



Fact Sheet On Redundancy

What is redundancy?

The law relating to redundancy is generally found in the [Employment Rights Act 1996](#) as amended and the [Trade Union and Labour Relations \(Consolidation\) Act 1992](#).

Redundancy occurs in three situations when an employee is dismissed due to:

- the actual or intended closure of the whole business;
- the actual or intended closure of the business at a particular workplace; or
- a reduction in the need for employees to carry out work of a particular kind.

Closure of the business

This may be permanent or temporary, eg closure of a restaurant for refurbishment. The decision cannot be challenged unless it is not genuine.

Closure of the work place

For example where a large employer closes down one outlet of a chain or one branch of a group of companies. Again the decision cannot be challenged unless it is not genuine.

Reduction of the workforce

This can arise where the employer reduces the workforce, as a whole or in specific areas, due to a downturn in business or to other need for rationalisation, eg technological advancement.

The test is not whether the employer needs fewer employees but whether he needs fewer employees to do work of a particular kind and that this is attributable to the state of affairs of the business. The key point to remember is that in the first place it will be the role that is effectively redundant and not the employee. Once it has been decided that a role is redundant, the question is what should happen to the employee(s) that hold(s) that role.

Difficulties arise when the employer re-organises the way work is done, eg the introduction of a new shift pattern. Although the work remains the same, an employee dismissed in the light of such re-organisation may not necessarily be due to redundancy and the employer will have to justify the dismissal as being for some other substantial reason.

When is a redundancy an unfair dismissal?

Redundancy is a potentially fair reason for dismissal. However the dismissal itself (and the procedure leading up to it) must still be fair and reasonable in all the circumstances. This means an employer must show that:

- the employees concerned have been given as much advance warning as is practicable;
- the employees concerned have been consulted individually;
- selection for redundancy has been made against a set of fair and (wherever possible) objective criteria;
- alternative employment has been offered if possible;
- volunteers have been released wherever possible.

A dismissal for redundancy may be unfair because:

- there was no genuine redundancy situation;
- the employer failed to consult (ie meaningfully, properly and genuinely);
- the employee was unfairly selected;
- the employer failed to look and/or offer alternative employment.

A dismissal for redundancy will be automatically unfair where the employee is selected on one of the following grounds:

- pregnancy or childbirth;
- raising health and safety issues;
- shop workers and betting workers who refuse Sunday work;
- being the trustee of an occupational pension scheme;
- union membership or activities;
- asserting a statutory right;
- acting as an employee representative under TUPE or collective redundancy legislation;
- taking time off to care for dependants;
- asserting flexible working rights;
- asserting working time rights;
- acting as a companion in a disciplinary/grievance hearing;
- making a public interest disclosure (“whistleblowing”);
- asserting national minimum wage rights.

If an employer cannot show that the reason or principal reason for dismissal was wholly, or mainly, attributable to a redundancy situation it will be unfair.

The consultation process

When is consultation required?

There are three situations where consultation is required:

- if 20 or more employees are to be made redundant in one establishment within a 90-day period then the employer must consult with those employees’ representative(s) at least 30 days before a decision is made where between 20 and 99 employees are to be made redundant and at least 90 days in the case of 100 or more employees;
- since 6 April 2005, an employer that intends to make 150 or more employees in one establishment redundant must adhere to the provisions of the [Information and Consultation of Employees Regulations 2004](#) and inform and consult employee representatives:
 - where there is a threat to employment in an undertaking
 - with a view to reaching an agreement on decisions likely to lead to substantial changes in work organisation or in contractual relations.
- there is no minimum statutory consultation period when making less than 20 employees redundant. However, each employee has a right to be genuinely consulted about redundancy proposals.

When should consultation take place?

Consultation should begin as soon as reasonably practicable and before the final decision to dismiss those identified for redundancy. At all stages of the consultation process it should be fair and genuine and employees should have the opportunity to express their views and put forward proposals for avoiding redundancies and/or their dismissal.

What should consultation be about?

Once it becomes clear that redundancies may be necessary, the consultation process begins and requires the employer to consider ways of avoiding dismissals, to identify the number of employees to be dismissed and to reduce the consequences of dismissals, including:

- reducing overtime;
- altering shift patterns;
- lay-off and short time working;
- alternative employment;
- volunteers.

The affected employees and/or their representatives (if any) should be involved in this process and the employees will at that stage be put "at risk" of redundancy. This should be confirmed in writing.

The aim is to give employees as much advance warning as possible to allow them to assess their position and, if necessary, look for alternative employment.

Should redundancies appear inevitable, employers should consult employees about the pool(s) for selection, the selection criteria that will be applied and the method of application. The selection criteria should be applied to the pool in the manner agreed. If no agreement can be reached with the employee and/or their representatives it will be for the employer to decide upon a fair and reasonable approach for the criteria to be used. Once this is completed the process of selection can go ahead.

Once employees have been provisionally selected for redundancy they should be informed in writing, individually invited to a meeting and given reasons why they have been selected. At this meeting, employees should be given the opportunity to be accompanied by a work colleague or a trade union representative.

There generally is no requirement to disclose another employee's marks under the selection process.

A further meeting should be arranged to discuss alternative employment. However, if alternatives cannot be found or there is no alternative employment dismissal will occur. The employee should be encouraged to put forward any suggestions s/he may have as to roles s/he might be interested in.

Once all options have been considered and it is apparent that an alternative role cannot be found, employees should be informed in writing of that fact and advised that redundancy is the only option. At that stage formal notice of termination can be given.

Employees should be given a right of appeal.

The selection pool

When facing the possibility of redundancies, the employer should analyse which employees are performing work of a particular kind that has either ceased or diminished. This is known as the selection pool.

An employer needs to be able to show that the system for choosing the pool is fair. If it cannot, then any redundancies could lead to claims for unfair dismissal.

What system for choosing the pool should the employer use?

If there is a customary arrangement or procedure for choosing a pool, then this should be used unless the employer can show objective grounds for not using it.

If there is no customary arrangement or procedure then the employer simply needs to show that they have considered the pool carefully and acted with genuine motives.

Who should be in the pool?

The pool should contain all employees who perform the same or similar type of work in a particular department or at a relevant location. The pool should not be structured so that one group of employees is disadvantaged, eg part-timers.

Certain groups of employees can be included in the pool even though the redundancy exercise does not on the face of it affect them as the targeted roles occur elsewhere within the company, eg if the roles in the pool are interchangeable.

If only one employee is identified within the pool, then the individual performing that role will be in a unique position and there is no requirement to go through a selection procedure. However, if the selection pool is flawed then the employee who is made redundant may have a claim for unfair dismissal.

Selection Criteria

How should the employer select employees for redundancy?

The selection criteria, which will normally form part of a selection matrix, must be systematic, consistent, justifiable and objective (as possible), and applied fairly. A points scoring method is commonly used. The selection matrix will normally include such factors as: length of service; productivity; timekeeping; attendance records; efficiency; employee's adaptability and the employer's future needs.

The lengths to which an employment tribunal expects an employer to go in drawing up and applying criteria will depend on the employer's size and administrative resources. Therefore less is expected of a smaller employer. However, even small employers must show that they used a fair selection method

Which selection criteria are fair?

If a selection matrix has been agreed in advance with a union or an employee representative body, then generally this should be used. Otherwise it is a case of the employer choosing fair criteria. Objective criteria commonly include a selection of the following:

- “Last in first out” (LIFO) – an outdated method of sole selection, which can amount to unlawful indirect discrimination against women returning to work after child care and also amount to unlawful indirect discrimination on the grounds of age against younger employees unless objectively justified;
- Skill and knowledge – this must be clearly defined and assessed objectively;
- Attendance records – this can amount to unlawful discrimination against disabled employees and therefore care should be taken as to whether “one-off” illnesses, long-term absences or work-related injury absences are to be included or excluded;
- Sickness absence – this overlaps with attendance records and care should be taken to avoid any discriminatory effect;
- Age – any selection based on age is likely to amount to direct age discrimination which is unlawful unless it can be objectively justified. It may also amount to indirect discrimination on the grounds of sex;
- Adaptability/flexibility – this is difficult to measure objectively and an unwillingness to relocate may indirectly discriminate against women who tend to be primary carers and could amount to indirect age discrimination;
- Performance – the scoring should be measured as objectively as possible;
- Disciplinary record – this must be assessed objectively; and
- Qualifications/experience – this is likely to amount to indirect age discrimination which will be unlawful unless objectively justified, as explained above. Using any length of service or experience factor as selection criteria is likely to discriminate against younger or older employees and also amount to indirect age discrimination unless it can be objectively justified.

A tribunal will usually accept some subjective criteria eg communication skills or attitude, provided they are balanced with objective ones.

The application of certain criteria, such as pregnancy, part-time working, fixed-term working or indeed length of service, may be directly or indirectly discriminatory.

Alternative employment

The employer's duty is not limited to offering similar roles or roles in the same work place. In some situations the employer is expected to have carefully considered bumping another employee and offering the role to the redundant employee, ie an employer may offer a redundant employee another employee's role and the other employee is then treated as dismissed for redundancy.

When offering alternative employment the employer must give sufficient detail of the vacancy and allow a trial period. Failure to do so is likely to make the dismissal unfair.

It is up to the employee whether to accept the alternative employment, which might even involve demotion or a reduction in pay. Employees who unreasonably refuse an offer of suitable alternative employment will lose their entitlement to a statutory redundancy payment.

One of the main purposes of consultation is to consider other employment, eg transfer to another workplace as an alternative to dismissal. An employment tribunal will consider what vacancies exist throughout the employer's operation and with any associated employer. A tribunal will look at vacancies existing during the consultation period and during the employee's notice period as well as the time of dismissal itself.

Case law states that employees on maternity leave should be fully consulted and provided with all role opportunities even though the employer does not consider them to be suitable. Where there a limited number of roles available, an employee on maternity leave must be offered suitable alternative employment in preference to other employees who are similarly affected by the redundancy situation. Contrast this with the usual position, which is that alternative employment must simply be considered but there is no obligation to offer it.

An employee who has been given notice of termination on grounds of redundancy and has two years' continuous employment should be given a reasonable amount of time off work during his/her notice period to look for work or make arrangements for training in respect of alternative employment. An employee is entitled to receive a minimum amount of 40% of a week's pay for time off.

Collective redundancy

When does a 'redundancy' take place for the purposes of the EU Collective Redundancies Directive?

The European Court of Justice (ECJ) considered whether 'redundancy' refers to the actual cessation of the employment, or the employer's expression of its intention to bring the employment to an end. It concluded that the latter interpretation is correct.

It went on to say that an employer is only entitled to carry out collective redundancies after the conclusion of the consultation procedure.

Employers would be well advised to ensure they avoid giving notice of dismissal until consultation has been completed.

Who should be consulted?

Trade union representatives must be consulted if the union is independent and recognised to conduct collective bargaining. Otherwise, existing representatives (such as members of a works council) or employee representatives who were specifically elected to deal with consultation on the proposed redundancies may be consulted. The employer should also consult the individuals who may be selected for redundancy.

What should redundancy consultation be about?

Consultation must be undertaken 'with a view to reaching agreement' and must cover ways of avoiding the dismissals, reducing the numbers to be dismissed and mitigating the consequences of the dismissals. Employers should not give staff notice of dismissal prior to the conclusion of consultations, as this might be taken as an indication that the consultations are a sham. This view is backed by the ECJ.

Note: There are special statutory rules relating to election of employee representatives, which must be adhered to by the employer.

What must be disclosed before redundancy consultations?

The employer must disclose in writing:

- the reasons for the proposed redundancies;
- the numbers and descriptions of staff proposed for redundancy;
- the total number of employees of those descriptions employed at the establishment in question;

- the proposed method of selecting those who may be dismissed;
- the proposed method of carrying out the dismissals, including the period over which the dismissals are to take effect;
- the proposed method of calculating any redundancy payments.

What happens if an employer fails to comply?

If an employer fails to comply with the collective consultation procedures, affected staff may bring a complaint before an employment tribunal. If the tribunal finds the complaint well-founded, then it will make a declaration to that effect and may make a protective award.

The award requires the employer to pay the employees remuneration for a protected period, which begins on the date when the first of the dismissals to which the complaint relates took place, and ends up to 90 days later. If an employer fails to consult on an individual basis, an affected employee may bring a complaint of unfair dismissal.

Redundancy payments

When is an employee entitled to a redundancy payment?

An employee is entitled to a statutory redundancy payment if s/he had been working for the employer continuously for 2 years.

Redundancy pay

A statutory redundancy payment is calculated with reference to age, length of service and statutory weekly maximum:

Age

In accordance with the Employment Equality (Age) Regulations 2006, the minimum and maximum ages prescribed for entitlement to a statutory redundancy payment have been removed.

Length of service

The maximum number of years to be taken into account for length of service is 20 years and based on a sliding scale dependant on each completed year of continuous service and age:

- below the age of 22, an employee will receive half a week's pay;
- below the age of 41 but not below 22, an employee will receive one week's pay;
- not below the age of 41, an employee will receive one and a half weeks' pay.

Statutory amount

The statutory limit for weekly pay is currently £380, which increases annually from 1 February and normally at a rate of £10 per week. There will, however, be no increase in February 2010. The maximum statutory redundancy payment is currently £11,400. Some employers pay in excess of the statutory redundancy payment, eg one month's full pay for each year of service and unless such a payment expressly includes reference to a statutory redundancy payment, a redundant employee will still be entitled to claim an additional statutory redundancy payment.

Alternative employment

As mentioned above, if an employee unreasonably refuses an offer of suitable alternative employment s/he will lose the entitlement to a statutory redundancy payment. However, the employer must show that both the offer was suitable and that the employee's refusal was unreasonable.

"Suitability" will include objective role related factors, eg pay, status, hours, location.

"Reasonableness of a refusal" will include an employee's individual circumstances, eg domestic factors, health, extra travelling time, expense, childcare responsibilities, status of the role (the higher the status the more likely an employment tribunal would expect an employee to travel).

Trial period

An employee can try out an alternative role for a trial period of 4 weeks. The trial period starts on the date that the employee begins the new role and ends 4 weeks (less a day) later, by which time the employee must have decided whether or not to accept the new role permanently. If the employee works beyond the 4-week period, s/he will lose the right to claim a statutory redundancy payment. This time limit can be extended by agreement between the employee and the employer if it is for the purpose of retraining an employee for a new role only and providing certain conditions are met:

- it is in writing specifying the date when the retraining ends;
- it specifies the terms of conditions of employment that will apply at the end of the trial period;
- it is agreed before the trial period starts.

Key Points

- Even where there is a genuine redundancy situation the employee may have been unfairly dismissed. A redundancy dismissal is unfair if there has been inadequate consultation, unfair selection or if there has been a failure to offer available alternative employment.
- The most important requirement is for the employer to consult adequately with the employee before dismissal. The only exception to this requirement is where such consultation would be utterly pointless or futile.
- The employer is expected to offer any available alternative employment, which the employee is capable of doing.
- Watch out for direct and indirect discrimination against ethnic minority employees, employees with a disability and employees that are pregnant, as this could in certain circumstances be unlawful.

PLEASE NOTE

The material contained in this fact sheet is provided for general purposes only and does not constitute legal or other professional advice. Appropriate legal advice should be sought for specific circumstances and before action is taken.

FOR MORE INFORMATION

If you have any questions about anything in this Fact Sheet, or for advice about employment law generally, please contact **Marc Jones** on **01895 201719**, or email marc.jones@turbervilles.co.uk.

© Turbervilles – 2009



www.turbervilles.co.uk