to their obligation to make an offer to the employee of suitable alternative employment they must give him sufficient information on the basis of which the employee can make a realistic decision whether to take the new job.”*

Conversely, in *Caulfield v Dunnes Stores (2003)*<sup>9</sup> Caulfield was employed as a night security guard with Dunnes Stores and had held several security positions with Dunnes Stores during his period of employment. On the date he left the employment he was employed as a night security guard in the head office of his employer. The head office was being relocated. The new office came with its own security provided by the landlord. Caulfield was offered an alternative position in another location on similar terms. He refused the offer and brought a claim under the Redundancy Payments Acts. Evidence was given that the travelling time from Caulfield’s home to the new location was in or about the same as the travelling time to his former workplace. Accordingly he did not succeed in his claim as the EAT felt that the offer of alternate employment was reasonable in the circumstances.

### *3. To Engage in Consultation, where the Redundancies are Collective*

The definition of a collective redundancy is dependent upon the ratio of the number of proposed redundancies to the total number of employees at the company within a 30 day period. In effect, a collective redundancy exists where<sup>10</sup>:

- (1) At least five employees are made redundant in an establishment normally employing between 21 and 49 employees.
- (2) At least 10 employees are made redundant in an establishment normally employment between 50 and 99 employees.
- (3) At least 10% of employees are made redundant in an establishment normally employing between 100 and 299 employees.
- (4) At least 30 employees are made redundant in an establishment normally employing 300 or more.

All categories of employees are included in the above specification with the exception of employees on a fixed term contract, except where the collective redundancies are affected before the completion of the contract<sup>11</sup>.

By virtue of the Protection of Employment Act 1977 and the Protection of Employment (Exceptional Collective Redundancies and Related Matters Act) 2007 an employer who purposes to make collective redundancies is under an obligation to notify the employee’s trade union or employee’s representatives<sup>12</sup> at least one month in advance of the redundancy. Consultation must begin in good time, but in any event at least 30 days before the date that the first notice of the dismissal takes effect<sup>13</sup>.

Representatives must be consulted about<sup>14</sup>:

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<sup>9</sup> RP 663/2003.

<sup>10</sup> Section 6(1) Protection of Employment Act 1977.

<sup>11</sup> Section 7(2) (a) Protection of Employment Act 1977.

<sup>12</sup> Including a staff association or excepted body.

<sup>13</sup> Section 9 Protection of Employment Act 1977.

<sup>14</sup> Section 10(2) Protection of Employment Act 1977.

- A. The rationale for the proposed redundancies;
- B. The number of employees affected;
- C. The possibility of avoiding or reducing the proposed redundancies;
- D. The method/(s) of selection being used to implement redundancies; and
- E. The period during which it is proposed to effect the proposed redundancies.

The purpose of the consultation is to look at: (1) ways of avoiding dismissals arising from redundancy<sup>15</sup>; (2) methods of reducing the number of employees to be dismissed; and (3) mitigating the circumstances of the dismissal.

Additionally, it is also accepted that consultation must be completed before notices of dismissal are served on employees – as otherwise the whole consultation process would be futile. This thinking is as a consequence of a European Court of Justice case, *Junk v Wolfgang Kuhnel (2005)*<sup>16</sup>. In this case, a German Court referred a question to the European Court of Justice on the interpretation of the Collective Redundancies Directive<sup>17</sup>. The Court concluded that only once the consultation period is concluded and the notification of proposed redundancies to the relevant government body has taken place, can an employer serve redundancy notices on employees. This decision has been adopted into Irish law by the Protection of Employment (Exceptional Collective Redundancies and Related Matters Act) 2007.

In addition, in cases of collective redundancy, all employers must also notify the Minister of Jobs, Enterprise and Innovation, in writing at the earliest opportunity, but at least 30 days before the first dismissal takes effect<sup>18</sup>.

### *Penalties*

Where an employer fails to engage in consultation as required by the legislation, an employer may be liable to a conviction on indictment to a fine not exceeding €250,000 in accordance with Section 10 of the Act. Furthermore, they may also be exposed to the payment of protective awards of up to a maximum of 90 days' pay for every employee who is made redundant in breach of consultation obligations.

In addition, an employer may be liable to a fine not exceeding €5,000 on summary conviction for failure to: (1) consult with employees' representatives, (2) provide information to employee representatives, or (3) notify the Minister of the collective redundancies.

- 4. *Not to encroach on any of the employees statutory rights (as outlined below).*

### ***Rights of an Employee***

Where a genuine redundancy situation exists, employees have the following rights:

- 1. *The Right to Notice:*

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<sup>15</sup> These may include short-time, temporary lay-offs, early or phased retirement, career breaks, flexible working arrangements, secondments, unpaid leave or untaken leave, natural wastage, re-training, relocation or re-deployment, re-evaluating benefit packages etc ...

<sup>16</sup> Case C-1888/03.

<sup>17</sup> Directive 98/59/EC.

<sup>18</sup> Section 10(3) & 12, Protection of Employment Act 1977.

As per the terms of the Redundancy Payments Acts 1967-2007 all employees are entitled to at least two week's notice of redundancy. However, in terminating a contract of employment an employer must also comply with the terms of the Minimum Notice and Terms of Employment Act 1973. Pursuant to this legislation a statutory period of notice must be given to every employee who has completed 13 weeks continuous service with an employer. The period of notice given will then depend on the employee's length of service<sup>19</sup>, as follows:

- A. Service up to five years – a minimum of two week's notice<sup>20</sup>;
- B. Service between five and ten years – a minimum of four week's notice;
- C. Service between ten and fifteen years – a minimum of six week's notice;
- D. Service in excess of fifteen years – a minimum of eight week's notice.

A clause in an employment contract providing for shorter periods of notice than the statutory minimum periods is automatically void<sup>21</sup>. However, a clause in a contract providing for a longer period of notice is valid and binding upon the parties.

The Minimum Notice and Terms of Employment Act also allows for the waiving of the right to notice and acceptance of payment in lieu of notice. When this arises the contractual date of termination is the date on which the notice, had it been given, would have expired.

## *2. The Right to Time-Off to Seek Alternate Employment*

By virtue of Section 7(2) of the Redundancy Payment Acts 1979, within two weeks of the employment termination by reason of redundancy, an employee is entitled to reasonable time off, with full pay, in order to look for new employment or to make arrangements for training for future employment.

An employer is entitled to request that all affected employees furnish them with evidence of arrangements made for these purposes, provided that it is not detrimental to the employee's interest to do so.

## *3. The Right to a Trial Period in Respect of an Alternative Position*

An employee, whose job is no longer available by reason of redundancy, can agree to undertake an alternative position with the employer for a trial period of not more than four weeks. At the end of this trial period the employee has the right to either accept the position or decline it. If the position is declined the employee retains the right to redundancy.

## *4. The Right to Fair Selection for the Purpose of Redundancy*

With regard to fair selection the employer is required to adopt appropriate selection criteria. Unfair selection for redundancy, if proven, will automatically be classified as an unfair dismissal under the legislation. In *Flexo Computer Stationery v Kevin Coulter (2003)*<sup>22</sup> the Labour Court stated that the

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<sup>19</sup> Section 4(2) (a)-(e).

<sup>20</sup> For the purpose of redundancy only – in any other situation one week's notice up to two years service and two week's notice for employment between two and five years service.

<sup>21</sup> Section 5(3).

<sup>22</sup> EED0313.



absence of a coherent and objective basis for a particular selection can be symptomatic of discrimination and could constitute a fact upon which discrimination may be assumed.

Fair selection criteria for redundancy may include the following:

- A. Voluntary: This is when an employer needs to reduce the workforce and asks for some employees to volunteer for redundancy<sup>23</sup>. The people who then volunteer for redundancy are, if they fulfil the normal conditions, eligible for statutory redundancy. However, the right to voluntary redundancy is by no means guaranteed, as it is given at the employer's discretion, and the employer has the right to turn down an employee's offer to take voluntary redundancy where the employer can demonstrate that the employee's position is critical to the continued existence of the company.

In addition, employers should ensure that eligibility for voluntary redundancy is in not in any way linked to age, as this may amount to age discrimination for the purpose of the Employment Equality Acts 1998-2008, as amended.

- B. Last-in, first-out (LIFO): this criterion is commonly used in relation to dismissals by reason of redundancy of unskilled or semi-skilled workers. In *Devlin and Leahy v McInerney Construction Limited (2004)* the existence of a redundancy situation was not disputed by the claimants, rather the selection of the claimants for redundancy was at issue. The Tribunal found that the respondent operated a policy of "last-in first-out" on a site-by-site basis, and that this policy was applied objectively. On the evidence the Tribunal was satisfied that there was precedent for this policy within the construction industry, irrespective of the fact that the policy was not universally applied within the industry. Accordingly, the dismissal was deemed fair.

As a potential method for selection, LIFO also has its disadvantages, in that LIFO limits employers' flexibility and can deplete key essential skills and result in the loss of "higher performing" employees who are necessary for the future operation and success of the business.

- C. Skills or competencies: some employers adopt this criterion by creating a critical skills/competencies matrix against which all relevant employees are scored. In effect the purpose of the matrix is to evaluate the key positions that will be required following rationalisation/restructuring of the organisation and the key skills/competencies required from staff who undertake these positions. In adopting this approach formal qualifications and advanced skills should be considered, although not in isolation. It may be appropriate for other aptitudes to also be taken into account.
- D. Performance: The standard of work performance or aptitude for work of those to be selected may be an important consideration. However, in order to assess employees under this heading employers must have objective evidence to support the selection, for example by reference to the company's existing appraisal system. Ideally, this system should rate the performance of the

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<sup>23</sup> The main advantages of this method are: (1) it is less demoralising for the workforce than compulsory redundancy, (2) it is less disruptive, provided the right people volunteer, and (3) there is less work needed to ensure that redundancy selection criteria are fair. The main disadvantages of this method of selection are: (1) it is often more expensive as longer-serving employees requiring higher redundancy payments tend to volunteer, (2) you may need to offer enhanced redundancy payments to attract people to leave (for example, under a voluntary redundancy scheme in 2010 the HSE provided for three weeks' pay per year of service plus two weeks' statutory redundancy, capped at a maximum of two years' pay), (3) you may get more volunteers than needed - those not selected may react negatively, and (4) you could end up with an imbalance in the skills and experience of remaining employees.

employee, and the employee should sign the performance appraisal confirming agreement to the rating allocated. Where an employee has contested the rating or where no rating system exists, it is more likely that selection based on performance may result in a claim of unfair selection for redundancy.

If attendance or disciplinary records are used as a measure of performance, then it will be necessary to ensure that they are accurate. Before selecting on the basis of attendance it is important to know the reasons for and extent of any absences. This is particularly important when considering sickness absence. Employers should look carefully at the duration of the spells of sickness and in particular if they are continuous or intermittent. Absences relating directly to an employee's disability should be discounted when using attendance as a selection criterion – as this will amount to discrimination based on a disability under the terms of the Employment Equality Acts 1998-2008<sup>24</sup>.

In this regard employers should be aware that selecting an employee for redundancy based on previous isolated acts of misconduct may, in certain situations, be deemed by the Court to amount to an unfair selection for redundancy. In *Fox v Des Kelly Carpets Ltd (1992)*<sup>25</sup> Fox was employed by Des Kelly Carpets from October 1989 until January 1991 when his employment was terminated because of restructuring within the company. Three employees were made redundant, Fox and the last two employees to join the company. His employer stated that when choosing people for redundancy he used his own judgment in that an attempt to ensure that he retained the best employees. According to his employer, Fox had been made redundant because of his behaviour and because of his ability. He had been verbally warned about his behaviour in the context of an incident which had occurred early in the period of employment. Fox, however, argued that at no stage was he told that his conduct was a factor in choosing him for redundancy. Verbal warnings were a common feature of the work and Fox argued that he was unfairly selected as a more junior person than he was retained. The Tribunal ruled that Fox had been unfairly dismissed as a more junior person had been retained. The employer was *estopped* from using alleged misconduct as a reason for selection for redundancy, since the employment of Fox continued after the said alleged misconduct.

In *Compagno v Virgin Retail (2001)*<sup>26</sup> the respondent employer had to make one of their three security supervisors redundant, due to restructuring. Under the new structure the remaining security supervisors had to become multi-skilled. The selection criterion adopted by the respondent was multifaceted and encompassed factors such as: (1) performance and capability; (2) quality of work; (3) attitude and approach to work; (4) adaptability and flexibility; (5) supervisory performance; (6) potential; (7) customer focus; (8) product knowledge; (9) attendance; and (10) length of service (if all else was equal). The Tribunal held that the respondent "*used comprehensive and objective criteria*" in selecting who was to be made redundant and rejected the applicant's claim of unfair selection.

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<sup>24</sup> In *Balmer v E Casey Bonding Company Limited* (UD550/2006) the EAT took a pragmatic approach to the use of time-keeping and absence records in selecting an employee for redundancy. Despite the fact that the claimant had never been reprimanded for lateness, and the fact that the employer was aware that he had an existing medical condition the Tribunal still determined that the dismissal was fair – as the claimant was also limited in terms of the actual work that he was skilled to complete.

<sup>25</sup> UD 106/91 & [1992] E.L.R. 182.

<sup>26</sup> UD 186/01.

Under the legislation unfair selection for redundancy automatically arises where:

- A. *The dismissal resulted wholly or mainly by reason of:* (1) the trade union membership and activities of employees, either during or outside working hours; (2) the religious or political opinions of the employee; (3) the race, colour, ethnicity or sexual orientation of the employee; (4) the age of the employee or as a consequence of their membership of the travelling community; (5) the fact that the employee has participated in a lawful industrial action or a strike against the employer; (6) or participated (or threatened to participate) in legal proceedings against the employer; (7) the pregnancy of the employee, or because the employee has exercised their rights under the Adoptive Leave Act, 1995 or the Parental Leave Act, 1998-2006; (8) the exercise of rights under the National Minimum Wage Act 2000<sup>27</sup>.

In *Kerrigan v Peter Owens Advertising (1997)*<sup>28</sup> the claimant was made redundant on the grounds of: (1) costs, (2) reorganisation, (3) his age, and (4) the costs associated with his particular contract. Kerrigan was told by the Managing Director that that his age was a factor, as the clients wanted to deal with 30 year old Account Directors. Accordingly, the Tribunal ruled that this was not a genuine redundancy or fair selection and he was awarded in excess of €34,000 in compensation.

- B. *The dismissal is in contravention of an agreed procedure between the company and the union or in contravention of custom and practice within the company and the company has no special reason to depart from the procedure or practice*<sup>29</sup>: In the case of *Mahon v McPhillips Ltd (1979)*<sup>30</sup>, the EAT determined that the fact that an employee was absent on sick leave at the time of the redundancy was not in itself a special reason to justify departure from the agreed procedure of last-in, first out. The claimant had brought a claim on the basis that he had been dismissed while more junior employees had been retained in contravention of the agreement.

## 5. *The Right to Redundancy Payment*

An eligible employee who is made redundant is entitled to a lump sum payment. To be classified as eligible the claimant must satisfy the following requirements:

1. The claimant must be classified as an employee<sup>31</sup> and paying PRSI contributions<sup>32</sup>, usually Class A contributions. However, employees who have a close family relationship with their employer are excluded under the terms of the legislation;
2. The claimant must be able to prove that he is over the age of 16. Up to 2007 an employee also had to be under the age of 66 for eligibility purposes – however, this obligation was removed under the terms of the Protection of Employment (Exceptional Collective Redundancies and Related Matters Act) 2007<sup>33</sup>;
3. The claimant must also be domiciled in the State<sup>34</sup>; and

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<sup>27</sup> Section 6 of the Redundancy Payment Act 1971 Act, as amended – Section 6 of the Employment Equality Acts, 1998-2004, as amended, and Section 6(2) of the Unfair Dismissals Act 1977-2003, as amended.

<sup>28</sup> UD 31/1997.

<sup>29</sup> A customary arrangement must be something which is well-known, certain and clear as to amount in effect to an implied term of an agreed procedure.

<sup>30</sup> UD 267/1979.

<sup>31</sup> In this regard an employee is defined as a person employed under a contract of service or apprenticeship, or an agency worker (Section 3(a) Redundancy Payments Act 2003).

<sup>32</sup> To be eligible the employee must be employed in an employment that is insurable for all benefits under the Social Welfare (Consolidated) Act 1993, or if not, had been in such employment at any time in the four years prior to redundancy.

<sup>33</sup> Section 15(1) (c).

<sup>34</sup> Section 8(a) Redundancy Payments Act 2003.

4. The claimant must have worked continuously for the employer for at least two years (104 weeks) where in full-time employment, or more than two years, if employed in a part-time capacity.

The amount of compensation payable to an eligible employee is dependent upon the employee's length of service<sup>35</sup>. In determining an employee's length of service, two issues are relevant: (1) their calculable service, and (2) their reckonable service.

#### *Calculable Service*<sup>36</sup>

In calculating length of service the employer is required to take into account the total period for which the employee was in employment. The following absences are not excluded from the determination of length of service:

- A. Illness<sup>37</sup> or occupational injury<sup>38</sup>;
- B. Service in the Reserve Defence Forces;
- C. A period of maternity or adoption leave;
- D. A lay-off;
- E. Annual and public holiday leave periods;
- F. Where an employee is re-engaged by an associated company of the original within four weeks of dismissal;
- G. Where an employee transfers to another employer and there is an agreement between all parties on continuity of employment;
- H. A period preceding reinstatement or re-engagement under the Unfair Dismissals Acts 1977–2007, as amended;
- I. Other causes authorised by the employer that did not last longer than 26 weeks (such as parental leave/carer's leave etc); or
- J. A lockout or strike for any period.

Similarly, where a transfer of undertaking arises the contract of employment is deemed unbroken for the purpose of redundancy<sup>39</sup>.

#### *Reckonable service*<sup>40</sup>

According to Section 12(b) Redundancy Payments Act 2003, the following periods of absence, during the three year period ending with the date of termination of employment, are excluded from the calculation of service for the purpose of determining redundancy payments<sup>41</sup>:

- A. An absence in excess of 52 consecutive weeks by reason of an occupational accident or disease within the meaning of the Social Welfare (Consolidation) Act 1993,
- B. An absence in excess of 26 consecutive weeks by reason of any other illness, and
- C. An absence by reason of lay-off by the employer.

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<sup>35</sup> Section 11 Redundancy Payments Act 2003.

<sup>36</sup> Section 12(a) Redundancy Payments Act 2003 – which amended Schedule 3 of the Redundancy Payments Act 1967.

<sup>37</sup> Up to a maximum of 26 weeks.

<sup>38</sup> Up to a maximum of 52 weeks.

<sup>39</sup> This is pursuant to the Transfer of Undertaking Regulations.

<sup>40</sup> Section 12(b) Redundancy Payments Act 2003.

<sup>41</sup> In accordance with Redundancy Payments Act 2003 (Commencement) Order 2005 (S.I. No. 77 of 2005).

Additionally, Section 12(c) provides that an absence from work by reason of a strike, in the business or industry in which the employee is concerned, is not calculated as reckonable service for the purpose of redundancy.

### *Amount of Payment*

Section 10 of the Redundancy Payment Act 2003 states that the statutory entitlement is two weeks payment for every year of service, plus one additional bonus week. For the purpose of calculation a week's pay is normal weekly remuneration<sup>42</sup> capped at €600<sup>43</sup> or €31,200 per annum.

In accordance with Section 11(2) any excess period of service will be accredited as a portion of the year – for example, 6.5 years services would bring an entitlement of 14 weeks pay for the purpose of redundancy<sup>44</sup>, whereas 6 years 9 months service would amount to 14.5 weeks pay for the purpose of redundancy<sup>45</sup>.

Employers may opt to make a payment to employees in excess of the statutory redundancy payment – for example, six weeks per year of service. However, in this regard employers should be aware that any such formula may set a precedent for future redundancy payments<sup>46</sup>. Historically, where cases have been referred to the Labour Court for investigation, the Court has tended to recommend payment above the statutory norm in accordance with previous custom and practice, where the company is seen to have sufficient financial resources. In cases where economic recession has been a major contributory factor in redundancy, the Court has tended to be sympathetic in considering the employer's circumstances.

Not surprisingly, since the onset of the current economic recession research has indicated that more employers are providing lower voluntary severance payments than in the past. But, according to *Industrial Relations News*<sup>47</sup> this trend is by no means across the board, with at least half of employers still paying the same level of severance payments as before the crisis. In a few sectors, such as pharmaceuticals and medical devices, almost all employers are keeping to the same level of severance package as in previous years<sup>48</sup>. Several of the sectors with the strongest downward pressure on severance terms are those with a link to the State, such as the public service, commercial semi-states and the banks<sup>49</sup>.

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<sup>42</sup> In accordance with Schedule Three, of the 1967 Act where shift premiums, overtime, bonuses and commissions are a feature of employment, they must be included in the calculation of a week's pay.

<sup>43</sup> With effect from the 1<sup>st</sup> January 2005, S.I. No. 695 of 2004: Redundancy Payments (Lump Sum) Regulations 2004, increased the ceiling on annual reckonable earnings to be taken into account in the calculation of a statutory redundancy lump sum payment from €507.90 per week to €600 per week.

<sup>44</sup> 2 x 6.5 years + 1 week.

<sup>45</sup> 2 x 6.75 years + 1 week.

<sup>46</sup> In *M & P Sales & Marketing Limited v MANDATE* (2010), LCR19960, the union claimed that as the workers concerned were employees of *SHS Group Limited* they should have been offered the same redundancy package as their colleagues, who had received statutory entitlement plus four weeks' pay per year of service. The Labour Court noted that while the companies were separate legal entities within the overall group, the business was organised to create a single trading unit with a single workforce. Therefore it would be unfair from an industrial relations perspective not to follow the precedent and apply different terms to employees similarly affected by the redundancies. In the circumstances the employer was ordered to offer the workers the same severance package.

<sup>47</sup> IRN News: Review of severance deals and cases, 2008-2012.

<sup>48</sup> For example, in 2012 *Lufthansa Airmotive Dublin* offered employees 4 weeks' pay plus their statutory entitlements, capped at 104 weeks' pay, as part of a voluntary redundancy package.

<sup>49</sup> <http://www.irn.ie/dynamic/pdf/IRN%20Severance%20Book%2012%20Sample.pdf>.

This statutory redundancy payment or the statutory redundancy part of any enhanced redundancy payment proffered by the employer is tax-free. The enhanced element of any redundancy payment is accessible for taxation purposes<sup>50</sup>.

### ***Dispute Resolution***

If there is a dispute in a redundancy situation, this may be referred to the Employment Appeals Tribunal<sup>51</sup> by completing the prescribed form (Form RP 51A). An appeal from the EAT may be referred to the High Court<sup>52</sup>.

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<sup>50</sup> Ex-gratia payments are taxed as follows: (1) the first €10,160, plus €765 per complete year of service is exempt from tax. If an employee receives redundancies from two associated employers, these exemption limits apply to the combined total, and (2) in certain circumstances, an additional €10,000 may be provided free of tax. In effect, if you are not a member of an occupational pension (superannuation) scheme or if you irrevocably give up your right to receive a lump sum from the pension scheme, the basic exemption can be increased by €10,000. However, the increased exemption can only be claimed if an employee has not made any claims in respect of a lump sum received in the previous 10 tax years. If an employee is a member of an occupational pension scheme, this increased exemption of €10,000 is reduced by the amount of: (1) any tax-free lump sum from the pension scheme to which the employee is immediately entitled, or (2) the present day value at the date of leaving employment of any tax-free lump sum which may be receivable from the pension scheme in the future. If the lump sum from the pension scheme is more than €10,000 the employee will not due the increased exemption. If it is less than €10,000 then the employee is due the increased exemption of €10,000 less the amount of the pension scheme entitlement. To ensure compliance all ex-gratia payments must be cleared by the Revenue Commissioners before they are made.

<sup>51</sup> Section 39 Redundancy Payments Act 1967.

<sup>52</sup> Section 40 Redundancy Payments Act 1967.