BERR | Department for Business Enterprise & Regulatory Reform

REDUNDANCY

A Simplified Guide

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Introduction

1. Redundancies can occur for a number of reasons and, whatever they are, it can be a challenging time for all involved.

2. Employers are likely to want to know how to apply redundancy procedures fairly and correctly, while employees will want to know what their rights and entitlements are. This guidance aims to provide an overview of those procedures, rights and entitlements. It is not a complete or authoritative statement of the law and readers should seek their own independent advice if any of the issues covered in this guidance raises further questions. A list of suggested organisations and other sources of advice is provided at the end of this guidance along with a checklist that summarises key points.

Consider alternatives to redundancy

3. Ideally, redundancies will only be implemented after alternatives to redundancy have been considered. These could include reducing the number of employees by natural wastage or by restricting or suspending external recruitment; reducing or eliminating overtime; or seeking applications for early retirement or voluntary redundancy. Employers can also try to avoid redundancies by maximising redeployment and retraining opportunities for employees who are likely to be affected in their organisation. If an employee is made redundant and they could show that there was a suitable position elsewhere in the organisation, it may be possible that the dismissal for reason of redundancy was unfair. This is covered in more detail later on.

4. However in certain circumstances it will be inevitable that the employer will need to make redundancies, in which case they need to be aware of employees' entitlements and ensure that the redundancy process is conducted in an open and fair manner. When this occurs the two most immediate issues are likely to be:

a. how much redundancy pay will affected employees be entitled to; and
b. how are employees to be informed of the potential redundancies?

Establishing the correct definition of redundancy

5. There are two statutory definitions of redundancy. These are:

a. to establish the entitlement to a redundancy payment; and
b. to establish the right to be consulted collectively.

6. The two definitions are important because they are used to identify who is entitled to a redundancy payment and the amount they will receive, and if the employer is intending to make 20 or more employees redundant at one establishment within a 90 day period, how the law requires the employer to consult with employees.

Establishing entitlement to a redundancy payment

7. If the dismissal is wholly or mainly one of these reasons:

a. closure of the business, either completely or at a particular workplace; or
b. a declining need for employees to do work of a particular kind;

then the employee may be entitled to a redundancy payment provided they fulfil the other conditions set out in the Statutory Redundancy Payments section of this guidance. In considering the need to make a redundancy (or redundancies) it is important that the employer focuses on the overall requirement for the employee(s) to do work of a particular kind and not the amount of work to be done. There is a redundancy if the dismissal is attributable to a reduced requirement for employees to do the work even if the overall volume of work remains constant. This might, for example, be the case where new machinery means that fewer employees are needed to produce the same output.

Collective redundancies and establishing the right to be consulted

8. Collective redundancies occur where the employer needs to make 20 or more employees redundant at one establishment within a 90 day period or less. The definition of 'redundancy' for these purposes differs from the one used to establish entitlement to a statutory redundancy payment. It is simply that the reason for the dismissal should be unrelated to the employee. Generally speaking, this means that the reason for dismissal is the result of a structural change. So, as well as applying where a business or plant closes down or where an employer no longer needs as many employees to carry out a particular task, it also applies to situations that employers might not think of as a 'classic' redundancy situation. This could include dismissals that are taking place in a business reorganisation or reallocation of work but which result in no overall reduction in the number of employees because, at the time of making redundancies, the employer is also taking on new recruits, or perhaps because the employees are being redeployed on new contracts with different terms and conditions.

9. Whatever the reason for the potential collective redundancy, under Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A), there is a specific requirement for the employer to consult with the appropriate representatives of the employees who may be affected by the dismissals. This means that where employees are represented by an independent trade union, the employer must consult with a trade union official (e.g. shop steward, district union official or if appropriate, a national or regional official) from that union. A trade union may be recognised for one group of employees at risk of redundancy, but not for another.

10. Where employees are not represented by a trade union the employer must inform and consult other appropriate or elected representatives. These may either be existing representatives or new ones specially elected for the purpose. It is the employer's responsibility to ensure that the consultation is offered to appropriate representatives and that if they are existing representatives, their remit and method of election or appointment gives them

the authority to act on behalf of the employees concerned. For example, where redundancies are to take place among, say, sales staff, it will not be enough for the employer to inform and consult a committee of employees set up to consider the operation of a staff canteen. However it would be appropriate to inform and consult representatives elected or appointed as a result of the Information and Consultation of Employees Regulations 2004 (ICE Regulations). It may also be appropriate to inform and consult a committee of employees, such as a works council or staff forum that is regularly informed or consulted more generally about the business's financial position and/or personnel matters. If the representatives are to be specially elected, certain election conditions must be met. If the affected employees fail to elect representatives, having had a genuine opportunity to do so, the employer can provide the relevant information directly to the employees. Further information on the election of employee representatives (and the ICE Regulations) can be found at www.berr.gov.uk/employment/employment-legislation/ice/index.html

11. Issues that should be included in the consultation are:

a. the reasons for the proposals;

b. the numbers and descriptions of employees it is proposed to dismiss as redundant;

c. the total number of employees of any such description employed by the employer at the establishment in question;

d. the proposed method of selecting the employees who may be dismissed;

e. the proposed method of carrying out the dismissals, taking account of any agreed procedure, including the period over which the dismissals are to take effect;

f. the proposed method of calculating any redundancy payments, other than those required by statute, that the employer proposes to make.

12. If an employer fails to meet the requirements of the legislation governing collective redundancies an employee or the employee's representative may lodge an application for a protective award with an employment tribunal. This is an award that focuses on the employer's failure to comply with the consultation requirements under the legislation. A tribunal is likely to make a maximum award unless the employer can justify the circumstances in which he failed to meet the requirements for consultation. The size of the award is based upon the employee's gross pay from the date of the first dismissal or of the tribunal award, which ever is earlier for a period of up to 90 days. Employees or their representatives will normally have three months from the date the last dismissals took effect to lodge a claim with a tribunal.

13. Statute does not specify a time-limit within which consultations must be completed but employers should undertake meaningful consultation with the view to reaching agreement with employees' representatives as it is not enough simply to go through the motions of a consultation. However the completion of a consultation will always depend on the circumstances of each case. Whilst consultation must start at least 30 or 90 days before the redundancies are proposed to take effect, it is not necessary that the consultation should last for all of that time. By contrast, where consultation has not been completed by the end of the 30 or 90 day period, employers should continue the consultation beyond the 30 or 90 day period. It is not necessary for the parties to have reached agreement for the consultation to be completed, but it is necessary for both parties to have undertaken genuine consultation '*with a view to reaching agreement*'. This means that the employer and employee representatives should be willing to actively engage with each other when discussing alternative options. Likewise there is nothing to stop an employer and the employees' representatives from completing the consultation early where an agreement is reached.

14. The consultation should be fair and transparent and be a two way process. It should begin when proposals are at a formative stage and encourage an ongoing dialogue between the employers and employees.

Employers should also take care to ensure that employees who are at risk from redundancy and are off work through disability, a long-term health condition, or on maternity or other types of family leave are consulted about the proposals. A failure to do so could lead to claims of sex or disability discrimination as well as unfair dismissal from those being made redundant.

15. The employer is also required to notify the Department for Business Enterprise and Regulatory Reform (BERR)) of the projected redundancies. In addition notifications to BERR must be made before any notices of dismissal for redundancy are sent to affected employees. Details on how to notify BERR can be found at www.berr.gov.uk/employment/redundancy/redund-forms/index.html

16. Where fewer than 20 employees are proposed to be made redundant, employers are under no specific legal obligation to consult employee representatives or notify BERR. Employers however, must warn and consult individual employees who are to be dismissed; adopt a fair basis for selection and take reasonable steps to redeploy affected employees. Failure to do so could result in the employer facing an unfair dismissal claim. An example of how to apply the Standard Dismissal Procedure can be found at Annex 1.

17. Once the employer has identified how many employees are at risk from redundancy the next step will be to identify the pool from which to select those to be made redundant and develop the selection criteria. The following section describes the process in more detail.

Identify the pool for selection and apply the selection criteria

18. Redundancies may be found from within a particular role that has been identified as surplus to the requirements of the business, or it may be that there is a need for redundancies that will affect particular sections or the whole workforce. The first thing that the employer will want to do is to consider from which group or section of employees he will be selecting those

to be made redundant. Those who may be selected for redundancy can be referred to as the selection pool.

19. However there may be instances where there is no need for a selection pool because the employer is closing down a particular operation in a company and will have to make all the employees working in that particular operation redundant, or there is one employee involved. In either case selection procedures are unlikely to apply and the next step would be to consider if any offers of alternative employment can be made to the affected employees or employee.

20. After identifying the selection pool, the employer should develop and then apply the appropriate selection criteria to it. Employers should as far as possible use objective selection criteria, which are precisely defined and can be applied in an independent way. Objective criteria should also help the business maintain a balanced workforce after the redundancies have been carried out. Some examples of selection criteria could be attendance and disciplinary records, experience, capability, relevant skills and competences. It is important that these criteria are applied in an objective and even handed manner as doing so will help to avoid any complaints of unfair dismissal or discrimination on prohibited grounds.

21. Employers should ensure that employees are not selected for redundancy because of their sex, marital status, sexual orientation, race, disability, religion or belief, or age. Selection for redundancy on the basis of trade union or health and safety activities, or because the employee was pregnant or on maternity leave is also unlawful. Part-time employees and fixed-term workers are also protected from being discriminated against during the selection process. Selecting employees for redundancy for any of these described reasons will, if challenged result in an unfair dismissal. A detailed list showing how an employee could be unfairly selected for redundancy can be found at www.berr.gov.uk/employment/employment-legislation/employment-guidance/page30889.html# (Dismissal on grounds of redundancy). If

challenged by an employee selected for redundancy the employer should be able to show that the selection was conducted fairly and that the there had been an objective analysis of the gathered information relating to the pool of employees.

22. Selection on a last in, first out (LIFO) basis is likely to be indirect discrimination on the grounds of age if it affects one age group more than another. Even then, however, selection on a LIFO basis could still be made if the employer was able to objectively justify it. Guidance on what 'indirect discrimination' and 'objective justification' means can be found in Acas' guidance on the Employment Equality (Age) Regulations at www.acas.org.uk/index.aspx?articleid=1841

23. If the business's resources allow it, employers may wish to provide those responsible for making the assessment of employees with additional training and support to ensure that the assessment of employees is carried out in a fair and objective manner. The assessment should be carried out by someone who knows the employees at risk from redundancy and with access to up-to-date employee records. Again, if resources allow it, it may be an idea to have a monitoring stage as part of the overall assessment to ensure that the process is impartial.

Where possible offer alternative employment

24. Where possible an employer proposing to make an employee redundant should attempt to offer suitable alternative employment within the organisation (or within associated companies). If possible (and relevant) the search for alternative employment should extend throughout the group of which the company making the redundancies is part. An employee made redundant could be found to have been unfairly dismissed if a suitable alternative position existed and was not offered to them.

25. An employee may not be entitled to a redundancy payment if they unreasonably refuse the offer of a suitable new job with the same employer,

an associated employer or an employer who takes over a business and the offer is made before the existing contract ends and starts within four weeks of the end of the old contract.

26. If an employee is offered a new job, in this way, the law sets down a four-week trial period. The purpose of this is to enable the employer to assess the employee's suitability for the new job and to enable the employee to decide if they want to accept the offer. This can be extended if retraining is needed, but only by written agreement between the employee and the employer. An agreement to extend the trial period must be made before the employee starts the new work; should be in writing; should specify the date that the trial period ends and importantly, set out the terms and conditions of employment that will apply after that date. If at the end of the trial period the employee is still in the job, he or she will be considered to have accepted the new position.

27. If during the trial period the employee finds the alternative work unsuitable (for example the work takes place in a different area of the country or requires a different set of skills) and the employer accepts this, or the employer realises that there is not actually the work available, the employee's entitlement to redundancy pay remains. However if the employer believes that the offer is suitable for the employee and the employee resigns because they believe the offer unsuitable, it will be for a tribunal to decide whether the job was suitable, and whether the employee's refusal was unreasonable.

28. Employers should make sure that the employee understands the consequences of accepting or refusing an offer of suitable alternative employment. Legislation does not define what makes alternative work 'suitable' or what is 'unreasonable' However the closer the work is to the employee's current job and the skills required, the more likely it is to be suitable. In such a situation, if the employee wished to claim a redundancy payment they would have to apply to a tribunal.

29. Employers should let employees know of available job vacancies and offer the job to an employee if they apply and are qualified as a failure to do

so may result in an unfair dismissal claim. It is important to remember that if the employee works beyond the end of the four week trial period the entitlement to a redundancy payment will be lost because the employee will have been deemed to have accepted the new contract of employment. The employer should make the employee aware of this fact where an offer of a trial period is made.

30 If during the trial period the employee terminates the contract (or gives notice), or if the employer for a reason that is 'connected with or arising out of any difference' between the new and previous contract, terminates the contract (or gives notice), the employee is treated as having been dismissed on the date on which the original contract came to an end. For any dismissal of the employee which is unconnected with or doesn't arise out of the change the employee can bring an unfair dismissal claim on the basis of the fairness of the dismissal in the trial period.

31. Broadly speaking this would mean that where an employer wanted to dismiss the employee who was three weeks into the trial period because it became apparent that they did not have the capability for the position, the employer would have to follow the same procedures that applied to an employee who was not on a trial period i.e. the statutory dismissal procedures. Whilst this may mean that the employee stays on beyond the end of the trial period for the dismissal to be fair, it is important to remember that the trial period gives the employee and employer the opportunity to assess the suitability of the post; it is not a four week period during which the employee relinquishes their employment rights, potentially enabling the employer to dismiss the employee without following the dismissal procedures.

Calculating individual notice periods

32. Once the employer has selected those employees to be made redundant, He must give them notice of dismissal by reason of redundancy. The length of the notice period will depend on the employees' contracts of employment, subject to the statutory minimum periods.

These are:

a. at least one week's notice if they have been employed for between one month and two years;
b. one week's notice for each year if employed for between two and twelve years; and
c. twelve weeks' notice if employed for twelve years or more.

33. In a collective redundancy situation, redundancy notices can be issued only when consultation with representatives of the affected employees has been completed. In other words, the consultation has either resulted in agreement with employee representatives, or has otherwise reached its conclusion.

34. For more detailed guidance on notice periods see – www.berr.gov.uk/employment/employment-legislation/employment-guidance/page18474.html on the BERR website. If employees are not given the notice that they are entitled to, they may be entitled to a payment in lieu of notice.

Time off to look for work or to arrange training

35. Once an employee is given notice of dismissal because of redundancy, they are entitled to reasonable time off with pay (but no more than two-fifths of a week's pay in total, regardless of the length of time off allowed) during working hours to look for another job or make arrangements for training for future employment. The time off must be allowed during the notice period. Employees are only entitled to time off in this way if they have had two years' continuous employment with their employer.

Pay in lieu of notice

36. Pay in lieu of notice or PILON is paid in a wide range of circumstances. For example, because the employer has breached the notice obligation and

the contract of employment is to be ended without notice, the employee is going to receive less notice than they are entitled to or the employee has received the appropriate notice but is not required to work during the notice period. If there is a PILON clause in the employee's contract, the amount the employer will have to pay should be set out there.

37. The amount the employee will get should cover everything that they would have been contractually entitled to during their notice period. This could, for example, include the equivalent amount of pension contribution or private health care insurance.

38. The tax treatment of PILON payments will vary according to whether the amount paid is regarded as compensation for breach of contract. More information on PILON can be found at
www.hmrc.gov.uk/bulletins/tb24.htm#payment_in_lieu

39 . The next section of this guidance provides information on calculating statutory redundancy payments, limits on payments and awards, and claiming statutory redundancy pay for lay-off and short-time working.

The statutory redundancy payment

40. An employee will be entitled to a redundancy payment if –

a. they are dismissed by reason of redundancy or are eligible by reason of being laid off or kept on short-time; and

b. have at least two years' continuous service;

How are statutory redundancy payments calculated?

41. An employee's statutory redundancy pay is based upon a calculation which uses age and length of service. This produces the number of weeks'

pay that the employee is entitled to, which is then multiplied by the employee's gross weekly pay to produce their statutory redundancy payment. The number of weeks' pay is calculated by identifying the 'relevant date' (see below) and then by working backwards, calculating the number of years of continuous employment. The redundancy tool on the Business Link website can calculate the amount of statutory redundancy pay an employee is entitled to, and generate the redundancy notices required by legislation (see sections [53] to [55] below.

42. There is a limit to the amount of a weeks' pay that is used in the calculation and this is currently set at £330 (from 2 February 2009 this will rise to £350). If the employee earns less than the limit, their actual weekly pay is used, and if they earn more, the weekly limit is used. The limit changes every year normally on 1st February. Employees will be entitled to the higher rate if the end of their notice period (whether given or not) falls on or after the 1st February. The new amount is calculated by multiplying the existing figure by the latest retail price index figures for September and then rounding up to the nearest £10.

43. For each complete year of service, up to a maximum of 20 years, employees are entitled to:

a. 1.5 weeks' pay for each full year of service where their age was 41 or above;
b. 1 week's pay for each full year of service where their age was 22 or above, but less than 41;
c. 0.5 week's pay for each full year of service where their age was less than 22.

44. For example, someone who is 45 and has completed 15 years' service will get 17 weeks' pay, i.e. 4 x 1.5 weeks' pay (because they were above 41 years of age) and 11 x 1 weeks' pay because they were above 22 years of age, giving a total of 17 weeks' pay. This is then multiplied by the employee's gross pay (subject to the cap).

45. As previously mentioned, whether an employee qualifies for a redundancy payment at all, and the number of weeks' pay due is calculated from the 'relevant date'. The 'relevant date' can mean a number of dates and the employer needs to think carefully about which one is appropriate. In most instances the relevant date will be, (when notice is given), the date on which the notice expires. However where no notice is given, it can mean the date on which employment ended. If the employee is working under a fixed-term contract it is the date on which the contract expires without being renewed.

46. In three situations, the 'relevant date' will be different.

First, in some instances the employer may give notice to the employee to terminate the contract of employment and the employee may then give a counter notice to finish earlier, in which case the relevant date is that date on which the employee's notice expires.

47. Second, where the employee is on a trial period and the contract of employment is terminated because of a reason related to a difference between the new contract and the previous one, the date used is the date on which the original contract of employment was terminated.

48. Third, if the contract of employment is terminated by the employer and the employee has not been given the statutory minimum period of notice, the relevant date is the date which the contract of employment would have ended had the employee been given the statutory minimum period of notice.

What is a week's pay?

49. This is the amount the employee is entitled to under the terms of their contract of employment on the 'calculation date'. The calculation date for the employee's redundancy payment will generally mean one of the following:

a. the date the employee was given the minimum notice required by law;
b. if the notice the employee received was longer than this minimum, the date on which minimum notice would have had to have been given to end the employee's employment on the day it actually ended;
c. the date the job ended if the employee was not given any notice or was not given enough notice.

Is statutory redundancy pay taxable?

50. As long as it is not more than £30,000 and is only made up of the redundancy payment, redundancy pay is not taxable. However care should be taken if PILON is paid and the employee is entitled to arrears of pay and holiday pay as these elements may well be subject to tax and national insurance contributions.

What if the employer cannot pay or if the employer is insolvent?

51. If the employer is declared insolvent, or cannot pay, the employee can apply to BERR for a direct payment from the National Insurance Fund. To qualify for payment the employee must have made a written application to the employer or applied successfully to an employment tribunal for an award, within six months of the job ending. A copy of the application form can be found at www.berr.gov.uk/employment/redundancy/redund-forms/index.html

How does an employee claim a payment?

52. There is no need for the employee to make a claim unless the employer does not pay or says that the employee is not entitled to a payment. If this happens, the employee should first of all write to the employer asking for payment. If having done so the employer still refuses or can not make the payment the employee is entitled to take the matter to an employment tribunal. The employee must act within six months of the date his/her

employment ended. Guidance on how to contact the employment tribunals can be found at: www.employmenttribunals.gov.uk

Written statement setting out the amount of redundancy payment

53. On making any redundancy payment the employer must give the employee a written statement indicating how their payment has been calculated. If the employer fails to provide this statement without reasonable excuse, they could be guilty of an offence and be fined up to £200.

54. If the employer fails to comply with this requirement the employee should write to the employer asking them to provide a written statement. If the employer fails to comply with a written request, they could be fined up to £1,000.

55. The Business Link website hosts a tool that will help employers to calculate the statutory redundancy payments due to their employees and produce written statements for each employee showing the amount of redundancy pay and how it was calculated. The online tool can be accessed at www.businesslink.gov.uk (Calculate the Statutory Redundancy Pay Due to your Employee).

Exclusions to employees' right to redundancy payment

56. There are certain instances where an employee may lose their right to redundancy payment. The first of these is where an employee is dismissed by their employer on the grounds of misconduct:

a. without notice; or
b. with shorter notice than is required either by contract or the statutory minimum; or
c. by giving notice accompanied by a written statement that the employer would, because of the employee's conduct, have been entitled to dismiss him without notice.

57. Such an instance is only likely to occur in a gross misconduct case. In order to ensure that the potential dismissal is fair the employer should normally follow the statutory modified dismissal and disciplinary procedure as described in the Acas Code of Practice, Disciplinary and Dismissal Procedures.

58. In such an event the employee can still apply to an employment tribunal for the redundancy payment to be made. If the tribunal finds in favour of the employee it may order the employer to make an appropriate payment (explained below) to the employee, if it considers that fair in the particular circumstances.

'Appropriate payment' means

a. the whole of the redundancy payment to which the employee would have been entitled; or

b. the amount that the tribunal thinks is fair.

59. Should a strike occur during the implementation of redundancies an employee is still entitled to a redundancy payment if they strike whilst working their notice period. However the employer may 'serve a notice of extension' which is a request in writing that the employee works the days lost during the strike at the end of the notice period. The notice of extension will also indicate the reasons for which the employer has made the request and state that if the employee does not agree, the employer may refuse to make a redundancy payment.

60. If the employer refuses to make the payment in these circumstances the employee can apply to an employment tribunal for the payment to be made. The tribunal may determine that the employer is liable to make an appropriate payment (as explained above) if it considers that the employee was unable to make up the lost days, or that it was reasonable for the employee not to do so.

61. Once an employee has been selected for redundancy and been given their notice for dismissal, they may find a new job elsewhere. Understandably the new employer may want the employee to start work as early as possible and leave their current post before the expiry of the notice period. In such a situation the employee should be warned that by doing so they may lose their entitlement to a redundancy payment (and the unworked part of the notice period).

62. If, the employee has received notice of dismissal for redundancy from the employer and decides to leave early, he should write to the employer and state that they wish to terminate the contract on a date earlier than the date given by the employer in the notice of dismissal. This notice must be given within what is called the 'obligatory period of notice'.

63. This should only become an issue where the employee has been given a longer notice period than the statutory minimum. Where the employer has given longer notice than the statutory minimum or than was required under the employee's contract, the employee should work out when that contractual or statutory notice period would have started (by counting back the appropriate number of weeks from the expiry date of the notice they have actually been given). They should continue working until they are in this part of the notice period, before writing to the employer asking to leave early.

64. If the employee gives the employer notice that they intend to leave early and still claim their redundancy payment and the employer accepts this, then there is no cause for concern. If however the employer does not accept the employee's notice and wants them to work the notice period, the employer should write to the employee requesting that they withdraw the notice terminating their contract of employment and that they continue in employment until the date on which the original notice period ends. The employer should make clear that the employee may lose the right to a redundancy payment if he or she does not do so. If the employee insists on leaving before the original date of termination they can be deemed as having

resigned and not automatically entitled to a redundancy payment but they will have to apply to an employment tribunal if they wish to claim a redundancy payment.

65. The tribunal will consider the reasons why the employee wished to leave early and also the reasons for which the employer required the employee to continue working. If the tribunal thinks that the employee's reason(s) were 'just' and 'equitable' then they may well find that the employee is entitled to a redundancy payment despite leaving before the expiry of the notice period.

66. Although it is impossible to say what a just and equitable reason could be, if an employee's position was difficult to replace it could be that the employer would be justified in contesting their decision not to work the notice period. Conversely if the post was one of routine work and the employee could have been replaced easily the tribunal may find in favour of the employee.

General exclusions from right to redundancy payment

67. The following categories have no right to a statutory redundancy payment:

a. Members of the Armed Forces.
b. House of Lords and House of Commons staff.
c. Some apprentices, but this will depend on the type of contract under which the apprentice is working/training.
d. Some employees with fixed-term contracts that were operative before 1 October 2002 may have given written agreement to waive their entitlement to a redundancy payment at the end of the contract. Any waivers inserted into contracts agreed, renewed or extended after 1 October 2002 are not valid.
e. Domestic servants working in a private home who are members of the employer's immediate close family.
f. Share fishermen paid only by a share in the proceeds of the catch.

g. Crown servants or employees in a public office.
h. Employees of the Government of an overseas territory.

Redundancy in relation to lay-offs and short time working

68. The lay-off and short- time provisions can apply where the employee is laid-off or because of the lack of work, receives less than half a week's pay (is put on short time). The provisions are designed to provide a minimum level of protection in lay-off and short-time situations.

Under the Employment Rights Act 1996, employees who are laid off without pay or put on short-time and receive less than half a week's pay for four consecutive weeks, or six weeks in a continuous period of 13 weeks, may claim a redundancy payment from their employer. That payment must be based on, among other things, length of service and contractual weekly earnings (up to the statutory limit).

69. An employee can claim a redundancy payment if they have:

a. been kept on short-time or have been laid-off for more than four consecutive weeks; or
b. have been kept on short-time or laid-off for more than six weeks (of which no more than three were consecutive) in any 13 week period.

70. Once the employee has been on short-time or laid-off for the required length of time and they want to claim a redundancy payment, they must write to the employer giving notice of their intention to claim a redundancy payment. This notice of intention to claim must be issued within four weeks of the last day of the four or six week period of short-time/lay-off.

71. If the employer does not reject the employee's claim within seven days of the employee's notice of intention to claim then the employee must give in writing, their notice terminating the contract of employment. The notice period

must be at least a week or the minimum period as required in the contract, and should be given within three weeks after the end of those seven days.

72. The employer can issue a counter-notice rejecting the employee's claim if they believe that normal working is likely to resume within a four-week period from the day that the employee's notice was received, and is likely to last for a minimum of 13 weeks. The employer must issue this counter-notice within seven days of receiving the employee's notice.

73. If after issuing the counter notice the employer decides to accept the employee's notice of intention to claim, they should write to the employee informing them that they accept the original notice. The employee must then give notice terminating the contract within three weeks. If the employer does not withdraw the counter-notice and the employee still wishes to claim the redundancy payment, the employee must submit a claim to a tribunal, after which they have three weeks to issue the notice of termination.

74. If an employee submits a claim to a tribunal, employers should be aware that any defence is likely to fail if the employee has been kept on lay-off or short-time during each of the four weeks following their written claim for redundancy.

75. Employers proposing to lay-off or to put employees onto short-time should ensure that their contracts of employment give them the power to do so. A lay-off term/short-time provision can be incorporated into an employee's contract in any of the following ways: by being expressly written in; by being included in a collective agreement made with the union; or the lay-off term may be included in the contract by being implied through custom and practice (this should be based on clear evidence). Sometimes the lay-off term can be included in the contract by the employer reaching agreement with the employee concerned.

76. Employers should also note that when employees are laid off they might be entitled to a statutory guarantee payment from the employer. Payment is

limited to a maximum of five days in any period of three months (except where the employee is normally required to work less than five days in a week) and the daily amount is subject to an upper limit which is reviewed annually. See Guarantee payments - guidance on the BERR website. On days on which a guarantee payment is not payable, employees may be able to claim Jobseekers Allowance and should be advised to contact their local Jobcentre about eligibility.

77. In the case where an employer without contractual right or without other rights mentioned in this section introduces lay-off or short-time working, the employees concerned may seek redress at an employment tribunal or the courts to recover lost wages for the workless days. Alternatively, they may claim that the employer's action amounted to a dismissal (constructive or otherwise) and complain to an employment tribunal of unfair dismissal. (See Guidance on contracts on the BERR website).

Other issues

Redundancy during maternity leave

79. It is automatically unfair and automatic sex discrimination to select an employee for redundancy for a reason connected with maternity leave, birth or pregnancy. If the reason for redundancy is connected with other family leave, paternity leave, parental or dependents leave, this will be automatically unfair and may be sex discrimination.

80. It is important that employers recognise that employees on maternity leave have special rights relating to suitable alternative employment. They have an express statutory right to any suitable alternative vacancy that exists. This applies even where the employee does not have the two years' qualifying service necessary for redundancy pay. A failure to comply with this right means that the employee's dismissal is automatically unfair and sex discrimination. The effect of this is that, in effect, a woman on maternity leave

has first call on a suitable alternative position.

For example, if an employer has one vacancy which would be suitable for three potentially redundant candidates, one of whom is on maternity leave, the vacancy must be given to the employee on maternity leave. This is the case even if she would not otherwise be the preferred candidate. If the employee accepts the suitable alternative role, it must be kept open until she returns from maternity leave.

The right extends to vacancies with an associated employer, so it is important to check for all vacancies across group companies.

81. The new contract must take effect immediately on the ending of the existing one and must ensure that:

a. the work to be done by the employee is both suitable and appropriate for her to do in the circumstances; and that
b. the capacity and place in which she is to be employed and the other terms and conditions of her employment are not substantially less favourable to her than if she had continued to be employed under the existing contract.

82. If the employer offers the employee a suitable alternative vacancy then she is entitled to a four-week trial period in which to decide whether the employment is suitable. The trial period commences after she has returned from maternity leave, even if other employees have been made redundant when she was on maternity leave. This period may be extended beyond four weeks by written agreement. If she unreasonably refuses the offer, either before or during the trial period, she may forfeit her right to a redundancy payment.

Entitlements on redundancy during maternity leave

83. If an employee is made redundant before her maternity leave period comes to an end, she is entitled to receive from her employer a written statement of the reasons for her dismissal, regardless of whether or not she has requested one, and regardless of her length of service. If her employer fails to provide a statement, or provides one that she considers to be inadequate or untrue, she may make a complaint to an employment tribunal, having first followed the dispute resolution procedures. (See Discipline and Grievance Procedures). The employee should also receive, her normal notice entitlement, pay in lieu of notice and a redundancy payment if there is an entitlement.

Disability and redundancy

84. An employer should not dismiss or select for redundancy an employee who is disabled within the meaning of the Disability Discrimination Act 1995 (the DDA) on the grounds of the disability or for a reason relating to the disability. Where necessary, the employer should also comply with its duty under the DDA to make reasonable adjustments to any provisions, criteria or practices, or physical features of its premises which place the disabled person at a substantial disadvantage in comparison to non-disabled persons.. So, the employer should make reasonable adjustments to ensure that the employee is able to fully participate in any consultation that takes place.

85. Particular care needs to be taken when drawing up selection criteria that could discriminate against a disabled employee. For example, it is likely to be a reasonable adjustment to discount disability-related sickness absence when assessing attendance as part of a redundancy selection scheme.

TUPE and redundancy

86. Where one business is taken over by another there may be a reorganisation that results in job losses. In such circumstances employees are offered a certain amount of protection by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). The purpose of TUPE is to preserve employees' terms and conditions when a business or undertaking, or part of one, is transferred to a new employer. This means that employees employed by the previous employer automatically become employees of the new employer upon the transfer on the same terms and conditions (except for certain occupational pensions rights). It is as if their contracts of employment had originally been made by the new employer.

87. TUPE makes clear that neither the new employer nor the previous one may fairly dismiss an employee for a reason connected with the transfer, unless that reason is an 'economic, technical or organisational (ETO) reason entailing changes in the workforce'.

88. In relation to TUPE, there are therefore three categories of dismissal: those which are not related to the transfer (potentially fair); those where the transfer is the reason for dismissal (automatically unfair) and those where the dismissal is for a reason connected to the transfer (automatically unfair unless that reason is an ETO reason entailing changes in the workforce, in which case it is potentially fair).

89. TUPE specifically states that a dismissal for an ETO reason entailing changes in the workforce will be treated as being for redundancy (for the purposes of statutory redundancy payments or when looking at the reason for dismissal under unfair dismissal law) as long as the legal definition of redundancy is fulfilled.

90. Where the dismissal is for a reason connected to the transfer, the onus lies on the dismissing employer to show that the dismissal falls within ETO reasons. Neither the TUPE Regulations nor the Acquired Rights Directive

define what an ETO reason may be. The courts and tribunals have not generally sought to distinguish between each of the three categories, but rather have treated then as a single concept. To qualify as an ETO defence an ETO reason must be one 'entailing changes in the workforce'. The courts have held that this means a change in the numbers of people employed or a change in employees' particular functions.

91. Even if the tribunal finds that there is a potentially fair reason for dismissal, the employer will still need to be sure that the legal definition of redundancy was satisfied, that it acted reasonably in all the circumstances, and where fewer than 20 employees are to made redundant, that it followed the standard Dismissal Procedures (SDP). Failure to do will still result in an unfair dismissal.

Further guidance on the TUPE Regulations can be found at
www.berr.gov.uk/files/file20761.pdf

Annex 1

The Standard (three-step) Dismissal Procedures

The purpose of the Standard Dismissal Procedures (SDP) is to provide a framework for discussing problems and dealing with dismissals in the workplace. The procedures apply where fewer than 20 employees are being made redundant and also in certain situations where contracts are being renegotiated (see Annex 2). Failure to use the SDP in such a situation will result in an automatically unfair dismissal.

Having identified the number of redundancies to take place, and where selection from a pool is required, the possible selection pool and selection criteria, to ensure that the dismissals are fair and to give the employee the opportunity to question any of the procedures the follow steps apply:

Step 1: The written statement

The employer should write to the employee(s) individually to inform them that they are at risk of being made redundant, even if it is only one individual who is at risk of redundancy. Employers however, do not have to put all the details of the reason for redundancy in the first letter. However if the employee is later selected for redundancy, then before the next step the employer should notify the employee(s) of the selection criteria being used and the assessment that has been made against them. The employer should ensure that there is time for each employee to consider a response and raise any issues at the hearing. The employer should also inform the employee(s) that they have a right to be accompanied at the hearing by a colleague or trade union official.

Step 2 : The hearing

At the hearing confirm with the employee that you have notified him/her of the selection criteria being used and the assessment that has been made of the employee in question and how that assessment was reached. If the employee has any concerns regarding the selection criteria or the consultation

process or raises any new issues in relation to the proposed redundancy, the employer should make every effort to listen to the employee and if possible try to resolve the issues at the meeting. If this is not possible and the issues raised by the employee require further investigation, the employer should say this to the employee and confirm that they will get back to the employee at a reasonable date. A further meeting may be necessary and in some instances if the issues raised by the employee takes more than one meeting to resolve, the employer should consider holding more meetings. If no new issues are raised, tell the employee what the decision is and inform them of their notice period and any other entitlements. At the same time the employee must be offered the opportunity to appeal against the decision, and set a time limit for the appeal (the Acas Code recommends five days).

The hearing must be held at a reasonable time and be in a convenient location. If the employee or person accompanying them is disabled the employer must take this into account and make reasonable provision to ensure that they can participate fully.

Employees have the right to take time off during working hours to accompany fellow workers employed by the same employer.

The companion is allowed to address the hearing in order to:

- put the worker’s case
- sum up the worker’s case
- respond on the worker’s behalf to any view expressed at the hearing but is not allowed to answer questions on behalf of the employee. The companion can confer with the employee during the hearing.

If the employee decides that they do not wish to appeal then soon after this hearing the employee should be given the appropriate notice of termination and a written statement saying what the employee’s entitlement to redundancy pay is and how it is calculated.

Step 3 : The appeal hearing

The employee has the right to appeal any decision made with regard to the dismissal. If possible a manager more senior than the manager who held the hearing at Step 2 should hold the appeal meeting. If the size of the business makes this impossible the employer will need to make an extra effort to deal with the matter impartially. Following the appeal meeting the employer must inform the employee of the final decision. The employee has the right to be accompanied at the appeal meeting. The same rules apply to this meeting as to the Step 2 meeting.

Dealing with delays during the standard procedure

If the employee is genuinely unable to attend any meeting the employer arranges, (for example if they are ill), then the employer must offer another reasonable date. If the employer cannot make the meeting, the employer must offer one other alternative date. If the person the employee has chosen to accompany him cannot make the date of the meeting the employer offers, the employee must propose another date and time which should be no more than five days later than the existing date.

If this second meeting is missed, the law considers the procedure to be at an end and the employer can proceed with the dismissal on the ground of redundancy without going through any more steps.

Annex 2

Dismissal or renewal/re-engagement following redundancy and the standard dismissal procedures

There may be occasions where there is a need to renew contracts or re-engage employees under new contracts. If this happens where fewer than 20 employees are being made redundant and the employer offers all of these employees' the option of renewal or re-engagement either before or on termination of their contracts, the employer will not have to go through the Standard Dismissal Procedures when the existing contract is terminated. However, the dismissals may still be unfair under the normal unfair dismissal rules, if there was no fair reason for them or the employer acted unreasonably. If an employer proposes to make (say) 19 employees redundant but then he decides that he can renew or re-engage the contracts of only 10 of them the employer will need to comply with the statutory Standard Dismissal Procedure.

Annex 3

Redundancy checklist

Is there a redundancy situation?

There is likely to be a redundancy situation if:

- you are closing the business, either completely or at a particular workplace; or
- there is a reduced need for employees to do the available work; or
- there is a need to relocate or restructure the business.

Have you considered alternatives to redundancy?

For example employers can reduce labour costs by:

- reducing the number of employees by natural wastage;
- restricting or suspending external recruitment; and/or
- reducing or eliminating overtime.

Consultation

This should:

- take place at a formative stage; provide employees with sufficient information on what is being proposed and ensure that they have enough time to consider a response;
- ensure that fairness and transparency of procedures is carried out at every stage of the process; and
- consult employees who are absent as a result of a disability or a long-term health condition or those who are on maternity leave.

Where 20 or more employees are being made redundant you will have to conduct a collective consultation. Employers should:

- consult in advance with trade union or elected representatives of the affected employees;
- notify the projected redundancies to the BERR;
- make the notification before any redundancy notices are sent to affected employees.

Where fewer than 20 employees are being made redundant the standard Dismissal Procedures apply (see annex 1 in this guidance). Failure to follow these procedures is likely to result in an unfair dismissal.

Offer of alternative work (including renewal and re-engagement)

Where possible consider offering employees at risk of redundancy alternative work.

- If the new contract is different from the existing one , the employee has a right to a four week trial period.
- Trial periods can only be extended for re-training purposes and with the agreement of the employer and employee (such agreements should be made before the employee starts work, must be in writing, specify when the period ends; and set out the terms and conditions of employment that will apply after that date).
- The employee should be made aware of the consequences of accepting or refusing an offer of suitable alternative work. For more details refer to the section – Refuse alternative work in this guidance.

Identifying the pool for selection and the selection criteria

If there is a need for redundancy and some employees in a particular section of the company doing similar work are to be retained while others are made redundant, the employer will have to:

- define the selection pool as part of the consultation process;
- use objective selection criteria, which are precisely defined and can be applied in an independent way for e.g. relevant skills and competencies, experience and capability;
- ensure employees are not selected on the basis of their trade union activities or because they are pregnant or on maternity leave; and
- ensure selection criteria do not discriminate against employees on grounds of race, sex, age, disability, sexual orientation, religion or belief. For a full description go to www.acas.org.uk/index.aspx?articleid=747 (Advisory booklet – Redundancy Handling)

Issue notice of termination

- Employees should receive a notice of dismissal from their employers. The notice period depends on the employee's contract of employment, subject to the statutory minimum periods.
- Employees may be entitled to a payment in lieu of notice if they are not given the notices that they are entitled to.
- In a collective redundancy situation, redundancy notices can be issued only when the consultation with representative of the affected employees has been completed.
- Employees with at least two years' continuous service are entitled to reasonable time off with pay during working hours to look for another job or make arrangements for training for future employment.

Redundancy payments

An employee is entitled to a redundancy payment if:

- they are dismissed by reason of redundancy or are eligible by reason of being laid off or kept on short-time;
- have at least two years' continuous service.

The amount of the employees' statutory redundancy payment depends on:

- how long they have been continuously employed by their employer; and
- how their continuous service relates to a particular age band; and their weekly pay, up to a legal limit.
- employees being made redundant have the right to a written statement of the amount of any redundancy payment and how the employer worked it out.
- employers can use the interactive tool on the Business Link website to calculate the statutory redundancy payment that may be due to your employee and create a personalised written statement showing the amount of the redundancy pay and how it was calculated. The online tool can be accessed at www.businesslink.gov.uk/bdotg/action/layer?r.l1=1073858787&topicId=1079123792&r.l2=1073876974&r.s=tl (Calculate the statutory redundancy pay due to your employee).

The terms of the employment contract may provide that the employee is also entitled to additional payments under the employer's individual redundancy scheme.

SOURCES OF FURTHER INFORMATION

Acas

Helpline: 08457 47 47 47 or at www.acas.org.uk

Helpline for text phone users: 08456 06 16 00

Business Link – Practical advice for business

www.businesslink.gov.uk/employingpeople

Directgov – employees seeking basic guidance on employment rights

www.direct.gov.uk/employment

Citizen's Advice Bureaux

www.citizensadvice.org.uk/index/getadvice

Tribunals Service

Enquiry Helpline: 0845 795 9775 or www.employmenttribunals.gov.uk

For details on making or responding to a claim to an employment tribunal – www.employmenttribunals.gov.uk/how_to.asp

Relevant and other publications

Redundancy entitlement – statutory rights

Ready Reckoner for calculating the number of weeks' pay due for redundancy pay purposes

Redundancy consultation and notification

Employees' information and consultation rights on collective redundancies and transfers of undertakings – a short guide

Informing and consulting employees – a brief guide to the new legislation

A guide to the 2006 TUPE regulations for employees, employers and representatives

Dismissal – fair and unfair: a guide for employers

Disciplinary, dismissal and grievance procedures – guidance for employers

Disciplinary, dismissal and grievance procedures – guidance for employees

The Acas Code of Practice on Disciplinary and Grievance Procedures

Discrimination in employment

Fixed term work – guidance

Amendments to the Part-Time workers (prevention of less favourable treatment)

Continuous employment and a week's pay: rules for calculation

Fair piece rates guide 2004

Rules for calculating a week's pay

HMRC Tax bulletin on pay in lieu of notice

Limits on payments and awards

Contracts of employment: changes, breach of contract and deductions from wages

Rights to notice and reasons for dismissal

Guarantee payments – guidance

Age and the Workplace – Putting the Employment Equality (Age) Regulations 2006 into practice

The Acas guidance on the Age Regulations

Maternity entitlements and responsibilities: a guide – babies due on or after 1 April 2007 – Part 2

Relevant legislation

Trade Unions and Labour Relations (Consolidation) Act 1992 {TULR(C) A}

Employment Rights Act 1996 {ERA 1996}

Employment Relations Act 1999 {ERA 1999}

Sex Discrimination Act

Race Relations (Amendment) Act 2000

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