Redundancy

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This section aims to put a brief outline of redundancy processes and law in place so that officers understand what happens and when.

Click on the linked questions below to find out more information:

What is a redundancy situation?

s.139 Employment Rights Act 1996 defines a redundancy situation as:

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

For an employer to make workers redundant, they must justify the decision to dismiss based on the above section of the Employment Rights Act.

Redundancy is one of the fair reasons for terminating an employee's employment, but that doesn't mean an employer always acts fairly when relying on redundancy as the reason for dismissal.

For example, there could be no genuine redundancy situation, no fair selection process or a process could be applied unfairly to an individual.

What happens when the employer decides to make redundancies?

Employers can't just announce that there will be redundancies and lay people off. At the very least they have a legal obligation to consult with either the recognised TU or elected representatives if there is no recognised TU.

The law is set out in Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 for England, Scotland, and Wales. In Northern Ireland it is set out in Part XIII of the Employment Rights (Northern Ireland) Order 1996 Article 216 onwards.

The UK law stems from a European Directive - the Collective Redundancies 98/59EC – which is currently still in force but may change after withdrawal from the EU.

There are two different scenarios depending on whether:

A) 20 or more employees at risk in one establishment

B) 20 or fewer employees at risk in one establishment

But the employer also has an obligation to consult the employee about the redundancy situation.

Important: Definition of 'same establishment':

The European Court of Justice has ruled that "establishment" means the business unit where

employees are assigned to work.

It does not need to have it's own management capable of carrying out collective redundancies or be a separate legal organisation, but it must be a distinct and stable entity with its own workforce.

20 or more employees at risk of redundancy

Where the employer is proposing to make 20 or more employees redundant at **one establishment** within a period of 90 days, s.188 Employment Rights Act 1996 says they must:

- Consult employees
- Provide information to **appropriate representatives** of the affected employees and consult with them.
- In collective negotiations with trades union representatives (or employee representatives) seek to avoid compulsory redundancies where possible and to mitigate the consequences of any compulsory redundancies that take place.

Fewer than 20 employees at risk of redundancy

To trigger the duty to consult collectively then 20 or more employees at risk of redundancy must work at the "same establishment".

There is no legal right to consultation with union reps if there are fewer than 20 people at risk (of course an employer should always engage in consultation with individuals about their individual redundancy situation – not doingso would be open to challenge on the fairness of a decision if they do not have such conversations).

Whether there is a legal right to consultation or not, it doesn't mean an employer couldn't enter into such consultation, and a good employer will engage the Union, or if none is recognised the workforce, in the reasons why a redundancy situation has arisen and look to alternatives to redundancy in discussions with its workforce.

'Same establishment' is important. In 2015, the ECJ ruled that Woolworths did not have to pay Protective Award claims to workers made redundant because though the workers involved all worked for Woolworths, they worked in different locations within the chain with fewer than 20 employees in some of the stores.

If there is any doubt about what constitutes 'same establishment' or the employer is refusing to consult because they say they are making fewer than 20 people redundant at the 'same establishment' (though they appear to be making more than 20 employees redundant across the business), it is worth challenging the 'establishment' argument so that the obligation to collectively consult arises.

Take advice on whether your challenge to the employer might also give grounds for a legal challenge if the employer refuses to budge on the issue of consultation.

Do only 'employees' count towards redundancy numbers, or can we include 'workers?

The duty on an employer to consult applies in respect of employees and not the wider category of "workers". However, there is EU case law that suggests there might be an argument to include the wider definition of workers. Balkaya v Kiesel Abbruch und Recycling

Technik GmbH [2015] ICR 110.

This might be worth trying in specific situations in terms of calculating the number of employees especially if this makes a difference on whether the obligation to consult is triggered at all. Specific advice should be sought.

What happens when we 'consult' on redundancies?

The duty to consult is officially triggered by a 'proposal' to dismiss.

Proposing to dismiss means something more than the employer merely contemplating redundancies (which is the wording used in the European Directive) but is less than having reached a definite decision about the number of employees that are to be dismissed.

So it's basically saying 'we think we may have to make redundancies but we haven't got a concrete plan of how many people that will apply to'.

Once there is a proposal to dismiss, Consultation must begin "in good time", but in any event must be:

- 45 days before the first dismissal if 100 or more redundancies are proposed within a 90 day period
- 30 days before the first dismissal if fewer than 100 redundancies are proposed

What information does the employer have to provide?

This is set out in section 188(4) of TULRCA. The employer must provide:

1. The reasons for the proposals to dismiss
2. The numbers and descriptions of employees whom it is proposed to dismiss as redundant
3. The total number of employees of any such description employed by the employer at the establishment in question
4. The proposed method of selecting the employees who may be dismissed
5. The proposed method of carrying out the dismissals, having regard to any agreed procedure, including the period over which the dismissals are to take effect
6. The proposed method of calculating the amount of any redundancy payments to be made to employees who may be dismissed
7. The number of agency workings working temporarily for and under the supervision and direction of the employer
8. The parts of the undertaking in which those agency workers are working
9. The type of work those agency workers are carrying out

The information must be provided in writing and must be handed to the "appropriate representatives", or sent to an address notified to the employer, or in the case of union representatives sent to the Union's head or main office.

In practical terms in collective consultation exercises Officers should raise questions right at the outset to clarify:

- **when** the proposal was made

- **by whom** it was made
- **when** it was approved
- **how** it was approved
- **whether** there are any written records of that process
- **whether** there have been any third party's communications

The aim is to find out whether it is a proposal or whether in fact the decision **has already been made** meaning that consultation is ineffective.

In COVID-19 terms, this consultation process is likely to be triggered by some employers when the Job Retention Scheme winds down and they are required to start making a contribution to pay or rather the amount of grant they can recover from the government starts to decrease.

What is the consultation meant to be about?

Consultation must be about the following:

- Avoiding the dismissals
- Reducing the number of employees to be dismissed
- Mitigating the consequences of the dismissals

The consultation must be meaningful and genuine on all three issues, if it is not any then the process could be open to legal challenge on the basis that there has been failure to consult.

The consultation should be undertaken with a view to reaching agreement with the "appropriate representatives", but this does not mean that agreement has actually to be reached. The process should not be a sham and the employer should consider the views and proposals of the "appropriate representatives".

Case law indicates that consultation should cover the reasoning behind the redundancy situation i.e the business or commercial decision for making employees redundant.

The NUM vs UK Coal Case concerned the closure of a coal mine where all the employees were being redundant, the Employment Appeal Tribunal held that the employer had an obligation to consult over the reason for the closure and that a failure to do so amounted to a breach of the consultation requirements. UK Coal had stated the mine was to close for safety reasons, when in fact the reasons were economic.

What is meaningful consultation?

The law says consultation has to be meaningful. Consultation is triggered by a proposal to dismiss, which should be an early stage – employers could be in breach of consultation requirements if they don't consult at the right point.

There have been cases where legal challenge has showed that employers had planned to make redundancies or knew that a redundancy situation was likely but refrained from issuing the official proposal to dismiss, meaning that they were so far down the line no consultation to mitigate redundancies could have been meaningful.

Basically – if the aim of consultation is to mitigate losses and save jobs, but the employer has allowed the situation to escalate to the point that is not possible then no meaningful consultation can be had, then it is arguable that they have breached the legal requirement to

consult.

This is why case law has not been able to resolve the question of the precise point in time when the obligation to consult is triggered, though the legislation states it is when the proposal to dismiss is issued.

These cases can are fact specific, there is no blanket advice that can be given so if you think you this situation might apply, seek advice from the Legal Director.

Get more time…write a process into agreements

30 days (for 20 employees plus) is the legal minimum, increasing to 45 days if more than 100 are at risk. In order to protect against future redundancies and ensure we have the best possible knowledge and input, more extensive and lengthy consultation processes could be written into employer agreements (alongside an employer agreeing to take 'all possible steps' before going down the redundancy route) when times are good.

If we are able to negotiate advance warning and a longer, informal consultation process as a standard in agreements then not only will we have more time to prepare and campaign, we will be able to influence board decisions before they have been made.

Who is the employer consulting with?

If GMB is recognised for the purposes of collective bargaining in relation to all employees, then the "appropriate representatives" will be the GMB representative.

If GMB is recognised only for a particular group or bargaining unit then the appropriate representative will be GMB but only for that group or bargaining unit.

If there is no recognised union then the employer can choose to consult with either:

- Employee representatives who were appointed or elected for a purpose other than for redundancy consultation but who have authority from employees to conduct the consultation EG a staff committee who are authorised to consult on redundancy matters (which is why in many areas we will try and ensure as good practice GMB reps are present on staff bodies where we are not recognised)
- Employee representatives who have been specifically elected for the purposes of redundancy consultation (there is a procedure for an election set out in the 1992 Act). This could be useful to the union. If we are not recognised but a redundancy situation arises, we should use this process in order to ensure that the staff representatives who are consulted as part of the committee are GMB representatives.

Does consultation only apply in a redundancy situation?

Officers should note that the definition for redundancy in the case of collective consultation is wider than the definition of redundancy involving individual employees.

Under section 195(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 redundancy is "...a dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related".

This means that there are some situations that might not be a redundancy under the Employment Rights Act 1996 but do fall within the wider definition of redundancy for the

purpose of TULRCA and trigger the duty to consult collectively, for example where an employer plans to vary existing terms and conditions by terminating existing contracts and re-engaging on new terms.

There may be no reduction in the number of employees required to carry out work of a particular kind, but the proposal to dismiss is not related to the individual concerned so collective redundancy consultation requirements applies.

The GMB case of GMB v Man Truck and Bus Limited confirms that the duty to consult arises in this situation even if the employer intends to re-engage all the employees and does not intend for any employees to lose their jobs.

Do voluntary redundancies count towards the 20 person threshold?

Employers sometimes ask for volunteers.

Voluntary redundancies can sometimes amount to dismissals to be included for collective consultation purposes. If there is any doubt about this, please take advice.

What happens to employers on fixed term contracts?

Employees on fixed-term contracts are excluded from the provisions relating to collective consultation unless the fixed term contract is terminated by reason of redundancy before the expiry of the fixed-term. So where fixed term employees are dismissed at the end of their term or on the occurrence of r a specific event, they do not count towards the 20-employee threshold.

But where the contract is terminated before the end of the termination date or before the occurrence of a specific event, this employee can be counted for the purposes of redundancy consultation numbers.

Can employers dismiss workers during consultation?

EU case law holds that notices of dismissal should not be issued until the consultation has been completed.

The Government guidance states that notification to an individual that they are being made redundant may be issued where “consultation has led to an agreement or come to a conclusion.”

Officers may be able to argue that unless there is a clear agreement or definite conclusion that the consultation process should continue and that notices of dismissal should not be issued until there is a clear end to the consultation process.

Important in COVID Redundancies:

Officers should press for documentation relating to the business reasons for any proposal to dismiss. There may be some employers who will use the public health emergency to force through adverse cuts to terms and conditions that they have wanted to make for some time and seek to blame it on the emergency.

The UK Coal case provides a means of supporting requests for information on and consultation over the business reasons.

The employer cannot avoid the consultation obligations by arguing that consultation would have been futile. Employees should be given a fair opportunity to understand the issues about which they are being consulted and to be given the opportunity to express their views, and those views should be genuinely considered by the employer.

Preparing for Covid-19 redundancies

Can genuine collective consultation really take place when the workforce – or even sections of it – are on furlough?

Government guidance in the Job Retention Scheme indicates that an employer is entitled to make an employee redundant whilst on furlough and that trade union representatives are entitled to carry out their duties in respect of collective consultation even if they themselves are on furlough.

There is nothing in the legislation on collective redundancy consultation that requires face to face meetings between representatives and members.

However, there are arguments to say that collective consultation is not possible on the following basis:

1. A fundamental part of adequate consultation is for the representatives of affected employees to be able to communicate the employer's views to them, hear their views on the employer's proposals, and to respond to the employer. If employees are on furlough, particularly if it is a large number, it will be difficult for communication to take place. It may prevent union representatives from being able to act upon the views of members.
2. Under section 188 (5A) TULRCA "the employer shall allow the appropriate representatives access to the affected employees and shall afford those representatives such accommodation and other facilities as may be appropriate". So if employees are on furlough or working remotely there is an argument that the employer is not able to provide appropriate representatives with the access that the legislation requires.

This is an untested area and we do not know what tribunals will make of it, but it may be a tactical argument to use in particular situations as a way of deterring employers from proceeding with proposals to make redundancies or at least to flag the issue up as a marker at the outset with the employer where collective redundancy consultation goes ahead.

Also remember what the government guidance on the coronavirus job retention scheme say:

When the government ends the scheme

“When the scheme closes on October 31, you must decide, depending on your circumstances, as to whether employees can return to their normal hours. If not, it may be necessary to consider reducing their hours, or a termination of employment (redundancy). Normal redundancy rules apply to furloughed employees.”
(Government advice)

So, it is perfectly appropriate for us to argue as a union that consultation should not even begin until the government's assistance with wages during this crisis comes to an end. If you are faced with this situation then you should seek advice on how to pursue that argument.

What consultation should take place and how?

If collective consultation takes place remotely then Officers and representatives are advised to agree a process with the employer for collective consultation meetings. This could include practical matters such as requesting that the employer provides training on how to use the new technology, for example how to access video conferencing software on mobile devices.

There may be time issues as to how long it may take for representatives to communicate with employees and how the employer might be able to assist with this.

In a situation where the union is recognised this includes all the workers in the bargaining unit and not just union members.

How will representatives be able to discuss matters privately with each other or with the employer?

How will the costs of dial in calls for members be dealt with?

How will documents be shared?

Will more “meetings” be needed because they are being carried out remotely?

Are there any circumstances where an employer may not have to consult over plans to make employees redundant?

The employer has a defence if they can show that there are “special circumstances which render it not reasonably practicable” for the employer to comply with the duty to consult collectively.

The employer only needs to take such steps as are reasonably practicable in the circumstances. The onus rests with the employer to show that it has taken all reasonably practicable steps.

Long-standing case law indicates that the defence applies in the event of something like a sudden disaster, whether physical or financial, that makes it necessary for the employer to close down the business.

We do not think that the pandemic or the fact that workers are furloughed will of themselves amount to special circumstances, so the employer cannot rely on this as a reason not to consult.

The following are very unlikely to amount to “special circumstances”:

- The fact that redundancies are always at short notice in the particular industry
- The fact that the decision was taken by the parent company and the parent company fallen to provide the required information to the employer
- The fact that the employer is insolvent following a gradual rundown of the business

If the employer is trying to use the above as a reason not to consult, you should seek advice.

The employer has failed to adequately consult, what are our legal options?

Where the employer fails to consult collectively the remedy is a **Protective Award**.

This is a claim made to an Employment Tribunal. Where GMB is recognised by the employer for the purpose of collective bargaining the claim is brought by GMB for the benefit of the members.

Where GMB is not recognised the claim is brought by the employee representatives. Where there are no employee representatives the claim is brought by individual employees.

If a claim is successful, a tribunal can award up to a maximum of 90 days' gross pay. In the case of an Insolvency the Protective Award forms part of the "capped" wages paid by the Redundancy Payments Service and the value can be drastically reduced.

In the event of a claim being considered, further advice should be sought.

The claim must be brought with **three months less one day** of the last dismissal. ACAS Early Conciliation must be complied with before making a claim.

What is an HR1?

The employer must notify the Secretary of State for the Department for Business, Energy, and Industrial Strategy (BEIS) of all proposed redundancies of 20 or more employees.

This done by using an HR1 form, sent to the Redundancy Payments Service. This is often copied to union representatives. This should be issued at the same time as the proposal to dismiss.

Individual consultation

Undertaking consultation with a union does not mean that an employer has no need to consult with its employees on their individual circumstances, please see our information sheet on redundancy and employees for further guidance.

Is there further guidance I should look at?

Yes. ACAS publish a Guide to Handling Redundancies and has recently published a redundancy map – which refers to the JRS as being one way that an employer could avoid the need to make anyone redundant.

And

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