

● Medico-legal advice

Redundancy and rehiring: the risks



Dermot Casserly, Beauchamps Solicitors, looks at the issue of redundancies and examines the rights and obligations of both employer and employee in this regard

In the private healthcare sector, many employees have been made redundant and/or suffered salary cuts in the last year due to the economic downturn. It is important to note that legal issues can arise if business needs change and an employer hires new employees to fill roles that were made redundant.

Legal risks

The Unfair Dismissals Act 1977 (as amended) deems all dismissals to be unfair unless there are substantial grounds justifying them. Redundancy is one such fair ground but there must be a genuine redundancy situation, proper consultation to avoid redundancy and the selection of an employee for redundancy must be justified on objective grounds.

Generally, an employee must have a year's service to acquire rights under the Unfair Dismissal Acts, but there are a number of exceptions to this requirement. Where an employee has been dismissed by reason of redundancy, he can seek to



Many health-service employees are on contract work

challenge the redundancy as an unfair dismissal.

If an employer is planning to rehire someone to fill the role that was made redundant, then the risks of a successful legal challenge to the redundancy are clearly much higher. If such a claim is made,

an employer will have to justify the original redundancy and the decision to re-hire. It is important to note that, if an employee successfully challenges their redundancy, the Employment Appeals Tribunal can order re-engagement, reinstatement or award com-

penensation of up to two years' remuneration (subject to the employees' obligation to mitigate their losses).

An employee generally has six months to challenge a redundancy but this can be increased to 12 months in exceptional circumstances.

It is accepted that there may well be valid grounds for an employer to re-hire after a redundancy, for example, where there is an unexpected upturn in business. However, this would be scrutinised closely and with some degree of suspicion by the courts/tribunals.

One way of managing this risk is to agree a form of compromise with the employee. If an employee agrees to compromise his rights by signing a compromise agreement (normally in return for an *ex gratia* payment), then an employer would be free to fill the role that was made redundant.

Re-hiring options

On a separate matter, if there are genuine reasons to re-hire after a redundancy round, it is

important to consider the most appropriate legal structure. The main options open to an employer are:

- Engaging employees on standard terms and conditions (indefinite term basis);
- Outsourcing the work to a third-party service provider;
- Engaging new employees on a fixed-term contract basis;
- Engaging independent consultants;
- Using agency staff.

Each of the above options has their own attractions and risks. For example, many employers offer only fixed-term contracts. Engaging employees on a fixed-term contract can provide employers with flexibility so that the employment relationship will automatically end on a specified date or on the completion of specified project.

Engaging independent contractors is not advisable if the true nature of the relationship is that of employer/employee. The distinction in law between an employee and an independent contractor can be a grey area and is closely scrutinised by the courts and the Revenue Commissioners.

Reversal of payouts

It is important to record in writing the terms of any pay

cut and to obtain employee consent. If you did not obtain employees' consent to the pay cut, it can be challenged.

From a legal perspective, in terms of potential exposure, it is relevant to determine what was actually agreed at the time of the pay cut.

For example, did the employees formally accept the pay cut? Was it agreed that the pay cut would be temporary in nature, or permanent?

An employer may also come under pressure to reverse pay cuts from existing staff if business and profitability improves. This is very much a commercial decision in the private sector, so employers should consider motivational and productivity issues including the risk of losing key staff and balance this with the need to stay competitive.

If an employer decides not to reverse pay cuts, it would be worth considering motivating key employees through other means such as share options or profit-sharing schemes.

It is always useful to seek independent legal advice at the earliest opportunity to reduce the risks of legal exposure down the line.

● Dermot Casserly

Partner, Beauchamps Solicitors
Email: d.casserly@beauchamps.ie