Policy & Information team

Briefing on ...

The Law on Redundancy

Update 2009

Redundancy - A Guide to the Law

There are two aspects, and two sources, of the law on redundancy for trade unionists. The requirements to inform and consult regarding collective redundancies are based on EU law and are contained in the Trade Union and Labour Relations (Consolidation) Act 1992 Part IV Chapter II (TULRCA). The law relating to redundancy as it affects individuals is contained in the Employment Rights Act 1996.

Collective Redundancies

The duty to consult the union is triggered when the employer proposes to dismiss as redundant at least 20 employees at one establishment. Where there is no recognition agreement the employer has to invite the employees to elect representatives, whom they then have to consult with.

Section 188 of TULRCA states that consultation must begin in good time, with the minimum period being 90 days where 100 or more employees are to be made redundant and 30 days for less than 100.

The employer has to consult the union on ways to avoid dismissal, ways to reduce the numbers being dismissed and ways to lessen the impact of dismissals.

As part of the consultation process, the employer has to tell the union, in writing,

- why redundancies are being proposed
- how many employees and what type of employee may be made redundant
- the total number of such employees at the establishment or unit the employees are assigned to – 'the pool'
- the method the employer intends to use to select employees for redundancy – 'the selection matrix'
- the procedure under which redundancies will be carried out, including the timing of redundancies
- the method of calculating redundancy payments.

All but the last of these should be contained in the HR1 Form completed by the employer for the DTI (now BERR) and copied to the union.

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Once the union has the required information the employer has to provide access to those employees affected by the redundancy proposals.

Where an employer fails to consult as required by section 188, the union or any affected member can complain to an Employment Tribunal.

Protective Awards

If a tribunal finds that an employer has breached s.188 it will issue a declaration and can also make a protective award.

A protective award is an amount of money payable by the employer to employees who are threatened with redundancy or who have been made redundant, where the redundancy has not been consulted on. The amount is the earnings the employees would have received for a protected period. The protected period starts with the date of the first redundancy or the date of award if the redundancies have yet to take place and lasts for up to 90 days depending on the level of the employer's failure.

Redundancy and Unfair Dismissal

Under the section 98 of the Employment Rights Act 1996 (ERA), redundancy is one of the potentially fair reasons for dismissing an employee. If it is accepted that redundancy was the real reason for dismissal, the test for fairness translates into whether or not it was fair to select that particular employee for redundancy.

It will be automatically unfair to select an employee for redundancy if the reason they were selected was one of the protected reasons such as trade union membership, whistle blowing or for exercising various other statutory rights. [NB. There is no minimum length of service for claiming automatic unfair dismissal.]

In deciding whether a particular selection was fair Employment Tribunals will look two aspects of selection: the pool for selection and the selection matrix.

The Pool

When considering the reasonableness of an employer's selection of the group of employees at risk of redundancy, relevant factors will include:

- Other employees dong similar work
- Employees doing interchangeable jobs
- The employees' previous jobs with the employer
- Trade union agreement

The Matrix

The most important test of the reasonableness of including any particular selection criteria in the matrix is whether or not it is objective. Objective criteria would include length of service, disciplinary records and qualifications. These criteria can all be measured and supported by documentation, unlike subjective criteria like appearance and attitude. The use of some criteria may also breach other employment protection rights. For example, using attendance records could infringe provisions relating to parental leave, and considering sickness absence without making adjustments for disability could breach the Disability Discrimination Act. It had been thought that using length of service may now be outlawed under the Age Discrimination Regulations. However, the Employment Appeal Tribunal has now ruled that it is legitimate for an employer to consider employee loyalty over time as *one* factor in redundancy selection.

Like any claim for unfair dismissal a claim for unfair selection for redundancy must be lodged with the Employment Tribunal within 3 months of the date of dismissal.

Alternative Employment

Where an employer offers *suitable* alternative employment, there is no redundancy, and therefore no right to a redundancy payment, if the employee unreasonably refuses the offer. In considering the suitability of the post, factors to consider include the content of the job, its status within the employer, the pay and hours of work and the job prospects. Redundant employees taking on a new role are legally entitled to a 4 week trial period without undermining their right to a redundancy payment if the job proves unsuitable.

Redundancy Payments

Only employees with a minimum of two years continuous service are entitled to redundancy payments and those payments are calculated based on the employee's length of service and age at the date of redundancy. Claims for redundancy pay must be made to the Employment Tribunal within 6 months of redundancy.