

Redundancy

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Redundancy dismissals

Definition of redundancy

Redundancy occurs where:

- a business closes down completely
- a business closes down at a particular workplace; or
- there is a diminished requirement by the business for employees to carry out work of a particular kind either generally or at a particular work place

Rights on redundancy

The two main statutory rights that an employee has are:

- (subject to having accumulated two years' continuous employment) a right to a statutory redundancy payment; and
- (subject to having accumulated one year's continuous employment) a right to claim unfair dismissal

NB: Maximum weekly pay upon which redundancy payments are calculated, and compensation levels, are reviewed once a year in February.

Redundancy pay

Statutory redundancy payment

This is calculated by reference to:

- the employee's length of continuous service
- the employee's weekly pay (subject to the current maximum weekly pay of £330); and
- the employee's age

Since the Employment Equality (Age) Regulations 2006 came into force on 1 October 2006, the calculation of statutory redundancy payments has changed (for example, employees over 65 are now entitled to statutory redundancy payments). However, statutory redundancy payments remain weighted in favour of older workers.

The DBERR (formerly the DTI) provides a calculator for employers, to calculate the amount of statutory redundancy pay due to employees: see <http://www.berr.gov.uk/employment/employment-legislation/employment-guidance/page33157.html>

Employees are entitled to receive details of the statutory redundancy calculation. Failure to provide these details is a criminal offence, although is probably never prosecuted. Statutory redundancy pay is paid gross, i.e. free of income tax and national insurance contributions.

Contractual redundancy pay

In addition to statutory redundancy pay, some employers have contractual redundancy schemes. These may be part of the written contract or may have become contractual because the employer has consistently paid an enhanced rate of redundancy pay over a period of time. Contractual redundancy payments should fall within the £30,000 tax exemption for termination payments provided they are genuine redundancy payments.

Ex gratia payments

Some employers have non-contractual discretionary schemes. Many employers make ex gratia payments to employees on redundancy. Generally, there is no right to such payments. Typically an employer will either use an employee's actual weekly pay when calculating statutory redundancy (rather than limiting it to the current maximum weekly pay of £330) or make an ex gratia payment of between £500 and £1,000 per year of service. Such payments should fall within the £30,000 tax exemption for payments made on termination of employment.

Where an employer is considering making substantial ex gratia payments, it may be worth ensuring that these are binding on the employee. If the payments are not binding, the employee may take the money and still bring a claim for unfair dismissal. Binding claims can be achieved either with the help of an ACAS conciliation officer or more commonly through the use of a Statutory Compromise Agreement.

Trial periods

If an employer expressly dismisses an employee for redundancy and subsequently offers him or her a new job under a new contract, the employee will be entitled to a statutory trial period of four weeks to see whether

the new job is suitable. If he or she unreasonably refuses to try the job or unreasonably terminates his or her employment during the trial period, the entitlement to a statutory redundancy payment may disappear.

Unfair redundancies

Whilst not all employees who are made redundant are unfairly dismissed, many have a right to claim unfair dismissal. As compensation of up to £63,000 (this figure is reviewed each February) may be payable, this should be taken seriously.

General principles

An Employment Tribunal cannot look into the business reasons for reducing a workforce. An employer is entitled to take the decision to employ fewer employees. However, an individual can bring a claim to an Employment Tribunal claiming unfair dismissal because of the way in which the redundancy was carried out. In particular, employees are likely to complain if:

- the selection process was unfair
- no proper consultation with them was carried out before being made redundant
- no proper attempt was made to identify other employment within the organisation

Selection

Employees selected for redundancy must be selected on fair and objective grounds. Selecting people on the basis of "last in, first out" (LIFO) is now likely to be discriminatory on the grounds of age. You should not select employees on the basis of performance unless that performance can be measured reasonably objectively. A manager's subjective view of who are good and who are bad workers will simply not do.

Some employers ask for volunteers for redundancy. Although this is good practice, it risks the best employees (with skills and experience that will help them find new jobs quickly) volunteering rather than the employees whom the employer would be less disappointed to lose. An employer should therefore make it clear that it is not obliged to accept a volunteer.

Pool for selection

When selecting employees, you must look at the entire group. For example, if you are going to make secretaries redundant in department A, you should not usually confine your selection to that department if there are secretaries in department B and the secretaries in department A could easily transfer to do their work. When considering a group for selection, you should consider all the employees who do the sort of work which is going to be reduced.

Individual consultation

Employment Tribunals attach great importance to individual consultation. The object of such consultation before coming to a final decision is to hear employees' views and to explore alternatives to redundancy. Each employee should have an opportunity to explain why the redundancy should not take place, why he or she should not be selected, and what alternative jobs he or she might be given.

A reasonable time (ideally this should be not less than two weeks and probably longer), should be allowed for consultation to take place and to give employees an opportunity to think about the situation. The employees should not be taken by surprise and should have the opportunity to be represented by another employee or a union representative.

Employers who fail to consult individuals risk unfair dismissal claims. These principles, therefore, should only be departed from where some good reason is shown to justify such departure.

Alternative employment

Before finally declaring an employee redundant, an employer should consider, and be seen to consider, what other jobs the employee could do in the organisation, and the rest of the corporate group if there is one. If there are options, they should be suggested even if it is unlikely that the employee will accept. At Employment Tribunals, employees who have not been properly consulted sometimes claim that they would have accepted a drop in salary although, at the time, this seemed unlikely.

Statutory dispute resolution procedures

Dismissal because of redundancy is still a dismissal, and should generally be dealt with in conformity with the current statutory dispute resolution procedures that came into force in October 2004. Please see our briefing note on this subject. In brief, an employee must be put through a quasi-disciplinary procedure, which includes a right of appeal, preferably to a more senior member of management who was not involved in the selection process.

Qualifying service

An employee generally needs one year's continuous employment in order to bring an unfair dismissal claim. However, employees who have been discriminated against, for example, by being selected because of their sex, race, disability or age, can bring sex, race, disability or age discrimination claims without any service qualification.

Collective redundancies

Employers should consult "appropriate" representatives of the employees if 20 or more people are likely to be dismissed for redundancy at one establishment within a 90-day period or less.

The consultation period is a minimum of 30 days; 90 days if 100 or more employees are going to be dismissed. Consultation requires a specific list of information to be given to the representatives.

The consultation has to be "with a view to reaching agreement" and must include ways of avoiding minimising the dismissals and mitigating the consequences. Significantly, following the recent case of *UK Coal Mining Ltd v National Union of Mineworkers*, the Employment Appeal Tribunal has confirmed that, where there is a workplace closure, the obligation to consult over avoiding the proposed redundancies inevitably involves engaging with the reasons for the dismissals, and that in turn requires consultation over the reasons for the closure.

If the employer recognises a Trade Union, the shop stewards will be the appropriate representatives. If there is no recognised Trade Union and no existing employee representatives, the employer will have to facilitate elections.

Employers who fail to consult appropriate representatives may have to pay affected employees up to 90 days' pay.

Consulting appropriate representatives is in addition to, not instead of, consulting individual employees who may be affected. Even if the representatives have agreed to the selection, consultation must still take place with individuals concerned.

Note the case of *Junk v Wolfgang Kühnel (2005)* in which the European Court held that consultation must have been properly carried out before redundancy notices are given to the employees concerned. This case was recently followed in the UK in *Leicestershire County Council v Unison*, which confirmed that consultation should begin before a decision is made as to implementation of redundancy - in other words, before giving notice of redundancy.

Notifying collective redundancies

Where an employer proposes to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the Secretary of State for Business, Enterprise and Regulatory Reform must be notified on form HR1. The Collective Redundancies (Amendment) Regulations 2006, which came into force on 1 October 2006, clarify that the form must be submitted:

- before giving notice to terminate an employee's contract of employment in respect of any of those dismissals, and at least 30 days before the first of those dismissals takes effect (where there are between 20 and 99 proposed redundancies); or
- before giving notice to terminate an employee's contract of employment in respect of any of those dismissals, and at least 90 days before the first of those dismissals takes effect (where there are 100 or more proposed redundancies)

Guidelines

The courts have set out guidelines on how selection procedure should be handled. Employers will probably be expected to apply the procedure described in these guidelines during consultation with employee representatives.

It is impossible to lay down detailed procedures for all reasonable employers to follow in all circumstances.

However, it is generally accepted that, where employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

- To give as much warning as possible of impending redundancies so that the union and affected employees can inform themselves of the relevant facts, consider possible alternatives and, if necessary, find other employment in the undertaking or elsewhere. Note that, following recent case law, there is a requirement to consult about the reasons for workplace closure
- To consult the union about achieving the desired management result fairly and with the least hardship to employees. In particular, the employer will seek to agree with the union the redundancy selection criteria to be applied. Following selection, the employer will consider with the union whether the selection was made in accordance with these criteria
- Whether or not agreement is reached with the union, the employer will seek to establish criteria for selection. These should not depend upon the opinion of the person making the selection, but be objectively checked against matters such as attendance record or efficiency at the job
- The employer will ensure selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection
- The employer will investigate whether, instead of dismissing an employee, he or she could be offered alternative employment



Contacts



Richard Kenyon
Partner
richard.kenyon@ffw.com



Margaret Davis
Partner
margaret.davis@ffw.com



David Gallagher
Partner
david.gallagher@ffw.com



Michael Calvert
Partner
michael.calvert@ffw.com



Peter Holt
Partner
peter.holt@ffw.com



James Warren
Partner
james.warren@ffw.com

Our employment and pensions law partners

Richard Kenyon, Margaret Davis, David Gallagher, Michael Calvert, Peter Holt and James Warren lead a team of specialist lawyers with many years of experience in the employment and pensions field. We also have specialist tax lawyers.



Field Fisher Waterhouse LLP 35 Vine Street London EC3N 2AA
t. +44 (0)20 7861 4000 f. +44 (0)20 7488 0084 info@ffw.com www.ffw.com

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