Thomas More Chambers

Redundancy

Introduction

Redundancy is a form of dismissal - a method by which an employer can properly terminate an employee's contract of employment. Redundancy is a potentially fair reason to dismiss any employee with two or more years' service or who otherwise has standing to bring a claim for unfair dismissal in the employment tribunal.

What is a genuine redundancy?

Sometimes, there can be a dispute as to the reason for the employee's dismissal. Dismissal by redundancy is where an employee's dismissal is wholly or mainly attributable to a redundancy situation.

There is a genuine redundancy situation when either (1) the business ceases or (2) the employee becomes surplus to the requirements of the business.

Whether the business has ceased is an objective test and the employment tribunal is not permitted to assess the need for the cessation.

An employee becomes surplus to the requirements of the business when the amount of work remains the same but an event discloses overstaffing issues. For example, the Coronavirus pandemic may disclose that there is a surplus of administrative or secretarial staff, as working from home becomes commonplace. The key issue is whether there is a diminution in the business requirements for employees.

This includes when the work ceases or diminishes at a particular existing locality. For example, the Coronavirus pandemic may mean that work ceases or diminishes at a particular office or ceases operating within office space generally, with employees working from home remotely.

In the Coronavirus pandemic, where many businesses will unfortunately be hit by a sudden cessation of work or downturn, the test is very likely to be met.

What is Reorganisation?

The employment tribunal will not assess the merits of an employer's decision to reorganise. Where there is a sound business reason, for example the business has been seriously and detrimentally impacted, re-organisation might be required. It is highly likely the test will be met as a result of the consequences of the Coronavirus pandemic.

Where redundancy arises in consequence of the re-organisation and there are new roles to be filled, the employer's decision as to the allocation of employees to new/amalgamated roles is likely to centre on the ability of an individual to perform the new role, rather than e.g. the *Williams* criteria or 'scoring' (discussed below).

The process will still need to be objective, although it is accepted by the employment tribunal that the decision - as to which candidate will perform best in the new role - will involve a substantial element of judgment.

When determining whether a redundancy is fair, the overriding consideration will be section 98(4) of ERA 1996 and whether the employer's decision fell within range of reasonable responses.

Consultation and Selection

There is a duty on employers to consult affected employees or their representatives about redundancies, but there are no set consultation rules or requirements for redundancies of less than 20 people in one establishment in a period of less than 90 days.

However, an open and collaborative consultation process gives the best chance to employers and employees to identify and agree a fair selection criteria and ensure that any subsequent dismissals are fair.

Williams v Compair Ltd [1982] ICR 156

The EAT listed the principles which its two lay members considered reasonable employers adopted when dismissing for redundancy employees who are represented by an independent trade union. However, best practice dictates that they are observed, as far as practicable, in all redundancies and, in any event, should not be treated as if they were statute or a check list.

Those guiding principles ("the *Williams* criteria") can be modified and summarised for general application, as follows:

(1) To give as much warning as possible, to enable the affected employees to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking elsewhere;

(2) To endeavour to agree the criteria to be applied in selecting employees to be made redundant;

(3) Whether or not agreement is reached, to establish criteria for selection which, so far as possible, do not depend solely on the opinion of the person making the selection, but can be objectively checked against such things as attendance record, efficiency at the job, experience or length service (however, note that there is no 'last in, first out' rule nor is using length of service as a criterion recommended by ACAS - see 'Fair Selection Criteria' below);

(4) To select in accordance with the criteria, considering any representations made, regarding selection (scoring, with evidence to support scores, is a good method of doing this, supported by ACAS); and

(5) To consider the possibility of offering alternative employment rather than dismissal.

The extent to which any one or more of these principles applies depends on the circumstances of the particular case and an employer's failure to adopt one or more of them will not necessarily lead to a finding of unfair dismissal.

It is now a common and accepted practice for employers to adopt a selection criteria which relies upon managerial assessment of employees' abilities and performance, as well as more purely objective criteria. However, a simple subjective judgment by line managers about 'who should stay and who should go' is unlikely to be fair.

Individual Consultation

It is not enough for an employer to simply warn of impending redundancies and then to announce the result. The employer must consult and consider employees' view properly and genuinely.

Fair consultation will usually require the affected employees to be given a fair and proper opportunity to understand fully the matters about which they are being consulted, to express their views and for the employer to considering those views.

Failure to consult is likely to render the dismissal unfair.

The fact the employer is a small company does not void the duty to consult but it may affect the nature or formality of the consultation process which it must undertake in order to have acted reasonably. For example, a very short consultation procedure might be reasonable, depending on the circumstances of the individual case. Whilst it has been held that a consultation is not required at all where a company is in dire financial straits and in desperate need of a purchaser (*Warner v Admet Ltd* [1998] ICR 1056), such circumstances are likely to arise in exceptionally rare cases.

Where the consultation is with individuals, the scope for useful consultation on issues such as avoiding the redundancy situation altogether or the choice of selection criteria is likely to be reduced and the focus instead will be on the circumstances affecting the individual's case, in particular the chances of alternative employment.

Fair Selection Criteria

Employees may be and often are marked and scored against the established selection criteria.

ACAS offers the following example how marking or scoring against selection criteria could be done fairly, dependent upon the unique requirements of the company:

Work Performance	Points
1. Outstanding - consistently exceeds company standard	15
2. Exceeds objectives of the role	12
3. Meets all objectives of the role	9
4. Meets some objectives of the role	6
5. Fails to meet objectives of the role	3

Skill/Competence	
1. Fully competent, multi-skilled, supports other on regular basis	15
2. Fully competent in current role	12
3. Competent in most aspects of current role, requires some supervision	9
4. Some competence in role, requires regular supervision and guidance	6
5. Cannot function without close support and/or supervision	3

Disciplinary record	
1. No records of disciplinary history	5
2. Record of informal disciplinary action	4
3. Verbal warning current	3
4. Written warning current	2
5. Final written warning current	1

Attendance record*	
1. No recorded absence	5
2. Some absence but below average for selection pool (or company)	4
3. Attendance in line with company (or selection pool) average	3
4. Absence level above average for selection pool (or company)	2

5. High/unacceptable level of absence 1

*Employers should ignore all absences related to disability or pregnancy or Covid19

It is noteworthy that length of service is not a recommended fair selection criterion.

Employees should have the opportunity to contest their selection. The employees must be given sufficient information so they can understand the dismissal and are placed in a position to challenge the accuracy of markings, correct them and provide supplemental information. What the employer must disclose in order to have acted within the range of reasonable responses will depend on the facts of the case, with factors of particular relevance being what the employee requested and whether he/she challenged the scores awarded to him/her.

The employment tribunal will not usually review the marks themselves. It will usually be sufficient to show that the employer set up a good system of selection and that it was fairly administered. There will normally be no need for the employer to justify all the assessments on which the selection was based.

As a general rule, if the employer sets up a system of selection which can reasonably be described as fair and applies without overt signs of conduct which mars its fairness, it will have satisfied section 98(4) of the ERA 1996.

This does not mean all marking systems are automatically fair. The employment tribunal will evaluate the fairness of the system, the criteria and marking methods, without subjecting it to an overly detailed analysis. An employee may be able to show the criteria or system of selection were unreasonable. However, where the system of selection is reasonable, the employment tribunal will not go on to examine in detail the actual scores awarded or substitute its own view of what scores should have been given. Where there is glaring inconsistency or bad faith or where the employer has made a fundamental and obvious error in the application of the procedure, a finding of unfairness can be made.

Pool for Selection

Determining the pool from which employees will be made redundant is a matter for the employer and it will be difficult for an employee to challenge it when the employer has genuinely applied his/her mind to the question. The question for the tribunal to consider with care and scrutiny is whether the pool adopted by the employer was one which a reasonable employer could have adopted. It is insufficient for an employer to assume that because only one employee's role is no longer required, the pool should include that employee alone, without further consideration or consultation on the issue of the appropriate pool.

The factors the employer should consider in deciding whether or not subordinate employees ought to be brought into the pool include:

(vi) Whether or not there is a vacancy;

(vii) How different the two jobs are;

(viii) The difference in remuneration between them;

(ix) The relative length of service of the two employees; and

(x) The qualifications of the employee in danger of redundancy.

Whilst there is some EAT authority for the position that there will be cases where it was reasonable for the employer to focus upon a single employee without developing or considering the development of the pool, it would be prudent for the employer to give careful thought to the pool, in the event it may need to justify its decision at a later date.

As a result of the Covid19 pandemic and lockdown, many employers will be considering whether to make multiple employees redundant. In circumstances where some but not all of a particular type of employee is at risk of redundancy, careful consideration must be given to the appropriate pool for selection. Employers should be prepared to justify that pool both during the consultation process (and make changes if necessary) and in subsequent employment tribunal proceedings.

Alternative Employment

A dismissal may be considered unfair if no consideration is given to finding affected employees another job within that company or group of companies, during the consultation and notice

period or if there were suitable alternative positions within the organisation that should have been considered/offered to the employee.

In practice, this is often the most important consideration, particularly to the question of any compensation that might be awarded by an employment tribunal.

Suitable alternative employment remains a live issue even after an employee has been selected for redundancy and been given notice of dismissal. If a suitable job is or becomes available during the notice period, within the company or organisation, the employer must offer it to an employee (in writing) rather than make him/her redundant. The employee does not have to accept it but an unreasonable refusal may exclude the employee from his/her entitlement to a redundancy payment.

A suitable alternative job should be offered even if it is at a lower salary or of lower status than the original job. This may entail dismissing some other (perhaps less long-serving) employee to make way for the employee whose job has disappeared ("bumping"), but it is not a compulsory consideration.

Suitability of the alternative role will depend on:

- Remuneration and benefits e.g. pension;
- Location and travel;
- Similarity to the current role;
- Terms; and
- Skills and abilities.

The employee should not have to apply for the job. If an interview is required, the tribunal will consider how far the process was objective but, given the substantial element of judgment, there is no obligation to always use only objective criteria. The assessment tools are, in the first instance, a matter for the employer and a case should not turn upon the minutiae of good interview practice.

The offer should be made before the current job ends and the new job should start within four weeks of the current job ending. If not, the employee qualifies as redundant and is entitled to redundancy pay.

Trial Period

The employee has a right to a four-week trial period for each alternative job offered, starting after the notice period on the current job (section 138, ERA 1996). Dates should be clear and provided in writing.

Before the end of the trial period, if both the employer and employee agree that the alternative role is not suitable, the employee is still entitled to redundancy pay. The employer can agree to an extended trial period.

The employee must inform the employer, in writing, before the end of the trial period, if he/she thinks the alternative job is not suitable. Failure to do so may lose the employee his/her right to redundancy pay.

The employee must have a good reason why the alternative job is not suitable, including:

- Lower pay;
- Health issues preventing the employee from doing the job;
- Difficulty in getting to the location because of a longer journey, higher cost or lack of public transport etc; and/or
- Disruption to family life.

If the employee takes issue with the location of the alternative role but the contract of employment has a 'mobility clause', requiring the employee to work anywhere, the employee may lose his/her entitlement to redundancy pay.

An employer who does not accept the employee's reason(s) and considers the employee is unreasonably refusing the offer may refuse to make a redundancy payment.

Other Alternatives to Redundancies

The consultation should also cover other ways to avoid redundancies, such as:

- 'Furloughing' staff under the government's Job Retention Scheme.
- Offering voluntary redundancy or early retirement.
- Flexible working (working fewer hours, working from home, job shares, compressed hours).
- Reducing hours temporarily ('short-time working') or asking employees to temporarily stop working ('temporary lay-off').
- Ask employees to agree to a pay cut.

- Retrain employees to do other jobs in your business.
- Terminate temporary or contract workers.
- Limit or stop overtime.
- Not hire any new employees.

As a result of the Coronavirus pandemic, employees might be a lot more willing than usual to take other alternatives offered to them, in particular parents with children at home or other employees who are finding it difficult or impossible to work from home and/or are perhaps unable or unwilling to return to the office.

Whilst there may be many ways to avoid redundancies, employers cannot materially change the terms of an employee's contract of employment (e.g. pay or hours) without the employee's consent. An employer unilaterally reducing an employee's pay may lead to a successful unlawful deduction of wages claims and any variations may lead to a successful constructive unfair dismissal. If an employee agrees to new terms under threat of redundancy or dismissal, he/she may be deemed to have continued working under 'protest' and still be able to bring a successful constructive unfair dismissal claim.

The first and most obvious step might be to invite volunteers for early redundancy. There must still be a fair selection criteria applied to those invited to volunteer. For example, offering early redundancy to only the older employees may lead to an age discrimination claim.

Consider increasing the redundancy pay to encourage volunteers and making clear from the outset that not all volunteers will be selected.

ACAS offers training on managing redundancies - https://obs.acas.org.uk/EventsList.aspx?SubRegionId=-1&SearchTopicId=60&SubRegion=--%20All%20Regions%20--&SearchTopic=Redundancy%20and%20restructuring

Appealing Redundancy

An employee is entitled to appeal against a decision to make him/her redundant. Therefore, it is wise for an employer to ensure, as far as reasonably practicable, that the procedure is fair by setting up an appeals process. This could be face-to-face, via the telephone or a video-conference or in writing (by letter or email).

The employer can accept the appeal and reinstate the employment, even if the notice period has finished, but the employee must be paid for any time off work.

The employer can reject the appeal, but must still pay the redundancy payment (unless an exclusion applies - see 'Redundancy Payment and Exclusions' below).

The appeal may proceed as either a rehearing or a review, at the employer's discretion. However, it is worth bearing in mind that a defect in a redundancy consultation process could be cured on appeal by rehearing but not by review (*Lloyd v Taylor Woodrow Construction* [1999] IRLA 782).

Fairness of The Dismissal

The employer will be liable in a claim for unfair dismissal, in addition to the redundancy payment, if he/she fails to act fairly.

The dismissal may be either automatically unfair or unfair because the employer has failed to act reasonably in all the circumstances.

Automatically Unfair Redundancy Dismissals

Where the reason or principal reason for the dismissal of an employee was that he was redundant, the dismissal will be automatically unfair, if the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking, who held positions similar to that held by the dismissed employee and who have not been dismissed by the employer, and the reason for the dismissed employee's selection was an automatically unfair reason (section 105, ERA 1996).

The automatically unfair reasons for redundancy selection are largely similar to automatic unfair dismissal reasons.

These include where the reason or principal reason for selection was:

(1) Related to being summoned for jury service (section 98B(1), ERA 1996).
(2) One of health and safety-related reasons (section 100, ERA 1996).
(3) Related to shop/betting shop workers refusing to work Sundays (section 101, ERA 1996).
(4) Related to working time (section 101A, ERA 1996).
(5) Related to his/her role as a trustee of an occupational pension scheme (section 102(1), ERA 1996).
(6) Related to his/her work as an employee representative (section 103, ERA 1996; or regulation 30, Information and Consultation of Employees Regulations 2004).
(7) Because he/she made a protected disclosure (section 103A, ERA 1996) ("whistleblowing").
(8) Related to his/her assertion of a statutory right (section 104(1), ERA 1996).
(9) Related to national minimum wage (section 104A, ERA 1996).
(10) Related to tax credit (section 104B, ERA 1996).
(11) Related to a flexible working request (section 104C, ERA 1996).
(12) Related to studying or training (section 104E, ERA 1996).
(13) Related to official industrial action (section 238A(2),(3),(4) and (5), Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA 1992")).
(14) Related to his/her activities as a member of a specified negotiating body (regulation 28(3) or (6), Transnational Information and Consultation of Employees Regulations 1999).

(15) Related to his/her assertion of his/her rights as a part-time worker (regulation 7(3), Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000).

(16) Related to his/her assertion of his/her rights as a fixed-term employee (regulation 6(3), Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

(17) One of the reasons specified in regulation 42(3) or (6), European Public Limited-Liability Company Regulations 2004.

(18) One of the reasons specified in paragraph 5(3) or (5) of the Schedule of Occupational and Personal Pension Schemes (Consultation of Employers and Miscellaneous Amendment) Regulations 2006.

(19) One of the reasons specified in regulation 31(3) or (6) of the European Cooperative Society (involvement of Employees) Regulations.

(20) One of the reasons specified in the regulation 46(2) or 47(2) of the Companies (Cross-Border Mergers) Regulations 2007.

(21) One of the reasons specified in regulations 29(3) or (6) of the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009.

(22) Related to a prohibited black list (section 104F(1), ERA 1996).

(23) One of the reasons specified in regulation 17(3) of the Agency Worker Regulations 2010.

(24) Related to pregnancy, maternity leave etc (section 99, ERA 1996; regulation 20, Maternity and Parental Leave etc Regulations 1999; regulation 43, Shared Parental Leave Regulations 2014).

(25) Related to trade union membership or activities (section 153, TULRCA 1992).

(26) One of the reasons related to pension enrolment (section 104D(1), ERA 1996).

Two years' continuous employment is not required to bring unfair dismissal proceedings for the automatically unfair reasons listed above.

In addition, an employer cannot select any employee because of a protected characteristic or adopt selection criteria which would indirectly discriminate against an employee. For example, selection criteria based on flexible working may discriminate against women more than men. To do so, may also entitle an employee or worker to bring a discrimination claim under the Equality Act 2010. During the Coronavirus pandemic, selection because an employee is 'shielding' may amount to disability discrimination.

Employees do not need two years' continue service to bring a discrimination claim (including a discrimination dismissal claim), under the Equality Act 2010.

Unfair Redundancy

A redundancy dismissal, which is not automatically unfair, may nevertheless be unfair 'in all the circumstances' (section 98(4) 1996), if the reason for selection was unfair or the procedure was unfair.

Whilst an employment tribunal will not investigate the commercial merits of an employer's decision that redundancies were necessary, the redundancies made could still be considered unfair.

"…the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation... It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with" (Lord Bridge, *Polkey v A E Dayton Services Ltd* [1988] ICR 142, at 162 - 163).

Abiding by the *Williams* criteria (see 'Consultation and Selection' above) maintains best industrial relations practice.

Circumstances where the employer *may* be held to have acted unreasonably or unfairly include:

- Failing to consult individuals involved;
- An inadequately or improperly applied selection criteria;
- An unfair pool for selection; or
- Inadequate efforts made to find alternative employment.

As aforementioned, whether or not the failure to take any particular step or steps renders the dismissal unfair depends on the circumstances of the particular case and selection may include assessment of ability and performance, provided it does not amount to a simple managerial decision as 'who should stay and who should go'.

Compensation for Unfair Dismissal

In unfair dismissal cases, the employee is entitled to a basic award plus a compensatory award. Where, however, an employee has been made redundant and has more than two years' service, he is entitled to a statutory redundancy payment that is calculated in exactly the same way as a basic award (see 'Redundancy Payment and Exclusions' below). Payment of the statutory redundancy payment cancels out any right to a basic award in a subsequent successful unfair dismissal claim.

The compensatory award must be 'just and equitable' and is capped at £88,519 or 52 weeks' pay (whichever is the lower). It is intended to compensate for loss of earnings suffered to the date of the hearing, loss of future earnings, loss of statutory rights (£300 - £400) and loss of pension rights.

However, as touched upon in relation to the absence of alternative suitable employment (see 'Alternative Employment' above), *Polkey* deductions are highly relevant to redundancy dismissals. Even if the dismissal is unfair because of some inadequacy in the consultation or selection process, if those inadequacies would not have achieved a different result and the employee would have been dismissed for reason of redundancy in any event, the tribunal may make a substantial *Polkey* deduction, potentially resulting in no compensation being awarded at all.

Duffy v Yeomans & Partners Ltd [1993] IRLR 368

"If the employer can establish that had he taken reasonable steps to consult with the employee or find him other employment, he would still have been dismissed, an employment tribunal may find the dismissal to be unfair but award no compensation, or compensate only for wages and benefits which

would have been received while consultation was taking place. The question to be asked in the exceptional case contemplated by Polkey where consultation would be pointless is not whether the employer in fact made a conscious decision not to consult, but whether a reasonable employer could have decided not to consult in light of the facts that were known at the time."

Redundancy Payment and Exclusions

The minimum statutory redundancy payment is calculated in the same way as the basic award is calculated in successful unfair dismissal claims (sections 210 - 219, ERA 1996), as follows:

[AGE FACTOR] x [SERVICE] x [WEEKS PAY]

Age Factor is:

- Half a week's pay for each year of employment for employees under 22;
- One week's pay for each year of employment for employees ages 22 - 41; and
- One and a half week's pay for each year of employment for employers aged over 41 until retirement.

A week's pay is is based on average wages without deduction of tax, not taking into account overtime, unless the employer is contractually bound to provide and the employee to work such overtime (sections 221 - 229, ERA 1996).

The length of service capped at 20 years (section 214(2), ERA 1996).

The maximum weekly pay for dismissal on or after 6 April 2020: £538

For example, a 28-year-old, with six years' service, at a weekly pay of £400, would be entitled to £2,400 at [1] x [6] x [£400].

A 45-year-old with 21 years' service, at a weekly pay of £600, would be entitled to the maximum of £16,140 at [1.5] x [20] x [£538].

Link to gov.uk's redundancy pay calculator: https://www.gov.uk/calculate-employee-redundancy-pay

Excluded categories:

Certain categories of employees are not entitled to a redundancy payment, including:

- Employees with less than two years' continuous service.
- Master of crew or fishing vessel, who are not remunerated, otherwise that by a share of profits or gross earnings of the vessel.
- Civil servants and other public employees.
- Persons employed in any capacity under the Government of any territory or country outside the UK.
- Domestic servants in a private household where the employer is the parent/step-parent, grandparent, child/step-child, grandchild or brother/half-brother or sister/half-sister of the employee, including relationships arising through civil partnership.
- Employees who have been offered employment on the same terms and conditions as their original employment or offered suitable alternative employment and in either case have unreasonably refused the offer.
- Employees who have been offered suitable alternative employment and have unreasonably terminated their contracts during the statutory period.
- Employees dismissed for misconduct, which must be accompanied by written notice that the employer would be entitled to terminate the contract without notice, i.e. for a fundamental breach of contract. This does not include dismissal for taking part of a strike. The Employment Tribunal retains a discretion to award in whole or in part a redundancy payment, where it is just and equitable to do so.
- Employees dismissed if an exemption order is in force, made by Secretary of State for Business, Innovation and Skills, where employers have similar or more advantageous agreements with their employees for making payments in redundancy.

Time for Payment

Unless the employee agrees in writing to a later payment, the employer should pay the redundancy payment no later than on the employee's final pay day. This can be included in the employees' monthly pay or paid separately.

If not paid on time, the employee may make a claim in the employment tribunal.

If redundancy payments puts the employer's business at risk, the employer can ask the Redundancy Payment Service ("RPS") for financial help. The RPS can make an insolvent employer's redundancy payments and recover the debt from the employer's assets.

Notice

An employer must give notice of redundancy, which is governed by section 86 of the ERA 1996 and dependent on the employee's years of service, as follows:

One month to two years	One week
Between two and 12 years	One week per year
12 years or more	12 weeks

The contract of employment may provide for longer periods of notice, which must be abided by. The contract of employment should also say when the redundancy notice period starts. Otherwise, it will be from the day after the employer gives notice of redundancy, if given in person; or, if sent by email or post, on the day after that email or letter is received rather than sent, allowing the employee a reasonable time to read it.

Pay During Notice Period

The employee is entitled to his/her normal pay during his/her notice period. This means full pay if the notice period is the legal minimum or is one to six days longer than the legal minimum.

The employee is not entitled to full pay if the notice period if one week or more longer than the minimum.

The employee may not be entitled to full pay if he/she is on annual leave, sick leave, maternity/paternity/adoption leave, temporarily laid off or on short-time working.

The employer is not required to pay the employee if the employee requests to leave before the end of the notice period (for example, to start a new job) and the employer agrees.

Payment in lieu of notice

Payment can be made in lieu of notice, if included in the contract of employment or if the employee agrees. This includes full pay and any extras provided for in the contract, such as pension contributions.

Notice Letter

The notice letter should include:

- The notice period;
- The leaving date;
- How much redundancy pay is due;
- How the redundancy pay was calculated;
- Any other pay owed (e.g. outstanding holiday pay);
- When and how the employee will be paid; and
- How the employee can appeal.

Other payments

The employer must also pay any arrears of wages and outstanding holiday pay for days not taken but owed. This will be calculated by determining the amount the employee would have been paid for the period of leave accrued but untaken, less the period he/she has in fact taken.

Summary of the Recommended 'Small-Scale' Redundancy Procedure

- Consult the affected employees/their representatives.
- Consider possible alternatives to redundancies.
- Establish objective criteria for selection for redundancy.
- Apply the criteria objectively.
- Inform affected employees at the earliest opportunity and give them an opportunity to contest the scores they are given.
- Investigate the possibilities of offering alternative employment within the company or group, continuing the investigation until the employment has come to an end.
- Give employees time off to seek employment.
- Pay all money due.
- Conduct an appeal (ideally by rehearing).
- Keep careful records and minutes of these steps.

18 MAY 2020

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In these unprecedented times the Thomas More Chambers Employment Law Team understands the importance of working closely with all our professional clients to best serve the needs of our mutual clients under difficult circumstances.

The Thomas More Chambers Employment Law Team is able to assist instructing sources on any employment law issues, including those arising from the Covid-19 pandemic. We are well used to working remotely and can arrange for confidential telephone or video conferences and meetings on a variety of platforms with you and our mutual clients. In addition, we all are well used to paperless working and to dealing with remote hearings and are always happy to assist in setting them up.

The Thomas More Chambers Employment Law Team is able to assist instructing sources on any employment law issues arising from the Coronavirus crisis. If you need

such assistance, please contact Craig Brown, Senior Civil Clerk on 020 7404 7000 or at cbrown@thomasmore.co.uk.

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Covid19 and Redundancy
Seminar Notes

Duty to consult in large scale redundancies

Employers have stringent duties of consultation where they propose to dismiss as redundant within a period of 90 days or less, 20 or more employees at one establishment.[1]

How to calculate the number of employees at issue.

Section 188 refers to "affected employees". This includes not only employees who may be dismissed but also employees affected by the proposed dismissals or who may be affected by measures taken in connection with the proposed dismissals.

When calculating the number of employees, the employer must include employees whom it hopes to redeploy if what is proposed amounts to a termination of the employee's existing contract of employment.[2]

Employees who volunteer for redundancy in response to an invitation from the employer must be included in the numbers of those the employer proposes to dismiss on redundancy grounds.[3]

When determining the number of employees an employer is proposing to dismiss as redundant, no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun.[4]

1 Section 188(1) Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992).
2 Hardy v Tourism South East [2005] IRLR 242, EAT
3 Optare v TGWU [2007] IRLR 931.
4 Section 188(3)

Fixed term employees. An employee on a fixed term contract which is coming to the end of its agreed duration is not included in the calculation of the number of employees affected. If, however, the employer proposes to dismiss fixed term employees earlier that the agreed end date in the fixed term contract (and the reason is redundancy), the employer must include the fixed term employees in the number of employees for collective redundancy consultation purposes.

What is an establishment?

The nature of "an establishment" has the potential to cause uncertainty as to whether the collective consultation requirements apply.

One of the leading cases on the subject is *Rockfon A/S v Specialarbejderforbundet i Denmark* [1996] IRLR 165 CJEU, where it was held that the word "establishment" referred to the local employment unit, namely the unit to which the employees made redundant are assigned to carry out their work.[5] This requires a focus on functional and organisational characteristics, whether the asserted establishment constitutes a unit and whether it is a single place.

The fact that a contract of employment contains a mobility clause allowing the employer to move the employee to a different location is not relevant.[6]

ACAS has suggested that when determining whether a workplace can be classed as an establishment, that the following questions might assist:

a. Is it a distinct entity?
b. Does it have a degree of permanence and stability?
c. Does it have the ability to carry out the tasks it has been assigned?
d. Does it have a workforce, technical means and organisational structure that allow it to carry out its function.

[5] Rockfon was confirmed by the CJEU in USDAW and Ethel Austin Ltd and others [2105] ICR 675.
[6] Renfrewshire Council v Educational Institute of Scotland

The issue as to what is an establishment can be complicated. If an employer is in any doubt, legal advice should be obtained.

When should the consultation process begin?

Section 188(1)1A states that the consultation must begin in good time and in any event –

a. where the employer is proposing to dismiss 100 or more employees at least 45 days, and
b. otherwise, at least 30 days

before the first of the dismissals takes effect.

Consultation must be completed before employees are given notice of dismissal.

Consultation under section 188 cannot begin until the employee representatives are elected and the information provision requirements set out in subsection (4) has been provided.[7]

The term "proposing to dismiss" means that the employer does not "propose" to dismiss until it has reached the stage of having reached a specific proposal.[8] In *Unison v Leicestershire County Council* [2005] IRLR 920, the EAT held that a "proposal" meant something less than a decision that dismissals are to be made and more than a possibility that they might occur.

At the commencement of the lockdown and the announcement of the Job Retention Scheme there was confusion and uncertainty as to whether collective redundancy exercise could be commenced during the furlough period. The updated guidance for employees makes it expressly clear that furloughed employees can be made redundant during the period of furlough or afterwards.

Who must the employer consult with?

The employer must consult with persons who are appropriate representatives.

[7] E Green & Son (Castings) Ltd v ASTMS [1984] ICR 352.
[8] Hough v Leyland DAF Ltd [1991] ICR 696.

Appropriate representatives are:

a. where the employees affected are of a description of which an independent trade union is recognised by the employer, representatives of that trade union;
b. in all other cases (and at the choice of the employer) one of the following:
    i. employee representatives appointed or elected by the affected employees for purposes other than the collective consultation redundancy exercise, who have the authority from the employees to receive information and to be consulted about the proposed dismissals on their behalf;
    ii. employee representatives elected by the affected employees for the purposes of the collective consultation redundancy exercise.

The election process

Where employee representatives are to be elected for the purposes of the collective consultation redundancy exercise, section 188A(1) sets out certain requirements relating to the election.

Those requirements are that:

a. The employer must make such arrangements as are reasonably practicable to ensure that the election is fair;
b. The employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all the affected employees having regard to the number and classes of those employees;
c. The employer shall determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees;
d. Before the election the employer shall determine the term of office of the employee representatives so that it is of sufficient length to enable information to be given and consultations under section 188 to be carried out;

e. The candidates for election as employee representatives are affected employees on the date of the election;
f. No affected employee is unreasonably excluded from standing for election;
g. All affected employees on the date of the election are entitled to vote for employee representatives;
h. The employees entitled to vote may vote for as many candidates as there are representatives to be elected to represent them, or, if there are to be representatives for particular classes of employees, may vote for as many candidates as there are representatives to be elected to represent their particular class of employee;
i. The election is conducted so as to secure that (a) so far as is reasonably practicable, those voting do so in secret and (b) the votes given at the election are accurately counted;

Elections may be somewhat time consuming, especially at the present time of lockdown.

The consultation process

Section 188(2) states that the consultation shall include consultation about ways of:

a. avoiding the dismissals;
b. reducing the number of employees to be dismissed; and
c. mitigating the consequences of the dismissals.

Consultation must be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

For the purposes of the consultation, the employer must disclose in writing to the employee representatives:

a. the reasons for its proposals;
b. the number and description of employees whom it is proposed to dismiss as redundant;

c. the total number of employees of any such description employed by the employer at the establishment in question;
d. the proposed method of selecting the employees who may be dismissed;
e. 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;
f. the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be dismissed;
g. the number of agency workers working temporarily for and under the supervision and direction of the employer;
h. the parts of the employer's undertaking in which those agency workers are working; and
i. the type of work those agency workers are carrying out (section 188(4)).

The information referred to above shall be given to each of the appropriate representatives by being delivered to the, or sent by post to an address notified by them to the employer or, in the case of a trade union representatives, sent by post the union at the address of its head or main office: section 188(5).

If the employer invites the affected employee to elect representatives and the employees fail to do so within a reasonable time, the employer shall give the affected employees the information referred to above.

Consultation must be genuine and not a sham exercise. There must be time for the representatives to properly consider the proposals.[9] Representatives must be given a fair and reasonable opportunity to understand the issues relating to the consultation and to express their views on those issues. The employer must then consider the representatives' views properly and genuinely. Employers cannot simply put forward a proposal to make redundancies as a done deal.

[9] TGWU v Ledbury Preserves (1928) Ltd [1985] IRLR 412.

It is important to note, however, that the employer is not obliged to adopt all or any of views expressed by the representatives.[10]

Consultation during lockdown can raise practical difficulties as to how to effectively carry out consultation exercises. ACAS guidance makes it clear that the duty to consult continues during the Covid19 lockdown but that there is no duty or requirement to consult face to face. The guidance states that employers should look at other ways to consult, such as over the phone or by using video or other conferencing calling technology.

What about individual consultation?

The requirement to carry out a collective consultation exercise does not remove the requirement imposed upon employers to carry out individual consultation exercises with employees at risk of redundancy. Normally individual consultation will take place after the collective consultation exercise has been completed and individual employees have been identified as being at risk of redundancy.

Requirement to notify the Department for Business, Innovation and Skills

Section 193 TULR(C)A 1992 imposes an obligation on employers to provide written notification to the Department for Business, Innovation and Skills in relation to large scale redundancies.

If the employer proposes to dismiss as redundant 100 or more employees at one establishment within a period of 90 days, notification of this proposal must be given in writing:

a. before giving notice to terminate an employee's contract of employment in respect of any of those dismissal; and
b. at least 45 days before the first of those dismissals take effect.

[10] R v British Coal Corporation and SofS for Trade and Industry, ex p Price [1994] IRLR 72

Similar obligations apply where the proposed number of employee redundancy dismissals is between 20 and 99. In these circumstances, the time period must be at least 30 days before the first of those dismissals take effect.

The notice is in a prescribed form: "HR1 – Advance Notification of Redundancies". It can be obtained from The Insolvency Service at www.insolvency.gov.uk/forms/forms.htm.

The Secretary of State, after receiving the HR1 notice, may by written notice require the employer to give him such further information as may be specified in the notice.[11]

If consultation with appropriate representatives is required, the representatives must be identified and the date upon which consultations started stated in the notice.[12]

Where consultation with appropriate representatives is required, the employer must give the representatives a copy of the notice.[13]

If there are special circumstances which make it impossible for the employer to comply with any of the requirements under section 193, it must take such steps to comply as are reasonably practicable in all the circumstances.[14] Ignorance of the statutory requirement to notify the Department of Business, Innovation and Skills does not constitute special circumstances.[15]

A failure to give to the Secretary of State the notice required under section 193 is a criminal offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale.[16]

Where an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person purporting

[11] Section 193(5)
[12] Section 193(4)(b)
[13] Section 195(6)
[14] Section 193(7)
[15] SofS for Employment v Helitron Ltd [1980] ICR 523
[16] Section 194(1)

to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.[17]

Consequences of a breach of the consultation requirements

Where an employer fails to comply with any of the requirements set out in section 188, a complaint may be made to an employment tribunal.[18]

It is a defence to any such complaint if the employer can show that there were special circumstances which rendered it not reasonably practicable for the employer to comply with the section 188 requirements and that it took such steps as were reasonably practicable in those circumstances.[19] The burden of proof is on the employer.

Insolvency is not, by and of and in itself, a special circumstance. It depends on the course of the insolvency whether the circumstances can be described as special or not.[20]

It is not a defence to a breach of the section 188 requirements that the employer was of the opinion that consultation would achieve nothing.[21]

Where the employment tribunal the complaint well founded it will make a declaration to that effect and may make a protective award.[22] The length of the protective award will be what is considered by the tribunal to be just and equitable in all the circumstances having regard to the seriousness of the employer's default in complying with any requirement of section 188. The maximum award is 90 days.[23]

17 Section 194(3)
18 Section 189. There are provisions as to which party or parties can bring such claims.
19 Section 188(7)
20 Clarks of Hove Ltd v Bakers' Union [1979] 1 All ER 152
21 Sovereign Distribution Services Ltd v TGWU [1990] ICR 31
22 Section 189(2)
23 Section 189(4)

The purpose of the protective award is to provide a sanction for breach by the employer of its obligations under section 188. It is not intended to compensate the employees. The asserted futility of any consultation is not therefore relevant to the making of an award.[24]

The employer's insolvency is also not relevant to the size of any protective award. The employment tribunal should focus upon the seriousness of the employer's default in failing to comply with any section 188 requirement.[25]

18 MAY 2020

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[24] GMB v Susie Rodin Ltd [2004] All ER 279
[25] Smith v Cherry Lewis Ltd [2005] IRLR 86

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