Our employer's guide to redundancy

Redundancy, meaning dismissal because of a reduction in the need for employees doing the work in question, is a potentially fair reason for dismissal. However, there are strict rules both as to the precise meaning of redundancy and the process that has to be followed. If you do not follow these rules, you may face an unfair dismissal claim at an employment tribunal and damages greater than the redundancy payment.

The definition of redundancy:

The definition of a redundancy is to be found in section 139 of the Employment Rights Act 1996. Under that section, there are four situations that justify a dismissal on the grounds of redundancy as follows:

- the closure of a business
- a diminishing requirement for an employee to carry out work of a particular kind – this would cover both economic downturns and business restructurings or re-organisations
- the closure of the place of work where an employee is employed
- a diminishing requirement for an employee to carry out work of a particular kind at the place where an employee is employed.

The redundancy situation must be genuine and provable on its facts. Redundancy must never be used as a convenient vehicle for removing an employee with whom you're unhappy.

Statutory redundancy payments

The statutory redundancy payment scheme operates so that any employee who has 2+ years' service who is dismissed for redundancy receives a lump sum payment, calculated according to age, length of service and gross weekly wage. Further details can be found in the redundancy payment calculator. If the payment is up to £30K it is tax free, though note that if it includes notice pay or annual leave, those elements will be be subject to tax.

The employee is entitled to receive a written statement from the employer setting out how the redundancy payment has been calculated.

Fair redundancy procedure

The mishandling of redundancy situations is a common reason for a finding of unfair dismissal by an employment tribunal. An employee can generally make a claim for unfair dismissal if they have been employed for 2+ years.

The principal procedural errors for which employers are criticised by employment tribunals are:

- lack of meaningful consultation
- the unfair selection of an employee for redundancy
- failure to consider the employee for alternative employment available.

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Individual consultation

Individual consultation is an essential component to a fair redundancy process. Note that, if a certain number of redundancies are proposed for a given time-frame, you must also follow a collective consultation process.

A series of consultation meetings with each of the affected employees should be held and this may include not only the ones who might be made redundant, but also those who are expected to stay.

Consultation must be fair and should involve giving the employees consulted a fair and proper opportunity to fully understand the matters about which they are being consulted and to express their views on those subjects, with the employer thereafter considering those views properly and genuinely.

There is no set redundancy consultation procedure but a fair procedure will usually include the following steps:

1. A general staff meeting

- It's highly advisable to start the procedure with a general staff meeting at which the possibility of redundancy is first raised with staff.
- Depending on the circumstances of the case, this might involve all the employees of the business or just those employees within the particular departments that may be affected.
- At the meeting, you should set out the background to the current position, what options have been explored so far in order to try and avoid the potential redundancy situation (for example, natural wastage, redeployment, suspending recruitment, reducing overtime, etc.) and what your broad proposals are at this stage.
- Remember that consultation should begin before you have reached a firm view as to whether redundancies should take place – you should start consultation at the earliest possible opportunity.

2. Individual consultation meetings

- Individual consultation meetings should then be held with each employee to discuss any particular concerns or questions they might have at that point and the matters set out at step 3.
- The individual consultation meetings should also be used to consult with employees on your proposed selection criteria (this would normally be at a second individual consultation meeting).
- The personnel information that you have, and upon which you intend to select for redundancy if this becomes necessary, should be checked with the employees to ensure it is accurate.
- Minutes of consultation meetings should always be taken by a meeting minute-taker and the employees provided with copies.
- Employees have no statutory right to be accompanied by a work colleague or trade union representative at individual consultation meetings. However, it is preferable to allow this as part of an overall fair procedure.

3. A reasonable opportunity for employees to put forward their suggestions and a request for volunteers for redundancy

- Following the general staff meeting, the employees should be given a reasonable opportunity to put forward their own proposals and options in order to avoid the potential redundancy situation.
- Volunteers for redundancy should also be asked for if possible. It is not a legal obligation to ask for volunteers, but it is good practice to do so, as it may avoid, or at least reduce, the need for compulsory redundancies. In addition, the requesting of volunteers does not oblige you to agree to make any or all of the employees who do volunteer redundant, as you have the right to make the final selection according to the future needs of your business (but you must be able to objectively explain the rationale behind your decision to turn down a volunteer). Thus, you can still revert to compulsory redundancy if necessary.
- If an employee does volunteer for redundancy and you provisionally accept them, it is important to be aware that the employee is generally in the same legal position from this point as employees who are selected compulsorily. You still need to involve them fully in your consultation procedure and continue to explore alternative employment options. This is because they are still regarded in law as having been dismissed i.e. they have not resigned.
- Finally, be aware that when ascertaining the numbers of employees proposed to be made redundant for the purposes of collective consultation (see further below), you must also include volunteers for redundancy.

4. A fair selection procedure

- If, after the applications for voluntary redundancy have been assessed and the proposals and options put forward so far have been fully explored, there is still a need to make compulsory redundancies, you should then embark upon a fair selection procedure (see further below). Of course, fair selection is only an issue where there is a 'pool' of potential employees to choose from. Where everyone in a particular department or in the business is to be made redundant, or there is only one affected employee, a fair selection procedure will not normally be relevant and you should tailor your redundancy procedure accordingly.

5. Informing employees of their provisional selection for redundancy

- Once you have provisionally selected employees for redundancy, you should write to the employee advising them of their provisional selection for redundancy and setting up a further individual consultation meeting to discuss the redundancy proposal.
- The letter should advise the employee of the grounds for their selection, the objective selection criteria adopted and the marks they were awarded. It should also set out the business reason for the proposed redundancy.

6. Further individual consultation meetings

- Further individual consultation meetings should be held with each of the provisionally selected employees, at which the redundancy proposal can be discussed and the employee permitted to put forward their own views and suggestions. All suggestions and alternatives to redundancy put forward by employees or their representatives should be fully explored.
- The employee should also be given the opportunity to challenge their provisional selection if they think they have been unfairly marked and be given a fair opportunity to explain any factors that they think might influence the decision to have provisionally selected them for redundancy. Indeed, one of the main purposes of individual consultation is to discuss the application of the redundancy selection criteria to the employee concerned.
- Further individual consultation meetings should be held with each of the provisionally selected employees as necessary. The number of meetings required will really depend on how the redundancy proposal progresses, what options are put forward, what alternative employment is available (see point 7 below), etc.
- The whole consultation procedure will probably last at least a couple of weeks, possibly longer.

7. Consideration of alternative employment

- You should consider alternatives to redundancy throughout any redundancy process. If an employer fails to make a reasonable search for suitable alternative employment, the dismissal may be unfair.
- Individual consultation also affords an opportunity to discuss the possibility of suitable alternative employment with an employee. It may allow the employee to express an interest in other vacancies within the business that the employer might otherwise have assumed to be unacceptable, for example because the post is on a reduced salary, involves a loss of status or is in a distant geographical location. All alternatives should be fully explored with the employee and the details confirmed in writing.
- It is important to note that employees who are at risk of redundancy whilst on maternity, adoption or shared parental leave are legally entitled to be offered any suitable alternative employment with the employer or with an associated employer in preference to other employees who are also at risk of redundancy. In practice, this means that employees on maternity, adoption or shared parental leave are not required to apply for any suitable alternative position but should automatically be offered it, even if other employees at risk of redundancy are stronger candidates. This rule only applies to those who are actually on maternity, adoption or shared parental leave during the redundancy process. It does not apply to those who are due to take such leave shortly or who have recently returned from such leave.

8. A fair selection procedure

- If, after detailed consultation, the individual is to be dismissed for redundancy, confirmation of the redundancy decision should be given in writing. It is only when all the consultation process has been completed that final decisions to dismiss by reason of redundancy can be made and confirmed in writing to employees. During the consultation process, any initial selection for redundancy should be clearly expressed to be provisional only.
- The letter of dismissal should confirm the reason for dismissal (i.e. redundancy), the appropriate period of notice (see the fact sheet on notice periods) or pay in lieu of notice, the date on which the contract of employment will terminate and how any redundancy payment has been calculated.

9. An opportunity to appeal.

- As you are required to demonstrate that you have acted reasonably in the procedure you adopted to effect the redundancy, it is recommended you provide an opportunity for the employee to appeal against your decision, even though this is not a statutory requirement. The employee is likely to appeal against the redundancy decision if they are not satisfied with it, for example, because they believe the redundancy is not genuine, because they feel they have been unfairly selected or because they think consultation was inadequate.
- Most employment tribunal cases concerning redundancy are lost because the employer has selected who is to be made redundant without consulting adequately, or at all, with the employee or pool of affected employees. Consultation does not mean informing the employees that they are redundant and inviting them to take a couple of days to think about what they have been told. Consultation must be meaningful. It means, for example, informing all the affected employees that the business has to reduce its overheads by 'x' pounds, providing financial information to explain the position, suggesting to the employees that the wage bill is the only significant overhead which can be controlled, and inviting employees to suggest ways in which the desired cost cut can be achieved. Clearly, redundancy would be an option but there may be others. It is not unknown for employees to decide to take significant pay cuts in order to preserve their jobs.
- Consultation, where properly carried out, will provide for a potentially fair dismissal. Employment Tribunals are not generally entitled to examine the employer's business or comment upon the employer's management decisions which may have led to the need for redundancies (although they do have more powers here where the collective consultation obligations apply). Many cases lost by employers at employment tribunal concerning redundancy are because the employee has not been properly consulted and has had no opportunity to understand what is happening, make representations or influence the outcome.

Collective consultation – 20 or more redundancies

The law imposes far-reaching obligations on employers to notify both recognised trade unions and the Department for Business, Innovation and Skills of forthcoming collective redundancies and to consult with representatives.

Where employers are proposing to dismiss 20 or more employees within a period of 90 days or less, they are required to consult with the 'appropriate representatives' of any of the employees whom the employer is proposing to dismiss and of any employees who may be affected by measures taken in connection with those dismissals. This will therefore include employees who, although not under threat of dismissal, might be affected by a redundancy situation.

Where there is a recognised trade union, its representatives must be the 'appropriate representatives'.

Where there's no recognised trade union, an employer may choose between:

- employee representatives already elected by the employees (provided that they are deemed to have the authority of the affected employees, bearing in mind the purposes for and method by which they were appointed or elected); or
- employee representatives specifically elected for the purpose of collective redundancies, provided that the process of their election complies with statutory requirements.

The relevant regulations set out a number of criteria which must be satisfied in relation to an election of employee representatives. These include ensuring that all affected employees are entitled to vote and that none of the affected employees are unreasonably excluded from standing for election. The employees may vote for as many candidates as there are representatives to be elected to represent them. The voting process should be secret. The employer can determine the number of representatives to be elected (subject to ensuring that there are sufficient representatives to represent the interests of the affected employees) and their term of office (subject to enabling the consultation process to be properly completed). The employer can also decide whether the employees should be represented by a representative for a particular class of employees, or by representatives for the entire group.

Employees who participate in an election of employee representatives are entitled not to be dismissed, or subjected to a detriment, on that ground. In addition, employee representatives and trade union officials are entitled to time off during working hours for training to perform their functions in relation to consultation.

Timely consultation

Consultation must begin 'in good time' and must in any event begin:

- where 100 or more redundancies are proposed within a 90-day period, at least 45 days before the first dismissal takes effect (that is, when the contract of employment is terminated)
- where 20 to 99 redundancies are proposed within a 90-day period, at least 30 days before the first dismissal takes effect (that is, when the contract of employment is terminated).

Essential disclosures

For the purposes of the consultation, the employer must disclose in writing the following information to the appropriate representatives:

- the reasons for his/her proposals
- the number and descriptions of employees whom it is proposed to dismiss as redundant
- the total number of employees of any such description employed by the employer
- the proposed method of selecting the employees who may be dismissed
- the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect
- the proposed method of calculating the amount of any non-statutory redundancy payment
- the number of agency workers working temporarily for and under the supervision and direction of the employer, the parts of the employer's undertaking in which those agency workers are working and the type of work those agency workers are carrying out (agency workers has the meaning given in the Agency Workers Regulations 2010).

Failure to elect representatives

If employees have failed to elect employee representatives within a reasonable time after being invited to do so, the employer must disclose the above information to each affected employee.

Redundancy dismissals and timing priorities

The process of collective consultation must always be completed before any notices of redundancy dismissal are issued to employees. It is often therefore good practice for employers to ensure that collective consultation lasts for the full 30 or 45 days (as appropriate) before any notices of redundancy dismissal are even issued.

For collective consultation purposes, the requirement for consultation to include not only straightforward redundancies but also dismissals which might occur for reasons not related to the individual concerned. This might cover circumstances where terms and conditions of employment might change e.g. hours of work, place of work, pay cuts, job titles, job descriptions, etc. and where this might result in employees being dismissed and then re-engaged.

Where collective redundancies are proposed, an employer must also send written notification in a prescribed form (Form HR1) to the Redundancy Payments Office (the address can be found on the HR1 form). This should take place before any redundancy notices are sent to the affected employees (and at least 30 days (or 45 days where 100 or more redundancies are proposed) before the first dismissal takes effect).

The overriding principle, as always, is consultation. The issues to be addressed in consultation include ways of avoiding the dismissals, reducing the numbers of employees to be dismissed and mitigating the consequences of the dismissals.

The maximum protective award for failure to comply with the collective consultation obligations on collective redundancies is 90 days' pay for each employee. An employment tribunal will always start with the maximum award, even where the collective consultation period was 30 days.

Finally, the question of whether the employer has complied with the duty of collective consultation (where this duty arises) is likely to be relevant to the question of reasonableness in the context of an unfair dismissal claim. The duty to consult collectively is separate from the duty to consult individually.

Fair selection

Selecting potential candidates for redundancy within a workforce is arguably one of the most demanding tasks for the manager or proprietor of a business. The selection criteria an employer adopts to decide which employees are to be chosen for redundancy are of great importance. While employers are given some latitude to tailor their staffing requirements to suit their business needs, they may well fall foul of the law if their selection criteria are either not objectively chosen or not fairly applied.

Redundancy selection process/criteria?

The first question you should ask is whether there is an agreed selection procedure relating to redundancy. A procedure providing criteria for selection may exist in an express form i.e. part of the contract of employment or contained within a staff handbook. If no such express selection criteria and procedure exists, you should next assess whether, at any time in the past, a procedure on selection has been orally conveyed to some, or all, of the employees. Finally, if there is no express or orally agreed procedure you should look to the custom and practice of the business (if any). It may be that there is no agreed selection procedure because redundancies have only very rarely been made in the past. In this case, you can have regard to the future needs of the business in choosing appropriate fair selection criteria.

Having ascertained the selection criteria to be used, they should then be applied in conjunction with the consultation procedure.

In determining the reasonableness of a redundancy dismissal, an employment tribunal is likely to examine your pool for selection (the group of employees from which the redundancies were made), the selection criteria which were applied to them and the manner in which the criteria were applied.

Pool for selection

If an employer dismisses an employee for redundancy without even considering the pool for selection, the dismissal is likely to be unfair. Where there is an agreed procedure which specifies a particular selection pool, you will be expected to adhere to it. Where there is no procedure, you have flexibility in defining the pool. However, while you are allowed to be flexible, you may be acting unreasonably if you exclude from the pool employees who are doing the same or similar work as the group from which selections are made. It should be noted that the fact one employee may be able to do another's job does not in itself mean that the employees hold similar positions.

It may also be unreasonable if you treat employees working at two different sites as separate groups for the purpose of redundancy selection.

The application of an agreed procedure does not have to be implemented across the board but may be restricted to those areas of the business where manning cuts are needed.

Selection criteria

If the selection pool is reasonable, the employment tribunal will then consider the selection criteria applied by the employer. The criteria must be objective and reasonable, having regard to the future needs of the business.

As part of a selection procedure, criteria such as skills, knowledge, qualifications and experience can be taken into account when selecting for redundancy, provided they can be shown as necessary for the future needs of the business. It is reasonable for an employer to try to retain a workforce balanced in terms of ability. Accordingly, an individual's skills

and knowledge are reasonable considerations, provided that they are assessed objectively. It is recommended that you carry out a skills audit of the workforce if skills and knowledge are to be included in the criteria for selection. Employers should also be aware that some selection criteria may have the effect of being indirectly discriminatory on the grounds of age (for example, using LIFO ('last in, first out')), in which case the employer would need to show that the criteria adopted are nevertheless objectively justified. It is highly unlikely that using LIFO on its own would be justified and it is therefore likely to be unlawful.

Vague, subjective criteria such as attitude of the employee concerned are generally, without the implementation of formal disciplinary measures, not acceptable.

It is generally unwise to make attendance the sole criterion for selecting employees for redundancy. However, attendance records may well be considered alongside other criteria. The fairness of the chosen period over which attendance should be assessed is a question of fact but the period should be substantial, particularly where long-serving employees are concerned. Obviously, absence due to maternity leave, other family-friendly leave, pregnancy-related illnesses, disability, etc. should not be included when assessing attendance records.

An employee's disciplinary record may reasonably be taken into account in the selection process.

Application of selection criteria/process

In order for a dismissal to be fair, employers must ensure that the relevant selection criteria are applied to the employees in a reasonable, fair and objective manner. The marks cannot reflect the personal opinions of the employer, but must be verifiable by reference to data such as attendance records, recognised qualifications and measurable efficiency.

It's always wise to ensure that any marking system adopted is checked by at least two members of the management team in order to keep the process as objective as possible.

In summary, an employer should always ensure that the selection criteria chosen are both necessary and appropriate and are operated in an objective way.

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