

Redundancy and the law

Branches can protect members' rights by following the legal processes outlined in this factsheet. It is vital to ensure the law is being observed. Questioning a council's decision-making process can be a useful delaying tactic, and also give your campaign momentum. Most of the information here comes from the Labour Research Department booklet *Redundancy Law: A guide for union reps* – see the *Further information* factsheet for how to get a copy. Other sources of legal information are found throughout the pack, for example, in relation to the calculations concerning redundancy pay and the LGPS.

Legal sources

The law below applies to England, Scotland and Wales. Northern Ireland has its own legislation, although the provisions are similar. Both statute and case law determine redundancy obligations and rights. The main legislation governing redundancy includes:

- The Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA)
- The Collective Redundancies and Transfer of Undertakings (Protection of Employment) Regulations 1995 (SI 1995/2587)
- The Employment Rights Act 1996
- The Collective Redundancies and the Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999 (SI 1999/1925)
- The Collective Redundancies (Amendment) Regulations 2006 (SI 2006/2387)

The Employment Equality (Age) Regulations 2006 which came into force on 1 October 2006 have also affected redundancy rights. For example, they remove previous upper and lower age limits (of 65 and 18 respectively) for statutory redundancy payments. The existing age bands used to calculate statutory redundancy pay are unaffected.

Definition

A genuine redundancy only arises, for the purposes of redundancy pay, in the following situations (Employment Rights Act 1996 s 136):

- the employer has ceased, or intends to cease, to carry on the business for the purposes of which, or in the place where, the employee was so employed; or
- the requirements of the business for the employees to carry out work of a particular kind, in the place where they were so employed (or otherwise), has ceased or diminished or are expected to cease or diminish.

The definition is therefore quite wide. Redundancy can occur when:

- the workforce is reorganised and there is less work
- changes in conditions mean the old job is quite different from the new one
- the business relocates
- an employer puts work out to contract.

The test for redundancy is whether the employer requires fewer (or no) workers to do work of a particular kind, and not just whether the work itself has ceased or diminished.

The primary reasons for making redundancies are the reorganisation of working methods and efficiencies. Confusion may arise because 'making someone redundant' can be used as another way of saying that an employee is being dismissed for some reason other than redundancy.

Individual and collective consultation

Individual consultation is necessary for all redundancies and the law requires collective consultation in the multiple redundancy situations referred to below. Organisations should follow the stages of their own redundancy procedure. As an absolute minimum before 6 April 2009 organisations must follow the three key steps of the the statutory disciplinary and dismissal procedure. From 6 April 2009, organisations should follow the stages of their own redundancy procedure. As a bare minimum, this should encompass the stages referred to here and adhere to

the ACAS guidance on handling redundancies (See the advisory booklet *Redundancy Handling*, at acas.org.uk). If the redundancy process began before 6 April 2009 and continues after 6 April, there are important transitional rules which apply to lodging any grievances associated with the redundancy process. Appropriate advice should be sought on what procedure to follow.

Consultation should include:

- the reason for the redundancy dismissals
- why and how individuals have been selected
- possible ways of avoiding redundancy
- possible alternative work.

Collective consultations (the duty only arises where 20 or more redundancies are proposed) with recognised trade unions or elected representatives must start at least 90 days beforehand for proposed redundancy dismissals of 100 or more employees, and at least 30 days before notification of redundancies for 20-99 employees. In cases where collective consultation is required, it must be completed before notice of dismissal is given to any of the employees concerned. The maximum compensation that can be awarded if an employer fails to consult is 90 days' pay.

ACAS says that as good practice, "employers should consult at an early enough stage to allow discussion as to whether the proposed redundancies are necessary at all. The consultation process should precede any public announcement of the redundancy programme and the issue of notices of termination."

The law requires meaningful consultation – it is not enough only to inform. Section 188 (4) of TULRCA specifies that the employer must provide the following information in writing to the appropriate representatives:

- the reason for the redundancies
- the numbers and description of employees whom it proposes to make redundant
- the total number of employees of any description
- the selection procedure to be used
- the proposal for how the redundancy dismissals are to be carried out, including the timescale
- the proposed method of calculating the amount of any redundancy pay, if this is more than the statutory minimum

Consultation must be real and not a 'sham', according to an Employment Appeal Tribunal decision which said that issuing redundancy notices by letter half an hour after a meeting with the unions suggested that consultation was not meaningful. A local authority had already decided on the number of redundancies it was going to make and made it obvious that it was not going to consider any alternative. This was not genuine consultation (*Middlesbrough BC v T&G and UNISON EAT/26/00*).

Seek legal advice from your regional office if you think proper consultation has not taken place – an action may be available at an Employment Tribunal. The complaint must be lodged either before the last of the dismissals takes effect or within three months after the last of them. In exceptional circumstances, the tribunal can allow a longer period for a complaint to be lodged but you should never rely on this exception!

In many branches where redundancies have been announced so far, the 'genuineness' of the consultation can be called into doubt. The decision-making process can be analysed in further depth by making a Freedom of Information Act request or by invoking the *Information and Consultation of Employees Regulations*.

Selection

In the earlier stages, councils should carefully determine the initial selection pool for redundancy. Unless there is a customary arrangement, the council should identify the group of employees who may be made redundant at the planning stage. This will usually be those who undertake a similar type of work in a particular department, or work at a relevant location, or whose work has either ceased or diminished, or is expected to do so. These will be the 'selection pool'.

Where there is a choice between employees, selection must be based on objective criteria, which may include:

- length of service
- attendance records
- disciplinary records
- skills, competencies and qualifications
- work experience
- performance records

Following the introduction of age discrimination legislation, 'last in, first out' (LIFO) is now dubious as a selection method. It can also discriminate on grounds of race, gender or disability if your employer has made recent moves to ensure a more diverse workforce. Case law holds that LIFO may still be a relevant as part of a wider range of selection criteria, however it must not be used as the sole selection method, and the council must be able to justify its use. In addition, LIFO remains an unsatisfactory way of retaining the most competent staff.

Tribunals should look favourably on selection procedures based on a points system which scores each employee against the relevant justifiable criteria. However, to avoid discrimination, great care must be taken in choosing and applying the criteria. Unfairness can be indirect or overt. For example, selecting part-timers in preference to full-timers could be indirectly discriminatory if it affects a high proportion of women.

ACAS points out "a dismissal may also be considered unfair where the reason or principal reason is redundancy but the circumstances apply equally to other employees who have not been selected. Employers need to show that in selecting a particular employee they had compared him or her in relation to the agreed selection criteria with those others who might have been made redundant and that, as a result, it emerged that the employee was fairly selected."

Notification

The employer must give the Department for Business, Enterprise and Regulatory Reform at least 90 days written notification if they are making 100 or more workers redundant, and at least 30 days for 20 to 99 employees. The department does not have to be notified for less than 20 employees.

Unfair dismissals

In law, there are many reasons which are automatically unfair for selecting employees for redundancy, including:

- trade union membership (or non-membership)
- part-time status
- pregnancy or maternity-related reasons
- gender, sexual orientation, marital status, disability, race or religion.

A dismissal may also be a normal (ie not automatic) unfair dismissal if there is not a genuine redundancy or if the selection criteria are too imprecise or subjective. And although the reasons for redundancy may be completely fair, it may still be judged unfair on procedural grounds such as lack of consultation.

Dismissing an elected representative will be automatically unfair if it is wholly or mainly related to the employee's status or activities as a representative. In addition, employers must allow representatives access to affected employees.

Appeals

Employees dismissed by reason of redundancy must be given the opportunity to appeal their selection for redundancy.

Time off

The law requires employees be given paid time off to look for work during the final notice period.