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Redundancy Guide

What is a redundancy?

In employment law, redundancy is defined as the termination of employment because of either:

i. The closure of a business;
ii. The movement of a business to another location; or
iii. The reduced requirement for employees to carry out work of a particular kind.

Redundancy is important because it is a potentially fair reason for dismissal and can give rise to an entitlement to a statutory redundancy payment and possibly a company redundancy entitlement.

The most common redundancy situation is point (iii) above; it includes a situation where fewer employees are required for the existing work and where the existing work is reduced and therefore fewer employees are required. These situations can arise where:

- Work has been reorganised and fewer employees are required to do the same work.
- Labour saving devices or more efficient work patterns have been introduced.
- Changes have been made to the nature of the work that mean a different skill set is required.

What is collective redundancy?

In circumstances where there are mass redundancies, employers are required to enter into collective consultation and comply with certain time-scales. The details are outside the scope of this guide, but in summary:

Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer must consult with appropriate representatives of any affected employees, or any employees that may be affected by the measures taken in connection with those dismissals. The appropriate representatives are:

- A recognised trade union
- Appointed employee representatives.
- Or the individual employees, where neither of the above exist.

The consultation must begin in good time and in any event, if:

- the employer is proposing to dismiss 100 or more employees within 90 days or less, consultation shall begin at least 90 days before the dismissals take effect; and
- the employer is proposing to dismiss less than 100 (but more than 20) within the 90 day period, consultation must begin at least 30 days before the dismissals take effect.

Voluntary redundancies are included within the numbers of dismissed employees.

The definition of redundancy for the purposes of collective consultation is different (and much wider) than in relation to individual employment rights.

What is a redundancy consultation procedure?

There are two types of redundancy consultation procedures:

a. the procedure an employer is required to carry out in order to dismiss an employee fairly; and
b. Where there are collective redundancies, the additional process an employer is required to carry out with trade union representatives, employee representatives or other employees. This guide does not provide information on the collective process.

In good time, fair and genuine

The first requirement of a fair redundancy procedure is that warning of an impending redundancy is given as soon as possible. This will allow the employee the maximum time to prepare for the potential change, but also allow them the fullest opportunity to influence the redundancy process.

Selection Pool

When there is a reduced requirement for employees, it is ordinarily a requirement on an employer to select employees from a selection pool. The identity of that pool can be central to whom is eventually selected for redundancy, and is therefore of significance when assessing the fairness of a redundancy consultation procedure.

The basic position is that where there is a "reduced requirement for employees to carry out work of a particular kind", the selection pool should constitute those employees carrying out that "kind" of work. The position becomes more complicated when issues of "bumping" arise (see later) and there is a material degree of inter-changeability between roles. If Group A are placed in a pool but they have the skills to carry out the roles of Group B, there is a strong argument that Group B should be included in the selection pool. The necessary considerations are very fact specific and will require detailed advice. An Employment Tribunal will want to see that an employer has addressed the question of the pool genuinely and with reasonable thought.

Selection Criteria and scoring

The selection criteria are those skills, abilities or levels of experience that each member of the pool for selection will be assessed against. Ordinarily there will be 4-5 criterion such as skills, disciplinary record, annual appraisal scores etc. The broad principle is that the criteria need to be fair, non-discriminatory and objective.

If an Employment Tribunal examines the decision to dismiss, it will want to know who decided the scores, why they arrived at the specific scores and what information was taken into account.

Bumping

A “transferred redundancy” or “bumping redundancy” is where one employee (A) is provisionally selected for redundancy but is subsequently retained in a role unrelated to his original area of work, at the expense of the holder of that unrelated role (B) being made redundant. The House of Lords (Murray v Foyle Meats) has held that the redundancy of (B) is still caused by the reduction of work in the area of the business that (A) was employed in, and is therefore a genuine redundancy situation.

Suitable alternative employment

Employers are obliged as part of the redundancy procedure to consider whether there is suitable alternative employment. A failure by an employer to consider the availability of suitable alternative employment can render a dismissal unfair. A failure by an employee to accept an offer of suitable alternative employment will disentitle the employee to a statutory (and possibly contractual) redundancy payment, and will strongly suggest the employee has failed to mitigate their loss.

Alternatives to redundancy

As part of the overriding requirement for reasonableness, employers are required to consider ways in which redundancies can be avoided. Common examples are:

- reduced hours
- recruitment freeze
- over-time ban
- work-sharing
- short-time working
- retraining
- voluntary redundancies.

Appeal

It is good practice for employees dismissed for redundancy to be offered the right to appeal the dismissal. There is however no set requirement to do so. The ACAS Code of Practice on Disciplinary and Grievance Procedures does not apply to redundancy dismissals. It is also

unlikely that an Employment Tribunal would deem an otherwise fair dismissal unfair because of a failure to offer an appeal. The main advantage of an appeal process to the employer is to allow them to argue that any unfairness in the original decision to dismiss has been "cured" by a complete rehearing on appeal.

The Acas Advisory booklet Redundancy handling (which has no statutory effect) suggests that it would be good practice to offer the employee a right of appeal since this can enable disputes to be resolved internally without recourse to Employment Tribunals.

Automatically unfair dismissal

If the reason (or principal reason) an employee is selected for redundancy is one of the prohibited grounds set out in section 105 of the Employment Rights Act 1996, the dismissal will be unfair. These include:

- pregnancy, childbirth, or statutory maternity, paternity, adoption, parental or dependant care leave
- a health and safety reason
- for making a protected disclosure
- for asserting a specified statutory right
- for performing functions as an employee representative on a TUPE transfer or collective redundancy

Right to be accompanied

On the basis that the ACAS Code of Practice on Disciplinary and Grievance Procedures and the statutory right to be accompanied (section 10 of the Employment Relations Act 1999) do not apply to redundancies; it would appear that employees do not have the right to be accompanied through redundancy procedures. Nevertheless, failure to do so may in some circumstances lead to a risk of the dismissal being unfair.