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 and/or organisational reasons which mean that the employee's post is redundant.

The Employment Rights Act 1996 can be viewed at: http://www.legislation.gov.uk/ukpga/1996/18/contents

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 employers who declared an employee to be redundant where the employment was really being terminated for some other reason because there was no 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 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 a branch, or other separate part of the business is closing, the employee working there will be redundant. Where the work is moving to another location, in a situation where the employee cannot be required to move to the new site, then s/he will be redundant. Otherwise the issue is generally whether or not the employer now requires fewer employees in the business to perform work than it did before. There are two notable exceptions to this:

- where the employer now only requires an employee to do the job part-time eg 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
- where the employer no longer needs an employee of this type, but needs an employee who can perform a different role. It will be essential to show that the new employee has a different skill set which the redundant employee cannot fulfil.

Qualification for redundancy pay

Only employees who qualify have a right to redundancy pay. 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 is 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 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 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 , but less than 41
- 1.5 weeks' pay for each full year of service where age during year is 41 or over.

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The redundancy payment is capped in that only 20 years of service is taken into account and the maximum week's pay is currently £464. The maximum redundancy payment is therefore currently £13,920. The age discrimination provisions expressly provide that calculation of redundancy pay on the basis of age is permissible.

Some employers pay in excess of the statutory entitlement, in accordance with their own redundancy payment policy. If an employer has such a policy, it is advisable for it to mirror the statutory scheme to prevent any claim of age discrimination as payment usually increases 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 ½-1-1½)
- 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.

If the employer has an available alternative for an employee who may otherwise be 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 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 perception that it involved considerable loss in status, or because of the employee's family or health circumstances 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, 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 his or her redundancy payment. S/he 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 less than 20 people redundant at one time. There is a statutory consultation process which 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 Business Link website on www.businesslink.gov.uk and also on the ACAS website at:
http://www.acas.org.uk/index.aspx?articleid=1461

Individual consultation

So 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 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, and the dismissal will be unfair.

First stage

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. 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
- 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 within the pool at risk of redundancy, they are a particular issue for the employer to consider. A redundancy in this situation may not only be an unfair dismissal but also sex discrimination.

Women on maternity leave have no right to keep their jobs in a redundancy situation, but they do need to be fully involved in the consultation process laid out below, and the employer should be flexible about this, eg 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.

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 where that is reasonably practicable.

Individual consultation

Where particular jobs are clearly earmarked for redundancy because eg a whole department is closing down or a particular function which a particular employee or group of employees performed is no longer required, then no selection will normally be 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 s/he is at risk of dismissal for redundancy, it is often good to have an informal chat with the employee at that time, setting out the issues and explaining why the letter has had to be sent
- inform the employee that s/he 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 2 and 4 weeks) in which s/he may come forward with comments and the employer will look for alternative employment in the business, if possible. Generally the more employees that 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 his/her notice. S/he 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 and employers usually use a marking scheme known as a 'matrix' which sets clear criteria against which the employee is marked
- 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 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 eg 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, neither should absence which is related to a disability.
- 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 one additional meeting where selection for redundancy is required. Thus the first meeting will be to consult on the selection criteria, and the employees at risk have a chance to see the 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 told of their selection although all employees in the pool 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
- any claim for unfair dismissal will be less likely to succeed if two people do the marking and their mark is averaged, as this is a fairer process.

As stated above, 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. The right of appeal is not obligatory, but is considered to be good practice.

If the employee exercises his or her 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 156 and involve making the 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 rather than go through a potentially disruptive redundancy exercise, or to enable them to speed up and simplify a restructuring exercise. It is important to be fully informed about this process and ACAS supply both a Code of Practice and Guidance on Settlement Offers on their website at http://www.acas.org.uk/index.aspx?articleid=1461, and employers should always seek legal advice where necessary.

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