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Brief Update
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from the Employment Law Division

Redundancy — Key Considerations

As we enter a period of global recession, businesses are increasingly having to give consideration to tightening their belts. When it comes to staffing costs, options include freezing recruitment or changing terms and conditions such as by reviewing bonus entitlements or agreeing to shortened working hours or reductions in salary or benefits. However, for some employers, redundancies are inevitable.

In this Update we look at the key considerations when undertaking a redundancy exercise and the cost of getting it wrong.

"Redundant: not or no longer needed or useful; Superfluous" (Oxford English Dictionary)

As the dictionary definition above demonstrates, the very word "redundant" has particularly negative connotations and a redundancy exercise can be an emotive and upsetting experience for employers and employees alike. For employees the financial consequences of being made redundant are obvious and this makes the incentive to bring employment tribunal claims greater. It is therefore vitally important to get the process right. Otherwise an exercise designed to cut costs in a time of economic downturn can turn out to be very costly indeed.

Do you have a genuine redundancy situation?

Redundancy is a potentially fair reason for dismissing an employee but it is for the employer to show that the particular circumstances surrounding the dismissal actually constitute a redundancy situation and further that the procedure followed in carrying out the dismissal was fair. In order for there to be a genuine redundancy situation, the circumstances must fit the particular statutory definition. In general terms, this will include situations where fewer employees are required. This might be due to the closure of all, or part of a business due to a down turn in work or there might simply be a reduced requirement for a particular class of employees. This can arise where workload had reduced but it will equally apply where an employer chooses to rationalise its staff in order to perform more efficiently, or where new systems or technology are put in place reducing the requirement for the number of employees to carry out the same amount of work, or even a greater volume of work, but on a more economic basis. A redundancy situation will also arise where all or part of a business relocates. This can include situations where a business outsources its work to India or where a local factory relocates to the next town. Redundancy therefore does not only arise in times of economic hardship.

How many employees do you intend to dismiss?

Specific statutory provisions apply where an employer proposes to dismiss 20 or more employees (irrespective of their length of service) at "one establishment" within a 90 day period. This is referred to as "collective redundancy" or "collective consultation". Specific timetables for collective consultation are prescribed and employers are also required to notify BERR of their proposals using form HR1. There is no specific definition of what an "establishment" might amount to. Take for example an Oil and Gas company which operates five installations situated in the North Sea and proposes to dismiss four employees from each installation. If each installation is considered to be one "establishment" then no collective consultation will be required, but, if all five of the installations together are the "establishment", then collective consultation will be required. The facts in each case are looked at individually but it is clear that the entity in question need not

have any legal autonomy, nor need it have economic, financial, administrative or technological autonomy, in order to be regarded as an "establishment". Collective consultation is complex and legal advice should be sought when contemplating redundancies of 20 or more. There are many legal pitfalls when undertaking collective consultation and the consequences of getting the process wrong are potentially much more costly than in an individual redundancy situation involving less than 20 employees. Here the tribunal has the power to make an extra award, known as a Protective Award of up to 90 days gross pay (without any cap) for each affected employee.

Fair Selection Criteria and Pool

As stated above, redundancy is only a potentially fair reason for dismissal. All employees who have over one year's continuous service have the statutory right not to be unfairly dismissed. In addition to showing a genuine redundancy situation, in order for a dismissal to be fair, the employer must show that he has a proper basis for pooling employees, applying objective selection criteria, individual consultation and proper consideration of any alternative work.

Care should be taken at the outset of a redundancy exercise to ensure that the correct pool of employees is identified. This may involve looking at employees from other departments or with different job titles where employees have interchangeable skills.

Most employers will then use a matrix to score employees on their chosen selection criteria from the identified pools.

Selection criteria, such as "attitude", are unlikely to be sufficiently objective. As far as possible, chosen criteria should be capable of being measured against specific yard sticks such as performance appraisals or productivity levels.

Any criteria which may be discriminatory should be avoided. For example care should be taken when using length of service as a selection criteria, as this is likely to discriminate on the grounds of age. Absence levels are a useful selection criteria but allowances should be made for disabled employees or employees on maternity leave who are likely to have higher absence levels.

Consultation Process

It is important to remember that the statutory disciplinary and dismissal procedures (DDPs) apply to all dismissals, including redundancies (except for collective redundancies). Care must therefore be taken to ensure that none of the vital steps in the 3-step statutory process are inadvertently omitted until the DDPs are repeated on 6 April 2009.

Whilst there is no one specific magic formula when undertaking an individual consultation process, it is vital to meet with each affected employee individually at least twice prior to confirming their dismissal. An appeal must be offered and employees should be allowed to take a companion to each meeting. Consultation must be meaningful. Employees should be given a true opportunity to discuss matters and put forward any suggestions before a final decision is taken. This may involve more than two meetings depending upon the circumstances and what has been raised in meetings.

We are able to help you decide on a consultation process which is fair and is also tailored to your specific business requirements and we can guide you through each step of the process.

The rules governing collective consultation are complex. Consultation must be with employee representatives, who may require to be elected specifically for the purposes of the redundancy exercise, or where there is a recognised trade union, consultation must take place with that union.

Specific rules also govern when consultation should begin and exactly what an employer must consult about in a collective situation. In one recent case, the Employment Appeal Tribunal confirmed that, where a workplace closure is proposed, the employer must consult about the business reasons for the proposal and not just about the effect that the closure might have on the affected employees.

Redundancy Pay

Redundant employees, with two or more years of service, are entitled to receive a statutory redundancy payment. This is calculated by reference to the employee's age and length of service.

Many employers also provide enhanced redundancy payments, often only in exchange for a signed compromise agreement. If enhanced payments have been made in the past, then employees may have a contractual right to receive them going forward by virtue of an adopted custom and practice. This can result in disputes, especially where these enhanced payments have been of a high value.

Historic enhanced payment schemes may also be discriminatory on the grounds of age and this can be problematic going forward. An enhanced scheme will be discriminatory unless the enhancements mirror the statutory scheme.

Alternative Employment

As part of a redundancy exercise, employers are obliged to consider whether there are any suitable alternative positions within their organisation, and within any associated organisations, which could be offered to redundant employees. A failure to do so will result in a potential claim for unfair dismissal. On the flipside, an employee who unreasonably refuses to accept an offer of suitable alternative employment, may not be entitled to receive a statutory redundancy payment.

Employers should offer lower grade and lower paid jobs to employees to which they may be suited and should not presume that these would not be acceptable.

Employees on maternity leave and are made redundant will generally be entitled to first refusal of any suitable vacancies. Employees are also entitled to a trial period in their new role.

The cost of getting it wrong

Employers must ensure that dismissals on the grounds of redundancy are both procedurally and substantively fair. Employers who get this wrong may face unfair dismissal claims from each affected employee. Generally the amount of compensation which an employment tribunal can award is capped, currently at the level of £63,000 (rising to £66,200 on 1st February 2009). Where discrimination is alleged, employers face potentially unlimited awards. Where the DDPs are not followed correctly, the tribunal is bound to increase the award made to each affected employee by between 10% and 50%. Employees may also bring claims for breach of contract if they believe that they are entitled to enhanced redundancy payments.

As discussed above, a hefty Protective Award can also be made in respect of each employee to penalise employers for a failure to consult properly in a collective redundancy situation. This is a punitive award and the starting point is an award of 90 days full pay. This will only be reduced where the tribunal is persuaded that there is justification for doing so. Where there has been a failure to consult properly in a collective redundancy, the claim for a protective award is made by the employee representative and the tribunal is required to make an award in respect of all of the affected employees.

Redundancy exercises, even when they go smoothly, can attract adverse publicity and consideration will also need to be given to managing this from the outset.

If you would like to discuss any aspect of this Update further, please contact or one of our employment law team members who will be happy to help:-

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We also provide full or half-day training courses on various topics including redundancy handling.