INTRODUCTION

Redundancy is where an Employee’s employment is terminated by his / her Employer, the termination being attributable to the fact that the position filled by that Employee is, or will become, superfluous to the needs of the Employer.

In order to dismiss an Employee for reasons of redundancy, an Employer needs to take pro-active steps to comply with the Employment Relations Act 2000 (“ERA”). The Employer must also comply with any relevant provisions contained in any agreement entered into between the Employer and the Employee.

An Employer faced with the prospect of dismissing an Employee for reasons of redundancy must:

• Be genuine in the decision which gives rise to the redundancy; and
• Act in good faith by:
  − Being fair, reasonable and sensitive to the Employee;
  − Abiding by the agreement entered into between the Employer and Employee;
  − Consulting with the Employee prior to the decision to render an Employee redundant being made;
  − Providing all information to the Employee to enable the Employee to contribute meaningfully during the consultation process;
  − Providing further assistance to the Employee if redundancy is the ultimate outcome of the process;

GENUINE REDUNDANCY

Employers are entitled to make commercial decisions about their business and these decisions may lead to positions held by Employees becoming superfluous. The Employment Relations Authority and the Courts will not interfere with genuine commercial decisions taken by an Employer. Examples of these types of decisions are:

• an election to become more efficient by automating departments;
• abandoning unprofitable activities;
• re-organising the structure of the business;
• re-locating a business;
• implementing cost-saving mechanisms;
• outsourcing work to independent contractors;

The Employment Relations Authority and the Courts may however enquire into the genuineness of the decision to render certain positions in the business superfluous. A genuine redundancy is determined in relation to the position and not the Employee and will usually be genuine if made for valid commercial reasons.

The timing of any decision to make an Employee redundant can be crucial. A financially distressed Employer faced with rendering part of its workforce redundant must start planning as early as possible, otherwise it may run the risk of losing its business altogether.
TERMS OF INDIVIDUAL EMPLOYMENT AGREEMENT (IEA)

Employers must check whether the agreements which they have with their Employees deal with redundancy. It may be that the agreements set out a process of consultation in a redundancy situation and how that should be handled. The ERA nevertheless has an overriding impact on the terms of the agreement.

CONSULTATION

The Employer and the Employee must engage in consultation and the consultation process must be a reality (as opposed to a charade). Consultation involves the making of a proposal not yet made final, listening to what the Employee has to say about the proposal, considering his / her response, and then deciding what will be done. The Employer must have an open mind and be ready to change its proposal.

The Employee to be consulted must be given notice of the commercial decision which is being considered by the Employer and that the commercial decision may lead to redundancies. The Employee must be given sufficient, precise information to allow a meaningful response to the commercial decision which may be taken by the Employer.

The Employee must be provided with an opportunity to contribute to the decision-making process. The Employee’s representations may show that there is no redundancy at all or that there are alternatives to dismissal.

Only once the Employee has been consulted should the Employer decide what is to be done.

INFORMATION

The input of the Employee in the consultation process is only likely to be meaningful if an Employee is provided with relevant and pertinent information.

The type of information which an Employer should provide to an Employee who is facing potential redundancy includes the disclosure of independent contractors being engaged (if relevant), the disclosure of future work potential, the disclosure of financial information and accurate information about alternative positions in the Employer’s organization. The Employer should likewise provide the selection criteria it has developed to determine which positions will become redundant.

The Employer has a right to withhold certain information to protect confidential information, the privacy of private persons and the commercial position of the Employer.

DISPARITY OF TREATMENT

Whilst the Employer has to deal with each individual Employee separately and on the facts pertaining to that affected Employee, generally each individual Employee should be treated the same. This is not always possible, but provided that the Employer has a plausible explanation as to why an Employee has been treated differently, it will not necessarily mean that the Employer has not acted fairly and reasonably.

FURTHER ASSISTANCE TO EMPLOYEE

Extensions of Time

Employees should be granted sufficient time to respond to their Employer, prepare for meetings and consider documentation and information provided. Reasonable requests for extensions of time should be granted.

Redeployment

The Employer should advise the Employee of other positions available in the organisation that are vacant in order that the Employee facing redundancy may make application for those positions.

Outplacement

An Employer should ideally provide outplacement support to its Employees whose positions have become redundant.

Additional Support

Alternatives to redundancy should be explored and fair treatment may call for counselling, career and financial advice, retraining and related financial support.

THE ER ACT (PART 6A)
Employers need to take cognisance of the ERA when their Employees are made redundant arising out of a restructure of the Employer’s business. Restructure includes selling or transferring all or part of the business of the Employer, contracting in, contracting out and subsequent contracting.

Particular categories of Employees are defined as vulnerable and a special process must be followed when a business is restructured and Employees affected thereby are categorised as vulnerable.

For the rest, every IEA should contain an Employer Protection Provision ("EPP") which applies to “restructuring” (excluding restructuring as a result of contracting in and subsequent contracting). The EPP should set out the procedure to be adopted by the Employer when negotiating with a new Employer, the process to apply to affected Employees and what those Employees who are not transferred would be entitled to.

Employers are always bound by the overarching duty of good faith.

CONCLUSION

Whilst the following list is by no means exhaustive, an Employer who has made a genuine decision to make an Employee redundant is required to be fair, reasonable and sensitive to the affected Employee and will be expected, during the process to:

• compile a proposal setting out the commercial decisions which may be taken by the Employer and the effect that the commercial decisions may have on the Employee’s employment (which should include a statement to the effect that the Employee’s position is at risk of becoming redundant);

• give the Employee notice of the need of the Employer to consult with the Employee about the proposal and the Employee’s potential redundancy. The Employer should avoid referring to performance / misconduct related issues in the notice.

• allow the Employee an opportunity to organise a representative;

• provide the Employee with all the necessary information that he / she will require to meaningfully partake in the consultation process;

• allow the Employee an opportunity to comment on the proposal and possibly avert redundancy;

• discuss how the redundancy process would be implemented, if inevitable;

If redundancy is inevitable the Employer should ideally:

• Provide financial and emotional counselling to the Employee;

• Assist the Employee in their attempts to secure alternative employment;

• Allow the Employee to work out notice periods;

• Give the Employee written references or certificates of service;

• Allow the Employee to farewell co-workers;

• Pay the Employee in accordance with agreed formulae (if relevant).