

## **COPING WITH THE CREDIT CRUNCH: REDUNDANCY AND UNFAIR DISMISSAL**

### **Selection Criteria And Alternative Employment**

1. Where a redundancy situation exists, there could be any number of employees who may face the possibility of dismissal for redundancy. An employer needs to determine which of its employees will be dismissed for redundancy.
2. To avoid making its own decision, and to protect against claims of unfair dismissal, an employer can offer voluntary redundancy to the workforce, which may render it unnecessary to make any formal redundancies. In those cases, the employer will just select from a list of employees who have volunteered to be considered for redundancy.
3. The advantages of this process are that it is :
  - less demoralising for the workforce than compulsory redundancy
  - less disruptive, provided the right people volunteer
  - less work needed to check that redundancy selection criteria are fair
4. However, it is:
  - often more expensive - longer-serving employees requiring higher redundancy payments tend to volunteer
  - you may need to offer enhanced redundancy payments to attract people to leave
  - you may get more volunteers than needed - those not selected may react negatively
  - you could end up with an imbalance in the skills and experience of remaining employees
5. To prevent imbalances, many companies' redundancy policies maintain management's right to decide whether a particular employee should be allowed to leave. Employers should consider amending their policies to enable them to have this facility.
6. One other option is to offer early retirement to employees. If an employer wants to use early retirement as an alternative to redundancy, they must follow the procedures given in the regulations.

Some of the **advantages** of early retirement:

- often an acceptable alternative to redundancy for employees and trade unions
- less harmful to employee morale than compulsory redundancy
- opportunities to promote junior employees if those retiring occupy more senior grades

Some of the **disadvantages**:

- can be expensive compared with a one-off voluntary redundancy payment - the business may have to fund a long-term pension
- may be hard to find new staff for specialised jobs if business improves]

### General Selection

7. Assuming a redundancy situation exists, and the employer does not wish to offer voluntary redundancies, or there are no takers, the next step is for an employer to consider which employees are to be made redundant. There are two steps: (i) defining the pool of employees from which redundancies will follow; and (ii) if necessary selecting from within that pool.
8. An employer should be using objective criteria wherever possible, precisely defined and capable of being applied in an independent way, when selecting employees for redundancy. This is to ensure that they are not selected unfairly. The chosen criteria should be consistently applied by all employers, irrespective of size. There should also be an appeals procedure.
9. The selection criteria that any business adopts should be set out in the Company's written procedures. They must be objective and applied consistently so that employees are not unfairly selected. Care must be taken to avoid any discrimination (as to which see below).
10. The requirements for a fair method of selecting and dismissing employees for redundancy is clearly stated in *Williams v Compare Maxam Ltd [1982] IRLR 83, EAT* and *Polkey v AE Dayton Services, [1988] ICR 142, HL*. In essence it involves the identification of a pool of employees, the adoption of fair criteria for selecting employees from that pool and the fair application of those criteria.

### Defining the Pool

11. The pool from which selection is to be made is for the employer to determine. It need not be limited to employees doing identical or even similar work. Where jobs are interchangeable an employer might be expected to wide the pool to include all jobs that the 'redundant position employees' could undertake.
12. The employer must choose a pool or group of employees from which the redundancy selection will be made. A reasonable pool will not simply be those employees who are actually doing the exact work which has been reduced by the employer (*Cowen v Hadden Carrier Ltd*

[1982] IRLR 225). The pool should include all employees doing work which the worker whose task has become redundant is capable of doing.

13. A Tribunal will also consider the contractual position, and in particular whether the employee can contractually be required to do other work. In that case, if such work is available they will not even be redundant. NB The recent case of *Home Office v Evans* [2008] IRLR 59, in which an employee was held not to be redundant when the contractual mobility clause was invoked.
14. The Tribunal ought to ask itself whether the Respondent acted reasonably in selecting those employees in the pool as the pool for redundancy: *Hendy Banks City Print v Fairbrother and others* [2004] EAT, unreported, case no, 0691104/ITM. At paragraph 7 of the judgement, the EAT approved the ET's reasons for finding that the employer had not drawn a reasonable pool. A Tribunal is likely to use similar factors to those set out at paragraph 14 as a guide when assessing reasonableness of the pool that an employer draws.
  - (i) the Applicants were the most experienced workers;
  - (ii) they covered all aspects of finishing work;
  - (iii) it was because of their experience and ability that they had, in 1998, been encouraged to train on the perfect binding machine;
  - (iv) they did not spend more than one third of their time on that machine;
  - (v) as a corollary of that, they did, in fact, spend two thirds of their time doing the same work as other members of the Department;
  - (vi) they were multi-skilled.
15. The key question: that the Tribunal ought to have asked itself was whether the Respondent acted reasonably in selecting those employees who worked on the Perfect Binding machine as the pool for redundancy. The EAT found it did. It was in the band of reasonable responses.

#### Automatically Unfair Selection Criteria

16. A dismissal for redundancy is unfair if selection was made upon a ground that would render a dismissal automatically unfair. These are set out in s.105 ERA, and include:
  - trade union membership, non-membership or activity
  - legal industrial action lasting up to eight weeks, or longer
  - certain employee representative reasons
  - actions taken on specified health and safety grounds

- reasons associated with pregnancy, maternity, paternity, adoption and parental leave
- reasons relating to regulations on part-time workers

### Selecting From the Pool

17. Among the variety of criteria that can be used to select employees for redundancy are:
- Skills, qualifications and aptitude - these can help keep a balanced workforce.
  - Standard of work performance - with this method, you need to provide supporting objective evidence, for example from the business' appraisal system.
  - Adaptability - it may be important for business that employees accept different types of work as needs change - but ensure that the basis for assessment does not discriminate.
  - Attendance/disciplinary record – businesses must apply this method consistently, and be sure your records are accurate and that you understand the reasons for absences.
18. Of course you must take care not to include absences for maternity, paternity or adoption leave, or DDA, otherwise this may amount to discrimination.
19. Practical examples of such criteria include:
- attendance record (if this is fully accurate and reasons for and extent of absence are known)
  - disciplinary record (if this is fully accurate)
  - skills or experience
  - standard of work performance
  - aptitude for work
20. Formal qualifications and advanced skills should be considered, but not in isolation. Although it may be unfair to select a marginally less competent person (if his work is generally satisfactory and he has long service),
21. Other examples, which have been considered relevant, include:
- Upheaval in domestic arrangements;
  - Efficiency: *Farthing v Midland Household Stores Ltd* [1974] IRLR 354
  - Greater experience in certain particular tasks or on certain machines: *Abbotts and Standley v Wesson-Glynwed Steels Ltd* [1982] IRLR 51;
  - The fact that certain employees remained loyal during industrial action: *Cruickshank v Hobbs* [1977] ICR 725
22. It is also necessary to analyse your proposed criteria to guard against accidentally discriminating against employees. For example, if you operate a "last in, first out" policy, you may contravene age discrimination laws in relation to younger employees who may be considered to be at an automatic disadvantage.

23. In the modern climate, it would be unwise to adopt this as a criterion because it may disadvantage younger employees who will not have had the opportunity to build up substantial years of service, and may therefore be regarded as indirect age discrimination.
24. If an employer operates a policy that is dependent significantly on performance and / or sickness absences, care must be taken to avoid claims of disability discrimination.
25. In *Paine and Moore v Grundy (Teddington)* [1981] IRLR 267 the Court criticised an employer for relying on absence, and failing to look at the reasons for the absence.
26. The best advice is to define selection criteria and put into the handbook. Ensure that employees are consulted over potential criteria in advance of it being put in the handbook. If this can be done at a time when redundancies are not a possibility, it is likely they will be reasonable, and an employer can rely upon this if a Tribunal situation arises.
27. It is well established that Tribunals cannot substitute their own decision of what the appropriate selection criteria are for those of the employer. They can only interfere where no reasonable employer could have adopted such criteria, or applied them in such a way that the employer did.
28. It is important that the selection criteria chosen should not be solely dependent on a subjective assessment of the employees, but capable of objective assessment. Employers should ensure that they do not dismiss an employee for another reason.
29. Application of this test:
  - In *Williams v Compair Maxam*, the Tribunal rejected selection of those “who, in the opinion of the managers concerned, would be able to keep the company viable”;
  - In *Graham v ABF Ltd* [1986] IRLR 90, the EAT upheld the criteria based upon “quality of work, efficiency in carrying it out and the attitude of the persons evaluated to their work”.
  - However, the vaguer the criteria, the more important it is for the employer to consult.

#### Unfair Application of Selection Criteria

30. The importance of the application of selection criteria is linked to the criteria themselves. If they are subjective, then it is impossible to determine whether they have been applied fairly or not, and an employer may end up on the wrong end of an unfair dismissal finding.

31. The Courts will not usually be willing to carry out a detailed examination of the way in which the criteria were applied. In *Eaton Ltd v King* [1995] IRLR 75, the EAT stated it was sufficient for the employer to have set up a good system for selection and to administer it fairly. It is also fair to rely upon assessments of subordinates. There was no need to call all the managers to give evidence to justify assessment, otherwise would need to hear all the evidence on which the decision was made.
32. The most successful system to defend is a matrix setting out four or five different areas or criteria, against which each employee is marked. The criteria are then weighted as appropriate, and final marks are obtained. Records should be kept, and the matrix should be used when consulting with the individual employee.
33. Obviously the use of inaccurate information in assessing marks would be an unfair application of selection criteria.

#### Rights Under Redundancy

34. People being made redundant have certain rights including the right to:
  - suitable alternative employment wherever possible
  - a trial period in another job you offer them without losing their right to redundancy payment
  - reasonable time off on full pay for job-hunting or to arrange training
  - not be unfairly dismissed (except employees with less than one year's service, unless they are selected for redundancy on grounds which are regarded as automatically unfair)
  - legal minimum levels of redundancy pay
  - a written statement of the amount of any redundancy payment and how you worked it out
35. An employee under notice of dismissal for redundancy has a statutory right to a limited amount of time off work to seek new employment or to make arrangements for retraining (ERtsA s 52)

#### Alternative employment

36. An employer considering redundancy must look for alternative work and satisfy himself that it is not available before dismissing for redundancy: *Vokes v Bear* [1973] IRLR 363, although the Courts have subsequently sought to restrict the application of this case.
37. The duty on the employer is take reasonable steps, not to take every conceivable step: *Quinhton Hazell Ltd v Earl* [1976] IRLR 296. And, the EAT, has said, that Tribunals should not

impose some 'unreal or Elysian standard': *United Shoe Machinery Co Ltd v Clarke* [1977] IRLR 297.

38. The obligation is not only with the employer, but also any associated company of the employer.
39. In order to minimise the risk of a redundancy dismissal being unfair, the employer might consider 'bumping' another employee to make way for the employee whose job has disappeared (*Thomas and Betts Manufacturing Ltd v Harding* [1980] IRLR 255).
40. In *Thomas and Betts Manufacturing* the criticism made of the employer was that it did not explain why it did not offer her other work, and that the company had not discharged the burden of proof. Additionally, consideration was given to the last in first out principle, which in 1980 was a factor in favour with the Employment Tribunals. In the current case, R explained that it did consider 'bumping' another employee, but came to the conclusion that it would be unfair to do so, given that she had had no involvement in the NFS. Mr Holland explained that he had even spoken to April Boyd who had made representations as to why she should not be dismissed.
41. It is noted that the requirement to 'bump' a more junior employee should be reconsidered in light of the modern law, and in particular the provisions regarding age discrimination. If the only ground for bumping is on the grounds of the employee's experience or length of service, then that could be indirectly discriminatory on the grounds of age.

#### Redundant Employee on Maternity Leave

42. Regulation 10 of the Maternity and Parental Leave Regulations deals with the applicable law for redundancy during maternity leave.
43. Where there is a suitable available vacancy, the employee is entitled to be offered alternative employment with her employer. This essentially provides for favourable treatment to be given to an employee on maternity leave.

#### Subordinate Roles

44. If there are jobs, even if they are of a lower status or carry lower wages than those that an employee currently enjoys, they should still be raised. An employer should inform the

employee of the proposed salary and benefits of any alternative position. A failure to do so may make the dismissal unfair: *Fisher v Hoopoe Finance Ltd* [2005] IDS ELB 784.

45. There is a slight conflict between the authorities on this point. On the one hand, the Scottish EAT held in *Barratt Construction Ltd v Dalrymple* [1984] IRLR 385 that it may be reasonable for the employer to assume that this will be unacceptable to the employee unless the employee indicates otherwise.
46. However, in *Avonmouth Construction Co Ltd v Shipway*, the EAT accepted that employers might be expected to offer an alternative job even if it involves demotion and should not readily assume that the employee will reject it. See also *Huddersfield Parcels Ltd v Sykes* [1981] IRLR 115 [they might be expected to discuss the possibilities with the employee].
47. Where alternative employment is available, the employer must ensure that sufficient information is given to the employee to enable him to make a realistic decision about whether to accept the job or not (*Modern Injection Moulds Ltd v Price* [1976] IRLR 172).
48. What is reasonable depends upon all the circumstances of the particular case. To that extent it may be contended that the *Barratt Construction* case is not directly in conflict with the other decisions mentioned in this paragraph. But clearly there is a marked difference in emphasis between the cases. This perhaps reflects in part the fact that the Scottish EAT has taken the view that once it is established that a dismissal is not automatically unfair under s 105, it is extremely difficult for an employment tribunal to find that it is unfair under s 98(4). In most cases it is likely that the employer's duty to take reasonable steps to find alternative employment will extend to exploring with the employee the possibility of jobs in subordinate positions.
49. In the case of *Jones v MEM Marketing Retails Services* [2008] EAT/375/07, HHJ Serota upheld the decision that a failure to offer a promotion did not render the dismissal unfair as she had been offered suitable alternative employment elsewhere in the organisation.
50. The Claimant was one of a number of Area Field managers. The Respondent made all these posts redundant. The Claimant was offered suitable alternative employment but claimed that instead she should have been considered for what was in effect a promotion to a post for which her manager did not consider she was qualified. There were no objective selection criteria for the vacant promotional post which was open to outside applicants. The ET was entitled to find on the facts it found that the Claimant could not complain she had not been

fairly considered for the promotion as she had been offered suitable alternative employment elsewhere in the organisation. It was irrelevant that the parties had subsequently agreed, so as to enable the claimant to receive a redundancy package that the post originally deemed suitable was no longer suitable alternative employment. The ET was bound to consider the question objectively and clearly concluded that she had been offered suitable alternative employment.

51. In *Hchette Filipacchi UK Ltd v Johnson* [2006] IDS ELB 804, the Court held that where an employer had failed to consult with an employee who had recently moved to a commercially risky and potentially redundant role about the prospect of returning to her initial role, was not necessarily unfair.
52. Where a job vacancy comes up after the dismissal of an employee, there is no obligation for the dismissed employee to be offered the job: *Octavius Atkinson & Sons Ltd v Morris* [1989] IRLR 158. However if the job is offered and rejected, this will be a powerful argument for failure to mitigate and will limit the losses recoverable by the employee.
53. In that case a dismissal was held not to be unfair in circumstances where alternative employment became available very shortly after a summary dismissal but was not offered to the employee. Since it was not available at the time of dismissal itself, the failure to offer it could not affect the fairness of the dismissal. The case itself turned on the precise moment in the day when the dismissal was effected, the Court of Appeal holding that it was the moment when the summary dismissal was effected.
54. Where an employer could make an offer of alternative employment to the employee, but the offer is made on an unreasonable basis, that is capable of rendering an otherwise fair dismissal unfair (see *Elliot v Richard Stump Ltd* [1987] IRLR 215).
55. In that case the employer purported to refuse to permit the employee to work the new job for a trial period before finally accepting it, notwithstanding that s 138 of the ERtsA expressly confers such a right.

#### Loss of Right to Redundancy Payment

56. Where an employee who is dismissed by reason of redundancy unreasonably refuses an offer of suitable alternative employment, he loses his right to a redundancy payment. In relation to this aspect, the offer:

- must be made by his original employer or an associated employer;
- must be made before the ending of his employment under his previous contract;
- may be oral or in writing;
- must take effect either immediately on the ending of the contract or after an interval of not more than four weeks thereafter;
- either
  - on the same terms and conditions as the previous contract;
  - suitable employment in relation to the employee.

57. Where the terms and conditions of the renewed or new contract of employment differ (wholly or in part) from the provisions of his previous contract, an employee has a statutory trial period of four weeks, beginning with the ending of his previous employment. This is to allow the employee to decide whether the alternative employment is suitable for him.
58. If the employee accepts the alternative employment, he is deemed not to have been dismissed on the termination of the original employment.
59. If during the trial period the employee gives notice for a reason unconnected with or not arising out of the change, or the employer dismisses the employee, the employee can bring an unfair dismissal claim on the basis of the fairness of the dismissal in the trial period: *Hempell v W H Smith & Sons Ltd* [1986] ICR 365.
60. If the terms of the new contract are suitable, and the employee gives notice during the trial period, he will not be entitled to a redundancy payment.

#### What Is Suitable?

61. This an objective question. N.B. When assessing whether an employee has unreasonably refused such an offer, that is a matter that is personal to the employee, and therefore a subjective matter. The tribunal is likely to consider issues such as pay, status, location and whether the new job is within the employee's skill set.
62. In the recent case of *Commission for Healthcare Audit and Inspection v Ward* [2008] UKEAT/0579/07/JO], HHJ Peter Clark held that it was acceptable to consider the degree of suitability of the job, when assessing whether rejecting it was unreasonable.
63. They held that a tribunal is entitled to have regard to the *degree* of suitability when deciding whether the employee's refusal is reasonable. In other words, where the new job offer is overwhelmingly suitable it may be a little easier for the employer to show that a refusal by the employee is unreasonable than if the suitability was a more borderline decision.

### Unreasonable Refusal?

64. In the case of *Cambridge & District Co-operative Society v Ruse* [1993] IRLR 156, the Court held that an offer to a butcher's shop manager of a job as a supermarket butchery department manager may be suitable alternative employment, but his perceived loss of status may make it reasonable for him to refuse it.
65. Another example is where a job with apparently reasonable hours could be subjectively unreasonable, if it will prevent him or her from complying with childcare arrangements.

### Practical Steps

66. It is good practice for an employer to do its best to help employees find **alternative employment**. Practical suggestions include:
- Contact the local Jobcentre Plus to find out about suitable vacancies or training.
  - Set up interviews onsite for redundant employees. You could consider using a specialist outplacement agency - outplacement counselling and retraining is tax deductible in respect of all redundant employees, including part-time workers.
  - Contact other local employers who may have vacancies.
  - Offer guidance on job application forms and interview techniques.
  - Offer advice on how to search and follow up suitable vacancies in the press.
  - Highlight the importance of being prepared to consider a wide range of jobs.
  - Consider re-employment if business picks up, where this is appropriate.

## **WHAT IS REDUNDANCY AND CAN IT BE CHALLENGED**

### **IN WHAT CIRCUMSTANCES CAN A REDUNDANCY BE CHALLENGED?**

An employee cannot claim that the employer acted unreasonably in choosing to make workers redundant: James W Cook & Co (Wivenhoe) Ltd v Tipper [1990] IRLR 386, CA.

However the courts may question whether the decision to make employees redundant is genuine and that it such a decision is made on the basis of proper information. Note, for example, Ladbroke Courage Holidays Ltd v Asten [1981] IRLR 59 (EAT held employers should produce some evidence of need for economy where employees made redundant due to alleged need to reduce wages) and Orr v Vaughan [1981] IRLR 63 (EAT held that employer in choosing method of reorganisation must act on reasonable information reasonably acquired). Employees won unfair dismissal claims in both cases both at first instance and at appeal.

An employee may only allege that a dismissal for redundancy is unfair on grounds that the method of implementing the redundancy has been unreasonable. The three areas where the implementation of redundancy can be challenged as unreasonable and, therefore, arguably unfair are:

- a. inadequate consultation;
- b. unfair selection criteria/unfair pool of selection;
- c. failure to offer alternative employment/redeployment.

### **WHAT IS A REDUNDANCY?**

Section 139 ERA 1996:

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

- (a) the fact that his employer has ceased or intends to cease –
  - (i) to carry on the business for the purposes of which the employee was employed by him, or
  - (ii) to carry on that business in the place where the employee was so employed, or
- (b) the fact that the requirements of that business –
  - (i) for employees to carry out work of a particular kind, or
  - (ii) for employees to carry out work of a particular kind in the place where the employee was so employed by the employer, have ceased or diminished or are expected to cease or diminish.

#### Section 139(1)(a)(i) Ceasing business

Largely self explanatory. A redundancy situation exists where employer ceases, or intends to cease, business. Note, redundancy situation exists whether cessation is or is intended to be permanent or temporary.

#### Section 139(1)(a)(ii) Ceasing workplace

Different test applied by courts over the years. First “geographic test, then “contract test”. Latterly, the appeal courts have restored the geographic or factual test, see:

Bass Leisure Ltd v Thomas [1994] IRLR 104, EAT;

High Table v Horst [1997] IRLR 513, CA.

## Section 139(b) Ceasing/diminishing requirement for work of a particular kind

Most common type of redundancy, eg:

Recession requiring reduced output;

Modernisation leading to change of product and replacement of old skills with new;

Rationalisation leading to increased efficiency so that same or greater output can be achieved with fewer employees.

As with section 139(1)(a)(ii) the courts have applied different tests over the years. First came the “terms and conditions test”, then the “function” test, then the “contract” test.

Situation appears to have been finally determined by the House of Lords in Murray v Foyle Meats [1999] IRLR 562 (which criticised the use of labels) which explicitly agreed and approved with the approach taken by the EAT in Safeway Stores plc v Burrell [1997] IRLR 200.

Determination of redundancy in this context involves a three-fold process:

1. Was the employee dismissed. If yes,
2. Had the requirements of the employer’s business for employees to carry out work of a particular kind ceased or diminished or were they expected to cease or diminish. If yes,
3. Was the dismissal of the employee caused wholly or mainly by the state of affairs identified at stage 2.

Regarding the (key) stage 2: “The only question to be asked is: was there a diminution/cessation in the employer’s requirement for employees to carry out work of a particular kind, or an expectation

of such cessation/diminution in the future (redundancy)? At this stage it is irrelevant to consider the terms of the applicant employee's contract of employment."

"Work of a particular kind"

Key question – how specialised must an employee be before he can be regarded as different from other comparable employees?

"Work of a particular kind... means work which is distinguished from other work of the same general kind by requiring special aptitudes, skills or knowledge": Amos v Max Arc Ltd [1973] IRLR 285 NIRC

Examples:

Hall v Farrington Data Processing Ltd (1969) 6 ITR 230, Div Crt;

European Chefs (Catering) Ltd v Currell (1970) 6 ITR 3, Div Crt;

Shawkat v Nottingham City Hospital NHS Trust [1999] IRLR 340, EAT;

British Broadcasting Corporation v Farnworth [1998] IRLR 1116, EAT;

Vaux and Associated Breweries Ltd v Ward (No 2) 1970) 5 ITR 62, Div Crt.

Note: employee's qualifications not relevant except in so far as they imply special skills, attributes or knowledge: Pillinger v Manchester AHA [1979] IRLR 430, EAT.

Note: Existing authority holds that part-time work is not a different kind of work for the purposes of determining a redundancy situation. "Work of a particular kind refers to the task to be performed, not to the other elements which go to make up the kind of job that it is.": Johnson v Nottinghamshire Combined Police Authority [1974] IRLR 170, CA.

## **REDUNDANCY AND UNFAIR DISMISSAL**

### **QUANTUM**

Qualifying period for statutory redundancy payment entitlement: two years continuous employment (section 155 ERA 1996).

Qualifying period for protection from unfair dismissal: one year.

If an employee, therefore, is unfairly dismissed by reason of redundancy when s/he has been employed for more than one but less than two years, s/he will be entitled to claim unfair dismissal even though not directly entitled to a statutory redundancy payment.

### The Statutory Redundancy Payment Entitlement

Set out under section 162 ERA 1996.

Essentially equal to the basic award for unfair dismissal.

Current level:

Employee aged 21 or younger – half week's salary for each full year of continuous employment;

Employee aged 22 to 40 – one week's salary for each full year of continuous employment;

Employee aged over 41 – one and a half week's salary for each full year of continuous employment.

Current statutory financial maximum - £240.00 per week.

Current statutory maximum length – 20 years.

If employee made redundant and has not received a statutory redundancy payment s/he must bring a claim within six months of his/her dismissal or must have made a claim for the payment by notice in writing given to the employer within six months of the dismissal: section 164 ERA 1996.

Note: if employee is made redundant, receives a statutory redundancy payment and thereafter brings a successful unfair dismissal claim, the basic award the successful applicant would otherwise receive is set off against the said statutory redundancy payment pursuant to section 122(4) ERA 1996.

Further note, if employee is made redundant due to temporary circumstances and receives a redundancy payment, the employee's continuity of employment is broken if s/he is subsequently re-employed: section 214 ERA 1996.

Factors which may have a material effect upon a redundancy unfair dismissal compensatory award.

### **Mitigation**

A tribunal is entitled to take into consideration its own knowledge of the local employment situation: Coleman v Toleman's Delivery Service Ltd [1973] IRLR 67. Further, where a successful applicant has not obtained new employment at the date of the tribunal hearing, it will be easier to argue for an award of loss of salary over a longer period in periods of recession than in times of economic boom.

An unfairly dismissed employee's duty to mitigate his/her loss arises after dismissal and not before.

Therefore refusal to agree to transfer and/or redeployment is not a failure to mitigate. Can,

however, amount to substantive contributory conduct: McAndrew v Prestwick Circuits Ltd [1988]

IRLR 514. This factor frequently arises in local authority cases.

### **Set off**

Section 123(7): If the amount of any payment made by the employer to the employee on the ground of dismissal was by reason of redundancy... exceeds the amount of the basic award which would be payable but for section 122(4), that excess goes to reduce the amount of the compensatory award.

"Polkey" set off

Most common consideration in seeking material/total deductions of compensatory award in redundancy unfair dismissal claims.

Polkey v AE Dayton Services Ltd [1987] IRLR 503 ie. what are the chances, in percentage terms, that if the proper procedure had been adopted by the employer the employee would have been fairly dismissed. Otherwise known as speculative loss.

Nature of cases to which the Polkey principle applies

The relevance of a Polkey reduction in the award for a successful unfair dismissal claim most commonly arises where there has been a procedural breach on the part of the employer regarding the process/approach utilised in dismissing an employee. It should, therefore, always be considered by employers and their legal representatives in circumstances where they have lost/are likely to lose a redundancy unfair dismissal claim.

Lack of consultation – likelihood of a substantial/total Polkey deduction high. Note, however, the argument that inadequate consultation can lead to the argument that adequate consultation would have meant that the employee would have not been dismissed as early as s/he was and, therefore, compensation should be awarded for the additional time that it would have taken to dismiss the employee on grounds of redundancy if proper consultation procedures had been followed: Mining Supplies (Longwell) Ltd v Baker [1988] IRLR 417. Generally only a short extension, in Mining it was an extra two weeks.

Unfair pool of selection – whether or not a substantial Polkey deduction will essentially be a question of fact. If the employee can point to another employee or employees who could/should have been selected in their stead it is likely that any Polkey deduction will be minimal/non-existent.

Failure to offer alternative employment/redeployment – if the employee can identify alternative employment that should have been offered to him/her then the chances of a Polkey deduction are very low.

Thomas More Chambers

**MANUS EGAN**

9<sup>th</sup> June 2008