

How to.... make an employee redundant

This article sets out the key steps in a redundancy process. By its very nature it is general guidance and is not a replacement for specific HR or legal advice which should always be sought.

If an employer is considering redundancies, they will want to ensure it is fair so that their workforce is treated well, their reputation as a good employer is maintained and to avoid potential employment claims.

Is it redundancy or something else?

Redundancies must fall under the definition set out in the Employment Rights Act 1996 (s139) which states for there to be a redundancy situation there must be:

- A closure of the employer's business, or
- A closure of a workplace, or
- A reduced need for employees to carry out work of a particular kind

If the circumstances do not fit into this definition, it is not classed as redundancy and does not qualify for statutory redundancy rights such as pay. For example, if an employee will not agree to change their working times, it does not mean there is less work or the need for less employees and therefore it is not a redundancy situation (but rather any dismissal would fall under 'SOSR' - some other substantial reason).

Also, by defining something as redundancy where it does not fall into the definition, the employee may be able to bring a claim for unfair dismissal as the reason for dismissal is incorrect.

Creating a business case

The need for redundancy will arise from a change in organisation strategy causing the requirement for people/skills to change.

An organisation is free to determine its own strategy – but it must manage the people impact of any change fairly. For a fair process, the reason for the redundancy will need to be explained to affected employees, so employers should take some time at the outset to create their business case. This will be the backbone to the subsequent consultation process and ensures a consistent message.

A fair procedure

It is important to remember that until consultation is complete, an employer cannot confirm a redundancy decision. Consultation is a very important step in a redundancy procedure. It is based on the principle that an employee should be able to have a say about their own role before a decision is made – until then, affected employees are only 'at risk of redundancy'.

Consultation is not the only step; some consideration of factors will be required before consultation and some key steps are necessary afterwards:

1. Identify selection pool

Where the headcount of similar roles needs to be reduced, but some people will remain, the employer will need to identify the 'pool' of people affected to whom a set of selection criteria will be applied. A pool normally consists of groupings of employees performing the same job or with similar skills. It could be some skills are transferrable therefore more than one role may be included in a pool. Depending on the scale of the restructuring project, there may be a number of different pools, each identified by role or key skills.

2. Selection criteria

To decide who is to be made redundant within a pool, some fair and objective criteria will need to be applied. Their purpose is to impartially identify who stays and who goes. The selection process is based on the premise that all people in the pool are equal, and will have some criteria applied to determine an objective selection decision.

Typical criteria are:

- absence
- disciplinary record
- length of service
- skills
- experience
- performance levels

The employer has freedom to choose their criteria, but they should ensure the chosen criteria are not discriminatory; therefore pregnancy and disability related absences should be excluded and only one criterion related to length of service may be used (to avoid age discrimination). If using performance, employers should ensure any performance system accurately measures performance and is applied consistently.

3. Consultation

As mentioned, consultation is a fundamental part of a fair process. All employees at risk of redundancy require consultation, but if 20 or more redundancies at one site are expected, employers have a duty to conduct collective consultation for a minimum of 30 days (or 45 days for 100 or more expected redundancies). There is a formal process for this – please seek advice to ensure compliance as failure to collectively consult is remedied by a 'protective award' to the employee of up to 90 days pay (and risks any redundancy decision being unfair).

Even where there has been collective consultation, individual consultation is required so each individual employee has the opportunity to directly influence their redundancy decision.

Consultation usually covers:

- The reason for proposed redundancy (although the employer is free to decide on this, so long it falls under the legal definition)
- The planned consultation process and timings
- Proposed selection criteria
- Ideas from the employee for how redundancies could be avoided
- Selection results

Normally consultation takes the form of 3 meetings:

- i. Advice that the employee's role is at risk of redundancy
- ii. Hearing back from the employee on planned process, criteria, ideas to avoid redundancy
- iii. Confirming the selection decision - which may include dismissal by reason of redundancy

There is no minimum timescale for individual consultation but the process should be balanced to feel it is thorough enough and not a rushed process, but equally not an elongated period of uncertainty. Consultation does not have to end in agreement, but any suggestions, questions or concerns raised should receive a response.

4. Suitable alternative employment

When an employee has been selected for redundancy, an employer is duty bound to consider whether they can be redeployed in a 'suitable alternative position'. This would be a vacant role of similar status and on no less favourable terms and conditions of employment. If such a role exists, the employee must be slotted into this suitable alternative position. This may be unpopular if the employee would prefer to leave and take their redundancy pay, alternatively if they do not want to leave, the employee may argue that a suitable alternative role exists and should be offered to them.

Where an employee is redeployed to alternative employment, they have the right to a 4-week trial period. If it is unsuccessful from either the employee or the employer's perspective and employment is terminated, any statutory redundancy pay entitlement would still be applicable.

If another role of different status in the organisation or on less favourable terms and conditions is available, it could be offered on a voluntary basis, and the employee may choose to accept it and remain employed, but there is no obligation to do so on either party.

5. Dismissal meeting

Where an employee is selected for redundancy, they should be formally invited to a final consultation meeting. The decision to dismiss still has not been taken at this stage. The meeting is the last opportunity to explore alternatives. This will be a formal meeting and the employee should be formally invited in writing, giving reasonable notice, advising the reason for the meeting, the potential outcome (*'this meeting may result in your employment being terminated by reason of redundancy'*) and the right to be accompanied.

The person holding the meeting should treat it as still being in consultation and recap on the consultation held to date, seek any further ideas to avoid redundancy and then, only if there are no suitable ideas then they may decide to dismiss.

If an idea is offered or comment made that could impact the selection decision, it may be that some time is needed to consider this, and a dismissal decision would not be made in this meeting.

6. Time off to look for work

If the employee is dismissed, they may serve out their notice. During this time they have the right to time away from work to seek help on interview skills, CV writing, attend interviews etc

7. SRP

For dismissals by reason of redundancy, an employee with 2 or more years' service is entitled to Statutory Redundancy Pay (SRP). They may also be entitled to enhanced redundancy pay if stipulated in their terms and conditions of employment.

SRP is based on an employee's age and length of service. On average 1 week's pay¹ is payable for each full year of service to a maximum of 20 years service. Employment when aged 21 or less attracts 0.5 weeks' pay and employment when aged 41 or more attracts 1.5 weeks' pay. A calculator is available [here](#).

What about employees with less than 2 years service?

To bring a claim of unfair dismissal, an employee must have 2 years service². If an employee has less than 2 years service they cannot claim the redundancy decision was unfair, but if redundancy decisions are based on discriminatory or 'automatically unfair' reasons – they may be able to bring a claim.

It is therefore not risk free to make an employee redundant and following a robust process helps ensure decision making is fair and supports employee confidence and an employer's good reputation.

¹ A week's pay is capped at a statutory limit set each year. In April 2020 it is £538

² To be precise it's 1 year and 51 weeks as statutory notice of 1 week is taken into account. Always be very careful of making commercial decisions close to 2 years service.

Keeping the workforce engaged

Applying a redundancy process in an organisation is an unsettling time for all of the workforce. It is key to keep the process constructive and provide frequent and clear communication to those affected and the wider workforce.

Remember to refer back to the business case throughout the consultation process to keep consistency in communications.

Consultation should be (and be seen to be) a genuine procedure to try and avoid redundancies and listening, responding and making concessions can be very powerful.

Employers should be alert to 'survivor syndrome' within the remaining workforce. This is where they become disengaged with higher absence levels and lower morale as they take on more work and possibly fear further job losses. This can be addressed with further pro-active communication and reassurance although promises cannot be made about what may happen in the future.

Employers should do the best they can in their circumstances and show it – it may be that when hiring again, reputation and workplace culture will be something candidates assess when choosing their next employer.

Whilst every care has been taken in compiling these guidance notes, West Human Resources Consultancy Ltd cannot be held responsible for any errors or omissions; the notes are not intended to be a substitute for specific legal advice.

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