

Wexford Chamber of Industry & Commerce

HR Forum

Downsizing your work force

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Downsizing your work force

- Flexi working
- Reduced working hours
- Short time/lay off
- Fixed term contracts
- Sub contracting
- Redundancies
- Contractual issues
- legislation



There are alternatives to redundancy

- You have an obligation to consider alternatives to redundancy
- The downturn will change
- You need to be prepared for the uplift
- You need to maintain valued staff
- Reality means you have to cut overheads
- There is a receptive work force to alternatives
 - Employees don't have the safety net of emigration
 - Employees have significant financial responsibilities



What must you always look at?

- The law
- The contract



The Law

- Protection of Employees (Part Time Work) Act 2001
- Employment Equality Acts 1998 to 2004
- Organisation of Working Time Act 1997
- Safety, Health and Welfare at Work Act 2005
- Protection of Employees (Fixed Term Work) Act 2003
- Code of Practice on Access to Part Time Working
SI 8/2006



The contract

- Have you a provision to allow lay off
- Have you a provision to reduce hours
- Have you a provision to place on short time
- Does your contract allow flexible work arrangements



Typical contractual term

- The Employer reserves the right to lay you off from work or reduce your work hours where, through adverse business circumstances, it is unable to maintain you in full-time employment. You will receive as much notice as is reasonably possible prior to such lay-off or short time. You will not be paid during the lay-off period. You will be paid for hours actually worked during periods of short time.



If you have no flexibility condition...

- Breach of contract
- Could refer complaint to Rights Commissioner
- Could leave and claim constructive dismissal
- Could leave and sue for breach of contract/wrongful dismissal
- Could claim injunction



Flexible working

- The law
- The contract
- Equality considerations
- Part time working policy
- Some case law
- Entitlement to redundancy
- Social welfare
- Managing the implementation



Part time workers

- Prohibition on less favourable treatment
- Unless such treatment is based on objective grounds
- Must be to achieve a legitimate objective of the employer
- Louth VEC and a Worker (2005)
 - Does the measure correspond to a real need on the part of the employer
 - Is it appropriate to achieving the objective, i.e. proportionate
 - Is it necessary to achieve that end
- Conditions may be pro rata for reduced hours
- Complaint to Rights Commissioner for breach of legislation



Rights of part time workers

- They retain their employment rights
- Holidays are paid pro rata
- Generally retain benefits such as car, health insurance, gym membership unless objective reasons for not
- Can claim social welfare if only working three day week



Is there a legal entitlement to part time work?

- No
- However employers should seriously consider requests
- Could be discriminatory not to do so
- New code of practice
- No legal effect but is persuasive
- Tribunals make take account of it in evidence



Benefits to employer

- Retention of valued and experienced staff who might otherwise leave thereby reducing training and recruitment costs
- Availability of a wider range of candidates for vacancies, especially skilled people who are only interested in part time work
- Flexibility to match work needs and staffing requirements more closely e.g. flexibility in service delivery, hours worked and variations in work load
- Improved productivity and reduced absenteeism
- Increased employee commitment, morale and loyalty which is associated with improved productivity



Benefits to employee

- Greater sense of responsibility, ownership and control of working life
- Better relations with management
- Improved job satisfaction



Code of practice

- Aims at minimising indirect discrimination for part time work
- Eliminate barriers to part time work
- Provides a frame work and practical guidance
- Applies to all employers and employees
- Not legally binding, however...
- In any proceedings before a court, Rights Commissioner, etc, the code shall be admissible in evidence and any provision of the code which appears to the court/tribunal etc to be relevant to any question arising in the proceedings shall be taken into account in determining that question



- The code applies to all employers and employees.
- Access to part time work should, as far as possible, be available across different levels in the organization.
- As far as possible employers should give consideration to requests from employees to work part time or full time and versa versa.
- An employee moving to part time work should suffer no diminution of status or employment rights generally with the exception of pay and benefits (unless there are objective grounds for doing so).
- The pro-rata principle should apply where appropriate.



You may take into account

- Costs (associated with, for example, administration, training and recruitment).
- Ability to accommodate part time work (replacement concerns, capacity/size of organization).
- Concern around day to day operations (impact on service, delivery, other full time employees).



Employer should in consultation with staff

- Explore the possibilities of either introducing part time work or increasing the scope of existing part time working arrangements.
- Review and remove where possible any barriers or obstacles to part time working.
- Maximize the range of posts as suitable for part time working.
- When recruiting for new staff members consider whether the vacancy could be performed on a part time basis.
- Consider seriously requests for part time work from full time employees and full time working from part time employees.
- Introduce a policy to facilitate effective access to and performance of part time work and detail how part time working arrangements will operate in the Company.



Your policy should outline a procedure for

- Applying for part time working.
- Consultation and discussion of the application.
- The process for and time frame for issuing a decision/response.
- Managing the outcome (implementation or refusal).



Procedure should provide for

- An application from the applicant outlining the reasons for the request for part time working indicating whether the request is for a permanent or temporary change.
- A reasonable time frame to consider the request.
- List the objective criteria which will be used to determine the suitability or otherwise of positions for part time working.



Factors which should be taken into account considering a request

- The personal and family needs of the applicant.
- The number of employees already availing of part time work.
- Additional recourses required to meet part time cover and other business operational needs of the organization and implications of same.
- Urgency of the request.
- The employee's legal rights and entitlements.
- The equal opportunities policy of the organization.
- How the applicant's proposed revised hours or arrangements will fit with the tasks of his or her job and how these tasks will be performed during the period of part time work.
- The implications if any for the applicant's conditions of employment.
- The effect if any on the staffing needs of the Company.
- Procedures for reviewing the arrangement.



Making the decision

- Make decision and issue reasons
- Discuss and clarify the details
- If refused give reasons
- Allow right of appeal
- Apply fair selection if offering arrangement to a group



On what grounds may you refuse?

- If you are satisfied that the arrangement would have an adverse effect on the operation of the business, lead to staff difficulties or other relevant factors which might impact negatively on the business.



Equality

- Remember discrimination on 9 grounds is prohibited
- Gender and family are most relevant to requests for part time also disability or disability by association
- Only refuse application if objective grounds exist for refusal
- Be mindful of previous decisions
- Take care for indirect discrimination
- Some cases:



Guidelines

- Have a policy on flexible working arrangements which outlines what type of arrangements may be facilitated by the employer, the conditions for application and the grounds on which the application will be considered.
- A meeting should be arranged with the employee to consider the request for the flexible working arrangements.
- The employer should give full consideration to any request for flexible working and in particular flexible working for the purposes of balancing work and family life.
- A refusal to facilitate the request should be based on objective business and other operational reasons.
- The employer should keep detailed notes to show that the matter was fully and objectively considered.



Record the new arrangement carefully, set out...

- The revised working arrangement.
- Whether this arrangement affects the contract of employment (which it will invariably will).
- Whether the arrangement is temporary or permanent.
- When the matter will be reviewed.
- The grounds on which the employee may be requested to return to their previous working arrangement.
- How the arrangement affects working hours, days, statutory and contractual benefits.



Other considerations

- Working from home
- Supervision
- Security and confidentiality
- Insurance
- Health and safety



Lay off/short time

- Check that you have condition in contract
- If not employee can claim redundancy immediately for lay off and breach of contract for short time
- Official short time is where hours are cut to 50% of normal
- Give notice...RP 9
- Give reasonable notice or notice if provided for in contract



Employee can claim redundancy

- Employee can claim redundancy for a lay off or official short time
- If layoff/short time extend for 4 weeks or 6 weeks in a thirteen week period
- Must serve notice RP9 part B
- Employer can serve counter notice RP9 part C
- Must provide the work otherwise redundancy claim stands (13 weeks)



Fixed Term Contracts

- Useful device to avoid permanent employment
- When purpose or time is achieved contract automatically terminates
- Will work for new employees
- Very doubtful that you can effectively convert a permanent contract to a fixed term contract
- Fixed term contract within a permanent position
- Strict compliance with the Fixed Term Act
- Renewals of contract – take care



Definition of fixed term worker

A person having a contract of employment entered into directly with an employer where the end of the contract of employment concerned is determined by an objective condition such as:

- arriving at a specific date;
- completing a specific task; or
- the occurrence of a specific event



Other conditions of the Act

- Fixed term worker is given equal status to a comparable permanent employee
- Cannot give less favourable treatment or terms and conditions of employment
- Can apply pro rata if less hours are worked
- May be treated less favourable where such treatment can be justified on objective grounds
- To achieve legitimate objective of employer
- Treatment must be appropriate and necessary for that purpose



Other conditions of the Act

- Must be in writing
- Be furnished as soon as practicable (within 8 weeks)
- Must specify purpose or term
- Be signed by both employer and employee
- Specify that the Unfair Dismissals acts do not apply at the ending of the period



Renewals of fixed term contracts

- Must give written notice
- State why another FTC is being given and not a permanent contract
- After third year of continuous employment FTC may be renewed once only for no longer than one year
- For successive FTC aggregate duration cannot exceed 4 years



Sub contractors

- Not employees
- Don't have employee rights and protections
- In business at their own risk
- What is an employee
- What is a contractor
- What is a duck



The Challenge

- Revenue
- The actual person



Employee

- Works for employer for regular wage
- Works under direction and control of employer
- Is not independent in carrying out his functions
- Is dependent of employer's directions, instructions control
- Is provided with necessary facilities, means to carry out functions
- Is integral to the business
- Does not take financial risk

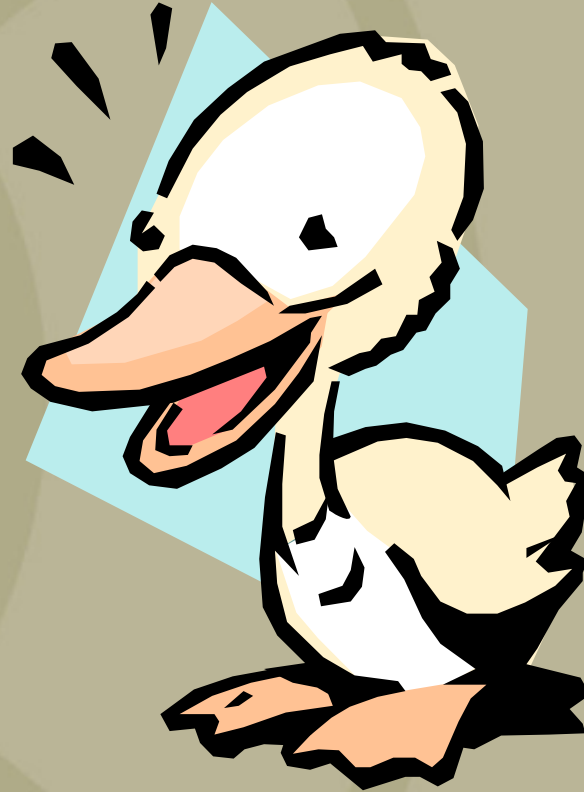


Contractor

- In business on their own accord
- Their own boss
- Provides own gear, equipment to carry out duties
- Can profit or suffer loss
- In control of their own performance
- Generally not under full control of owner of business
- Can delegate work to others
- May be an employer themselves



A Duck



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Some tests for a contractor

- Owns own business
- Exposed to financial risk
- Has control over what is done, how it is done, when and whether he does it personally
- Free to hire others
- Provides own materials equipment
- Has place where materials are stored
- Costs and agrees price for job
- Is liable for negligence
- Registered for Vat
- Has insurance



Some concerns

- Sub contacting out existing employees
- Exceptional redundancies
- Rebate
- Is it genuine?



What is redundancy

- Cessation of business
- No further requirement for work of that kind
- Work to be done by other employee
- Work to be done in way for which employee not qualified
- Work to be done by employee who can do other work

Job is redundant.....not the person



Challenge?

- No redundancy situation exists
- Wrongful selection



Venues for Remedies

- EAT unfair dismissal
- Courts wrongful dismissal
- Equality Tribunal discrimination
- Labour Court labour dispute

Multiple claims



Redundancy entitlement

- 2 years continuous service
- 2 weeks per year of service
- Plus one week
- Notice*
- Cap of €600
- Use calculator

* Contractual notice

* Labour Court and custom and practice



Collective redundancies

- Obligation to consult
- If in 30 day period:
 - 5 in work force of 20 -50
 - 10 in work force of 50 – 100
 - 10% in work force of 100 – 300
 - 30 in work force in excess of 300

Exceptional collective redundancies



Notification to employees

- Reason for proposed redundancies
- Numbers envisaged
- Possibility of reducing or avoiding proposed number of redundancies
- Method of selection
- Period of time to effect redundancies



Notification to Minister

- Name and address of employer
- Address where redundancies are proposed
- Total number employed there
- Number and description or category of proposed redundancies
- Period to effect redundancies
- Reasons for redundancies
- Name and address of employee representative consulted
- Date consultation commenced and progress to date



Unfair dismissal and redundancy

- 1 year service requirement
- Remedies
 - Re-engagement/instatement rarely awarded if redundancy is genuine
- Compensation may be added to lump sum
- Acceptance of lump sum not a bar to claim



Waivers

- Common practice to get waiver
- Cannot contract out of unfair dismissal
- Waiver may be disregarded by EAT – particularly if no legal advice
- Shortt –v- Data Packaging case
- Careful drafting required
- Translation and advice



Proving and defending a claim for unfair dismissal

- Burden of proof on employer
 - Prove genuine redundancy
 - Must be wholly or mainly for redundancy
- Employee may allege unfair selection
- Employer bound to follow agreed procedures
- If no agreed procedures employer to act reasonably



Selection Procedures

- Agreed procedures must be followed
 - Unless good reason to depart
 - Would result in discrimination
- Implied terms – custom and practice
- Apply fair selection procedure if no agreed procedure
 - Reasonable
 - Objective
 - Fair



Guidelines

- Examine alternatives
- Voluntary redundancy
- Follow agreed procedure or apply fair procedure
- Set fair and comprehensive selection criteria
- Determine number of employees to whom situation applies
- Inform those affected of selection criteria
- Opportunity to express views
- Apply selection criteria fairly to all employees in group



Selection criteria

- Length of service
- Skills, qualification or training
- Occupation
- Experience
- Future business needs
- Capability
- Flexibility
- Cost of employee to company
- Attendance record



Caution

- Be wary of criteria which affect “equality protected” categories – foreign nationals, females, married people, parents, older people
- Avoid subjective or unreasonable criteria
- Watch out for unintended indirect discrimination.



Importance of fair procedures in selection

- No direct legislative requirement
- But requirement firmly set down in EAT decisions
- Reaffirmed in recent case – Sheehan and O’Brien –v- Vintners Federation (June 2008)
- Section 6(3) of UDA allows the Tribunal to take account of the reasonableness of the employer's conduct in relation to the dismissal



Conclusion

- There are alternatives to redundancy
- Flexible work arrangements should be investigated
- Check contractual position
- Get agreement of employee
- Act fairly and reasonably
- Look out for discrimination
- Be fair in selection
- Involve employees



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