

# technical factsheet 155

## Redundancy

### What is redundancy?

Redundancy was introduced in the 1970s and provides a separate reason for a contract to be terminated. It is governed by the Employment Rights Act 1996. Redundancy is a form of dismissal, but the conduct or competence of the employee is irrelevant. The dismissal has taken place for economic reasons which mean that the employee's post is redundant.

It is essential to ensure that, where a redundancy dismissal takes place, the situation is one of genuine redundancy. Claims have successfully been brought against companies who declared someone redundant where the employment should have been terminated in some other way.

The definition of redundancy is as follows:

An employee is taken to be dismissed for redundancy if the dismissal is wholly or mainly attributable to the fact that:

- The employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed, or
- The requirements of that business for employees to carry out work of a particular kind in the place where they were so employed have ceased or diminished or are expected to cease or diminish.

### Qualification for redundancy pay

Only employees have a right to redundancy pay, if they otherwise qualify. Workers such as agency staff and casuals cannot claim a statutory payment.

A person who has been made genuinely redundant will not be able to successfully claim unfair dismissal, providing the employer has gone through a proper selection and consultation process.

All employees who have worked for their employer for at least two years continuously will qualify to claim statutory redundancy pay, in addition to their contractual or statutory notice.

A redundant employee must be given a written statement showing how his or her redundancy pay has been calculated - failure to do so is a criminal offence.

The amount of redundancy pay will be calculated as –

- 0.5 week's pay for each full year of service where age during year is less than 22
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41
- 1.5 weeks' pay for each full year of service where age during year is 41 +

The redundancy payment is capped in that only 20 years of service is taken into account and the maximum on a week's pay is currently £330, which will rise to £350 in February 2009. The maximum redundancy payment is therefore currently £9900.

Some employers pay according to their own redundancy payment policy in excess of the statutory entitlement. It is advisable for such policies to mirror the statutory scheme to prevent any claim of age discrimination as most redundancy payments will increase with length of service and therefore age is a significant factor.

A permitted enhancement is one or more of the following:

- not applying the cap on a week's pay (e.g. calculating it using the employee's actual weekly pay) or using a higher cap
- multiplying the number of weeks' pay for each year of service by a factor (e.g. applying a scheme of 1-2-3 weeks' pay for each year of service under the statutory age bandings, instead of the statutory  $\frac{1}{2}$ -1-1 $\frac{1}{2}$ )
- multiplying the total amount produced by the statutory calculation or by these variations by a factor (e.g. twice the amount of statutory redundancy pay).

### **Offer of suitable alternative employment**

If alternative work is available and the employer fails to offer it, this may convert a redundancy into an unfair dismissal. If a redundant employee is offered a suitable alternative, and refuses it, then s/he will lose their right to redundancy pay. Therefore the statutory scheme encourages redeployment.

Where the employee has been made redundant, the employer must make an offer of re-employment before the old employment ends. The new job must start, or be due to start either immediately the old job comes to an end or after an interval of not more than four weeks. If the employee accepts the offer, s/he is treated as not having been dismissed and no redundancy payment will be made. If the employee unreasonably refuses an offer of suitable employment, then the employee will lose the right to a redundancy payment, although s/he will still be dismissed for redundancy.

### **What is suitable employment?**

The question of whether the offer is a suitable one is always a question of fact for the tribunal. This is both objective and subjective. The first issue will be the objective one, ie whether the nature of the job on offer in terms of content, status and terms and conditions, and to what extent they are equivalent to the redundant position. The next issue is subjective suitability, and the extent to which the employee perceives the position as being suitable. This will determine whether the employee was reasonable to refuse it. There are a number of cases where tribunals have found that the new position being offered is suitable objectively, but because of the employee's perception that it involved considerable loss in status, it was not suitable for this employee and s/he was reasonable to refuse it.

### **Trial period**

In any situation where an employee has accepted an alternative job, statute provides for a 'trial period' in which s/he can try out the job for its suitability. The statutory trial period is mandatory. The trial period begins when the employee's employment under the old contract ends and it ends four weeks after the date on which the employee starts work under the new contract.

If the employee terminates the contract during the trial period, or gives notice during the trial period to terminate it, and the contract does then end, s/he is treated as having been dismissed for redundancy when the original contract came to an end. The employee is also treated as having refused the new offer of a job. If it is concluded that the alternative job was suitable, then the employee will lose his/her right to a redundancy payment. It is possible, in limited circumstances, for the trial period to be extended by mutual agreement. The only acceptable purpose for this is that a period of retraining is needed by the employee in order to perform the new job.

### **Fair redundancy procedure**

The information in this factsheet is aimed at businesses making less than 20 people redundant at one time. There is a statutory consultation process which must be completed in the context of larger redundancy exercises.

## **First stage**

The employer should

- Consider ways of avoiding redundancies – it may be possible to negotiate some kind of flexible working or job share arrangements, and it may be possible to second staff to other businesses or clients, have a recruitment freeze, reduce agency working etc in order to stave off the need for a redundancy programme.
- Consider a general economic reorganisation of the workforce eg reducing hours, overtime payments etc. Employees may prefer to agree to such a change in order to try to keep their jobs. This means vital staff are not lost.
- Ask for volunteers for redundancy, but reserving the right to veto any applications where staff are too valuable to lose.
- Take legal advice to ensure that any redundancies are carried out in accordance with the law, if they do become inevitable.

## **Ensure that it is a genuine redundancy**

The definition of redundancy is laid out above, and it is essential that any dismissal falls under that definition. If a replacement is quickly recruited to work in the same or a similar role in the establishment then the requirement for the employee has not ceased or diminished.

## **Women on maternity leave**

If there are women on maternity leave within the pool at risk of redundancy, they are a particular danger to the employer. A redundancy in this situation may not only be an unfair dismissal but also sex discrimination.

- The woman is entitled to be offered any suitable alternative vacancy, before it is offered to anyone else who has been made redundant. This may involve using temporary workers until she returns from her maternity leave and starts her new job
- Women on maternity leave need to be fully involved in the consultation process laid out below, and the employer should be flexible about this eg holding meetings at the woman's home

## **Where there is more than one role at risk**

- It may be necessary to make more than one person in a particular role or department redundant
- The employer must select the staff on a fair and objective basis
- Criteria that are used must be as objective and relevant as possible and based on skills and knowledge
- Employees may be disadvantaged by discriminatory criteria – be careful of absence criteria that discriminate against disabled people, or women who have been on maternity leave.
- The selection procedure should place everyone in the same or similar role being considered for redundancy into a selection matrix. Factors or criteria can be chosen and given marks, which, say, add up to 100, with a time frame of eg the last 12 months
- Any claim for unfair dismissal will be less likely to succeed if two people do the marking and their mark is averaged
- Before the employer actually applies the selection criteria and does the marking, it should undertake the individual consultation process laid out below
- Everyone who is at risk of redundancy should have an opportunity to have input on the planned selection process before it is carried out, so the employer should hold individual meetings at which the employees at risk have a chance to see the matrix, take it away and comment on it.
- The law does not specify a particular period for consultation, but it is likely to take between two and four weeks in practice, although it could be longer depending on the size of the employer, the number of redundancies etc.

## **Individual consultation**

The employer must

- Carry out a proper consultation to give individual employees an opportunity to comment on the process and to provide time for the employer to decide whether alternative employment is available.
- Carry out the consultation before serving notice to terminate the contract
- Ideally, write to the employee before holding the first consultation meeting setting out the fact that s/he is at risk of dismissal for redundancy.
- And inform the employee that s/he has a right to a companion at any meeting

At the first meeting, the employee should be told of the reasons for the redundancy, discussing what options have been explored with a view to minimising redundancies. If there is no selection process, there will be a first 'at risk' meeting and then a second meeting at which the employee is made redundant, if that is the decision. If there is a selection process, the employer will have an additional meeting at which the matrix is shown to the employee and s/he is given a chance to comment.

Only after consultation has been concluded should the employer give notice of termination. The notice must be in writing and should include a right of appeal.

If the employee exercises his or her right of appeal, then an appeal hearing must be arranged (a consideration of the employee's appeal without a meeting is not sufficient to comply with the SDDP) at which the employee is given the right to be accompanied. The employee must be informed after the meeting (preferably in writing) of the outcome of the appeal.

Before any dismissal takes place, the employer must satisfy itself that there is not alternative employment available and must fully consult with the employee about anything that might be suitable. The law relating to alternative employment and trial periods is laid out above.

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