



Although news of redundancies has slowed, many positions are far from safe. Louise Randall explains your rights and responsibilities if the worst happens.

employment law: know your rights



■ **It remains impossible to turn on the news or open a newspaper without being bombarded with reports of more household names announcing large scale redundancies.**

2009 has so far been witness to such announcements from the likes of Barclays, Aviva and HSBC, to name but a few. We know that the current economic climate is affecting businesses on a global scale. Businesses are making tough decisions as they strive to cut costs to help them stay afloat.

The financial services sector is beset not only by employment law requirements and the current economic crisis but also the heavy burden of regulation under the Financial Services regime.

With Hector Sants, chief executive of the FSA, telling the financial services sector in no uncertain terms to “be afraid”; the ongoing controversy over the city banker bonuses and

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the current enquiry being carried out by the Equality and Human Rights Commission into pay inequalities between male and female staff in the financial services sector, the financial services sector is under fire from all angles.



from the employer's perspective

so, what options are available to employers who are looking at cutting costs whilst seeking to retain their workforce?

Carrying out collective redundancies can be an expensive exercise in several ways. Not only are employees entitled to lump sum payments in most cases, but significant management and HR time must be devoted to the process, which carries a high risk of employment litigation due to the complexity of the law in this area. Perhaps even more importantly, by dismissing employees as redundant the employer loses skills and experience which it will have to pay to recruit all over again once the economic outlook improves.

One alternative to redundancy that many employers have been exploring is changing terms and conditions, on either a temporary or permanent basis. Even if an employer is already consulting with its staff about possible redundancies it needs to remember that it has a duty to consider alternatives to dismissals in any event. Many companies have successfully negotiated with their workforces recently to avoid redundancies by, for example reducing working hours and pay, introducing pay

freezes, unpaid sabbaticals or to give up certain benefits; employees are often willing to do this if it means that redundancies can be avoided.

how does an employer change its staff terms and conditions?

Changes to contractual terms and conditions cannot be imposed on employees unilaterally - it must be done with their consent. An employer who tries to force changes onto an employee could find themselves facing a claim for breach of contract and/or constructive dismissal.

Persuading employees to accept changes to their terms and conditions requires an effective communications programme - this will be crucial to the success of any attempt to change terms and conditions.

There are some limited circumstances where consent may not be needed. For example if the contract term can be read as giving the employer an element of flexibility i.e., can permit a change in the place of work. However, an employer must still act reasonably in operating such a clause and consult with the staff on the proposed changes. A failure to do so could result in a claim that the employer has breached the implied term of trust and confidence. As much notice as possible should be given and there should be meaningful consultation with the employees about the changes.

An employer also has freedom to make changes unilaterally where provisions are clearly not contractual terms. For example, workplace rules or policies in a staff handbook or benefits which are truly discretionary.

consultation requirements

The question of consultation, and whether this should be done on an individual or collective basis, can be a difficult one. Clearly, if the employer recognises a trade union or has an employee information and consultation body then they will need to be involved in discussion at an early stage.

Employers should be aware that if they are making certain changes to pension benefits, then additional regulatory requirements apply and expert advice should be taken before embarking on such changes.

There must be collective consultation with employee representatives where it is proposed that 20 or more employees are to be made redundant within a 90 day period. However, the definition of redundancy for these purposes is much wider than is commonly understood. It extends to cover any situation where the dismissal is for a reason not related to the individual and this could encompass situations where the employer is seeking to change terms and conditions of employment, even though no redundancy payment is due.

Where there is a possibility that employees who do not accept the change will ultimately have to be dismissed and offered re-employment on the new terms and conditions then the collective consultation provisions will apply.

Preparation

- Be clear about your motive for requiring the change; is there a good business reason? Consider the impact of the proposed change on the employees. Is there any alternative to this particular

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change which might have a less detrimental effect on the employees, or can you demonstrate that this is the only option short of redundancy? Can the effects of the proposed change be mitigated in some other way?

- Look at the documentation: is this a contractual change or a change to a discretionary term? If the former, review the contractual term to see if it can be read as giving you the flexibility or whether there is any other flexibility in the employment contract to make the changes.
- Don't assume that all employees have the same terms; make sure you check the situation for every category of affected employee.
If the change is to a contractual term, consent will be needed. Decide whether you will require express agreement in writing from the employees or rely on implied consent i.e., if they do not object but carry on working they will be deemed to have accepted. Written consent is usually the preferable way of evidencing acceptance; an e-mail would suffice. However, if a large number of employees are affected this may not be a practical option.
- Consider the likelihood of the employees' agreement to the change and, in the event of the employees failing to agree, what the consequences of that will be.
- Consider the numbers of employees affected. Assess whether collective consultation with a trade union or other employee representative body will be

required or whether consultation will be carried out on an individual basis only.

- Carefully plan your communications programme and draft the documentation which will be sent to the employees.

Communication

- Consider whether obligations to consult under specific legislation apply e.g. information and consultation of employees, European Works Councils, collective redundancy consultation, pension consultation requirements etc. Consult with employee and/or employee representatives to reach agreement on the changes. Don't forget to include employees who are currently away from the workplace, for example on maternity or sick leave.
- Explain fully why the changes are proposed and the consequences of them not being accepted - effectively you need to 'sell' the changes to the employees. Give employees the opportunity to ask questions, raise concerns or suggest alternatives. Keep a record of the consultation meetings.
- Write to the employees formally setting out the proposed changes and reasons. You could include a tear-off strip for employees to reply indicating whether or not they accept. Impose a deadline for a response.
- If the employees all agree then a written statement of the change should be sent to them. If not all the employees agree then you will need to consider your options.
- Make sure that you actively consider any

alternative proposals or specific objections raised during the consultation. In some cases it may be appropriate to allow objectors to remain on their old terms and conditions. Where this is not viable the only option may be to terminate on notice with re-employment offered on the new terms. However, this should be a last resort and should be carried out in accordance with the new ACAS Code of Practice on carrying out dismissals, introduced on 6 April 2009.



from the employee's perspective

what are the employee's rights?

From the employee's perspective, many will have mortgages and personal financial commitments to honour during these tough economic times.

In such times of uncertainty, the employee will want to know that their employer is doing all that they can to 'look after them'.

The fact that employers are seeking all alternatives to redundancy may be a comforting thought, and indeed the proposed changes may not cause such a devastating effect on their personal circumstances as the loss of their job.

Redundancy law requires employers to consider alternatives to proposed redundancies in any event. The requirement to consider alternatives is a mutual obligation. Therefore, if you are faced with the prospect of redundancy,

use all of your efforts to try and consider ways that the employer might be able to cut costs whilst retaining jobs, and communicate those ideas to your employee representatives and/or employer. It may be the case that the employer simply hasn't thought about your suggestion.

It is always advisable to go through the redundancy proposals fully and in particular the selection criteria that the employer is seeking to rely upon. Are they using perhaps unfair criteria for selection such as age/length of service/ subjective criteria - which may be potentially unfair or discriminatory?

Alternatively, if your employer is seeking to make changes to your terms and conditions such as changing working hours, consider the proposals carefully, as this might be a way of retaining your job. Nevertheless, if it is the case that the proposed changes do not work for you due to perhaps your childcare arrangements, raise the issue with your employer. You will have protection under the various discrimination laws which the employer will need to take into consideration before pushing through the changes.

what if redundancies cannot be avoided? what are your entitlements?

Your basic entitlements upon redundancy are:

- **notice pay**

Your notice entitlement will be set out under your employment contract. If you don't have an employment contract, in general terms you will be entitled to receive one week's pay for each full year of service (up to 12 years). The employer is fully within their rights to require you to work during your notice period. Some employers make payments in lieu of notice, meaning that you receive your notice pay as a gross lump sum payment instead of having to work out your notice. There may be tax implications with such payments, if for example there is a contractual right under the contract of employment to make a payment in lieu of

notice, in which case, the payment is taxable as pay in the usual way.

- **statutory redundancy pay**

After two years' service you will be entitled to a statutory redundancy payment.

The payment due to each employee under the statutory redundancy payment scheme is based on:

- the employee's age
- the employee's amount of continuous service, subject to the minimum of two years and a maximum of 20 years
- the employee's weekly gross pay - up to a limit of £350 for redundancies up to and including 31 January 2010

- **additional redundancy payments**

Some employers offer one-off discretionary ex gratia payments, as a gesture of goodwill. Very often they will only make such payments if you accept the payment under the terms of a compromise agreement, signing away your rights to pursue legal claims in respect of the redundancy and the way that it was handled. In order for such an agreement to be lawful and binding, you would need to receive your own independent legal advice in respect of the terms of that agreement.

Employers may have a contractual enhanced redundancy payment scheme, which "tops up" the statutory redundancy payment entitlement. These types of arrangements are usually negotiated and set up with trade union representatives.

The position is more complicated where the employer has made a habit historically of making discretionary enhanced redundancy payments. In such cases, it is possible that the employees in the current round of redundancies may claim entitlement to such a payment by way of custom or practice. Whether or not the employee is entitled to such a payment is not a straightforward matter to determine and will depend upon the facts of each case.

- **accrued holiday pay**

You will be entitled to receive payment of accrued but untaken holiday pay (under the Working Time Regulations) and perhaps also your contractual entitlement (if that exceeds the statutory entitlement), depending upon the terms of your employment contract.

what if it all goes wrong: what are my rights as an employee?

Employees can challenge their variation in terms of employment/termination of employment in the civil courts or more commonly in the Employment Tribunal (ET). It is free to issue a claim in the ET and the process tends to be quicker than the civil court procedures. Unlike the civil courts, the general rule in the ET is that (unless one party has acted unreasonably) both parties bear their own legal costs of pursuing/defending the claim (regardless of who wins the case).

The types of claims that employees can bring in relation to redundancy/changes in terms of conditions of employment include the following:

- breach of contract/unlawful deductions from wages
- unfair dismissal
- constructive dismissal
- discrimination/victimisation (on the grounds of age, race, sex, disability, sexual orientation etc)
- up to four weeks' pay where there is no statement of terms of employment

It is clear therefore, that redundancy is not the only option and indeed, it is possible that employees can be retained, albeit on varied terms of employment, whilst the employer weathers the ongoing economic storm. ■

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