

# Company Matters

15 November 2009

## Question

I own a small engineering company that has suffered from a slump in business. I need to implement a 10 per cent pay cut for all staff, but one of my 10 employees is refusing to accept the cut and suggested it would amount to a breach of his employment contract. Can I implement the pay cut without his consent or can I make him redundant?

## Answer

This is an issue that is facing many employers as they attempt to cut costs. But you should beware that there can be complications with pay cuts which may lead to litigation.

At the outset, you should review your employee's contract of employment to assess what level of flexibility you have to change the terms. For example, it is useful to have a clause in the contract reserving the right to review, amend and alter the contract of employment.

It is clearly preferable to implement a pay cut by way of agreement, as opposed to unilaterally enforcing one. Best practice would dictate that an employer, after consulting with employees, issues a written statement to the employees confirming the salary reduction and the date on which it will take effect and seek the employees' written consent to the change.

If the proposed pay cut is genuine and is communicated in an open manner, employees are more likely to accept the reality that a reduction is necessary.

It is useful for an employer to communicate pay cuts in the context of trying to avoid redundancies, and to make it clear that redundancies will follow if the pay cuts are not accepted.

If you implement a pay cut against the will of an employee, the employee could, depending on the facts, make a claim for breach of contract, a claim under the Payment of Wages legislation, or resign and claim constructive dismissal. Many employers are now prepared to take this risk.

If the employee objecting to the pay cut has less than one year's continuous service, you have the flexibility to simply terminate his contract on serving notice. However, if the employee has over 12 months service, he is entitled to the protection of the Unfair Dismissals Acts.

Under these Acts, all dismissals are deemed to be unfair unless there are substantial grounds justifying the dismissal. The fact that an employee objects to a pay cut would not be considered to be a substantial ground justifying dismissal.

In your case, it would not be advisable to single an employee out for redundancy on the basis that he refused a pay cut. There must be a genuine redundancy situation and the mechanism for selecting an employee for redundancy must be capable of being upheld objectively.

Depending on the size of the organisation, there should be consultation with the employee in relation to alternatives to redundancy. While salary cost or refusal to accept a pay cut may be a factor in selecting an employee for redundancy, it should not be the sole reason for selection.

It is advisable that you document the objective reasons why a particular position is to be made redundant. You should consider alternative positions, such as, for example, that maybe this employee and others could work on a job sharing basis.

If the matter were to go to the Employment Appeals Tribunal, the tribunal would ask you to justify the selection of the particular employee and may ask you to produce documentary evidence supporting the selection of the employee.

If the employee were to successfully claim unfair dismissal, the EAT has the power to award up to two years remuneration, subject always to the employee's obligation to mitigate loss, ie to seek other employment.

However, there is an argument that an employee should not be compensated for any significant financial loss where the employer had offered to maintain him in employment, albeit at a reduced salary.