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Employment Law

A Practical Guide to Redundancy in Uncertain Times



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During these unprecedented times, employers may be faced with the difficult decision to make redundancies. When conducting a redundancy process in a business it is important that employers adhere to the strict rules and procedures required to ensure the process is fair and non-discriminatory – it will come back and bite you if you don't.

Redundancies typically occur as a result of:

- Recession or other economic pressures making business closure or reduction in staff necessary.
- Changes in the nature of products or services provided.
- Internal reorganisation to make more efficient use of roles and duties.
- Technological developments resulting in change to some or all job functions.
- Relocation of business.

The law does not interfere with an employers freedom to make such business decisions that are needed, providing a tribunal is satisfied that redundancy is the genuine reason for a dismissal and is fair. In order for a dismissal for redundancy to be fair:

- The employer must establish that redundancy was the real reason for the dismissal.
- The tribunal must find that the employer acted reasonably, in all the circumstances of the case, in treating redundancy as the reason for dismissing the employee.

Employers must follow the 'procedural fairness' guidelines which confirm that an employer will normally not act reasonably unless it:

- **Warns and consults:** Employees, and/or their representative(s) should be warned and consulted about a proposed redundancy.
- **Adopts a fair basis on which to select for redundancy:** An employer must identify an appropriate pool from which to select potentially redundant employees and must select against proper criteria.
- **Considers suitable alternative employment:** An employer must search for and, if it is available, offer suitable alternative employment within its organisation.

To help ensure that businesses follow the correct redundancy procedures, we will outline here the steps they should take. However, it is recommended that they seek professional legal assistance at the earliest opportunity to reduce the risk of mistakes being made which may result in legal action being taken against them in future.

Identifying the reason for redundancy

The first step that businesses should take is to establish whether there is a real redundancy situation. The law (Section 139, Employment Rights Act 1996) simply states that a genuine redundancy situation, which allows a person to be dismissed, may arise where an employer has ceased or intends to cease business or the place of business where the person works closes.

Businesses can also seek redundancy where there is a reduced requirement for employees to carry out work of a particular kind.

Establishing the redundancy pool

Having identified the reason(s) behind the redundancies that need to be made, an employer must consider how many people should be made redundant and which members of staff it needs to dismiss. It is very important that employers quickly establish how many redundancies are being proposed as:

- If 20 or more redundancies (including employees with less than two years' service) are being proposed in a 90-day period then collective consultation obligations will need to be met and several requirements will apply, for example the need to consult with employee representatives or trade union representatives, and notify the Secretary of State 30 days before the first dismissal takes place among others.
- If fewer than 20 redundancies are being proposed then it will be necessary to follow a fair procedure in relation to each employee at risk of redundancy.

If a business needs to undertake a collective consultation the employer must notify the Secretary of State:

- At least 30 days before the first dismissal takes effect (in other words, the date on which notice is to expire or employment is to end) where the employer proposes to dismiss 20 to 99 employees within a 90-day period; or
- At least 45 days before the first dismissal takes effect where the employer proposes to dismiss 100 or more employees within a 90-day period.

The notification must be in writing (either by letter or on a form HR1) and a copy must be provided to the employee representatives. Employees cannot be given notice of dismissal until the Secretary of State has been notified.

Selecting the pool

There are no fixed rules about how the pool should be defined however, the following principles should be considered:

- In deciding whether a redundancy selection was unfair, a tribunal must decide whether the employer's choice of pool was within the range of reasonable responses.
- The question of how the pool should be defined is primarily a matter for the employer to determine and, provided an employer genuinely applies its mind to the choice of a pool, it will be difficult for an employee (or a tribunal) to challenge that choice albeit not impossible.
- A particular set of circumstances may give rise to a variety of permissible pools and there is no legal requirement that a pool should be limited to employees doing the same or similar work.

Usually an employer will wish to keep the pool for selection fairly narrow, but employees within the pool may want to argue that the pool should be wider, as this will usually lower the risk of being selected.

It has been held to be fair to place employees in a pool of one and the fact that employers can choose a redundancy pool that is the same size as the number of redundancies to be made has been confirmed in previous case law however employers must be careful when doing so as tribunals will carefully scrutinise such decisions.

Factors that are likely to be relevant to identifying a pool are:

- The type of work that is ceasing or diminishing.
- The extent to which employees are doing similar work (possibly even those at other locations).
- The extent to which employees' jobs are interchangeable.
- Whether the employer 'genuinely applied' its mind to the composition of the pool.
- Whether the selection pool was agreed with the union or employee representatives.

As well as considering the reasonableness of the selection pool, the tribunal will consider whether the selection criteria used by the employer are reasonable.

In order to be reasonable, the redundancy selection criteria should, as far as possible, be both objective and capable of independent verification. This means that the criteria should be measurable, rather than just being based on personal opinion. Potentially fair selection criteria include:

- Performance and ability.
- Attendance records.
- Length of service.
- Disciplinary records.

It is legitimate for an employer to attach weightings to the criteria, reflecting their relative importance, but it should be able to justify any such weightings. The risk of discrimination when choosing criteria by which to select a pool an employer should avoid criteria which are discriminatory.

Criteria that discriminate directly on any of the protected characteristics, such as sex, maternity or pregnancy, marital status or civil partnership, age, race, disability, sexual orientation, gender reassignment, or religion or belief or on grounds of fixed-term or part-time status, should be avoided as they could result in a claim for unfair dismissal as well as unlawful discrimination.

Selection on purely subjective grounds is also likely to be unfair. This is to ensure that an employee is not selected by a manager due to personal animosity, or for an automatically unfair or discriminatory reason.

Methods of selection

There are various methods that businesses can employ to select their pool, some of which focus on the criteria previously covered. These include, but are not limited to:

Last in first out: Based on length of service, this method is less used as it can lead to discrimination against younger employees with less experience. Employers should be mindful when using this as a criterion, in particular when there are other objective criteria to choose from.

Performance and ability: Scores employees on a weighted system based on their ability and track record. Businesses must, however, consider the skill and knowledge required for its current and future needs. This method should be based on written records such as performance appraisals.

Attendance: When an employer wishes to refer to attendance records, it should check the accuracy of the information and consider the reasons behind absence. Consideration should be given to whether any particular periods of absence should be discounted, such as paternity leave or a serious long-term illness or disability.

Alternative employment

As part of procedural fairness rules employers must consider whether suitable alternative employment exists within its organisation. As such, they should undertake a sufficiently thorough search for alternative employment and ensure their search is documented.

Since the fairness of a redundancy dismissal is judged not only at the date on which notice of termination is given to an employee but also when an employee's employment actually terminates.

Employers should also provide employees with sufficient information about any vacancies so that they are able to take an informed view as to whether the position is suitable for them. However, this is a reasonable duty and there is no duty on employers to create an alternative role where one does not exist.

Aspects of suitability that should be considered include:

- Status and responsibility.
- Pay and benefits.
- Skills, aptitudes and experience.
- Hours.

If any of these elements are significantly diminished by the offer of alternative employment then it may not be considered fair by a tribunal. By following these rules if an employee unreasonably refuses an offer of suitable available alternative employment, or unreasonably resigns or gives notice during a trial period), they will be treated as having been dismissed by their employer but they will lose their right to a statutory redundancy payment.

The consultation process

To help employers prepare for the redundancy procedure we have outlined the consultation process below:

Step 1 – First Meeting

Employer meets with employees who might be made redundant and explains:

- The reasons for the potential redundancies.
- The number of jobs that are potentially at risk of redundancy.
- The pools and proposed selection criteria.
- The right to take time off to seek alternative employment.

At this stage, employers should also ask employees if they have any suggestions of ways to avoid redundancies and see if any employees are willing to consider voluntary redundancy. In some cases, employers may wish to offer a better package of remuneration for those that leave voluntarily.

Step 2 – Send confirmation letters

Employers should send out a letter to employees that confirms the information given during the first meeting in writing. With this letter they should include a copy of the selection criteria and scoring guidelines, if relevant to the method of selection being used.

Step 3 – Selection

Score each potentially redundant employee using the selection criteria and scoring guidelines. Ensure that at least two line managers conduct the scoring, to help ensure scores are objective as possible and not biased by personal relationships.

Step 4 – Contact those in the pool

An employer should write to those employees that have been provisionally selected for redundancy, inviting them to a meeting to discuss their provisional selection. It is important that you include an invitation to bring a trade union representative, colleague or other personal representative to the meeting.

This document should set out the reasons for the redundancy situation and for provisionally selecting the employee for redundancy, and summarising the consultation that has been held with them to date.

Confirm that no final decision has been made at this stage, and that a further meeting will be arranged if their selection for redundancy is confirmed.

Step 5 – Individual Meetings

Having given employees reasonable time to consider the prospect of redundancy you should begin to consult with employees on an individual basis.

This is an opportunity to consider any comments from the employee, particularly in relation to their scores and their ongoing role in the company.

Employers should also discuss available alternative roles within the group. Employees should make sure you have someone take a detailed note of the meeting.

Step 6 – Second Meeting

Having reviewed your notes from the first meeting and made a decision on who should be made redundant each individual selected should be invited to another meeting. Again, make it clear that they are entitled to bring a representative of their own to the meeting.

Assuming that nothing has changed, confirm that the employee has been selected for redundancy and go through the package that is available to them. Remind the employee of the right to time off to seek alternative employment and take a detailed note of the meeting.

Step 7 – Dismissal letter

Write to the employee confirming the decision to dismiss them as redundant and specify the termination date (termination may be with immediate effect if the employer is paying the employee in lieu of notice).

Explain the calculation of the redundancy payment and any other payments to be made such as notice and holiday pay.

Confirm that the employee has the right of appeal. Explain how to appeal and the relevant time limit.

The appeal process

If an employee appeals, invite them to attend a further meeting to hear their appeal. If possible, the meeting should be held by someone senior to the person who held the previous meeting(s).

Allow employee to be accompanied by a trade union representative or work colleague. Following the meeting, write to the employee confirming the outcome of the appeal and that this is a final decision.

How we can help

If you anticipate a need to make redundancies and are unsure of your obligations or the processes that you are required to follow then we can help. Our dedicated Employment Law Team are standing by to assist businesses grappling with the difficulties of redundancy.

We can help to alleviate the stress of redundancy and give you peace of mind that the correct procedures are being followed in line with current legislation and case law. **To find out more, please contact us.**

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