Calling all
Employers & Cross Border Workers

Dundalk Chamber & Eures Cross Border Partnership

**Breakfast Briefing**

On Tax Implications for Cross Border Employers & Workers

Thursday 21st May 2015 from 7.45am to 9am
Ballymascanlon Hotel, Dundalk Co.Louth

Presentation by
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Topics to be covered include:

- Jurisdiction and Posted Workers
- Discipline and Dismissal
- Redundancy
- Minimum Notice
JURISDICTION AND POSTED WORKERS

Introduction

Irish organisations regularly require employees to work in other locations within the European Union. The employment relationship is then impacted by the laws of more than one EU Member State and this can lead to complex issues where a dispute arises regarding the terms of employment and/or on termination of the employment.

Convention on the Law Applicable to Contractual Obligations

The Convention on the Law Applicable to Contractual Obligations (the “Rome Convention”) is an EU set of rules governing the law applicable to contractual obligations in any situation involving a choice between the laws of different countries. The guiding principle in the choice of law rules relating to contracts is party autonomy and the freedom of choice. The Rome Convention is an international agreement entered into on a voluntary basis by the EU Member States. The Rome Convention was ratified or acceded to by all member states of the EU.

The Rome Convention, which was transposed into Irish law under the Contractual Obligations (Applicable Law) Act 1991, provides that the law, which will apply to contracts with connections to one or more countries is the law chosen by the parties to the contract. Therefore, the position with regards to contractual entitlements will be straightforward if the employment agreement contains an express choice of law e.g. “This agreement will be governed by and construed in accordance with the laws of the Republic of Ireland”.

If the employment agreement is silent as to the choice of law, Article 6.2 of the Rome Convention provides that the applicable law will be where:

• The employee habitually carries out his/her work; or
• The place of business where the employer is located if the employee does not habitually carry out his/her work in any one State.

However, notwithstanding where the employee habitually works, Article 6.2 includes a general provision that the employment agreement will be governed by the law in the country with which it is “more closely connected”.

Notwithstanding that the Rome Convention was ratified by all member states it became apparent that there was a lack of harmonisation in its implementation across all member states. In December 2005, the European Commission announced its intention
to convert the **Rome Convention** into an EU Regulation. An EU Regulation is a legislative act that becomes immediately enforceable in all member states, without the need for national transposition. The **Rome I Regulation** ("**Rome I**") provided for the updating and adaption of the **Rome Convention**. **Rome I** embodied the **Rome Convention** on applicable law on cross border contracts. As from 17 December 2009, **Rome I** superseded the **Rome Convention** on the same subject matter and applies to all contracts concluded after the same date to all member states, excluding Denmark. However this does not change the application of the previous law. Article 6.2 of the Rome Convention is now fully embodied in Article 8 of **Rome I**.

**Jurisdiction Applicable to the Employment Agreement**

The rules governing the law applicable to the employment agreement and the rules governing which Member State’s courts have the right to hear any contractual disputes arising are entirely separate. Therefore, it is possible that, for example, the contract may be governed by Irish law but that an English Court has jurisdiction to hear any contractual disputes arising. In the majority of cases it is clearly in the interest of both parties that applicable law and jurisdiction is that of the same country.

Since March 2002 the rules on jurisdiction have been governed by **Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters**, known as the **Brussels I Regulation**. This applies to all Member States. The **Brussels I Regulation** was implemented in Ireland by the **European Communities (Civil and Commercial Judgments) Regulations (S.I. 52 of 2002)**. The Regulation is directly applicable and forms part of the body of EU law whereas the **Rome Convention**, being an international agreement entered into on a voluntary basis by the EU Member States, does not.

In considering jurisdictional disputes relating to contracts of employment, the starting point is Article 5(1) of the Brussels I Regulation which states that jurisdiction is conferred “in matters relating to a contract, in the courts for the place of performance of the obligation in question”. Article 19 of the **Brussels I Regulation** further provides that an employer may be sued (1) in the courts of the Member State where he is domiciled or (2) in the courts for the place where the employee habitually carries out his/her work.

The rules on jurisdiction contained in Article 1 and Article 19 of the **Brussels I Regulation** are overridden where the parties have entered into a written agreement to submit to the jurisdiction of the courts of one of the states who have contracted to the Regulation and (a) the agreement was entered into after the dispute or (b) the
employee chooses to rely on the agreement. This means that an employment agreement with an express clause stating that, for example, the “Irish courts will have exclusive jurisdiction on all matters arising in relation to the agreement” will be ineffective unless relied on by the employee. The employer can only secure the exclusive jurisdiction of the courts of a certain country if a written agreement to that effect is concluded with the employee after the dispute has arisen.

Statutory Employment Rights

Notwithstanding the choice of law provisions contained in contracts of employment, employees are protected by the employment legislation of the country where he/she mainly works regardless of any express provision on applicable law in the employment agreement. Article 6.1 of the Rome Convention provides that a choice of law made by parties to an employment agreement shall not have the result of depriving an employee of the protection afforded by the mandatory rules of law applicable in the country where the employee habitually carries out his/her work. For example, in Rainer Zimmerman (claimant) v. Der Deutsche Schulverein Ltd (respondent); UD 373/98 [1999] the Employment Appeals Tribunal found that it had jurisdiction to hear a case under S.13 of the Unfair Dismissals Act 1977 where the employee carried out his duties in Ireland notwithstanding the fact that German law was expressed to apply to the contractual relationship.

Furthermore, Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (the “Posted Workers Directive”) stipulates that workers who are posted by their employer from one EU country to another for limited periods should have at least the same basic terms and conditions of employment as workers habitually employed in the EU country to which they are posted. The Directive provides that the definition of worker is that which applies in the law of the Member State to whose territory the worker is posted. Member States have the choice to derogate in relation to minimum rates of pay with respect to postings of less than one month.

Termination of Employment

Given that disputes more often than not arise at the point of termination of the employment relationship, it is worth considering the rights of employees working outside Ireland in the context of the Unfair Dismissals Acts 1977 to 2007 (the “Act”). Section 2(3) provides that the Act will not apply in relation to a dismissal of an
employee, who, under the relevant contract of employment, ordinarily worked outside the State unless -

• The employee was ordinarily resident in the State during the term of the contract, or
• The employee was domiciled in the State during the term of the contract and the employer was either ordinarily resident in the State (in the case of an individual) or had its principal place of business in the State (in the case of a body corporate or an unincorporated body of persons) during the term of the contract.

The issue of ordinary residency was considered by the Employment Appeals Tribunal in Roche v Sealink Stena Line Ltd [1993] E.L.R 89. The Tribunal held that, notwithstanding the facts that the employer was a British registered company, that the contracts of employment were made in the United Kingdom and the employees were paid their wages in sterling, the employees were “ordinarily resident” in Ireland for the purpose of the Act as they were able to establish that they lived in Ireland, two of them owning their own house and two of them living with their parents.

With regards to s.2(3)(ii) of the Act, an employee of an Irish entity who works abroad is entitled to protection under the Act, unless the employee has acquired a domicile of choice in the new location. The concept of domicile is a much more permanent one than that of residency and if an employee asserts rights under the Act the burden of proof to establish that the employee’s domicile has changed will be placed on the employer. In M v M [1988] ILRM 456, Barr J referred to the onerous burden of proof placed on a person who asserts a change in domicile of origin. The case concerned whether a UK domiciled taxpayer had acquired a domicile of choice by moving to Ireland and setting up home here. Barr J concluded that in order to abandon a domicile of origin the taxpayer would have to prove that it was his intention to set up his permanent home in Ireland and went on to distinguish between setting up residence for an indefinite period and setting up a permanent home here, the latter implying an intention to remain for the foreseeable future which may only be altered in the event of a change in circumstances not then in contemplation or anticipated as being likely to happen at a future date.

Similarly in the UK, the House of Lords held in Serco Ltd v Lawson, Botham v Ministry of Defence and Croft and Others v Veta Ltd and others [2006] UKHL 3, that employees who work overseas for UK companies may still be protected by British unfair dismissal laws under s.94 (1) of the UK Employment Act 1996.
In certain circumstances the courts or statutory tribunals of several Member States may have jurisdiction over a case. Hence, the risk exists that an employee might take an action in the courts/statutory tribunal of a particular country not because it is best placed to settle the dispute (since it is, for example closest to the evidence) but because it applies the law most favourable to his/her case.

For example, consider the position of employees of Irish entities working abroad. If they have the requisite service requirements, they will be entitled to protection under the Act unless their employer can prove that they have acquired a new domicile (see above). However the employee will also be entitled to the statutory protections afforded to workers in the jurisdiction in which he/she mainly works (see above). Therefore, if it is necessary for an Irish employer to dismiss an employee who works abroad, it is possible that such an employee could try to establish separate rights of action in two different jurisdictions – i.e. in Ireland under the Act and in the jurisdiction in which he/she mainly worked.

This could leave the employer in the position of trying to comply with proper procedures to effect a dismissal in two different jurisdictions where such procedures may be in conflict with each other. For example, in Spain very often the most efficient way to effect a dismissal is for the employer to issue a dismissal letter to the employee recognising that the dismissal is unfair but giving the employee a severance payment equivalent to 45 days’ salary per year of service up to a maximum of 42 monthly payments. However, in Ireland to effect a fair dismissal in accordance with the Act it is imperative that that fair procedures are followed. A dismissal effected following the Spanish procedure, although offering the employer the most risk-free means of termination in Spain, would not satisfy the Irish requirement of fair procedure and would leave the employer open to liability under the Act. Conversely, following best practice to effect the dismissal under the Act may expose the employer to liability under Spanish law as it will not satisfy the procedural requirements of that law.

**Summary**

Where an employee has connections with two or more Member States within the EU the contractual provisions and employment legislation of both jurisdictions need to be considered. In effecting a termination the employer will need to consider the best practice in both jurisdictions and follow the course of action that exposes it to the least risk.
DISCIPLINE AND DISMISSAL

The Law of Unfair Dismissal in the Republic of Ireland

The Content of Disciplinary Procedures

An employer contemplating dismissing an employee for a breach of contract short of serious misconduct will encounter grave difficulties in convincing the Employment Appeals Tribunal that such a dismissal is not unfair unless a graduated scale of disciplinary action is invoked and the dismissal results from the employee failing at successive stages of the procedure to correct the defect in capability, conduct or performance concerned.

While it is almost trite to suggest that the purpose of a disciplinary procedure is to bring about corrective action on the part of the employee it is very often seen by both employers and their advisors as the instrument by which an effective dismissal can be brought about. A proper disciplinary procedure should make it abundantly clear that at each stage of the procedure an employee will be specifically addressed on the nature of the unsatisfactory conduct,
performance or attendance, as applicable, the specific improvements required and if possible, the time frame within which corrective action must be taken. Finally, the consequences of a failure to show the required improvement should be stated by reference to the further stages in the procedure which will be invoked up to and including dismissal.

Cases involving serious misconduct should be provided for separately within the overall disciplinary code. If there is to be a right of appeal the procedure should state clearly to whom that appeal lies. Appeals to the board of a company for example are cumbersome and where it is made clear that no final decision is made pending the appeal, the board members may be called to justify their individual input to the decision ultimately made. In *Kenny v Warner Music (Ireland) Ltd*, [UD 389/92] the EAT held that where the appellant had been summarily dismissed by the sales and marketing manager but then invoked a right of appeal to the managing director which was partially successful, the decision to dismiss had been taken by the sales and marketing manager and was unfair notwithstanding the successful appeal. Having regard to the authority of *Loftus and Healy v An Bord Telecom* [Unreported, High Court (Barron J) 13 February 1987.] where Barron J stated that in considering whether a dismissal was unfair, regard must be had to all the circumstances which involved looking at not only what the employer did before the dismissal, but also the entirety of his actions up to and including the hearing of the proceedings it would appear clear that the outcome of an internal appeal should be highly material in determining whether the dismissal was unfair.”

In dealing with issues of serious misconduct it would seem from a review of the principal authorities that the following propositions can be stated:

(i) An employee when confronted should be afforded the opportunity of having a colleague or some other party present on his behalf while allegations of misconduct are being investigated. It is as yet unclear from the authorities whether an employee is in such circumstances entitled to legal representation. [Contrast the decision of Barr J in *Aziz v Midland Health Board*, (1995) MLJI 119 relying on dicta in the judgment of Finlay CJ in *O’Neill v Iarnrod Éireann* [1991] ELR 1 with the decision of Blayney J in *Gallagher v Revenue Commissioners*, Unreported, High Court, 11 January 1991.]

(ii) While there is no immutable rule that an employee who is suspended during an investigation into allegations of serious misconduct should be paid, the better approach would commend that any such suspension should be without loss of pay.
(iii) An employee who is the subject of a disciplinary investigation is entitled to be afforded rights to natural and Constitutional justice which require more than what is embodied in the two well known Latin maxims *audi alteram partem* and *nemo iudex in causa sua* and may extend, *inter alia*, to the right to confront witnesses who give evidence impugning his character. [*Cf the judgment of Hamilton CJ in Gallagher v Revenue Commissioners*, op cit, p. 23] For cases involving serious misconduct, justifying summary termination of employment, the employer will have to demonstrate both that the misconduct alleged was sufficiently serious to justify dismissal and that procedural fairness had been observed in effecting the dismissal. Given the importance afforded to principles of natural and constitutional justice in Irish courts it is unlikely that a dismissal could be justified either at common law or under statute where there has been a substantial failure to observe fair procedures. [*However, in Hickey v Eastern Health Board [1991] 1 IR 208 the Supreme Court doubted whether principles of natural justice were applicable in the context of a dismissal other than for misconduct. In the instant case Ms Hickey was dismissed on grounds of redundancy and sought to judicially review her employer on grounds of failure to follow fair procedures.*]

While at common law what constitutes a wrongful dismissal is determined purely by reference to the terms of the contract, subject to considerations of natural/constitutional justice, the test is considerably different under the *Unfair Dismissals Act*. The only detailed judicial exposition of what is required under the Act to justify a dismissal is to be found in the judgment of Barron J in *Loftus & Healy v An Bord Telecom* [*Supra*] where the following explanation of section 6 of the Act was given:

“The onus of proof is on the employer. He must establish that the dismissal resulted wholly or mainly from one or more of the matters specified in subsection (4) or from some other “substantial grounds justifying the dismissal”.

Subsection (4) is without prejudice to the generality of subsection (1) and accordingly any dismissal which results wholly or mainly from one or more of the matters specified in subsection (4) must be such that the dismissal is justified. A dismissal will be deemed to be an unfair dismissal therefore unless it can be shown that it resulted wholly or mainly from substantial grounds (which in themselves justified the dismissal) of which those enumerated in subsection (4) are some though not necessary all.” [*Ibid., pp 4–5. Section 5 of the Unfair Dismissals Act, 1993 amends the test provided in section 6 of the 1977 Act by permitting the Rights Commissioner, tribunal or court investigating the claim of unfair dismissal to take account of the reasonableness of the employer's conduct and the extent to which procedures have been followed.*] At common law the
essential question is whether the breach giving rise to termination is repudiatory and therefore justifying dismissal. [Pepper v Webb [1969] 1 WLR 514 and Laws v The London Chronicle “Indicator Newspapers” [1959] All ER 285] An employee will be required, inter alia, to exercise reasonable care and skill, to cooperate with his employer and to serve his employer honestly and faithfully. Should he act in breach of one of these obligations dismissal could ensue. The contract itself may expressly provide for other circumstances justifying dismissal and while such grounds could provide an absolute defence to an action for wrongful dismissal they would still have to meet the objective standard of fairness in any claim of unfair dismissal.

Staff Handbook – Disciplinary Policy

The employer will generally be covered where the employer follows carefully the procedures outlined in the company’s Disciplinary Procedures. Where the company does not have a formal Disciplinary Procedure then the company should ensure to follow the procedures outlined in the Labour Relations Commission Code on Grievance and Disciplinary Procedures issued May 2000.

The Law of Unfair Dismissal in Northern Ireland

The Content of Disciplinary Procedures

The same principles as apply in the Republic of Ireland also apply in Northern Ireland but there is also a basic minimum award of 4 weeks pay and there are certain minimum steps (the “3 STEPS” Procedure) that must be included in a disciplinary procedure. These are known as the ‘statutory minimum procedures’. If an employer dismisses an employee without following this process, then if the employee makes an Unfair Dismissal claim, the dismissal will normally be ‘automatically unfair’. The employee normally needs at least a year’s service before he can make an Unfair Dismissal claim.

“3 STEPS” Procedure

Step One: A written statement — the employer should send the employee a written statement setting out the circumstances that have led them to contemplate dismissal and setting out an invitation to a meeting to discuss the matter.

Step Two: The meeting — the meeting should then take place, after which the employer should inform the employee of the disciplinary decision and of their right to appeal.
Step Three: Appeal — if an employee exercises their right of appeal, an appeal hearing should take place, after which the employer should inform the employee of the final decision.

There is a separate two-step Modified procedure (comprising Step One: Statement of the grounds for action; and Step Two: Appeal) for use in a small number of gross misconduct dismissals where the employer dismisses an employee by reason of his or her conduct without notice or pay in lieu of notice. It is important to note that:

- Each step and action under the procedure must be taken without unreasonable delay.
- Timing and location of meetings must be reasonable.
- Meetings must be conducted in a manner that enables both employer and employee to explain their cases.
- In the case of appeal meetings which are not the first meeting, the employer should, so far as is reasonably practicable, be represented by a more senior manager than attended the first meeting.

The Labour Relations Agency Code of Practice on Disciplinary and Grievance Procedures April 2011 provides practical guidance to employers, workers and their representatives on:

- the statutory requirements relating to disciplinary and dismissal issues;
- good employment practice in dealing with grievance issues
- what constitutes reasonable behaviour when dealing with disciplinary and grievance issues;
- drawing up and using disciplinary and grievance procedures; and

a worker’s statutory right to bring a companion to grievance and disciplinary hearings.

The Website also has very helpful Flowcharts and sample Letters outlining the procedures involved.

At Industrial Tribunals in Northern Ireland financial penalties for employers and employees are imposed if minimum statutory dismissal and disciplinary procedures, as detailed in the Code, are not followed. Additionally, unreasonable failure to follow the Code of Practice may result in a further financial penalty.

The statutory procedures are the minimum standard in Northern Ireland and, unless they are followed, the Industrial Tribunal will find the dismissal automatically unfair. The Tribunal award will also be adjusted to reflect this failure: consequently, the compensation awarded could be increased by between 10% and 50% where the tribunal feels it is just and equitable to do so.
Differences between Republic of Ireland and Northern Ireland

Employers in the Republic of Ireland commencing a business in Northern Ireland where they employ Northern Ireland employees can often (particularly where they are an SME) be unaware of these statutory procedures when it comes to disciplining / dismissing an employee in Northern Ireland. This can often leave the Republic of Ireland employer subject to the penal consequences of the statutory procedures even though the employer may have treated the employee fairly in the substantive Hearing. Failure to abide by the strict procedures which apply under Northern Ireland legislation will in itself leave the employer open to penalties.
REDUNDANCY

The Republic of Ireland

A Redundancy situation occurs where a position no longer exists as a result of objective business reasons and where there is no intention to replace the position. It is important to note that a true Redundancy is based not on the employee, but on the role itself.

How does a Redundancy arise?

Redundancies typically arise in circumstances of:

- Business closure;
- Rationalisation, where certain roles are cut or the numbers carrying out certain roles are reduced;
- Reorganisation, where job specifications are changed so that people with different skills/qualifications are required to do the job; or
- Mergers/takeovers, where two workforces are combined and numbers need to be reduced.

The Redundancy Payments Acts 1967 to 2007 (the “Redundancy Acts”) set out the legal basis for redundancy dismissal. It is vitally important that the redundancy is genuine and that employees are selected for redundancy in accordance with fair and objective selection criteria.

Pooling & Selection

The employer first needs to identify the “pool” of employees within which redundancy arises. It must then carry out a process of selecting which employees from that pool will be made redundant. Identifying appropriate selection criteria is critical and is an area in which employers frequently go wrong. Criteria should be based on measurable data rather than on individual opinion and might include:

- **“Last in, First Out”** (LIFO)
  LIFO was a common formula in the past but is applied less now because it is a blunt instrument which does not take the requirements of the role or the attributes of the candidates into account, other than length of service.

The following considerations can be applied, but care must be exercised:
Performance rating
It is important to ensure that ratings can be verified, ideally by written records such as performance appraisals.

Attendance record
While an employee’s attendance record can be taken into account, employers should be careful to “adjust” for absences such as certified sick leave, maternity leave and parental leave, in order to avoid indirect discrimination on grounds of disability, gender and family status.

Punctuality

Qualifications and training
Employers should consider what qualifications/training are relevant to the new role and whether the employee has resulting skills which are likely to transfer well to the new role.

Relevant experience
Consider whether the employee’s past experience is relevant to the needs of the new role. Also consider whether periods on secondment or on project-based work should be counted towards the employee’s overall experience.

These are only some examples.

Consultation

Employers are obliged by law to consult with employees in a collective redundancy situation (where the numbers of redundancies in a given period reach certain minimum thresholds - see Collective Redundancy thresholds below). The consultation process must be initiated at least 30 days before the first dismissal notice is issued and must cover matters such as the reason for redundancy, any potential alternatives and the selection criteria to be applied. Employers are also required to notify the Minister for Enterprise, Trade and Employment.

When engaging in consultation, employees who are absent on sick leave, maternity leave and other types of leave should be contacted and given an opportunity to participate. Employers should not assume that simply because an employee is not at work, he/she can be excluded.

While not expressly required by the Redundancy Acts, it is advisable, even in small scale or individual redundancy situations, to engage in dialogue with employees likely to be affected. Employers should bear in mind that the news of redundancy may be a shock to the employee. It is preferable to communicate that news in a way
which gives employees the opportunity to consider their options (including any alternative roles) and to put forward their own views.

It is also important to remember that an employer’s conduct in implementing a dismissal (whether on grounds of redundancy or otherwise) can be taken into account by the Employment Appeals Tribunal (the “EAT”) when assessing the fairness or otherwise of a dismissal. While employers are not required to create a position for redundant employees where none exists, the EAT has found an employer’s failure to look into the availability of alternative positions and to offer them to the employee to be unfair.

**Entitlement to Statutory Payment**

An employer who dismisses an employee by reason of redundancy must ensure that the employee receives:

- the notice provided in the contract or the minimum statutory notice, whichever is the greater;
- an employee with 104 weeks’ continuous service is entitled to a redundancy lump sum of two weeks’ pay per year of service up to a maximum of €600 per week, plus an additional week.

In addition to the statutory lump sum, employers often offer an ex gratia payment. The amount of any ex gratia element is affected by the particular circumstances of the redundancy and by custom and practice within that particular company or sector. Typically, such packages lie in the range of 2 – 6 weeks’ pay per year of service in the particular employment, whether in addition to or inclusive of the statutory lump sum. If making an ex gratia payment, it is advisable to require employees to enter into an agreement accepting the payment in return for waiving any right to claim against the employer in respect of the termination of their employment. Such agreements require careful drafting in order to ensure that they are enforceable.

**Collective Redundancy**

Collective redundancies arise where, during any period of 30 consecutive days, the employees being made redundant are:

- 5 employees where 21-49 are employed
- 10 employees where 50-99 are employed
- 10% of the employees where 100-299 are employed
- 30 employees where 300 or more are employed

**Redundancy Panel**
Under the *Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007* a Redundancy Panel has been set up by the *Department of Jobs, Enterprise and Innovation* in accordance with the partnership agreement *Towards 2016*. Some collective redundancies may be referred to the Panel to determine whether the redundancies were (or are being) carried out in order to replace the employees with workers on lower pay or other less favourable terms and conditions. These are known as *Exceptional Collective Redundancies*. If the Panel decides the redundancies were carried out for this reason, the employees concerned will be able to take action for Unfair Dismissal.

In such a situation, under the *Protection of Employment Act 1997–2007* the employer is obliged to enter into consultations with a view to agreement with the employee’s representatives. This legislation is separate from the *Redundancy Payments Acts 1967–2007*. These consultations must take place at the earliest opportunity and at least 30 days before the notice of redundancy is given. The aim of the consultation is to consider whether there are any alternatives to the redundancies.

The employer is also obliged to provide the following information in writing to the employees’ representatives:

- The reasons for the redundancy
- The number and descriptions of the employees affected
- The number and descriptions of employees normally employed
- The period in which the redundancies will happen
- The criteria for selection of employees for redundancy
- The method of calculating any redundancy payment.

The employer is also obliged to inform the Minister for *Jobs, Enterprise and Innovation* in writing of the proposed redundancies at least 30 days before the occurrence of the first redundancy.

If the employer has not complied with the requirement for a 30-day consultation process the employee may make a complaint that the employer has contravened Section 9 or 10 of the 1977 Act in relation to information and consultation of employees.

The potential compensation that an employee might be awarded under the *Unfair Dismissals Acts* where the dismissal is found to result from an Exceptional Collective Redundancy is potentially increased to a maximum of 208 weeks (or four years) in the case of an employee with less than 20 years service or a maximum of 260 weeks (or five years) in the case of an employee with over 20 years service. These levels of compensation are substantially higher than
the normal maximum of two years under the unfair dismissals legislation.

These higher compensation thresholds were clearly introduced to act as a disincentive to cosmetic collective redundancies in the future.

**NORTHERN IRELAND**

Same principles apply but the Redundancy payment is calculated as follows:

Statutory redundancy pay is based on a calculation which uses the employee’s age and length of service. The total amount the employee should be paid for redundancy will be based on:

- how long he has been continuously employed
- his age
- his weekly pay, up to a certain limit (current maximum £490)

The employee will get:

- 0.5 week's pay for each full year of service where his age is under 22
- one week's pay for each full year of service where his age is 22 or above, but under 41
- 1.5 week's pay for each full year of service where his age is 41 or above

The maximum number of years that can be taken into account is 20 years.

**Collective Redundancies**

If the employer is planning to make 20 or more employees redundant within a 90-day period, the employees’ trade union, or elected employee representative, if there is no union, should be consulted before anyone is given notice.

The consultation should cover ways to avoid a redundancy situation, how to keep the number of dismissals to a minimum and limit the effects on those dismissed (such as offering retraining). It should include alternative work patterns and job share proposals. The consultative process should continue until the issues have been aired and parties have had a reasonable amount of time to comment on information given and the proposals or counter-proposals which have been made.
It is important for the employer and employee representatives to show that they have acted reasonably throughout their dealings and it is good practice for parties to keep signed copies of any meeting minutes.

The speed of the consultative process is likely to depend, among other things, on the amount of resource devoted to it. It should take place at least 30 days before the redundancies are due to begin or 90 days if more than 100 employees are affected.

If this doesn't happen, the employee can take the employer to an Industrial Tribunal which can award up to 90 days' pay in compensation to each employee. This is known as a Protective Award.

**Protective award**

If the employee is covered by a Protective Award, the employer must pay the employee his normal week’s pay for each week of a specified period, known as the Protected Period, regardless of whether the employee is still working. To be covered by an award, the employer must plan to dismiss or have already dismissed the employee as redundant and failed to comply with the consultation requirements under the *Employment Rights (Northern Ireland) Order 1996*.

The Protected Period will begin with the date on which the first dismissal takes effect or the date of the Tribunal award - whichever is earlier. The length of the period will be determined by the Industrial Tribunal, taking into account the extent of the employer’s failure to consult and any extenuating circumstances. It is however subject to an upper limit of 90 days in all cases.

**Collective Redundancies – Northern Ireland Employer and RoI operation**

The circumstances in which obligations arise under Collective Redundancies legislation differ in the Republic of Ireland from those which arise in Northern Ireland and Great Britain.

Furthermore, a Northern Ireland/Great Britain employer which employs a large workforce in the Republic of Ireland and is intending to undertake a Collective Redundancy must be aware of The *Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007* where the circumstances of the Collective Redundancy must be notified to the Redundancy Panel set up by the *Department of Jobs, Enterprise an Innovation* during the 30 day Redundancy Consultation period which applies in Ireland. If the
Panel makes a preliminary decision that the redundancies proposed are being carried out simply for the purpose of replacing the existing employees with workers on lower pay or less favourable terms and conditions (ie, that it is an “exceptional collective redundancy”) and that local resolution has failed the Panel must refer the matter to the Minister for a decision of the Labour Court. Where the Labour Court confirms that what is proposed is indeed an exceptional redundancy but the employer proceeds nonetheless with the dismissals the employees concerned will be entitled to take action for Unfair Dismissal (with increased compensation limits) and the employer could be liable to a conviction or fine of up to €250,000.00.

**Different Claim periods**

Finally, while an employee in Great Britain/Northern Ireland must make a claim for redundancy within 6 months of being made Redundancy the employee in the Republic of Ireland has one year within which to make such a claim and this claim can be extended up to a period of two years from the date of dismissal in exceptional circumstances.

**MINIMUM NOTICE**

**REPUBLIC OF IRELAND**

Under the *Minimum Notice and Terms of Employment Act 1973 to 2001*, all employees must receive the following notice of termination:

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<th>Length of Service</th>
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<td>13 weeks to 2 years</td>
<td>1 week</td>
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<td>2 years to 5 years</td>
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<td>5 years to 10 years</td>
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<td>10 years to 15 years</td>
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<td>15 years or more</td>
<td>8 weeks</td>
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</tbody>
</table>
Please note that the Minimum Notice required in a Redundancy situation is **TWO WEEKS**. Thereafter, the notice periods, as outlined above, apply. This also applies to employees with less than 104 weeks service who are being made Redundant, despite the fact that they are not entitled to a payment. Where a greater period of notice is provided for in the employee’s contract, this notice period applies. For example, an employee with 4 year’s service has a 3-month notice period in her contract. If she were to be made Redundant, his employer must give him 3 month`s notice of same.

**NORTHERN IRELAND**

Same principles apply.

The minimum statutory notice given by the employer depends on length of employment:

<table>
<thead>
<tr>
<th>length of continuous employment</th>
<th>minimum notice you must give</th>
</tr>
</thead>
<tbody>
<tr>
<td>at least one month but less than two years</td>
<td>one week</td>
</tr>
<tr>
<td>at least two years but less than 12 years</td>
<td>one week for each year</td>
</tr>
<tr>
<td>at least 12 years</td>
<td>12 weeks</td>
</tr>
</tbody>
</table>