

# Technical factsheet

## Redundancy

This factsheet is part of a suite of employment factsheets and a pro forma contract and statement of terms and conditions that are updated regularly. These are:

- The contract of employment
- The standard statement of terms and conditions
- Working time
- Age discrimination
- Dealing with sickness
- Managing performance
- Disciplinary, dismissal and grievance procedures
- Unlawful discrimination
- Redundancy
- Settlement offers
- Family-friendly rights
- Employment status: workers

### **What is redundancy?**

Redundancy is a separate and specific reason for an employer to fairly terminate a contract of employment. It is a form of dismissal, but the conduct or competence of the employee is irrelevant; the dismissal is for economic and/or organisational reasons that have led to a reduction in the workforce. It is governed by the Employment Rights Act 1996. The Employment Rights Act 1996 can be viewed at [bit.ly/ea-96](http://bit.ly/ea-96).

It is essential to ensure that, where a redundancy dismissal takes place, the reason is genuinely redundancy. Claims have successfully been brought against employers who declared an employee to be redundant where there was no substantive redundancy on the facts, and the tribunal has concluded that the employment was really being terminated unlawfully for some other reason. The other important aspect of redundancy is procedure; a poor procedure can render the dismissal unfair, even in a genuine redundancy situation.

### **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
- the employer 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.

Thus, where the business is closing altogether, or where a branch, or other separate part of the business, is closing, any employee working there is likely to be redundant, unless they can be redeployed elsewhere in the business. Where the work is moving to another location, and the employee cannot be required to move to the new site, then they will be redundant. Otherwise, it is generally about the employer reducing staff; does the employer now require fewer employees to perform work than were needed previously?

There are two situations that are genuine redundancy even though there is no reduction in the number of staff:

- where the employer wishes to reduce a full-timer to a part-time role: for example, if there is a reduction in demand or some technological change. In this case, the full-time employee may be offered the option of continuing part time or accepting a redundancy payment; there will still be the same number of employees required, but working fewer hours. This can be seen in ***Packman Associates v Fauchon*** ([bit.ly/packman-fauchon](http://bit.ly/packman-fauchon)), where the tribunal confirmed that where a downturn in work for a bookkeeper led to the role being downgraded to part time, there was still a redundancy. The old full-time role had gone, to be replaced by a part-time position, which Ms Fauchon had no obligation to accept as an alternative.
- where the employer no longer needs an employee of one type but needs an employee who can perform a different role. It will be essential to show that the new role requires a different skill set, which the redundant employee cannot fulfil, and cannot be trained to fulfil, within a reasonable time. Again, the same number of employees are required as before the redundancy, but the new employee replaces the previous incumbent, who is entitled to a redundancy payment. In the

case of *Murphy v Epsom College* ([bit.ly/murphy-epsom](http://bit.ly/murphy-epsom)), a school introduced a new heating system and dismissed their resident plumber when he was not competent to operate and maintain it. The replacement recruited was a heating engineer and Mr Murphy argued successfully that his position, as plumber, was redundant and had been replaced with an entirely different role. His dismissal was by reason of redundancy and he was able to successfully claim for a redundancy payment.

### **Qualification for redundancy pay**

Only 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. Workers such as agency staff and casuals cannot claim a statutory redundancy payment.

A person who has been made genuinely redundant following a fair procedure has been fairly dismissed; they will not be able to successfully claim unfair dismissal and they will be restricted to redundancy pay only.

A redundant employee must be given a written statement by the employer showing how their redundancy pay has been calculated; failure to do so is a criminal offence.

The amount of redundancy pay will be calculated as follows:

- 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 over but less than 41
- 1.5 weeks' pay for each full year of service where age during year is 41 or over.

The redundancy payment is capped; only 20 years of service is taken into account and the maximum week's pay is £508 from April 2018 (£530 in Northern Ireland). The maximum redundancy payment is therefore currently £15,240 (£15,900 in Northern Ireland). The age discrimination provisions expressly provide that this calculation of redundancy pay on the basis of age is permissible.

Some employers pay in excess of the statutory entitlement, either because they choose to do so or because they have a redundancy payment policy which provides for more. If

an employer has such a policy, it is advisable for it to mirror the statutory scheme, as any calculation based on that structure is exempt from a claim for age discrimination.

A permitted enhancement is one or more of the following:

- not applying the cap on a week's pay (eg 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 (eg applying a scheme of 1-2-3 weeks' pay for each year of service under the statutory age bandings, instead of the statutory 0.5-1-1.5 laid out above)
- multiplying the total amount produced by the statutory calculation or by these variations by a factor (eg twice the amount of statutory redundancy pay).

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

The statutory scheme encourages redeployment. If suitable alternative work is available and the employer fails to offer it, any dismissal of the employee for redundancy is likely to be unfair. If a redundant employee is offered a suitable alternative, and refuses it, then they will lose their right to redundancy pay.

Where the employer has an alternative post for the redundant employee, they 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, they are 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 they will still be fairly 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 what is the nature of the job on offer in terms of content, status and terms and conditions, and to what extent is it broadly equivalent to the redundant position? The next issue is subjective suitability, and the extent to which the employee perceives the position as being suitable, and whether this perception is reasonable taking into account the employee's particular personal circumstances. 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 reasonable perception that it involved considerable loss in status, or because of the employee's family, health circumstances or travel situation, it was not suitable for this employee and it was reasonable for them to refuse it.

### **Trial period**

Where an employee has accepted an alternative job, statute provides for a 'trial period' in which they 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, by notice or otherwise, they are 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 their right to a redundancy payment, otherwise they will be entitled to redundancy pay. It is possible, in limited circumstances, for the trial period to be extended by mutual agreement, but only where a period of retraining is needed by the employee in order to perform the new job.

If the employer decides that the job is not working out during the trial period and terminates the employment, then the employee is entitled to their redundancy payment. The employee may also challenge the dismissal if they feel that it was a suitable alternative and they should have been allowed to continue working.

### **Fair redundancy procedure**

The information in this factsheet is aimed at businesses making fewer than 20 people redundant at one time. There is a statutory consultation process that must be completed in the context of larger redundancy, and recent changes have reduced the minimum period of consultation in larger redundancy exercises. Details can be found on the [gov.uk](https://www.gov.uk) website and also on the ACAS website at [bit.ly/acas-redund](https://bit.ly/acas-redund). Otherwise, the individual consultation process laid out below should be followed.

## **PRACTICAL GUIDE TO CARRYING OUT A REDUNDANCY**

How should the employer deal with a redundancy situation, in terms of consulting the affected employee(s)?

### **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 has been recruited or is immediately recruited to work in the same or a similar role in the establishment, then the requirement for the employee has not ceased or diminished, and the dismissal will be unfair.

At every stage of the procedure, the employer should document the decision-making process and all meetings and discussions with the employee, whether formal or informal.

### **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 transfer 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 that vital staff are not lost.
- consider asking for volunteers for redundancy but reserving the right to veto any applications where staff are too valuable to lose. Many employers do not like to do this for operational reasons, and it is certainly not obligatory.
- take legal advice to ensure that any redundancies are carried out in accordance with the law, if they do become inevitable.

### **Women on maternity leave**

If there are women on maternity leave at risk of redundancy, they require careful consideration. A redundancy in this situation could be an unfair dismissal but potentially also sex discrimination.

Women on maternity leave have no particular right to keep their jobs in a redundancy situation but they do need to be treated in the same way as other staff in terms of consultation and selection. A woman away on maternity leave needs to be fully involved in the consultation process laid out below, and the employer should be flexible about this: for example, holding meetings at or near the woman's home. Care will also have to be taken with any selection matrix to ensure that they are not being disadvantaged as against staff who are not on maternity leave; equally, they should not be treated more favourably than other staff in the way in which they are assessed.

Where a woman on maternity leave is to be made redundant, she 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 where that is reasonably practicable.

### **Individual consultation**

Where particular jobs are clearly earmarked for redundancy because, for example, a whole department is closing down or a particular function that a particular employee or group of employees performed is no longer required, then the redundant employees are self-selecting, and identifying those to be made redundant is not normally necessary. In that situation, 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.
- Write to the employee before holding the first consultation meeting setting out the fact that they are at risk of dismissal for redundancy; it is good to have an informal chat with the employee at that time, setting out the issues and explaining why the letter has been sent.
- Inform the employee that they may have a companion at any meeting; this is not legally required but is generally considered to be good practice.
- At that meeting, set out formally the reasons for the redundancy and give the employee an opportunity to comment and to ask questions before setting a consultation period (normally between two and four weeks) in which they may come forward with comments and the employer will look for alternative employment

in the business, if possible. Generally, the more employees who are being made redundant, the longer the consultation should be. It is critical that at this meeting the redundancy is not expressed in any way as a final decision; the employee is 'at risk' and not redundant at this stage, and the employment contract continues as normal.

- If no options present themselves, a further meeting will be held at the end of the consultation period in which the employee will be given their notice. They may or may not be required to work that notice, and at termination they will be formally dismissed for redundancy and receive their redundancy pay and any accrued holiday due.

### **Where there is a need to select employees from a group**

- It may be necessary to make one or more people in a particular role or department redundant out of a number of other similar or interchangeable staff.
- The employer must select the staff on a fair and objective basis; employers usually use a marking scheme known as a 'matrix', which sets clear criteria against which employees are marked.
- Criteria 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 against women who have been or are on maternity leave.
- The selection procedure should place everyone in the same or similar role being considered for redundancy into a 'pool' for selection. This generally consists of those staff who are genuinely interchangeable. They will then be subject to a selection matrix. Factors or criteria can be chosen and given marks, which, say, add up to 100, with a time frame of, for example, the last 12 months. They may include matters such as performance (where there are clear objective criteria that can be fed into the matrix), casual absence record, disciplinary record, qualifications, flexibility etc. Length of service is often used in this exercise but it should only be one of a number of objective criteria and it should never be a determining factor because of the risk of age discrimination claims. Absence related to a disability should always be disregarded for these purposes.

- Before the employer actually applies the selection criteria and does the marking, everyone who is at risk of redundancy should have an opportunity to have input on the planned selection process before it is carried out; this means there is an additional meeting where selection for redundancy is required. Thus the first meeting will be to explain the redundancy situation and the reason for it, but also to consult on the selection criteria. The employees at risk have a chance to see the blank matrix, take it away and comment on it. From that point the process continues in the same way as with individual consultation laid out above. The second meeting takes place once the marking is done and the selection is made. At this meeting, the selected employees are shown their marked matrix (not those of other employees) and told of their selection, although all employees in the pool are told that they remain at risk; the consultation process continues and then the third meeting confirms the selection (if this is the decision) and the selected employee(s) are given their notice.
- It is always preferable for two people do the marking with their mark being averaged, as this is a fairer process.

## **Restructuring**

- Employers may adopt an alternative approach to selection from a group and may choose to restructure the jobs. The process involves creating a new job or suite of jobs from existing roles, and slotting employees into the new roles by carrying out an interview process. Where there are fewer jobs in the new structure than the old, this will inevitably lead to redundancy for some staff. The employer must:
  - decide on the new structure and on the new job roles
  - create job descriptions for them
  - meet affected employees and explain the new structure, the reasons for it and the details of the new roles
  - ask employees to apply for any of the new roles for which they are suitable
  - make a redundancy payment to any employees deciding not to apply at all
  - hold interviews for the new roles, with employees slotted in as they are selected
  - consult with any employees not selected as laid out above, with an opportunity to discuss the outcome and put forward alternative suggestions.
- It should be noted that, in accordance with a recent decision, where a woman who is pregnant or on maternity leave is suitable for one of these new roles, the employer is required to allocate the role to her and cannot open it up to competition.

## **Notice of termination**

- As stated above, in all cases it is only after consultation has been concluded that the employer should give notice of termination. The notice must be in writing and should include a right of appeal. The right of appeal is not obligatory but is considered to be good practice.
- If the employee exercises their right of appeal against their selection for redundancy, then an appeal hearing must be arranged 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.

## **Settlement offers**

Where there might be an argument that a redundancy is not genuine, or an employer does not wish to go through a complex redundancy process, there is always the option of using a settlement offer. This may cost slightly more but gives the employer the comfort of knowing that no legal action can be taken in respect of any termination of employment. Settlement offers are covered in *Technical factsheet: Settlement offers* and involve making selected employees an offer at any stage in the process, or before it starts, to terminate the employment on agreed terms.

Many employers will attempt to reach a settlement with the employee, paying some kind of enhanced redundancy compensation, rather than go through a potentially disruptive redundancy exercise, or to enable them to speed up and simplify a restructuring exercise. The employer must be fully informed about this process; Acas supplies both a code of practice and guidance on settlement offers on its website at [acas.org.uk](https://www.acas.org.uk). Employers should always seek legal advice where necessary.

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