

**GOOD
PRACTICE
GUIDE:**

Redundancy: Line manager briefing on individual redundancies

This line manager briefing looks at the law and best practice on redundancy exercises involving fewer than 20 employees. It includes information on:

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1. Meaning of "redundancy"

Redundancy is a potentially fair reason for dismissing an employee. However, an employment tribunal will not treat a dismissal as a redundancy dismissal unless it is caused by:

- the closure of a business;
- the closure of a particular workplace; or
- a diminished need for employees to carry out work of a particular kind.

Closure of a business

There will be a redundancy situation if an employer ceases, or intends to cease, to carry on the business for the purposes for which an employee was employed. If, for example, an employer decides to close down its entire manufacturing business because it is not economically viable, and dismisses all the employees as a result of this, this will be a redundancy situation.

Closure of a particular workplace

Where an employer closes down the place at which an employee is employed to work, this will also amount to a redundancy situation.

Usually it is obvious where an employee is employed to work. However, the situation is more complicated where the employee's contract contains a mobility clause allowing the employer to change his or her place of work.

As a general rule, in determining the place at which an employee is employed to work, line managers should start by looking at the place where the employee is in fact employed before the dismissal, and not at the place or places where the employer could lawfully require the employee to work under the contract of employment. If an employee's job requires him or her to work from different places, the terms of any mobility clause may be useful in determining the place where the employee is in fact employed.

Diminished need for employees

This is often the most difficult of the redundancy situations to identify. It covers a number of scenarios, including where:

- the employer requires fewer employees to do the same amount of work;
- there is less work available; or
- the employer no longer requires employees to do the work because of, for example, the introduction of new technology or the use of external contractors.

Difficulties sometimes arise when there is a business reorganisation/restructuring exercise and the same amount of work exists but the employer wishes it to be carried out on different terms and conditions, or by a different type of employee. Line managers should be particularly careful when dealing with such situations. The tribunals have confirmed on a number of occasions that, as a general rule, there will not be a redundancy situation simply because the work is carried out under different terms and conditions, or by a different type of employee.

2. The selection process

Carrying out a proper selection process is crucial if unfair dismissals are to be avoided.

When selecting employees for redundancy, line managers should ensure that:

- the "pool" for selection is identified correctly; and
- the selection criteria used are objective and fairly applied.

The pool for selection

Line managers must consider the "pool" of employees from which those who are to be made redundant will be selected. Clearly, if the company is closing down its business or a particular place of work, the issue of the "pool" for selection will not usually arise since all the employees in that place will potentially be redundant.

Points to consider in selecting the "pool" for redundancy

Is there an agreed procedure/arrangement in place governing which employees should be included in the pool?

If the employer recognises a union or has elected employee representatives, it should consider consulting them with regard to the appropriate pool.

The type of work that the employees carry out.

If other employees do jobs that are interchangeable, or do the same or similar work, line managers should consider widening the pool to include these employees.

The selection criteria

Having identified the "pool" for selection, line managers must consider the selection criteria. They should ensure that these are, so far as possible, objective and fairly applied.

Tribunals have made it clear that employers should seek to establish selection criteria that do not depend solely on the subjective opinion of the person who is selecting employees for redundancy, but can be checked objectively against such things as attendance records and efficiency at the job.

The selection criteria will be dependent on the employer's needs and arrangements. It is important that line managers adopt a consistent approach and have clear rules about what can and cannot be taken into consideration.

Commonly used selection criteria

Last in, first out (LIFO)

Now that the age discrimination legislation is in force, line managers should be cautious about using length of service as a selection criterion. This is because it is potentially discriminatory against younger employees who are more likely than older employees to have shorter service.

Skills and knowledge

It is reasonable for line managers to take employees' skills and knowledge into account in a selection exercise. Line managers should ensure that such skills are assessed objectively and should avoid difficult-to-measure tests such as employee "attitude".

Attendance

While line managers can use employees' attendance records as a criterion for selection, they need to consider the period over which attendance is reviewed and the reasons for absence. To avoid the risk of discrimination claims, they should exclude any absences due to pregnancy. They should also be aware of the potential risk of a discrimination claim where absence is for a disability-related reason.

Disciplinary records

Employees' disciplinary records may be taken into account in the selection process. One way of doing this is to award points in relation to the seriousness of the warning. Again, line managers should consider the period over which disciplinary records are to be assessed. It is good practice to take into account only unexpired warnings.

Discriminatory selection criteria

If an employer's selection criteria discriminate on the grounds of race, sex, disability, religion or belief, sexual orientation or age, the employer will potentially face discrimination claims as well as claims for unfair dismissal.

It used to be the case that employers could dismiss employees who had reached the company's normal retirement age or the age of 65 without the risk of complaints of unfair dismissal and/or claims for a statutory redundancy payment. Since the introduction of the age discrimination legislation in October 2006, this is no longer the case.

Line managers also need to be careful not to discriminate against part-time or fixed-term employees.

Automatically unfair reasons

The Employment Rights Act 1996 contains a list of grounds on which selection for redundancy will be automatically unfair. They include (but are not limited to):

- as a shop or betting worker, refusal to do Sunday work;
- assertion of a statutory right;
- asserting a right as a part-time worker; and
- asserting a right as a fixed-term worker.

In such circumstances, an employee does not need one year's service to bring a complaint of unfair dismissal.

Practical tips on selection for redundancy

It is good practice for more than one person to be involved in the selection process, to reduce the risk of perceived bias or discrimination. It is sensible to have two people, both of whom know the individual employees concerned, carry out the assessment.

One way in which this can be done is for each of the two people to carry out his or her own assessment, and then discuss the outcomes, before the individual is given a final score.

It is generally good practice to use a matrix. This is a score sheet that attaches a certain weight and score to each criterion - usually on a scale of 1 to 10. The matrix gives each employee being considered for redundancy a final score on which the redundancy decision is based. When all the scores have been worked out, those employees with the lowest scores will be the ones provisionally selected for redundancy.

Volunteers and early retirement

Employers are not under a legal obligation to seek volunteers for redundancy, but it is good practice to do so.

Sometimes employers offer enhanced redundancy payments as an incentive for employees to volunteer for redundancy. It is important that they reserve the right to turn down requests, to avoid an imbalance in the workforce or a loss of employees with particular skills and experience.

Early retirement can be an acceptable alternative to redundancy for both employees and trade unions. However, compared with a one-off redundancy payment, it can prove expensive for employers, as it usually involves a larger financial commitment by way of an early pension.

3. Individual Consultation

Individual consultation with employees is essential. If a line manager does not carry out such consultation any subsequent dismissal will almost certainly be unfair.

Consultation involves the line manager explaining to each employee the basis on which he or she has been provisionally selected for redundancy, and giving the employee the opportunity to express his or her views, to raise any questions, and to discuss and/or identify any alternatives to redundancy.

The requirement to consult does not mean that the line manager has to agree with what the employee says. It means considering what the employee has to say and not dismissing it out of hand. Genuine engagement with the employee is required.

Individual consultation must take place prior to the employee being given notice of termination by way of redundancy. If a line manager serves notice to dismiss prior to carrying out consultation, there is a grave risk that a tribunal will consider the consultation process to be a sham and the dismissal to be unfair.

Suggested steps

Following the repeal of the statutory dismissal and disciplinary procedure on 6 April 2009, the focus in relation to redundancy exercises has returned to the reasonableness of the employer's behaviour in dismissing the employee in question for redundancy, including whether or not there has been proper consultation.

There is no set rule regarding the number of meetings held. What is appropriate will largely depend on the scope and complexity of the redundancy exercise. However, a typical consultation process would involve the following steps:

- An initial meeting with staff to announce the likelihood that redundancies will be necessary. At this meeting, the line manager should set out the background to the situation. He or she should also inform the employees about any options that the organisation has already considered to try to avoid the potential redundancy situation. These might include a recruitment freeze, redeployment and

reducing overtime. The line manager should then outline the broad proposals for taking the matter forward. This will include setting out the proposed redundancy selection criteria and how they will be applied.

The employees should be permitted to put forward any suggestions that they may have. They should also have the opportunity to ask questions or raise any concerns. Individual meetings with employees will often be the best forum for this.

- Individual meetings with the employees selected for redundancy, outlining the basis on which the selection was made. Employees must be given the opportunity to challenge the basis for their selection. The line manager may need time to investigate issues raised by an employee. If this is the case, a further meeting with the employee to discuss the outcome of the investigation will be necessary.
- Individual meetings at which employees' selection for redundancy is confirmed. The line manager should also discuss possibilities for redeployment to alternative work, and any assistance that the organisation can provide to help the employee find other work.

Redundancies "started" before 6 April 2009

Although the statutory dismissal and disciplinary procedure was repealed on 6 April 2009, it still applies in relation to any small-scale redundancy exercise where the employer started the procedure - by sending the step-one letter (see below) - before 6 April 2009. Where the procedure still applies, failure to comply will result in a finding of automatically unfair dismissal and an increase of between 10% and 50% in any compensation awarded.

Where the statutory dismissal and disciplinary procedure has to be followed, as well as the initial general meetings discussed above, the individual redundancy consultation process should involve the following steps:

- The line manager should write to the employee inviting him or her to a consultation meeting. The letter should set out the circumstances that lead the manager to contemplate dismissing the employee, for example that the company is downsizing or that the plant is closing. Prior to the meeting, the employee should be given sufficient information in relation to the application of the selection criteria to be able to understand why he or she has provisionally been selected and challenge this.
- The line manager should meet with the employee to discuss his or her provisional selection for redundancy. The employee should be given the opportunity to make representations. Where no alternatives to redundancy can be identified, the employee should be informed that he or she is to be made redundant. The line manager should write to the employee confirming the decision to dismiss. The letter should also outline the employee's right of appeal.
- If the employee informs the employer of his or her wish to appeal, the line manager should invite the employee to attend a further meeting, after which he or she must inform the employee of the final decision. This should be done in writing.

Employees have the right to be accompanied at the above meetings by a trade union official or a fellow worker if they wish.

4. Suitable alternative employment

An employer must take reasonable steps to find alternative employment for employees who may otherwise be dismissed by way of redundancy. A failure to do so could make any dismissal unfair.

What is "reasonable" is ultimately a question that only a tribunal can decide, but will include identifying possible vacancies within the company and inviting the employee to consider them.

Line managers should not assume that, because an alternative position would involve, for example, a reduction in salary, relocation or loss of status, an employee would not be interested in it. The employee might be interested in such a position if the only alternative is redundancy. The safest course of action is to provide employees with details of all vacant positions.

If an employee accepts an offer of suitable alternative employment, or unreasonably refuses an offer of suitable alternative employment, the employer will not be liable to pay the employee a statutory redundancy payment. However, this will be the case only if:

- the offer is made and communicated to the employee prior to the end of his or her old contract; and
- the alternative job starts no later than four weeks after the end of the old contract.

If the terms and conditions of the new job differ from those of the old job, the employee is entitled to a four-week statutory trial period. The purpose of the trial period is to give the employee the chance to decide whether or not the new job is suitable.

If an employee terminates the contract or gives notice to terminate it at the end of the trial period, he or she is treated as having been dismissed on the date on which the original contract came to an end. Similarly, if the employee is dismissed for a reason relating to the trial period, for example because the new role is unsuitable, the employee is treated as having been dismissed with effect from the end of the original contract. If the termination is for some other unrelated reason, such as misconduct, the employee may lose the right to a redundancy payment.

An employee will lose the right to a statutory redundancy payment if he or she unreasonably refuses an offer of "suitable" alternative employment. The onus is on the employer to show that the job offer was "suitable" and that the employee's refusal was "unreasonable".

Suitability will be assessed objectively by a tribunal, taking into account such factors as location, remuneration and status. However, there is also a subjective element because the tribunal will look at whether rejection was reasonable in relation to the employee concerned. For example, in one case, an employee's need to look after her elderly mother justified her refusal to move to new premises where this would have involved extra travelling time.

5. Notice to terminate employment

Employees are entitled to be given a certain period of notice to terminate their employment. An employee's contract of employment will normally specify his or her notice period. If it does not, a "reasonable" period will be implied into the contract. In either case, the period of notice must not be shorter than the statutory minimum notice period.

Where the employee has been employed for at least a month but less than two years, the statutory minimum notice is one week. After two years' service this rises to one week for each year of continuous service, up to a maximum of 12 years.

In a redundancy situation, the employer frequently does not require employees to work out their notice period. Employers should, therefore, give consideration to making a payment in lieu of notice, rather than requiring employees to work out their notice. Line managers need to bear in mind the implications of making such a payment in the absence of an express right to do so in the contract. For example, post-termination restrictions will not be enforceable.

Leaving during the notice period

Sometimes employees who have been given notice to terminate their employment on the grounds of redundancy wish to leave before the expiry of their notice period, usually to start a new job. If this is the case, they are required to serve a counter-notice on the employer.

If the employer agrees to allow the employee to leave early, the employee will remain entitled to a statutory redundancy payment.

If the employer does not agree then it must serve written notice on the employee requiring him or her to withdraw the counter-notice and continue in employment until the original termination date. The written notice must state that, if the employee fails to do so, the employer will contest any liability to make a statutory redundancy payment. If the employee does not comply, he or she will be treated as dismissed on the date specified in the counter-notice.

The employee will, however, be able to apply to a tribunal, which will consider whether or not it is just and equitable for him or her to receive a redundancy payment. It will take into account the reasons why the employee wanted to leave the employment early and the reasons why the employer wanted him or her to remain in it.

6. Time off to look for new employment

Employees who have at least two years' continuous employment and have been given notice of dismissal by reason of redundancy are entitled to reasonable paid time off during working hours to look for new employment or make arrangements for training for future employment. Time off could be for the employee to attend an interview, or visit a job centre or recruitment agency.

There is no statutory definition of how much time off is "reasonable". There should be a balance between the employer's business needs and the employee's need to find a new job.

Tribunals can make awards against employers that unreasonably refuse to allow this time off, or allow the time off but refuse to pay for it.

7. Redundancy pay

An employee who is made redundant will be eligible for a statutory redundancy payment provided that he or she has at least two years' continuous service.

The amount of any statutory redundancy payment is based on three factors: an employee's age, salary and length of service. The employee is entitled to receive:

- half a week's pay for each year of employment in which the employee was aged 21 or under;
- one week's pay for each year of employment in which the employee was aged between 22 and 40; and
- one and a half weeks' pay for each year of employment in which the employee was aged 41 or over.

The maximum number of years of employment that can be taken into account is 20.

The cap on a week's pay is currently £380 (for dismissals on or after 1 October 2009).

Employers are required to provide employees with a statement setting out how their statutory redundancy payment has been calculated.

Enhanced redundancy payments

As statutory redundancy payments are usually relatively small, many employers offer enhanced redundancy payments under a company redundancy policy.

There have been several tribunal cases arising out of situations where employers have offered enhanced payments in the past and then sought to stop or vary the payments.

Enhanced redundancy payments may become contractual if an employer has led its employees to believe that they will receive such a payment, or there is a "custom or practice" of making such payments. If an employer wishes to avoid such payments becoming contractual it should make it clear that they are discretionary and that no precedent is being set, and vary its practice from time to time.

When providing a written statement in respect of a contractual payment, the employer should state that the payment is deemed to include the amount of any statutory redundancy payment due (assuming that this is the case).

Employers must ensure that any enhanced redundancy scheme is not discriminatory under the age discrimination legislation. There is specific provision in the legislation for an employer to enhance statutory redundancy payments by:

- increasing or removing the £380 cap on a week's pay; and/or
- multiplying the appropriate amount allowed for each year of service by a figure of more than one; and/or
- multiplying the total amount of the redundancy payment by a figure of more than one.

Any other enhanced redundancy payment formula will need to be objectively justified.

Taxation

Statutory redundancy payments are expressly exempt from income tax. They will, however, be taken into account in determining whether or not the total compensation paid to an employee exceeds the £30,000 tax-free limit.

Non-statutory redundancy payments are also taxable only to the extent that they exceed the £30,000 limit.

Payments that are not genuinely made to compensate for loss of employment through redundancy will, however, be taxable. For example, payments made for past services, payments for extra work in the period leading up to redundancy, and loyalty payments conditional on continued service for a time after the issue of the redundancy notice will be taxable.

Employees will be entitled to be paid for such things as unused but accrued holiday pay. Such payments will not be tax free, as they are not compensation for loss of employment.