Think Ahead ACCA

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, which does not involve the employee's circumstances or conduct. The employee is being dismissed by the employer for economic and/or organisational reasons that have led to a reduction in the workforce; matters such as their conduct or competence are irrelevant. It is governed by the Employment Rights Act 1996, which can be viewed at bit.ly/ea-96.

It is essential to ensure that, where such a dismissal takes place, the reason is genuinely redundancy. Unfair dismissal claims have successfully been brought against employers who dismissed for redundancy in circumstances where there was no substantive redundancy on the facts, and the tribunal believes that the employment was really being terminated for some other reason.

The other important aspect of redundancy is to ensure that a proper procedure is followed. A poor procedure can render the dismissal unfair, even in a genuine redundancy situation.

Statutory definition of redundancy

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.

The first point above is 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 also be redundant. Otherwise, redundancy generally involves action by the employer that results in a reduction in staff numbers: does the employer now require fewer employees than were needed previously to carry out the work?

There are two situations that also amount to a 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; the business still needs the same number of staff, but working fewer hours. This can be seen in *Packman Associates v 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, and Fauchon had no obligation to accept this as an alternative.

- where the employer no longer needs an employee of one type but needs an employee who can perform another, wholly 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 business needs the same number of employees 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*, a school introduced a new heating system and dismissed the resident plumber when he was not competent to operate and maintain it. The replacement recruited was a heating engineer and Murphy argued successfully that his position as a plumber was redundant, and had been replaced with an entirely different role. The tribunal confirmed that he had been dismissed for redundancy and he was able to successfully make a claim for a redundancy payment.

Qualification for redundancy pay

Only employees who have worked for their employer continuously for at least two years qualify to claim statutory redundancy pay. It is not clear at the moment whether the government proposes to reduce or remove the qualifying period in the future. Redundancy is paid in addition to the employee's 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 is calculated as follows:

- 0.5 week's pay for each full year worked before the age of 22
- 1 week's pay for each full year worked from 22 to 40
- 1.5 weeks' pay for each full year worked from the age of 41.

The redundancy payment is capped; only 20 years of service is taken into account and the maximum week's pay is £719 as from 6 April 2025. The maximum redundancy payment is therefore £21,570 (2024/25 limits were £700 and £21,000 respectively). The age discrimination provisions expressly provide that basing this calculation of redundancy pay on 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 that 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 unreasonably refuses it, then they will lose their right to redundancy pay. There are particular provisions

that relate to pregnant women, women and other employees who are on maternity leave, shared parental leave or adoption leave, and those who have returned from those leaves. These employees are entitled to be considered ahead of other employees for any suitable alternative employment that is available. This is dealt with in more detail below.

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.

Collective 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 at bit.ly/gov-redund and on the Acas website. Currently the collective procedure is only triggered if there are 20 or more redundancies being made within a 90-day period at any one of the employer's places of business, otherwise the individual consultation process laid out below should be followed. The government had stated its intention to change the qualification for collective redundancy to require an employer making 20 or more redundancies at all sites, but has decided to leave the law as it was. However, the intention is to increase the protective award for failure to the follow the procedure from 90 days' pay per affected worker to 180 days' pay. This will be a significant increase and employers will have to be even more careful to ensure compliance.

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 statutory 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, transfer staff to other businesses or clients, have a recruitment freeze or withdraw outstanding job offers, or 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.

People on long-term family leave

Women on maternity leave or other staff on adoption or shared parental 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. Those away on such leave need 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 employee'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 leave; equally, they should not be treated more favourably than other staff in the way in which they are assessed.

The law in relation to offers of alternative employment has recently been changed. Historically, where a woman on maternity leave, or those on adoption leave or shared parental leave, were to be made redundant, they were entitled to be offered any suitable alternative vacancy before it was offered to any other redundant staff. Such a vacancy would be one that is 'suitable in relation to the employee and appropriate for them to do in the circumstances', and the terms and conditions of employment 'are not substantially less favourable…than if [they] continued to be employed under the previous contract' (Regulation 10, Maternity and Parental Leave Regulations 1999). This may involve using temporary workers until the employee returns from leave and starts the new job where that is reasonably practicable. As from April 2024, this right has been extended to women who are pregnant but not yet on maternity leave, those who have recently returned from maternity leave, and others who have returned from adoption or shared parental leave (this is called the additional protected period). The details of this are included in the factsheet relating to family-friendly rights, but broadly this protection lasts for 18 months following the birth of the child or placement for adoption.

Employers need to be careful to determine when it is appropriate to offer the protected person the relevant post. There has been some case law on this which has reached the following general conclusions, although every case turns on its facts. The first case, *Sefton Borough Council v Wainwright 2014*, deals with where an employer proposes to combine two roles into one, and both current employees are notified that they are at risk of redundancy, but one is on eg maternity leave. Both are qualified to perform the new role and are interviewed for it, but the employee on maternity leave is edged out by the other individual as the preferred candidate. There are no other available roles that are suitable for her. In this scenario (role restructure), the employment appeal tribunal made it clear that the new, combined role is 'suitable' and a 'vacancy', and therefore (absent of any

other suitable vacancy offered to her) the woman on maternity leave must be offered it. She takes priority over the other (better) candidate.

The second situation concerned a reduction in numbers and was addressed in *Carnival plc v Hunter 2024*. Following a downturn in business, the employer proposed to cut its team-leader roles from 21 to 16. One of the team leaders was on maternity leave. All 21 team leaders were placed in the redundancy selection pool, and the criteria for selection agreed with employee representatives. Scoring was undertaken by managers and calibrated. The employee on maternity leave scored in the bottom five. This was the first reported case on this scenario and the employment appeal tribunal said (overturning the employment tribunal's decision) that, on these facts, the team-leader roles were not 'vacancies' because they were already filled by team-leader candidates who had had higher scores in the redundancy exercise. Regulation 10 does not operate to override a valid selection process by giving a lower-scoring employee on maternity leave the right to 'bump' a higher-scoring colleague out of their role.

Individual consultation

A central tenet of a fair consultation process is that it must be meaningful and not predetermined. The recent case of *De Bank Haycocks v ADP RPO UK Ltd* has served to remind employers that, no matter how well managed the process is, it is critical that it starts early enough for the consultation to be meaningful. In particular, there should not be any evidence that senior managers have already decided who is to be made redundant. The purpose of the consultation process is to determine whether there are any alternative options that could be considered, and the employer should show that it has kept an open mind.

Where particular jobs are clearly earmarked for redundancy because, for example, a whole department is closing down or a specific job function performed by a particular employee or group of employees 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 business case for the redundancy, and give the employee an opportunity to comment and to ask questions before setting out the proposed timetable and process. This will consist of 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 – for example, to select four lorry drivers out of a staff of 20 such drivers.
- The selection procedure should place everyone in the same or similar role being considered for redundancy into a 'pool' for selection, which should consist of those staff who are genuinely interchangeable.
- 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.
- Factors or criteria can be chosen and given marks, which, say, add up to 100, with a time frame of, for example, the past 12 months They may include matters such as performance (where there are clear objective criteria that can be fed into the matrix, such as recent

appraisal grades), 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 criteria and it should never be a determining factor because this risks age discrimination claims. Absence related to a disability should always be disregarded.

- Criteria used must be as objective and relevant as possible.
- 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, or other staff on family leave.
- Before the employer actually applies the selection criteria and does the marking, everyone who is at risk of redundancy should have an opportunity to comment on the planned selection process, including the pool; this means there is an additional meeting before selection for redundancy takes place. Thus the first meeting will be to explain the redundancy situation and the reason for it, but also to consult on the selection process and 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 to independently grade the employees in the pool according to the criteria, with their mark being averaged, as this is a fairer process.
- Employers still need to consult even if there is a pool of one, because there is a need to ensure that the employee has an opportunity to comment on the identification of the pool, even if there will not be any selection criteria. For an example of where this was not done properly, see *Mogane v Bradford Teaching Hospitals 2022*.

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 (see above).

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 and enhanced redundancy

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 making an enhanced redundancy offer and/or using an individual settlement offer. This may cost more but gives the employer the comfort of knowing that no legal action can be taken in respect of any termination of employment.

Many employers may make a practice of offering an enhanced redundancy package to employees, rather than go through a potentially disruptive redundancy exercise, or to enable them to speed up and simplify a restructuring exercise. Employees will be offered either the statutory redundancy payment, or an enhanced payment, with the latter being dependent on signing a settlement agreement. Large companies often make a practice of doing this when carrying out an exercise involving multiple redundancies.

Settlement offers are covered in *Technical factsheet: Settlement agreements* and involve making selected employees an offer at any stage in the process, or before it starts, to terminate the employment on agreed terms. Acas supplies both a code of practice and guidance on settlement offers on its website. Employers should always seek legal advice where necessary.

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