

MANAGING A REDUNDANCY PROCEDURE

As a result of the credit crunch many employers are beginning to notice an adverse impact upon their own business which may unfortunately mean that restructuring and redundancies cannot be avoided.

Implementing a fair redundancy procedure can be fraught with difficulties. The law is constantly changing particularly in relation to consultation and getting the process wrong can lead to expensive claims for unfair dismissal and a demoralized workforce.

If twenty or more employees are being made redundant specific procedural requirements must be followed including an obligation to consult collectively. A failure to consult collectively may lead to a “protective” award being made by an Employment Tribunal which can mean having to pay full pay to all employees who have been dismissed or who it was intended to dismiss as redundant for the duration of the protected period which can be up to ninety days. Appropriate legal advice should always be taken in such circumstances.

The information provided in the remainder of this fact sheet is designed to cover situations where less than twenty employees are at risk of being made redundant.

What is redundancy?

Redundancy is a potentially fair reason for dismissal. The legal definition of redundancy envisages four situations :-

- the business closing completely ;
- the business closing at the site at which the at risk employees work;
- the job that the employee performs disappearing entirely;
- fewer people being required to perform the job.

Planning for redundancy

Before considering compulsory redundancies due consideration should be given to whether alternatives exist. These might include :-

- stopping or reducing overtime;
- retraining or redeploying employees;
- reducing working hours and salary costs;
- considering salary cuts generally;
- offering job share/part time working;
- offering early retirement or voluntary redundancy;
- terminating temporary contracts.

All alternatives may have drawbacks of their own and practicalities may vary from employer to employer. Any changes that are agreed with employees need to be carefully documented. Imposing, without agreement, a salary cut is likely to be a breach of contract that may lead to a constructive dismissal claim.

Selecting those at risk

If a job is no longer required making the employee holding the job redundant should not be a problem provided the statutory minimum procedure is followed as detailed below.

In situations, however, where redundancies are to be made from amongst a number of employees performing the same or similar work (the “selection pool”) a fair process must be used in order to decide which employees are to be made redundant. The majority of applications to Employment Tribunals claiming unfair dismissal on

redundancy grounds are based upon alleged unfair selection. It is essential to use objectively justifiable selection criteria in order to determine who is to be made redundant which might include :-

- attendance record;
- experience/skills;
- performance levels that can themselves be objectively justified;
- disciplinary record.

Care should be taken to ensure that selection criteria are not directly or indirectly discriminatory on grounds of sex, race, disability, sexual orientation, age, religion or belief. Not only must the criteria chosen be capable of objective justification but they must also be carefully applied during the redundancy process. Often, a matrix is utilized by which points are awarded to at risk employees against the chosen criteria and the redundancy selection is based upon the number of points scored with those achieving the lowest scores being selected.

Consultation

Individual consultation with employees at risk of redundancy is **essential** before a final decision is made as to which employees are to be made redundant.

Good practice will involve an informal meeting with any employee “provisionally” selected for redundancy at which an explanation should be provided as to :-

- the reasons for the redundancy exercise;
- why the employee has been provisionally selected (including clarification about any selection criteria that is to be used) and;
- what the employee’s proposed redundancy entitlement might be.

Statutory dismissal procedures

Currently, statutory minimum procedures exist which **must** be followed whenever an employer is contemplating dismissing any employee. The procedures therefore apply to all redundancy dismissals and a failure to follow the procedure makes any resulting dismissal automatically unfair and which then leads to an uplift of between 10 and 50% in the level of compensation awarded at Employment Tribunal.

The formal consultation process

The statutory minimum dismissal procedure requires an employer to follow three steps :-

Step One – The employee should be notified in writing that his job is at risk of redundancy and invited to attend an initial consultation meeting. The letter should be in compliance with step one of the statutory minimum procedure.

The statutory procedures provide a right for an employee to be accompanied by a work colleague or trade union representative at any meeting where dismissal is contemplated and to be informed in writing of that right. The meeting should be conducted along the following lines :-

- explain to the individual employee why the job is redundant;
- explain why it is considered the individual employee is at risk of redundancy;
- listen to the views of the employee and allow sufficient time for those views to be expressed
- where a selection process is carried out the employee should be informed of the selection criteria and the scores achieved. This should be done before any decision to dismiss is made.

- discuss the possibility of suitable alternative employment that may be available for the employee.
- no decision should be taken about dismissal for redundancy at this meeting. Allow at least a couple of days for the employee to express any additional views and opinions and for those comments to be further considered.

Step Two – At the meeting the employee must be given further details regarding the proposed ground for dismissal. Sufficient information should be provided to enable the employee to respond. In a redundancy situation where a selection process is carried out an employee should be informed of the selection criteria and the score that he/she has achieved. This should be done before any decision to dismiss is made;

Step Three – If a decision is made to make the employee redundant after notification of that fact the employee should be informed of the right to appeal. If the employee chooses to appeal the employer must be informed and must then invite the employee to attend a further meeting following which a final decision is made and communicated to the employee.

Suitable alternative employment

Employees who have been provisionally selected for redundancy should be considered for suitable alternative employment. This might include a move to a new place of work and potentially even a less senior role. The suitability of another role can depend upon a number of factors including :-

- earnings;
- status;
- the abilities of the employee;

Whether or not it is reasonable for an employee to refuse an offer of suitable alternative employment is assessed subjectively and from the point of view of the employee affected. Employees have a statutory right to a four week trial to consider whether or not the offer is a reasonable alternative and during which period the employee's right to any statutory redundancy payment will remain open. An employee who unreasonably refuses an offer of suitable alternative employment can lose the entitlement to a statutory redundancy payment. An employer is not required to create a job for the purposes of offering suitable alternative employment.

Dismissal for redundancy

If all options have been considered and there is no alternative to redundancy an affected employee should be notified of that fact and informed that his/her job has been made redundant. Only at this stage should formal notice of termination of employment be given in writing and the employee provided with the appropriate notice entitlement and details of the redundancy payment to be made. The employee should be given the right to appeal the decision preferably to somebody of a more senior status and who was not involved in the original decision to dismiss.

Automatically unfair redundancy dismissals

A redundancy dismissal will be automatically unfair if the dismissal was for :-

- pregnancy or childbirth related reasons;
- raising health and safety issues;
- taking time off to care for dependants;
- asserting flexible working rights;
- asserting any other statutory right;

- union membership or activities;
- acting as an employee representative under TUPE or collective redundancy legislation;
- acting as a companion at a disciplinary or grievance hearing;
- whistle blowing;
- asserting rights to working time;
- asserting rights to the national minimum wage;

Redundancy payment

Every employee made redundant who has been in continuous employment for more than two years has an entitlement to a redundancy payment. That payment is calculated as follows :-

- for each complete year of employment when the employee was aged 41 or over one and a half weeks pay;
- for each complete year of employment when the employee was aged between 22 and 40 inclusive one weeks pay;
- for each complete year of employment when aged between 18 and 21 inclusive half a weeks pay.

With effect from February 2009 a weeks pay for these purposes is subject to a statutory maximum of £350.00 but employment contracts and/or custom in particular industries may make provision for higher payments.

The maximum length of service to be taken into account for the purposes of calculation of a redundancy payment is twenty years. The maximum statutory payment is therefore $£350.00 \times 1.5 \times 20 = £10,500.00$.

A statutory redundancy payment is paid free of tax.

An employer can pay more than the statutory redundancy payment but it is important not to create a contractual “right” to any such increased payment and appropriate legal advice should be taken in such circumstances.

Time off work

An employee who is being made redundant is entitled to take reasonable time off work with pay to look for another job or to arrange training. There is no definition of what is reasonable time off and this will depend upon individual circumstances. Employees are entitled to be paid their hourly rate for the period of absence from work but an employer does not have to pay more than two fifths of a weeks pay regardless of the length of time off allowed. Employees unreasonably refused time off by their employers or who are not provided with the appropriate payment can complain to an Employment Tribunal.

Taking other people on after making redundancies

If an employer immediately takes on somebody else to do a redundant employee’s job the redundancy dismissal is likely to be unfair. If, however, an employer takes on other people to do different jobs in the work place or to do the same job but in a different work place at which the original employees made redundant would not have worked the situation is different and potentially can provide a defence against any claim of unfair dismissal.

Similarly, redundancies may have been made in anticipation of a downturn in business that has not materialized or new orders may have been received since the redundancy exercise was completed. Subject to being able to establish that such a

downturn was expected or that new orders have been received a defence may exist to any claim that the redundancies were unfair.

This is a complicated area and advice should always be taken.

“Bumping”

A “bumping” dismissal arises when an employee, X, whose job is redundant, is redeployed to another job and the employee in that job, Y, is the one who is actually dismissed. Although Y’s job may not be redundant the dismissal of Y is attributable to redundancy because it has been brought about by the diminished need for work of a particular kind i.e the work previously carried out by X. Uncertainty can exist in such circumstances as to whether bumping is something that an employer must consider or whether it is merely an option available in defining the selection pool.

Recent case law provides that failure to consider “bumping” will not always make a redundancy dismissal unfair but best practice suggests that an employer should consider bumping as an option and a failure to do so may render the dismissal unfair.

Making employees redundant on purchase of a business

This is a particularly complicated area. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) provide employment rights to employees when an employer changes as a result of a transfer of a business to a new employer or where a “service provision change” takes place e.g. where a new contractor takes on a contract to provide a service from a previous contractor. TUPE is designed to preserve the continuity of employment and terms and conditions of those employees who are transferred to the new employer when the transfer takes place and to protect

employees from dismissal before or after a relevant transfer. Neither the new or old employer can fairly dismiss an employee :-

- because of the transfer itself; or
- for a reason connected with the transfer unless that reason is an “economic, technical or organizational reason entailing changes in the work force”.

Whether or not TUPE applies is likely to determine whether or not redundancy dismissals are fair and will depend upon the particular facts and circumstances of the business transfer and taking appropriate legal advice is essential.

Age discrimination and redundancy

Following the introduction of age discrimination legislation it had been presumed that the use of the criteria of last in/first out as a means of selecting employees for redundancy would no longer be permissible. This was based upon the reasoning that younger employees with less years of service would have been discriminated against by the utilisation of such criteria. A recent Court decision, however, has decided otherwise.

Rolls-Royce operated a points based redundancy selection scheme using a number of criteria. A point was awarded to each worker for every year of service. The Court decided that length of service as one of the criteria in a redundancy selection matrix was indirectly discriminatory against younger workers but that it could be objectively justified on the basis that it was used with the legitimate aim of achieving a fair selection procedure. The Judge held that “the criterion of length of service respects the loyalty and experience of the older work force and protects older employees from

being put on to the labour market at a time when they are particularly likely to find alternative employment hard to find”. This decision from 2008 is difficult to reconcile with the Employment Equality (Age) Regulations 2006 and is being appealed to the Court of Appeal.

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This guide is for information purposes only and not intended to create a solicitor/client relationship. Readers should not act upon this information without seeking professional legal advice.

