

# COVID-19 PANDEMIC HR CONSIDERATIONS

An introduction to legal and operational decisions  
employers may need to consider

TOM SMYTH & ASSOCIATES

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## Disclaimer & Introduction

### *Disclaimer*

*This briefing document is for general guidance only and should not be regarded as a substitute for customised situational advice which should always be sought. Employers may have specific legal, contractual or custom/practice barriers that will influence how exactly the contents of this documents should be pursued in their workplace.*

*While the information contained within this document is accurate as of the date of publication, TSA Consultants are not responsible for any errors or omissions, or for any action or decision taken solely as a result of reviewing this document.*

### *Introduction*

*No document prepared at the time of writing can fully predict every operational, safety, health and HR consideration affecting an individual business when it looks to return to a form of normal working as and when Covid-19 restrictions are relaxed.*

*The main focus of this advisory document is on HR and Employment Law considerations but, to provide a more complete service for our clients and contacts, we have included safety, medical, financial and operational issues which employers should seek separate and detailed advice on.*

*In mid-April it became clear that social distancing was a phrase business was going to have to consider until a vaccine is rolled out. It is still unclear when this will be so business has to expect to operate in the shadow of Covid-19 for months.*

*We have kept this report in keeping with our commercial and conversational style. Please be very clear, however, that the matters herein, most especially those that negatively affect an employee's terms and conditions of employment are very legalistic in nature. Customised advice will be required to ensure that the onerous requirements of employment law are considered before commercial decisions are made.*

*Each business must assess the impact Covid-19 has on every aspect of its operation by conducting ongoing risk assessments and business contingency planning. This document serves as a starting point to increase awareness on the issues to consider in order to assist and enable effective planning.*

*The team at Tom Smyth & Associates are available to discuss and provide further detailed advice to clients on particular aspects of this document at any time.*

T: 021-4634154

E: [info@tsaconsultants.ie](mailto:info@tsaconsultants.ie)

W: [www.tsaconsultants.ie](http://www.tsaconsultants.ie)



**Directors: Tommy Smyth & Fiona O'Connor**

Since 1991, Tom Smyth & Associates has assisted employers in Ireland meet their Human Resources objectives. Both Irish and International employers across the country trust us to support their HR, IR, Employment Law and Health & Safety functions.

Through our head office in Cork and with Director Fiona O'Connor based in Dublin, our team of consultants help hundreds of clients across many sectors (including retail, hospitality, manufacturing, pharmaceutical, IT and financial services). We are flexible and work with clients as they need us, from straightforward phone support to more thorough outsourcing partnerships.

We have clients in all 26 counties of the Republic of Ireland as well as Northern Ireland, the UK and some US firms, all of whom partner with Tom Smyth & Associates to ensure they comply as employers and have systems and policies in place to create an excellent work environment for their team.

Our services include HR Consultancy, Employment Law, Conflict Resolution, Training & Development. We also provide an online HRM application, [TrainStationHR](#) which enables employers to issue and control all key employment and training documents.

We pride ourselves on our ability to adapt to client needs and we are always happy to discuss individual requirements.



## Section 1 – Re-opening Considerations

### Ongoing Contingency Planning

Planning cannot stop. There is a long way to go before Covid-19 no longer impacts people's lives, habits and business activity. Businesses should plan for worst case financial impacts and have a survival plan to build a people strategy around.

Other day-to-day operational plans need to consider at a minimum;

- Securing finance to keep the business in existence
- Risk managing an employee contracting the virus and what this means for the replacement of their skills and the health of the overall workforce
- Sales and distribution channels to keep business churning
- The stages of recovery and what milestones of progression will trigger a further implementation of the recovery plan.

### Health and Safety Considerations

In consultation with your Safety partners ensure that you have risk assessed each changed aspect of your working horizon and introduce infection control measures where required. This can include:

- Proper working from home risk assessments for each employee's home workstation
- An analysis of each work practice to minimise personal contact and adhere to the HSE guidelines on social distancing
- Personal hygiene guidelines
- High risk employees such as elderly, pregnant or those with underlying health conditions. What reasonable accommodations can be provided, if any, to ensure their workplace is risk managed properly?

### Physical Workplace Layout

The physical workplace must be assessed to ensure the employer can demonstrate that due care was taken before employees returned and all necessary protective and preventative measures are put in place to ensure the health and safety of employees. This may include:

- Ensure adequate distancing between employees, customers, clients, suppliers etc., in line with public health guidelines
- Consider desk or work-station spacing (e.g. till locations)
- Consider fitting screens/ dividers
- Consider implementing 'zones' within the workplace to manage the flow of employees and social distancing
- Clear signage in appropriate locations
- Ensure hand sanitiser is at entrances and appropriate points throughout the premises
- Is it necessary to manage the number of employees/ customers on site at any one time to ensure spaces are not crowded and if so, will extra staff/ security be required to manage this?



## **Employee Training**

It is critical that employers create customised training documentation on new work expectations, requirements, policies and norms. Combine these with the HSE requirements that affect your business and ensure that all employee review, query if they need to and then sign off on any new policies. Training should include:

- Use of Personal Protective Equipment (PPE)
- Cleaning requirements
- Ongoing cough/sneezing etiquette
- Remote working policy
- Video call etiquettes
- HSE guide to social distancing
- Break and canteen etiquette to ensure social distancing is maintained
- Client or customer interaction policies

## **Work Rosters or Timetable**

Employers must consider whether changes to the normal timetable will be of benefit to the business. Many employers, including professional offices, are considering splitting their workforce into separate teams to firstly; ensure social distancing and secondly; to ensure that cleaning can take place between teams to avoid any outbreak of Covid-19 at the workplace rendering everyone unfit to work. In order to avoid cross-contamination, there should be no swapping between teams. Other employers are considering introducing staggered start times to facilitate social distancing, as well as exploring the different technologies available to monitor body temperatures as employees, and indeed customers, arrive at the premises.

## **Ongoing HR Scenarios**

Covid-19 has not gone away. It will be a part of our lives for months to come. Managers and business owners will still be faced with employment queries which will need to be managed properly and fairly to avoid employment disputes and claims of discrimination or unfair treatment. Consistency is a key word that employers need to remember when engaging with employees. Some examples to consider include:

- Ensure ongoing communications with employees on Covid-19 issues and any temporary or permanent changes to work practices
- Consider how to select which employees within each department/position are needed to return (if the full workforce is not required to return initially)
- Some employees may continue to refuse or be reluctant to come to work. They will have their reasons, which they will feel are genuine, so it is important to engage with these employees as well as clearly advising them that you expect your employees to attend work and uphold their end of the contract of employment
- Employees who are certified as being vulnerable or 'at risk' by their GP
- Ongoing requests to work from home even when the workplace reopens on a temporary or permanent basis
- Employees with no childcare who cannot attend work



- Employees who are certified as being the primary carer for a vulnerable or 'at risk' individual
- Employees who do not want to use public transport to travel to work
- Health and Safety at work concerns – manage these carefully to ensure no exposure to claims that you penalised an employee who raised such concerns, as to do so may be considered as victimisation under Health and Safety legislation
- Employee grievances and discomfort at others breaching social distances or returning after illness
- Continuing to manage absences and return to work protocols for both Covid-19 and non Covid-19 related absences
- Managing employees who become sick at work with possible Covid-19 symptoms
- Managing and supporting an employee who tests positive for Covid-19
- Management of annual leave for 2020 and travel abroad

These are the type of queries we have been dealing with for clients over the past few months and which we predict will continue to form the type of workplace scenarios that will require HR support.



## Section 2 – Business Supports Available

The speed at which this virus impacted our day to day lives caught many off guard. Government agencies and other parties have scrambled since March to make supports available to businesses and we provide an introduction and link to many of these below. We would encourage clients to seek support which may assist in future-proofing your business as the effects of this pandemic will be felt for many months to come.

The Department of Business, Enterprise and Innovation has outlined a suite of supports designed to help employers impacted by COVID-19 and a full booklet can be downloaded at

<https://dbei.gov.ie/en/Publications/Supports-for-businesses-COVID-19.html>

We would encourage you to actively review this booklet to identify your options and review your eligibility for supports available through loans, grants, vouchers, training and mentoring.

In addition to financial considerations, remember this is also an opportunity to avail of additional expertise and advice which may not be readily available within your business.

Details are also available via the following links:

<https://sbci.gov.ie/>

<https://microfinanceireland.ie/>

<https://www.enterprise-ireland.com/en/>

<https://www.localenterprise.ie/response>

As these supports are open to change and updates we would advise you to keep abreast of the options available to you and utilise these as much as possible.

Other useful resources as you move forward will be:

<https://www.gov.ie/en/>

<https://www.nsai.ie/>

<https://www.gov.ie/en/organisation/department-of-employment-affairs-and-social-protection/>

*\*The above is accurate at time of publication 30/04/20*



## Section 3 – Labour Cost Savings

From a HR perspective, the immediate and draconian restrictions forced on business in the middle of March created few HR headaches. The mass layoffs and business closures were so vast employee grievances with their employer were minimised.

As restrictions lift and business recommences, it will not be a v-shaped recovery for the majority of businesses. This will likely mean the employer has difficult staffing decisions to make. If you do not require everyone to return to work immediately, who comes back first and why? This is a difficult area of HR Management and can lead to claims of redundancy, discrimination, constructive dismissal, payment of wages etc.

There are many precedents from the last recession, circa a decade ago, where employers lost legal cases at Rights Commissioners/LRC (now Adjudication Officers/WRC), Employment Appeals Tribunal, Labour Court and Equality Authority hearings. Nowadays, the WRC and Labour Court will hear and adjudicate upon such cases from aggrieved employees who feel their rights have been breached.

Solicitors and Trade Unions will have no hesitation representing individuals and taking costly and time-consuming legal actions for their client/member.

Employers need to take time and plan properly, with competent advice, when making selection decisions that favour some employees over others.

### **Start with a plan**

We recommend clients start with a business plan and from this prepare a wage budget. What, if any, wage restrictions will be in place compared to pre Covid-19 levels?

Is the employer eligible for the Revenue Wage Subsidy Scheme (WSS) and if so, what further savings are needed during its operation, and may be needed after its conclusion?

Once you have a target set, you can then go about populating a roster or employee list with the most critical of positions (not names but roles).

As you progress into the exercise, you will start to see how many employees you will not be able to return to pre Covid-19 levels. This may affect team members in different ways.

If, for example, you have 100 work hours to distribute you must decide do you a) give 5 employees 20 hours each or will you b) need more bodies and perhaps give 10 employees 10 hours each.

Two key phrases to remember as you progress with any labour cost saving measures are **Unilateral Right and Fair Procedure**;

**Unilateral Right** – Do you need the agreement (written) of each individual to change a part of their contract of employment or is there sufficient flexibility in the contract to allow for the changes you require?

**Fair Procedure** – Did you follow a fair process (not in the employer's mind but under law) in coming to the decisions made or can any employee legitimately feel aggrieved that they were treated less favourably than a colleague. E.g. they received a comparatively high pay/hours cut or they were made redundant but others with less service were not.



## How do employers generally seek labour cost savings?

### Hours Cut

Check the employees' contract of employment and analyse what it states in relation to;

- Hours of Work
- Requirement for flexibility
- Reference to Lay off and/or Short time
- Reference to any unforeseen emergency situation (e.g. a policy inserted after the 'snow' a few years ago)

Your contractual commitment to your employee may mean any cuts to the hours of work must be through agreement and not unilaterally.

The most common forms of hour revisions would be;

- Fair and transparent % cut across the board; For example, a 40 hours per week worker moves to 35 hours, meaning a 20 hours per week worker moves to 17.5 so that pro-rata they have both contributed the same % of their weekly roster.
- 3-day weeks; Social Welfare will support an employee who has their working time reduced so long as the employee does not work more than 3 days in a given week. This is not a Covid-19 specific support and has been operating for some time. Further information is available in Section 5 under Short-time Working Benefit Support.
- Rotated lay off; whereby employees in an affected area take turns going on lay-off and claiming social welfare. E.g. Over a 10-week period, each of the 5 employees takes a turn on 2 weeks lay-off.

### Wage Cuts

As a general rule you must get employee acceptance of any wage cut in writing or it constitutes a breach of contract and an employee can mount a successful legal challenge to it. Unless there is a Trade Union agreement, employers have an individual contract with each employee. So, if you need to seek wage cuts, you will need to have an individual conversation with each employee and will ask them to sign a letter accepting the temporary, or permanent, cut to their pay.

If most accept it, but some don't, the employer needs to decide whether to proceed or not. Those who refuse to accept a pay cut cannot be unreasonably treated by the employer for this. They are merely exercising their right to uphold the terms of their contract. There are no guarantees, but experience has taught us that if an employer prepares properly and is honest and open with their employees then the vast majority will agree to a revision of their wage, at least on a temporary basis.

Plan and deliver a personal message to your team. Explain the reason for the cut, and how long it may last. Be sure to remind the employees of the cuts that owners and/or senior managers are taking. Be clear about the necessity of achieving the labour cost savings and what the possible consequences of not achieving them are (i.e. redundancies).

### Redundancies

An employer may need to permanently remove employees from the payroll. We go into detail in the next section (4) on the issue of redundancies.



## Section 4 – Redundancy

### **Redundancy**

*\*An immediate point to note is the Government made a temporary change to the redundancy legislation (section 12) for the duration of the ‘emergency period’ (13<sup>th</sup> March – 31<sup>st</sup> May 2020). Essentially this change restricts employees from requesting redundancy from their employer by reason of being on layoff for over 4 weeks as they normally can. The Government has advised that they will keep this under review as the Covid-19 situation develops. Employers who are concerned by the possibility of employees requesting, or demanding, redundancy should keep abreast of updates to the protection currently offered by this emergency legislation.*

With the economic slowdown being felt, there is no doubt that companies across Ireland are having to examine the possibility that their business will not survive at the same level, if at all, and must now consider the possibility of redundancies for their staff.

Where a redundancy situation arises and impacts more than one employee who performs the same or similar roles, it is essential to apply fair selection to ensure a transparent and fair process.

The element of fair selection is outlined under section 6(3) of the Unfair Dismissal Act and it is important to keep in mind that there are certain criteria that must be met, otherwise the dismissal may be deemed to be an unfair dismissal.

In the case of the current situation for many companies, it is likely that the circumstances constituting the redundancy may apply equally to one or more other employees in similar employment with the same employer. Within that group, the employer may choose to dismiss certain employees and not others.

It may be successfully argued that the selection was unfair and the employee was unfairly dismissed, where it can be proven that selection of the employee for dismissal resulted from;

1. An automatically unfair reason(s) for dismissal.
2. A matter that would not be grounds for justifying dismissal.
3. Their selection did not follow an already agreed procedure of the company regarding redundancy, without any special reason to ignore this procedure.

So how do we navigate fair selection for redundancy and ensure we meet this test?

### **Process**

If it is obvious that workload will be reduced in the medium to long term and/or if some business functions are no longer needed or can be outsourced then the prospect of redundancy becomes very real.

We would advise clients to keep a record of any discussions, debates, plans etc. and create an email trail amongst owners/directors/senior management to prove that genuine, commercial related discussions took place that led to the decision to explore the prospect of redundancies. These emails or notes may be important evidence at a later time if any individual feels a redundancy process is a personal attack against them.



## **Redundancy Roadmap (1-4)**

*The advice below is a summary only and would need to be personalised and stress tested with the exact detail relevant to each proposed redundancy.*

### **1. Beginnings**

Following the completion of a comprehensive business review, it has been determined that the most logical and credible way for a business to obtain necessary labour cost savings is to consider certain roles to be made redundant.

A form of team communication is prepared, usually in the form of a 'state of the nation' style address from the Owner or Managing Director. This speech focuses on the positive message that the business will survive, but that tough decisions have to be made and some positions have to be considered for redundancy in order to secure many others. It is confirmed that individual meetings will be organised soon after this point to hold relevant discussions with affected employees.

If a voluntary redundancy scheme is being offered then this can be announced at this stage also. This would mean that some employees can put their hand up and volunteer to take a redundancy payment to leave. This has the benefit of minimising the difficult decisions as those who are satisfied to leave go with no fuss. Obviously, this needs to be cost analysed, as those who volunteer for redundancy generally have longer service which is costlier to the employer. If an employer is operating a voluntary redundancy program they should prepare a detailed document outlining how the scheme would work, that any offer is subject to management approval, identifying timelines for application and stressing confidentiality in case the employer does not want a particular volunteer to leave.

### **2. At-Risk**

Presuming a voluntary redundancy program is either not being offered, or does not yield all the labour cost savings required, an employer needs to identify positions that are at risk and notify those in these positions that their role is at risk of redundancy. This must be in writing. It is critical the employer start with 'positions' and not 'people'. Usually the safest and least contentious way of identifying position is on a last in, first out (LIFO) basis. For example; a kitchen operated with 5 porters and given the reduction in restaurant covers it now only needs 3, the last 2 porter roles filled are identified as being at risk.

It is possible for an employer to create a 'skills matrix' and basically score all candidates, such as the kitchen porters in the example above. Ideally you have an independent process whereby the risk of allegations of prejudice are removed as much as possible. The headings under which employees are 'rated' should be as tangible as possible. Clients should be clear, however, that a skills analysis does cause more grievance as you are comparing employees and making judgments on who is better than who!

An 'at risk' meeting should be arranged with the employee to explain the logic of the situation and invite him/her to come back with thoughts, comments or criticisms, all of which should be considered by the employer.

It is likely that there may not be suggestions made that will save the job (if there are, great!) so therefore you will likely have to indicate that the job is therefore being made redundant.



### **3. Consideration of alternatives**

If the decision is to proceed with the position being made redundant the employee is invited back into a decision meeting.

At this meeting, you would likely be informing the employee that the role they occupy is being rendered redundant and consideration must now move to what happens the employee.

Consider other options for the employee. Have they sufficient service to displace others in another department or location? Have they transferable skills to take on another role? Is the employer hiring in any other area of the business?

After the meeting, you summarise the options to the employee in writing and give them a timeline for consideration. Depending on the specifics of each scenario the options may include redundancy and an exit or relocation to one, or more, alternative roles within the business.

### **4. Final decision**

Once any consideration time elapses, a final decision is made on the future of the employee. Any final decision is obviously confirmed in writing. As we have mentioned, a redundancy is a form of dismissal so always include a right to appeal a decision to dismiss. This will generally be to a higher level of internal management but sometimes, if this is not practical, to an external business partner such as HR Consultant, Solicitor, Accountant. It has to be someone who credibly has the ability to overturn the decision if they find it substantively or procedurally flawed. If the appeal mechanism is invoked the Appeals Officer reviews the process and decision impartially and issues a decision.

### **Statutory Redundancy**

Statutory Redundancy is 2 weeks' pay per year of employment (part years are included) plus 1 bonus week. For example, an employee with 3.5 years' service is entitled to  $((3.5 \times 2) + 1)$  8 weeks' pay tax free. Additional weeks may have been offered during previous redundancies, therefore it is important to check if any precedents exist and establish if there are any established Trade Union agreements in relation to this.

There is an online calculator on the [welfare.ie](http://welfare.ie) website which will produce a one-page PDF outlining the exact figure an employee is due.

#### [Welfare.ie Redundancy Calculator](http://welfare.ie)

An RP50 form is filled in with the particulars of the departing employee and a copy retained by both sides to act as a form of receipt for revenue and welfare reasons. This can be submitted in hard copy or online.

### **Ex-Gratia Payments**

Employees can receive further payments from their employer called 'ex-gratia' sums which can also be tax free subject to limits. As a basic guide an employee can get €10,160 plus €765 per year of completed service in a tax-free manner.

There are further tax-free reliefs such as the additional increased exemption of an €10,000 (must be authorised by Revenue), top-slicing etc. but for the vast majority of redundancies the basic exemptions cover what the employer can offer.



There is a history in Ireland of employers giving an enhanced redundancy package to departing employees. In industrial relations terms it is usually reflected as extra weeks per year of service. For example, statutory redundancy being 2 weeks' pay per year of service, you would hear a person received 2+2 or 4 weeks' pay per year of service. This is the employer availing of the basic exemptions and adding to the lump sum the employee receives.

Employers should be aware that if employees are represented by a Trade Union and are unhappy with their redundancy sum and bring a case to a Labour Court, they usually are awarded an extra sum above basic statutory as the Labour Court view ex-gratia payment as a tradition in Irish industrial relations.

### **Affordability of Payment**

The employer is liable for 100% of the redundancy payment to the employee. In the past, a rebate was offered by government for 60% (then 15% for a brief period) to support an employer but this has been abolished\*. If the employer cannot afford the statutory lump sum they can support the employee by applying to the Social Insurance Fund for payment in full. The Government will require a letter from an accountant confirming the employer's inability to pay the statutory lump sum and acceptance of the employer's liability to pay the full lump sum, in addition to a Statement of Affairs. If the Government agree to make the payment they will pay the redundancy lump sum to the employee directly and then engage with the employer on a repayment strategy when the employer is in a position to pay. In essence, they may provide an interest free loan to the employer to facilitate the redundancies. For Limited Company employers, this becomes a debt of the Company. For Sole Traders, however, please be aware that this debt follows the individual and we have heard cases where the Government seek repayment of any redundancy support from the estate of a deceased Sole Trader.

*\*We are advising employer bodies to lobby government to bring back the employer rebate for a defined period to ensure that the necessary and inevitable redundancies caused by the Covid-19 pandemic do not put an employer in a precarious financial position that may endanger all jobs.*

### **Reasonable Alternative Position**

The employer must consider as part of a fair redundancy process whether the employee occupying the role identified for redundancy can be relocated to another position within the business. For example; if Store A is to close but an employee there has more service than some of the team in Store B which is 10 miles away, (s)he should be offered the opportunity to move and replace a colleague with lesser service.

As part of the process when considering a redundancy, the employer should discuss any other available roles within the business. They should also explore what flexibility the employee would show to changes in role, travel to other locations etc. Remember a dismissal for any reason should be viewed as an act of last resort so the employer must put effort into trying to keep people in work if possible to genuinely try to keep the employee, but also to prove they followed a fair process when terminating the employee by virtue of redundancy.

Sometime the employer will try to avoid a redundancy payment by unilaterally transferring an employee to another location. Whether this truly constitutes a 'reasonable alternative' can depend fully on the individual circumstances of the employee. For example, a move between two towns 5 miles apart may seem reasonable but not if an employee does not drive and walks to work. If there



is no regular public transport then it may not be 'reasonable' for the employee to transfer and the employer may have to pay redundancy.

### **Collective Redundancy**

A collective redundancy is where in any period of 30 consecutive days the number of dismissals (redundancies) is:

- (a) at least 5 redundancies in an establishment normally employing more than 20 and less than 50 employees,
- (b) at least 10 redundancies in an establishment normally employing at least 50 but less than 100 employees,
- (c) at least ten per cent of the number of employees being made redundant in an establishment normally employing at least 100 but less than 300 employees, and
- (d) at least 30 redundancies in an establishment normally employing 300 or more employees.

**In a collective redundancy situation, the employer must give the Minister for Jobs, Enterprise and Innovation (the "Minister") written notice of its proposal at the earliest opportunity and at least 30 days before the first dismissal takes effect.** The Protection of Employment Act, 1977 ("the Act") also provides that the employer must, with a view to reaching an agreement, also consult the representatives of the employees affected. Again, these consultations must be initiated at the earliest opportunity and in any event at least 30 days before the first notice of dismissal is given. Notice periods cannot run concurrently with the 30-day consultation period.

### **The consultations must include the following matters:**

- (a) the possibility of avoiding the proposed redundancies, reducing the number of employees effected by them or mitigating their consequences by recourse or accompanying social measures aimed at, inter alia, an aid for redeploying or retraining employees made redundant; and
- (b) the basis on which it will be decided which particular employees will be made redundant.

### **Employee Representatives**

The Act makes reference to Employee Representatives supporting employees throughout a collective redundancy situation. This can include trade unions, staff association or other accepted bodies. If there are no Employee Representatives within the organisation, it will be a matter for the employer to ensure that employees receive satisfactory support and representation during this time.

When the employer is consulting the employees, the employer must supply the employees' representatives with all relevant information relating to the proposed redundancy. This includes (but is not limited to):

- (a) the reasons for the proposed redundancies;
- (b) the number and descriptions or categories of employees whom it is proposed to make redundant;
- (c) the number of employees and description of categories, normally employed;
- (d) the period during which it is proposed to affect the proposed redundancies;



- (e) the criteria proposed for the selection of the workers to be made redundant; and
- (f) the method of calculating any redundancy payments other than those methods set out in the Redundancy Payments Acts, as referred to above.

In addition, the employer must supply to the Minister copies of all information supplied to the employees' representatives.

A useful tip is to prepare a questions and answers document which can be handed out to employees in a collective redundancy situation to avoid any confusion or repetitive questions.

An employer should ensure that the consultation is at the very least seen to be meaningful and therefore the redundancies should be referred to as a "proposal" and not a "conclusive decision".

The employer must be seen to be considering alternatives to closing during the consultation period. If the employer does not do this, each employee can make a complaint to the Workplace Relations Commission (WRC). While there is an obligation of consultation, there is no obligation on the employer to reach an agreement with the employee representatives.

### **Risks in not complying with the obligations in relation to collective redundancy**

The risks associated with not complying with the obligations of an employer in a collective redundancy situation as set out in the Redundancy Payment Acts are as follows:

- In the event that an employer is in contravention of its obligation to consult employees' representatives (internal representatives) at least 30 days prior to first dismissal taking effect or the employer is in contravention of its obligation to supply the information as specified in the Act, the employer is liable on summary conviction of a fine not exceeding €5,000.
- In addition, an employee, trade union, staff association or other accepted body can make a complaint to the WRC for not entering into a consultation process at least 30 days prior to first dismissal or for not supplying the employees with the required information.
- Also, an employer who does not notify the Minister in writing of the proposed collective redundancy at least 30 days before the first dismissal takes effect, is guilty of an offence and shall be liable on summary conviction to a fine not exceeding €5,000.
- Where an employer has notified the Minister but the collective redundancies are effected by an employer before the expiry of 30 days from the notification to the Minister, then the employer will be liable on indictment to a fine not exceeding €250,000.

### **CASE LAW - REDUNDANCY**

We understand some readers of this report may not have had redundancies before, may not have had legal cases taken against them before and therefore may feel some of the content is overly onerous on the employer. We have therefore compiled examples of case law to demonstrate how the various tribunals and courts interpret redundancy cases.

#### **- Lack of procedure**

In a case of **Olivia Dempsey v C&F Automotive Ltd, t/a Iralco [UD 788/2014]**, the employer was making considerable losses and the manufacturing of some products was moved abroad or came to an end. While employees did realise that the company was not prospering as it used to, Mrs



Dempsey was never officially informed about the seriousness of the situation. Mrs Dempsey was in the company for more than 10 years and over the years she performed different tasks. As a result of her role being varied she gained a considerable amount of skills. **The employer failed to put Mrs Dempsey at risk of redundancy,** but also **overlooked her experience** within a company and **her availability to perform several other** jobs and proceeding with a stand-alone redundancy. Mrs Dempsey was awarded €20.000 in compensation for an unfair dismissal.

**- Consider other alternative positions for the employee.**

Where a role is to be made redundant, prior to a final decision being made, it is prudent for all employers to ensure they have examined the possibility of any alternative roles they could offer the employee to maintain them in employment.

In the following case, no alternatives were considered where they were available.

**UD1169 - Employee v Employer - Employer didn't follow fair procedure**

The Claimant was employed as a Development Officer with the Respondent.

The Respondent stated out of 60 Development Officers, 8 were made redundant. Out of these 8 redundancies the Company decided to restructure and make 2 new positions. The Tribunal found that the Respondent did not use fair procedures. They did not consider possible alternatives to redundancy and the Claimant was not offered an appeal of the decision to make him redundant.

The Tribunal found that the Claimant was unfairly dismissed and was awarded the sum of €27,500.

This case highlights the importance of following fair procedure. An employer must **consider alternative** employment for the employee being made redundant. It also highlights that an employee should also be offered an **appeal** of the decision to make them redundant.

**- Reasonable alternative position**

In the case of **UD206/201:- No evidence of Selection Criteria and deemed not a reasonable alternative**

The Adjudication Officer in this case held that no evidence was presented as regards any objective and transparent selection criteria being used prior to deciding that the employee be made redundant. He held that an offer of a two day week could not be considered a suitable alternative employment as it constituted a 60% reduction in working times from earnings. The employee was not advised that he could appeal the decision. An award of €21,750 was made.

**What is a reasonable alternative?**

We see this examined in the case of **RPA/18/17 Cinders v Celine Byrne Limited**. It was found that where Ms. Byrne had refused the offer of work in an alternative store which mirrored previous terms and conditions, as well as a similar proximity to her home, commuting distance and cost, the Court found that the Complainant's refusal to accept the option of working in the Respondent's Wicklow Street store was unreasonable.

**The right to appeal a dismissal (redundancy)**

It can be seen in the cases that we have discussed in this paper that failure to allow the employee the right to appeal is a factor in determining if a fair procedure was followed in the redundancy



process. Redundancy is a process where it is the job or the position that is being made redundant. It is the effect of that position being made redundant that the employee becomes redundant. Where redundancies are being considered it is not a question of keeping the best employees. It is an issue of deciding which jobs will go and then applying the selection criteria to the people in those jobs.

In the case of **EDA095 - Intrinsic Justitia v Kerrie McGarvey**, this case relates to a complaint of **unfair selection for redundancy on the grounds of gender and family status**.

Redundancies arose in this organisation and there was a matrix system developed to select staff for redundancy. The Complainant was informed that she was selected for redundancy when she was 7 months pregnant. The facts established were that the Complainant was pregnant, and known to be so at the time of the selection for redundancy, previous remarks had been made about her family status and the basis for the matrix and the method of calculation was unclear to the Court. The findings of this case were that the Complainant was made redundant on the basis of being discriminated against on grounds of gender and family status the Labour court reduced the compensation amount to €20,000.

This case highlights the need for organisations to take care when selecting employees for redundancy and to ensure that any selection matrix used is clear. In addition it is also a reminder of the additional care that should be taken when selecting pregnant employees for redundancy.

The EAT decision in the case of **Sean De Loughry v. Distinct Business Consulting Limited (UD1414/2010)** examined in detail the matrix used which contained three headings – salary scoring, current chargeability and future requirements and **determined that the selection criteria used was fair and reasonable** in all the circumstances.

**- Collective Redundancy and the legal obligation of employers to engage in meaningful consultation with employees:**

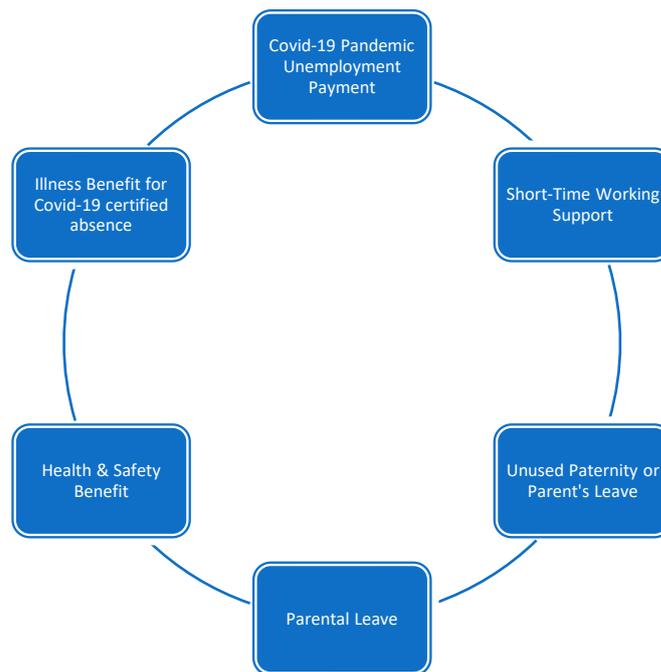
The recent High Court decision of *Tangney and Others v. Dell Products Limerick* [2012 No. 245MCA] highlights the legal obligation of employers to engage in meaningful consultation with employees regarding proposed collective redundancies. The case was an appeal on a point of law from an EAT determination to the effect that the respondent had not failed to comply with its obligation to consult with employees under section 9 of the Protection of Employment Act 1977 regarding a proposed collective redundancy. The employees were informed about the proposed redundancies via letters providing details of provisional leaving dates and proposed severance packages. That day, the employees were also briefed by senior management about the proposed redundancies. Dell subsequently engaged in a consultation and discussion process with its employees as required by legislation. However, the employees brought a claim to the EAT alleging that the letter and meeting constituted a notice of dismissal and that any subsequent consultations were too late to be effective. The EAT found that the initial communication did not constitute notice of dismissal and declared the complaints not well founded.

In the *Dell* decision, the High Court found that at the very least, the employer should have made a strategic decision regarding its business which requires it to consequently consider the likelihood of ensuing collective redundancies prior to the commencement of any consultation process. Birmingham J. stated that any discussions or correspondence issued during redundancy consultations should be open to amendments and should not pre-determine any issues.



## Section 5 – Welfare and Leave Support for Employees

This section sets out some of the supports that eligible employees can avail of if there remains a difficulty returning them to their normal working arrangements as Covid-19 restrictions are lifted.



### **Covid-19 Pandemic Unemployment Payment**

This payment of **€350** was introduced with the aim of providing employees, and the self-employed, with an income should they be placed on temporary layoff, lose their job or, in the case of the employer, be forced to close their business temporarily due to the Covid-19 Pandemic, (i.e. have lost all of their employment) on or after the 13<sup>th</sup> March. It is expected that this payment is set to last for the duration of the crisis.

Individuals that qualify for this payment should complete the online application for the emergency COVID-19 payment on [www.mywelfare.ie](http://www.mywelfare.ie).

Information from the department leads us to believe that when this payment ends, those who remain off work will migrate to jobseekers benefit/allowance (currently starting at €203).

For up to date information please visit the department website:

<https://www.gov.ie/en/collection/490ac8-all-services-offered-by-the-department-of-employment-affairs-and-soc/>



### **Short-time Working Benefit Support**

Any employee that has experienced a temporary reduction in their normal hours of work, and is placed on a short-time working arrangement, should apply for this Short-Time Work Support which is a form of Jobseekers Benefit, and is based on the employees PRSI Contributions. Any employee that does not qualify for Jobseeker's Benefit based on their PRSI contributions should apply for Jobseekers Allowance.

Any employee who has suffered a significant reduction in their normal working hours, or has been placed on a maximum 3-day week where they originally worked on a full-time basis, may qualify for this support.

The maximum entitlement for Jobseekers Benefit is €203 per week, so for example a full-time employee (5 days) that is reduced to a 3-day working week may apply for two-fifths of this Jobseekers Benefit for the two remaining days. This employee should receive a total of €81.20 welfare payment for the two remaining days.

Some employees with a qualified adult or qualified child may also be entitled to an increased rate of payment in addition to this Jobseekers' Benefit.

Employees that qualify for this payment must complete the online application for the Jobseeker's Benefit on [www.mywelfare.ie](http://www.mywelfare.ie). Employees may also apply at their local Intreo Centre or Social Welfare Branch Office.

### **Unused Paternity or Parent's Leave**

Any employee that qualifies for and has not used their paternity leave or parents leave may be entitled to now apply for this leave.

Paternity Leave – entitles a new parent (other than the mother) to take two (2) weeks off from work anytime within the first 6 months of the birth of the child or adoption. While this leave is usually unpaid from the employer, the employee may qualify for payment from the DEASP depending on their PRSI contributions. This benefit is paid at a standard weekly rate of **€245** per week.

Parent's Leave (Benefit) – This is a new scheme that was introduced in 2019 which allows parents to take an additional two (2) weeks leave from work within their child's first year of birth. While this leave is usually unpaid from the employer, the employee may qualify for payment from the DEASP depending on their PRSI contributions. This benefit is paid at a standard weekly rate of **€245** per week.

However, any employee who may currently be on the Covid-19 Pandemic Unemployment Payment must close this claim to receive their Paternity Leave Payment or Parent's Leave Benefit.

### **Parental Leave**

While unpaid, if parents are not in a position to return to work they may consider applying for Parental Leave and employers may consider being flexible to accepting these applications.

Parents are entitled to take 22 weeks Parental Leave per eligible child, which must be taken before the child's 12<sup>th</sup> birthday. This entitlement is set to increase to 26 weeks on the 1<sup>st</sup> September 2020.



This leave must be requested in writing at least 6 weeks' prior to the employee's intention to take this leave and must be taken in one of the following methods:

- One continuous block of 22 weeks leave
- Two separate blocks of a minimum of 6 weeks each
- In shorter periods broken into hours or days if agreed to by the employer

If both parents of the eligible child work for the same employer, one parent may transfer 14 weeks of their parental leave entitlement to the other parent if the employer agrees to the transfer.

A confirmation document must be signed by the employee and employer outlining the agreed details of the leave period at least 4 weeks prior to the start of this leave.

Any employee that works part-time may be entitled to this leave on a pro-rata basis.

Any employee with a child with a disability or long-term illness can avail of this leave up until the child's 16<sup>th</sup> birthday.

While there is no social welfare payment applicable to this payment, this is a protected leave and therefore the employee will accrue annual leave, public holidays, etc. and the employee's service will not be affected.

#### **Illness Benefit – for Covid-19 Certified Absence**

Any employee who has been requested to remain in quarantine or self-isolation as the business re-opens should be entitled to apply for illness benefit of **€350** per week. The employee should discuss this directly with their GP and should request an unfit for work cert/isolation cert for their employer.

#### **Health & Safety Benefit**

Any employee who is pregnant, or may be breastfeeding (up to 26 weeks after birth of the child), or has given birth and is a night worker may be entitled to qualify for Health and Safety Leave (Health and Safety Benefit from Social Welfare) if there is a risk in the workplace to this employees health that the employer cannot remove from the workplace, or the employee cannot be assigned to alternative "risk free" duties, and the employee has the required PRSI contributions. This benefit must be granted from the employer and is a form of protected leave.

If Covid-19 is a risk to the employee in the workplace, the employer should request a detailed letter from the employee's GP outlining the reasons for the employee being placed in the at-risk group and the risks in the workplace that are of concern. Following receipt of this, the employer should conduct a maternity risk assessment with the pregnant employee and then make a decision relating to the Health & Safety Leave.

The employer must pay the first 3 weeks of normal wages for this benefit and the remainder of this leave is paid for by the DEASP.



## Section 6 – New Ways Of Working Highlighted By The Crisis

While the overwhelming effects of Covid-19 have been negative, in this section we explore some areas where the Pandemic has introduced employers to new ways of working and also rekindled lost senses of co-operation, community spirit and care in our workplaces and society.

We have selected 4 HR concepts or ideas that have been around a long time but that, especially in the Small and Medium Enterprise (SME) sphere, were viewed as big business initiatives that their business could not afford or embrace. This pandemic has well and truly given these concepts a huge shot in the arm. Whether their widespread recognition lasts remains to be seen!

### **Working from Home – Remote working**

Employers, with a very short lead time, had to look at new ways of working for their employees. For those for whom it was possible to work from home, employers now had to see how this would work, taking into account a number of considerations.

Some employers may have previously resisted allowing employees work from home, citing various reasons for wanting employees to attend the office. Reasons include concerns that managers could not manage employees they could not see and employees potentially not completing work assigned. With Covid-19 now showing employers that more flexible working is possible, employers must embrace the situation they find themselves in as flexible working can be a positive asset to any organisation. Many employers have seen the benefits of allowing employees work from home. If employers are going to consider working from home on a more permanent basis, a detailed working from home policy should be prepared to deal with issues such as, but not limited to, GDPR, Connectivity, Rest Breaks, Health & Safety, Client interactions, Use of Equipment, Cost of Home Office Equipment, Security etc.

### **New Technologies**

The pandemic has seen a surge in the use of various web-conferencing applications such as Microsoft Teams, Zoom, Google Hangouts etc. to communicate with people in a new way. These applications allow employees to virtually attend meetings, presentations and work catch ups so that the same work is carried out, although in a new “normal” way. Since the introduction of virtual meetings, companies must now look at the “do’s and don’ts” of participating in virtual meetings and the importance of the professional etiquette required. Meetings in the virtual world will allow everyone to keep connected and can also be used to maintain connection with those outside of your organisation such as customers and suppliers.

However, employers must also look at the security of these applications and take measures to ensure Data Protection is not breached.

Be aware of the privacy and security features of the applications you choose to use, have a clear policy on password protection and avoid presenting commercially sensitive or confidential company data on public chat facilities.

[DataProtection.ie-Tips for Video Conferencing](https://www.dataprotection.ie/Tips-for-Video-Conferencing)



Employers must weigh up the time and expense saved by engaging with virtual meetings in a more permanent manner versus the human personal touch of a physically attended meeting. People thrive on physical connections and engaging someone with body language can be irreplaceable. Despite this, from a HR perspective, we can see a large uptake in virtual meetings to assist employers with;

- Interviews, recruitment and online inductions/on-boarding
- Preliminary workplace investigations
- Appraisals and Probation reviews
- Non-critical cross border team meetings
- Non-invasive Company health and Doctor appointments
- Long distance risk assessment and accident investigations

Separately, the HSE are currently working on the introduction of a Covid-19 contact tracing app for use in work settings. The app is designed to log interactions between staff to identify and subsequently contact people who have been in close contact with a diagnosed colleague. This will be an 'opt-in' service and, at time of print, discussions around its operation and GDPR implications are continuing with the Data Protection Commissioner.

### **Wellbeing**

On the softer side of HR, the concept of employee wellbeing has received a lot of online column inches and virtually all employers have taken a caring and compassionate view on the effects Covid-19 has had on their teams and customers/clients. While different organisations may have had various employee wellbeing initiatives in place for some time, or only more recently, now more than ever it would be important to review and communicate these initiatives with your employees.

Employers may wonder what type of initiatives they can introduce now that they are not seeing their employee. Again, companies must look at how they can do this differently considering the situation we are in. Many companies may have communicated initiatives previously using posters, plasma screens, printed newsletters, etc. What can companies do now that employees are physically not onsite? Employers are encouraged to be creative, do you have e-mails and mobile numbers for your employees? Communication could be forwarded to employees using these methods. Also, does the company have an intranet? Employees could be contacted to inform them to monitor these forums for updates.

Next to consider is what wellbeing initiatives to communicate? Often initiatives are based on employees taking part onsite and so employers must now be imaginative of the initiatives they can introduce. Also, companies may have already identified and scheduled initiatives taking place for the year. It would be important to review this list and reflect as to whether it needs to be adjusted. There are many tips and videos on employees keeping well during this time. Reach out to your health insurance provider to see if they have details they can share with you. These tips and videos can range from fitness, cooking, managing sleep, coping with distress, dealing with isolation, parenting tips etc. There are plenty of legitimate websites to avail of this information from, so employers are encouraged to research the information and communicate it to your employees.

Furthermore, where your organisation has an Employee Assistance Programme, employees should be reminded that this programme is in place and continues to be available to them where they may need it. If employees had challenging personal circumstances prior to Covid-19 these may have been exacerbated by the recent difficult weeks. There has been an increase in employees using an



Employee Assistance Programme and employers should encourage employees to continue to avail of this where they feel they may need to. Employees should also remind employees the Employee Assistance Programme is not just for work issues, and they are encouraged to use it for personal queries also.

While the initiatives above are based on employees coping away from work, employers should also take into consideration the social interaction employees would have had with their colleagues prior to Covid-19 and what they can do to mirror this. Employees need a sense of belonging in an organisation and so employers should consider what initiatives employees can take part in that would contribute to their overall wellbeing. Some suggestions include virtual bake offs, running photo competitions etc., prizes could also be provided for the best cakes, photos etc. this would also contribute to engagement with employees.

It is important to keep in mind that organisations rely on employees for the success of their company and so it is important employees, their family and home life are a focus for employers to ensure a productive workforce.

### **Corporate Social Responsibility (CSR)**

Arguably, now more than ever, we have seen the world and Ireland coming together to get through this world-wide pandemic and employers are encouraged where possible to contribute to the community in a positive way. Many SME's have gone out of their way to support front-line workers with meals, donations, PPE etc. LinkedIn is full of examples of businesses helping out however they can.

Due to social distancing and guidelines in place many charities have had to cancel fundraising events and so are in need of much needed funds in order to continue with the services they provide. As well as charities, fundraising events have been carried out for those on our front line. We have seen GAA clubs doing a 24 hour Wall Ball Marathon, people at home wearing formal wear for a day at home or work, virtual concerts, people running in their garden, to mention a few. Employers should look to see what event they could organise and what chosen charity they could support.

Working for an employer 'who cares' and has a sense of CSR and community spirit gives employees an enhanced sense of pride in their job and business, and many feel they can stand tall in their community knowing that support has been given to front-line workers or charities in part because of their hard work for their employer. The challenge for business is to prove that their charitable phase was not only for the PR and Social media posts and sets the tone for an ongoing charitable streak which will be needed well into the future.



## Section 7 – Possible Updates for your Contracts and Employee Handbooks

Employers must be careful when updating an employee handbook, or most especially a Contract of Employment. On the other hand, business is always evolving and the law is regularly updated. This Pandemic may lead to consideration to change certain internal policies either on a temporary basis or permanently. We would reiterate that employers need to show due caution and examine whether they allow for the right to update policies unilaterally or require employee agreement.

Policies to consider introducing or updating to take account of Covid related issues;

- Layoff/Short-Time Working
- Annual Leave (Consider a policy for washing through the 2020 annual leave into 2021)
- Bonus (what happens in 2020?)
- Exceptional Circumstances or Events
- GDPR
- Confidentiality & Security – *Computer & mobile password protected, hard copy files filed away in a locked drawer...*
- Remote Working – Working from Home
- Flexible Working
- Work Permits and Visa Checks
- Lone Working Policy
- Unplug from working – The right to switch off
- Flexibility & Mobility – *transfer between roles in the business*
- Customer Care/Hygiene guidelines – *wear gloves, use hand sanitiser, provide hand sanitiser and gloves for customer use, use of PPE.*
- Visitors Policy – *no unauthorised personnel may access the business premises. Any visitors must present to the reception. Prevent the likelihood of someone entering the premises that may have Covid-19 and not realise it.*
- Exit procedures – *(if there are likely to be redundancies) - return uniform, badges, access cards, company equipment (laptops/phones), documents and files, etc.*
- Probation – *employees who were still on the probation period before this pandemic and may now have gone passed the 6- or 11-month probation period date.*
- Update to Illness/Absence policy – *most likely temporary for Covid-19 considerations*



## Concluding thoughts

It is important to remember that, above all else, Covid-19 is a global health issue. While the contents of this document discuss issues which are important for the future of enterprise and individual livelihoods, it is important to remember the people who become critically ill because of this virus and the front line workers helping them and protecting the public.

We remain available and will continue to make our clients aware of ongoing, relevant, information via our newsletter service.

Our contact details are: [info@tsaconsultants.ie](mailto:info@tsaconsultants.ie)

T: 021 4634154