Information

Redundancy - frequently asked questions

Below are some frequently asked questions (FAQs) about redundancy. Although these FAQs highlight some key issues relating to Employment law, they are not comprehensive and the answers should not be treated as a substitute for seeking professional advice on a specific issue.

Q: We need to make some people redundant. Is it advisable to establish a formal redundancy procedure, and if so, what should it cover?

A: Yes. Redundancies are subject to a range of requirements and failure to observe them could give rise to claims for unfair dismissal. The best way to reduce the risk is to have a procedure and stick to it. It should cover:

- identifying a reasonable 'pool for selection', i.e. the group of employees from whom the employees selected for redundancy will be chosen;
- adopting objective selection criteria and applying them fairly to the employees within this pool;
- warning and consulting employees about the potential redundancy situation;
- seeking a view from the union (if any);
- informing and consulting employee representatives in cases of collective redundancy;
- considering alternative employment for those employees whose roles are redundant;
- giving reasonable paid time off to look for work or make arrangements for training for future employment.

In addition, if you are making individual employees redundant your procedures must currently incorporate at least the statutory minimum procedure: a written explanation of the reason(s) for the redundancy; a face-to-face meeting to discuss it; and a right of appeal.

Q: How much notice do we have to give of proposed redundancies?

A: As well as individual consultation which is required in respect of all redundancies, where you have to make collective redundancies, you have a statutory duty to inform and consult employee representatives about your proposals.

If you are proposing to dismiss 100 or more employees for redundancy at one establishment within 90 days or less, consultation must begin at least 90 days before the first dismissal takes place.

If you are proposing to dismiss between 20 and 99 employees for redundancy at one establishment within 90 days or less, consultation must begin at least 30 days before the first dismissal takes place.

Where you are proposing to dismiss smaller numbers, it is obviously reasonable to give as much notice as possible.

Q: In cases of collective redundancy, what information, if any, do we have to provide in writing to employee representatives?

A: You have to disclose the following, in writing, to the appropriate representatives during the consultation process:

- the reasons for your proposals;
- the number and description of employees whom you propose to make

Head Office
3 Lonsdale Gardens
Tunbridge Wells
Kent TN1 1NX
T 01892 510000
F 01892 549884

Thames Gateway
The Old Rectory
St. Mary's Road
Greenhithe
Kent DA9 9AS
T 01322 623700
F 01322 623701

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redundant (for example, 10 shop floor workers);

- the total number of employees of that description employed at the establishment in question (for example, 32 shop floor workers);
- the proposed method of selecting people to be made redundant;
- the proposed method of carrying out the dismissals, including the period over which the dismissals are to take effect (for example, five notices to be issued within the next three months, and another five at the end of the year);
- the proposed method of calculating the amount of any redundancy payments to be made (other than statutory redundancy payments).

Q: How much do we have to pay in redundancy pay?

A: The amount of the statutory redundancy payment depends on the employee's age, length of service and pay, and is calculated using the following starting point:

- one and a half week's pay for each full year of service in which the employee was aged 41 years or more;
- one week's pay for each full year in which the employee was between the ages of 40 and 22;
- half a week's pay for each full year in which the employee was aged up to and including 21.

An employee must have two years' continuous employment at the relevant date in order to qualify for a redundancy payment. The maximum length of service that may be taken into account is 20 years. Age-related limits on redundancy entitlement and redundancy pay remain, notwithstanding the new legislation banning age discrimination. However, younger workers can now claim for service before the age of 18 and older workers can claim for service beyond 65.

The week's pay is subject to a statutory maximum, currently £380 per week.
You might want to offer more than the statutory redundancy payment, particularly if you want to encourage voluntary redundancies. However, you should be careful that you do not create a contractual 'right' to such enhanced payments. In a recent case before the Court of Appeal, an employee successfully argued that mention of an 'entitlement' to enhanced redundancy payment in the staff handbook meant that he should have been given more than the statutory minimum.

Q: Will we run into problems if we just weed out the people we would like to get rid of?

A: Yes. To reduce the risk of being sued for unfair dismissal and unlawful discrimination, you should, in the first instance, identify a fair 'pool for selection' for redundancy.
If there is an agreed procedure or a customary arrangement which prescribes a particular selection pool, you would normally be expected to follow it, unless you can show that it was reasonable not to do so.

If there is no agreed procedure or customary arrangement, you have flexibility in identifying the pool for selection. Nevertheless, you should ensure that you act reasonably in identifying the pool for selection, for example, by considering

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whether employees' jobs are interchangeable.

Having identified a fair pool for selection, you should then fairly apply objective selection criteria, in order to identify which members of the pool should be made redundant (that is, those who score lowest). Such criteria could include performance, attendance and length of service. However, you should be aware of the risk that a length of service or last in first out ("LIFO") criterion might fall foul of age discrimination legislation, as it disproportionately affects younger employees.

Q: Do we have to go through a redundancy procedure if we can offer alternative employment at a site 20 miles away?

A: Yes. Some people might be happy to take up the offer, but for others it will either mean moving, or a considerable increase in travelling time. An Employment Tribunal would be unlikely to consider this an offer of 'suitable' alternative employment, although much will depend on individual circumstances.

Q: Can we select candidates for redundancy from amongst the part-timers, most of whom work for pin money?

A: Not if you select those candidates because they are part-time workers. Part-timers are now entitled to the same employment rights as full-timers and that includes the right not to be singled out for redundancy. It is unlawful to treat part-timers less favourably than full-timers, unless you can justify the different treatment on objective grounds. Moreover, if most of your part-timers are women, you risk being accused of indirect sex discrimination.

Q: Three employees with less than one year's service say our redundancy selection process was unfair. Can they do anything about it?

A: Possibly. Employees with less than one year's service cannot sue for unfair dismissal — unless the dismissal was for an 'inadmissible' reason (such as pregnancy, or involvement in trade union activities). However, if your trio have characteristics which set them apart from the majority of your workers — for example, if they are women, or older workers, or from a racial minority group, or disabled — be careful. There is no qualifying period of service in relation to claims of unlawful discrimination. If they can establish on the facts what appears to be a difference in treatment related to gender, age, race, sexual orientation, religious or philosophical belief, or disability, an Employment Tribunal may draw an inference of unlawful discrimination unless you can provide a satisfactory alternative explanation. An award of compensation for unlawful discrimination has no upper limit.

Q: Former employees are claiming that redundancies were not genuine because we have subsequently taken on more people. Do we need to worry?

A: It depends on the context in which the redundancies took place. A redundancy situation can arise not merely as a result of a downturn in business, but also in the expectation of such a downturn. If you can prove you had a reasonable expectation that the business in which your former employees worked was about to turn down,

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then — even if you were wrong — you have a defence against their claims.

However, if your ex-employees can convince an Employment Tribunal that you used the pretext of redundancy to get rid of them, you are likely to end up paying compensation for unfair dismissal.

Q: Some employees are threatening to ask for a 'protective award'. What is this?

A: A ‘protective’ award may be made when an employer has failed to comply with the obligation to consult appropriate representatives in a collective redundancy situation. The award is for a ‘protected period’, which may be up to 90 days. If a protective award were made, you would have to pay full actual (i.e. uncapped) pay to all the employees who have been dismissed or whom you propose to dismiss as redundant, for the duration of the protected period. This is why it is important to start collective redundancy consultation sooner, rather than later.

Q: Are we obliged to minimise redundancies by cutting overtime elsewhere in the business, even if that could cause some good employees to leave?

A: Yes. Redundancies should be the last resort.

Q: Is it reasonable to select people for redundancy on a LIFO (last-in-first-out) basis?

A: Probably, providing you are consistent. You risk trouble if you make some of your most recent recruits redundant, but hang on to others — unless you have additional criteria (also discussed in the consultation process) that justify the difference in treatment. For example, you might decide to make people redundant on a last-in-first-out basis, unless they have successfully completed a training programme.

However, if the application of LIFO disproportionately affects a particular sector of your workforce, they may have a claim for unlawful discrimination on the ground of gender, age, race, sexual orientation, religious or philosophical belief, or disability — unless you can show that the application of LIFO is objectively justified. If, for instance, you habitually take on a tranche of 18-year olds, and find your redundancies from amongst them later in the year, you could well fall foul of the age discrimination legislation.

Q: Can we select people on performance?

A: Yes, providing this is a genuine criterion. You would need to produce as much objective evidence as you could — for example, sales figures, productivity records, appraisals — to demonstrate that you are losing the people who make the least contribution to the business, rather than merely exercising favouritism.

Q: If we select people for their skills, can we include their ability to speak and understand English?

A: Be careful here. If their ability to speak and understand English is essential to doing the job, this is a reasonable criterion to use. But you would have to demonstrate conclusively that a certain standard of English is required; and you would also have to demonstrate that you are applying exactly the same criterion to workers who

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are native English speakers. If you attempt to get non-native speakers to take a test while native speakers are excused, you lay yourself wide open to a charge of race discrimination.

Q: We're thinking of taking over a rival's business, but not his company. We don't have to take on his staff, do we?

A: This is a tricky area. If you are buying the business as a going concern, then it is possible that the staff will be transferred with it on their existing terms and conditions of employment, in accordance with the Transfer of Undertakings (Protection of Employment) Regulations 1981 ('TUPE Regulations'), as amended by the TUPE Regulations 2006.

The new regulations make it plain that transfers of services are caught by TUPE, as well as transfers of businesses. However, they also make it easier to transfer insolvent businesses, by providing for agreement on changes to employment contracts to preserve employment. The question of how the TUPE Regulations will apply, and whether you can use the 'economic, technical and organisational' ('ETO') exemption, will depend on the particular facts and circumstances of the transfer of the business. Seek legal advice.

Q: Can we take over a business, make the staff redundant, and then offer jobs to the ones we want to keep on our terms?

A: If the TUPE Regulations apply to the take-over, you would risk liability for unfair dismissal. An employer may avoid liability for a dismissal in a TUPE transfer if he dismisses for an 'economic, technical or organisational' ('ETO') reason (also see question 15). However, if the purpose of the redundancy exercise was to 'cherry-pick' employees, then this would not constitute a genuine ETO reason.

Q: Is redundancy money paid gross, or do we have to deduct tax and National Insurance contributions?

A: Statutory redundancy pay is paid gross to the employee (that is, tax free). It may be possible to pay any additional severance pay without deduction of tax and NI, but it will depend on the terms of the employment contract and any agreed terms of severance. Seek legal advice.

Q: Our company normally gives generous redundancy pay. Our employees say they have a right to it this time. Do they?

A: Possibly. The employees may be able to establish that an implied right to an enhanced redundancy payment has developed by custom and practice. Take legal advice.

Q: Do we have to give redundancy pay to employees who have turned down alternative employment two miles away?

A: This will depend on:

- whether the alternative employment is suitable; and
- whether the employees' refusal of it is reasonable.
- if the new job is the same as, or similar to the old job in terms of content, pay, hours of work and prospects, then it will constitute suitable alternative employment.

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- whether it is reasonable to refuse suitable alternative employment is assessed subjectively, from the employee's point of view. On the face of it, relocation to a new workplace just two miles away from the old workplace is a relatively small change to terms and conditions of employment. However, it may pose particular problems for some employees in terms of travelling time or domestic commitments and, in those circumstances, a refusal to relocate would probably be reasonable.

Q: We are in financial trouble, and will not be able to meet our redundancy payments. What happens now?

A: If you are unable to make your statutory redundancy payments, they will be paid out of the National Insurance Fund administered by the Department for Work and Pensions. If your employees are entitled to more than the statutory payments, they join your other (unsecured) creditors in waiting for whatever assets can be released from the business.

Q: One employee has tried the alternative employment we offered, says it is not suitable, and wants the redundancy money. Do we have to pay?

A: Providing he has decided he does not want the job within four weeks of trying it, yes. Even if you know that he has used the time to find himself another job, if you made him redundant and failed to offer him suitable alternative employment, he can take the money and go.

For further information, please contact Nick Hobden on 01892 510000 or by e-mail at nick.hobden@ts-p.co.uk.

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