

IMPLEMENTING REDUNDANCIES: FIVE QUESTIONS TO ASK YOURSELF TO ENSURE A FAIR PROCESS

While the extension of the Coronavirus Job Retention Scheme (CJRS) has been a welcome reprieve for employers, the economic effects of the COVID-19 pandemic are likely to be long lasting for many businesses. With the CJRS due to come to an end in September, the continuing impact of the pandemic is such that many employers will undoubtedly be forced to plan for redundancies in the coming months of 2021.

In this article and in our upcoming webinar, we provide a summary reminder of key rules and considerations for employers planning for redundancies.

HAVE YOU EXPLORED ALTERNATIVES TO REDUNDANCY?

Implementing redundancies should be a last resort and employers will need to show that they have reasonably considered and assessed alternatives to redundancy. This includes any alternatives considered prior to commencing the redundancy process and also those raised by employees during consultation. Typical alternatives to redundancy may include:

- Pausing any recruitment.
- Exercising any contractual right to 'lay-off' staff on a temporary basis or reduce their hours.
- Reducing or removing overtime.
- Redeploying staff.
- Ceasing or reducing use of contractors / agency staff.
- Seeking expressions of interest for voluntary redundancy.

Employers should be able to demonstrate that they considered alternatives and document why these alternatives are not a viable means of avoiding redundancies.

HAVE YOU CARRIED OUT A FAIR AND NON-DISCRIMINATORY SELECTION PROCESS?

At the initial planning stage, employers should assess and identify the correct 'pool' of employees who will be placed at risk of redundancy. This should be given careful consideration and employers should clearly document how they have determined the pool(s). Employers should not place staff in a selection pool purely because they are on furlough. There is a risk that this approach may result in claims that you have followed an unfair or potentially even discriminatory redundancy process. The extent of the risk will be dependent on the rationale for staff having been furloughed in the first place, and the selection process that was used.

The selection criteria used to score employees in the pool should be both measurable and objective. In practice most employers use a matrix of criteria such as skills, competencies, qualifications, performance, disciplinary and attendance records. However, employers should be mindful of any potentially discriminatory criteria. For example, while attendance records can be an effective and measurable criterion, it may place those persons with a disability or women at a disadvantage unless absences related to disability or pregnancy/family related leave are discounted.

HAVE YOU MET YOUR OBLIGATIONS FOR CONSULTATION?

Employers should consult all employees individually to explain why there is a need to implement redundancies, the process which will be followed and to provide an opportunity for employees to ask questions and put forward alternative proposals. Effective communication at these meetings is essential to ensure fair and meaningful consultation occurs. There is no prescribed number of individual consultation meetings an employer must hold with an employee before confirming their redundancy, but a minimum of two meetings will usually be



necessary to enable representations from employees to be properly considered before a decision is made.

In light of COVID-19, you can consult employees about their potential redundancy at a virtual meeting on platforms such as Microsoft Teams and Zoom, providing full allowance is made for the employee's right to be accompanied. You should ensure employees have access to suitable equipment, such as a smart device or laptop to facilitate the meeting.

Employers should also be mindful that if they plan to make 20 or more employees redundant at one establishment within a 90-day period, collective consultation obligations will be triggered. In order to engage in collective consultation, employers may need to set up a process for the election of employee representatives (unless trade union representatives have been already appointed for this purpose through an existing collective agreement). This consultation should take place at least 30 days before any dismissals take effect. If planning to make 100 or more redundancies, the consultation must take place at least 90 days in advance of any dismissals. In this scenario, the Department of Economy must also be given advance notice of the proposed redundancies via a HRI form.

HAVE YOU CALCULATED STATUTORY REDUNDANCY PAYMENTS AND NOTICE PERIOD COSTS?

Employees with at least two years' continuous service on the date which their employment terminates are entitled to a statutory redundancy payment if they are dismissed on the grounds of redundancy. Statutory redundancy pay is calculated according to a formula based on age, length of service and an individual's weekly pay.

For furloughed employees, the guidance is explicit – the CJRS cannot be used to cover the costs of statutory redundancy payment. Additionally, employees are entitled to receive statutory redundancy pay based on their normal wage and not the reduced furlough rate.

Employers also need to factor in notice period costs when planning for redundancies. While employers could previously claim under the CJRS for a furloughed employee fulfilling their notice period, this is no longer the case. From 1 December 2020, employers cannot claim for any days during which furloughed employees are serving a statutory or contractual notice period.

HAVE YOU FOLLOWED THE STATUTORY DISMISSAL PROCEDURE?

As a minimum, employers in Northern Ireland must adhere to the following three-step statutory dismissal procedure or risk a tribunal finding that the redundancy was automatically unfair.

- An employee should be provided with written notice that they are being invited to a meeting to consider the termination of their employment on the grounds of redundancy.
- A meeting should be held to consider any final suggestions put forward to avoid redundancy. If there are no viable suggestions, the redundancy should be confirmed in writing and the employee should be provided with confirmation of their entitlement to any statutory redundancy pay, notice or other contractual entitlements, such as payment for any accrued but untaken annual leave.
- The employee should be offered the right to appeal against the redundancy decision. Any appeal hearing should be chaired by an individual with no prior involvement in the process to date.

In summary, redundancies can be a very stressful and a traumatic experience for those involved and employers have a duty to follow a fair process. The risks of getting it wrong can be substantial, with potential exposure to unfair dismissal, discrimination and redundancy pay claims and the resultant reputational damage. The benefits of early and proper planning cannot be overstated and taking the time to do things correctly will provide you with a stronger defence if you are challenged on a dismissal. That being said, even the most well-planned redundancy processes will undoubtedly encounter obstacles and challenges. We would encourage employers to engage the support of HR experts to help manage the process smoothly and reduce the risk of potential liability to your organisation.

SEMINAR: THE FURLOUGH SCHEME IS ENDING... WHAT NEXT?

In partnership with Millar McCall Wylie solicitors, Think People Consulting are offering a free online seminar to explore methods for considering the sustainability of your pre-crisis workforce and employment costs, and alternative measures such as lay off and redundancy. Our HR consultant will provide expert advice based on their experience of implementing fair redundancy processes, and Millar McCall Wylie's employment solicitor will outline legal considerations to minimise the risk of tribunal claims.

Learn more and register at: <https://bit.ly/3foubPk>

