

GUIDANCE NOTE

Redundancy Law

March 2013

What is redundancy?

Redundancy arises where an employer reduces the number of its employees either as a whole or at a particular site or in a department or in a particular job function or role. It can arise if the overall amount of work is the same, but the employer decides to use fewer employees, for example, for financial reasons.

Thus the legal definition of redundancy is that the employee's employment has ended because of:-

- Business closure: the employer has ceased or intends to cease the business in which the employee is employed.
- Workplace closure: the employer has ceased or intends to cease business in the place where the employee is employed (including relocation to a new site).
- Reduction of the workforce: the employer requires fewer employees in the business to carry out work of a particular kind or requires fewer employees at the employee's workplace to carry out work of a particular kind.
- Specific job loss: the overall number of jobs may remain the same, but a job involving "work of a particular kind" disappears and is replaced by a new job involving a different kind of work.

Generally speaking the law does not question or interfere with the employer's commercial decision to implement redundancies. An employer is not required to justify a decision to close or streamline a site or department, but there are important obligations to consult with employee representatives and/or the workforce.

Bumping is a process where a potentially redundant employee is moved into another role and the employee currently performing that role is made redundant. This is a redundancy, but it is important to ensure that the bumped employee is not dismissed unfairly.

An employee may also be entitled to treat himself/herself as redundant where there is a period of lay-off or short-time working.

Collective consultation

Where an employer proposes to make 20 or more redundancies (including voluntary redundancies) at one establishment within a period of 90 days or less, the employer is required to consult with union representatives or elected employee representatives. The employer must also notify BIS of the proposed redundancies on an HR1 form. Failure to notify BIS is a criminal offence.

Although “establishment” usually means a geographical location or site, there have been cases where several sites have been ruled to constitute one establishment and so the number of redundancies across those sites has been aggregated.

Consultation must begin “in good time” and at least 30 days before the first redundancy takes effect or 90 days beforehand where 100 or more redundancies are proposed: the 90 day period is due to be reduced to 45 days from 6th April 2013.

The employer is required to provide certain specified information to the union/employee representatives in writing at the start of the process, including the reasons for the redundancies, the number of proposed redundancies and any selection criteria. Failure to do so puts the employer in breach of the requirement. Consultation must be genuine and meaningful and carried out with a view to reaching agreement on ways of avoiding or reducing the number of redundancies and mitigating the consequences, although there is no requirement actually to reach agreement.

Failure to comply with the legal requirement for collective consultation can result in an employment tribunal making a protective award against the employer of up to 90 days’ pay for each redundant employee. The statutory cap on a week’s pay of £450 does not apply.

One area of uncertainty is whether the employer is under a legal duty to consult about the strategic decision to implement redundancies rather than just the redundancy process itself, e.g. the decision to close a particular site. In some case law it has been ruled that, where redundancies will inevitably arise from a closure, consultations must take place about the proposed closure before the final decision is made (because consultation must include consultation about ways of avoiding the redundancies). The extent and application of this ruling is not clear. Further clarification is awaited from the courts.

In addition to collective consultation, an employer must normally carry out individual consultations with each redundant employee about his/her own case, e.g. in relation to selection or possible alternative employment. Failure to do so can give rise to an unfair dismissal claim.

Unfair dismissal

Redundancy is a potentially fair reason for dismissal. Nevertheless a redundancy may give rise to an unfair dismissal if redundancy was not the true reason for dismissal or if the redundancy process has been handled unfairly.

An employer must ensure that, if challenged, it is able to prove that the redundancy was genuine and not a sham being used to dismiss an unsatisfactory employee for other reasons.

In order to avoid a genuine redundancy being ruled to be unfair, particular points to be addressed include:-

- Identifying an appropriate pool of employees to put at risk of possible selection for redundancy.
- Adopting and applying fair selection criteria which, so far as possible, can be objectively applied and measured and which are not directly or indirectly discriminatory on the grounds of age, race, sex, disability, sexual orientation or religion or belief. Potentially fair selection criteria include skills and qualifications, experience, performance and ability, length of service, attendance records, disciplinary records.
- Giving as much warning as possible to those employees at risk of redundancy and carrying out genuine consultations about their possible selection and their assessment by reference to the selection criteria.
- Considering in consultation with the employee whether there are any ways in which redundancy can be avoided, including the possibility of alternative employment either within the company or with any group company or the possibility of part-time working.
- Offering an opportunity to appeal against redundancy selection.
- In certain circumstances selection of an employee for redundancy may be automatically unfair and the qualifying period of service to bring a claim does not apply, e.g. selection for a reason connected to pregnancy.

Alternative employment and trial periods

A redundant employee who has been offered alternative employment in a different job or on different terms is entitled to a trial period of up to 4 weeks to decide whether the new job is suitable. The employee can terminate his/her employment during or at the end of the 4 weeks and will retain the right to a redundancy payment if his/her decision is not unreasonable.

The trial period can also be used by the employer to assess the employee's suitability for the new role.

Avoiding redundancies

Before embarking on a redundancy programme and whilst the redundancy process is underway employers should consider whether they can avoid or reduce redundancies by taking other measures. Possibilities include:-

- Natural wastage and suspending or restricting recruitment.

- Removing or reducing overtime.
- Retraining or redeployment.
- Ceasing or reducing the use of agency workers.
- Offering the opportunity to apply for early retirement.
- Introducing temporary short-time working or permanent part-time working.
- Pay freezes or agreed salary reductions.

Redundancy payments

A redundant employee with at least 2 years' continuous employment is entitled to a statutory redundancy payment which is calculated according to a statutory formula based on age, length of service and the amount of a week's pay. A calculation tool is available on the gov.uk website (www.gov.uk/calculate-your-redundancy-pay).

Many employers operate enhanced redundancy payment schemes, either on an ad-hoc or discretionary basis or as part of contractual terms.

In addition to any statutory or contractual redundancy pay, a redundant employee must also be given the appropriate period of notice of termination of employment (which he/she may be required to work in full or in part or not at all) or alternatively payment in lieu of notice.

Redundancy pay, whether statutory or contractual, is tax free up to £30,000. Payments in lieu of contractual notice may or may not be tax free depending on whether the employment contract provides for payment in lieu of notice or the employer has a custom of always making a full payment in lieu.

Time off to look for work or arrange training

An employee with at least 2 years' continuous service who has been given notice of redundancy is entitled to take a reasonable amount of time off with pay to seek alternative employment or to arrange training.

The comments in this guidance note are of a general nature only. Full advice should be sought on any specific problems or issues

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