Issues Facing Employers if Considering Pay Reductions as a Result of the Covid-19

The implications of Covid-19 have been swift and deep. Most organisations are responding in the best way they can and are prioritising temporary decisions over permanent ones to deal with the immediate crisis. However, it is also apparent that several employers are moving to consider implementing pay reductions, or deferrals, to reduce costs with the consent or acquiescence of employees who are concerned about their jobs. Here we set out both the general legal issues and the matters of practice which need to be considered in evaluating this as a potential course of action.

Legal Considerations

What is well-established is that a party to a contract cannot unilaterally impose a reduction which would amount to a change in terms and conditions. An employee faced with such a reduction could (a) sue for breach of contract at common law or seek an injunction to prevent implementation, or (b) mount a payment of wages claim for the unpaid amounts, or (c) perhaps even pursue a claim for constructive dismissal before the WRC.

Section 5(1) of the Payment of Wages Act, 1991 sets out the rules governing any deduction (or payment) from wages which must satisfy several conditions. Satisfying s. 5(1) is not the end of the matter. For the deduction to be lawful, the employer must give one week's notice before making the deduction (Ryanair Ltd. v. Downey[1]) and under s. 6, a WRC Adjudicator is entitled to enquire whether the deduction actually falls within the contractual provisions.

Under the Act the deduction of wages may be authorised not only in writing but may also be agreed orally or implied into the contract. However, section 5(1) (b) of the Act does not appear to require the deduction to be expressly provided for in a written contract; rather it allows for two possibilities. Either the deduction must be required to be made by virtue of a term of the contract or so authorised. An employee facing a pay reduction which is in breach of their contractual terms will have a remedy, whether under the 1991 Act or in breach of contract at common law.

For the purposes of the Payment of Wages Act 1991 the case law suggests that a "deduction" is not the same as a "reduction". A 2011 case of McKenzie v Minister for Finance [2] concerned a Government decision to reduce the rates of expense allowances payable to public servants for motor travel and subsistence. Before the High Court, the applicants sought to challenge the matter and the Payment of Wages Act was one of the issues raised by them. Mr Justice Edwards held:

[1] [2006] E.L.R. 347.
[2] [2011] E.L.R. 109

"… the reduction in the PDF allowance is not a "deduction" from wages payable. It is a reduction of the allowance payable. The (Payment of Wages) Act has no application to reductions as distinct from "deductions""

This distinction between 'reductions' and 'deductions' was novel such that if it was a reduction only, then it was not unlawful under the Act. This allowed employers to reduce wages without facing claims under the 1991 Act. As the matter at issue related to the reduction in an allowance payable in respect of motor travel and subsistence it was outside the definition of 'wages' in the 1991 Act.
More recent case law has cast doubt on the validity of the issue of 'reductions' vs 'deductions'. In the case of Earagail Eisc Teoranta -v- Doherty & ors [2015] IEHC 347 the issue came up for consideration where the company had sought employee agreement on a 10% pay cut in 2011 and when this wasn't forthcoming they introduced the pay cut on the basis of a contractual policy. The High Court closed the door on the argument that an employee cannot claim for compensation under the 1991 Act on foot of a pay reduction. The Court stated that the Act permits an employer to deduct pay where it is authorised by a term of the employee's contract "or" where the employee has consented to it. This means one or the other is enough to make the deduction and that you do not require both.

Employers should review if their contracts of employment contain specific wording allowing such a deduction/reduction to be made, as per section 5(1)(b) of the Payment of Wages Act, otherwise they are likely to find themselves unsuccessful in attempting to defend a Payment of Wages Act claim. The contract may have an explicit term allowing for a reduction or have a clause dealing with a variation of terms.

There is Still The Issue of Breach of Contract

At common law where a breach of contract claim is pursued, in the absence of any agreement to do otherwise, a Court will want to assess whether there is a contractual obligation to pay the agreed terms and what, if any, conditions are attached to such payment. If payment is not discretionary, the Court has no discretion to interfere with the terms of the agreed contract. Where depending on the facts it could be proven that payment of the terms was obligatory, a judge would be bound to award damages in the amount of any monies owed.

Pragmatism Has Been Evident in the Labour Court Approach

The Labour Court has confirmed that as an employment rights issue, a unilateral reduction is an unauthorised deduction to which the Payment of Wages Act 1991 applies.

However, the Labour Court when dealing with industrial relations issues arising for parties will usually take a pragmatic view, backing a company's plea to reduce costs where necessary to stay in operation and to maintain jobs and viability. A precondition will be evidence of a burning platform, that the employer is acting reasonably and the Court will balance these issues with protecting worker entitlements and to ensure cuts, notice and duration are fair and that all costs and not just labour costs have been addressed. The Court will tend to uphold an agreement where it can be shown that this was freely entered into by both parties. However, it will not always regard an agreement as immutable. The implications of Covid-19 may well

constitute such a burning platform for an employer and would give the prospect following consultation of securing staff consent on temporary measures.

Dealing with Reality

Companies who want to effect even temporary cutbacks in the form of pay reductions must secure the consent of the relevant employees. If that cannot be done, then they may have to effect redundancies in the usual way. Individual employers, amidst the Covid-19 crisis, may believe they have a strong case for even a temporary reduction in pay, consistent with a balanced approach to preserving employment where possible. If an employer is to act on that intent, considerable care must be exercised. For those firms who are non-union, even a temporary pay reduction may encourage staff to seek external representation. Full account should be taken of all the implications, including for employee relations, paying attention to the construction of the relevant employment contract and to ensure that the deduction is not prohibited by section 5 of the Payment of Wages Act, 1991.

If any business has questions, or need further guidance or support on the issues discussed in this article, please do get in touch with me at brendan.mcginty@stratis.ie.

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