TACKLING COLLECTIVE REDUNDANCIES

Introduction

Since 2010 over 940,000 jobs have been lost in the public sector. Against the current background of sustained cutbacks in public spending and the Conservative government’s commitment to review and cut back existing budgets, job insecurity and redundancies are a major issue amongst public sector workers.

This factsheet gives some guidance, examples of case law rulings and advice on how to deal with collective redundancies, particularly focusing on the legal duty of employers to ‘consult’. It may be possible for branches to negotiate a new, or update / protect an existing redundancy agreement.

It is essential that branches and UNISON reps ensure that if redundancies take place in their workplace that these are carried out following the correct procedures and time-lines. This is to make sure the best protection possible is in place for UNISON members. It is also important for branches to note some of the legal avenues that are available in responding to collective redundancies (e.g. failure to consult with Unions/employee representatives).

What should branches do?

An organising response and representation is crucial to supporting and defending members who may be at risk of redundancy. Branches should:

- try and agree a collective agreement of redundancy and redeployment with your employer before a redundancy situation occurs, including a commitment to avoid putting staff at risk of compulsory redundancy wherever possible, as it may be easier to influence management before redundancies are put on the agenda. If employers do not follow an agreed procedure there may be grounds for claiming unfair dismissal;

- If there are redundancies being proposed or plans to dismiss and re-engage staff on new contracts or even just rumours circulating about them - although this can be an extremely unsettling time for any employee, it is also an ideal time to recruit new members in order to support them through this process, Branches should involve members and encourage members to become UNISON reps;
What is a collective redundancy consultation?

Where an Employer proposes to make redundancies of **20 or more employees** within a period of 90 days or less it must consult on its proposal with representatives of the affected employees and also notify BIS.

The duty to collectively consult is imposed under section 188 of TULRCA, of Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), which implements the European Collective Redundancies Directive (Directive 98/59).

When the duty arises

The duty to consult arises where the employer is proposing to dismiss as redundant **20 or more employees** at **one establishment** within a period of **90 days or less**.

Where redundancies take place an employee’s contract of employment is terminated by reason of redundancy.

Employers cannot begin consultation with a closed mind or properly consult over something that they have already decided to do. Consultation must therefore begin while the proposals are still at a formative stage.

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In **Leicestershire County Council v UNISON UKEAT/0066/05**, an Employment Tribunal (“ET”) found that the Council had breached section 188 by failing to consult when it sought to make changes to its employees' contracts by dismissal and re-engagement. The Council argued that no duty to consult arose until the Council members had approved the plan to dismiss and re-engage the staff. The ET said that the obligation to consult arose before a decision to dismiss had been taken. In any event, the ET ruled that the decision had in fact been taken by the Council’s management a month before it was formally approved by the Council’s members. The Council appealed and the Employment Appeal Tribunal agreed with the ET and followed the ECJ’s decision in **Junk v Kühnel [2005] IRLR 310** and held that "proposing to dismiss" means "proposing to give notice of dismissal". This confirms that consultation should begin before decisions on dismissal for redundancy are made.
Whom to inform and consult

The duty is to inform and consult appropriate representatives of the affected employees. Where the duty applies, the employer must also notify BIS of the proposed redundancies. Failure to do so is a criminal offence.

Affected employees are those affected by the proposed dismissals or by measures proposed to be taken in connection with their dismissals. Where there is a recognised trade union in relation to any of the affected employees, the trade union must be consulted. In other cases, the employer may consult with representatives directly elected by the affected employees.

Consultation process

Consultation must begin in good time and the minimum time periods for consultation will depend on the numbers of redundancies proposed.

Where 100 or more redundancies are proposed, consultation must begin at least 45 days before the first dismissal takes effect (this period was reduced from 90 days on 6 April 2013).

Where less than 100 redundancies are proposed, the minimum period for consultation must begin 30 days before the first dismissal takes effect. Proposed voluntary redundancies should be included in the numbers.

Consultation must always begin before any final decisions on redundancies have been made. Branches should try to negotiate for UNISON to be consulted when any redundancies are first considered and before formal proposals are submitted. If branches are involved in the process at an early stage, discussions on how to avoid redundancies can take place. The point of consultation is that it is undertaken "with a view to reaching agreement" on ways and means of avoiding the dismissals, reducing the number of dismissals and mitigating their consequences. For example, offering early retirement, reducing agency staff, reducing overtime, re-deployment/ re-training opportunities (with appropriate pay protection) and once all these avenues have been explored seeking volunteers for voluntary redundancy to the widest pool of staff, in order to create re-deployment opportunities for other staff.

It is not sufficient for the employer to simply explain its proposals and listen to any counter-proposals. Employment Tribunals have ruled that the consultation process should be 'genuine and meaningful' and not just a process with a foregone conclusion at the end. Failure to consult properly can result in employers being taken to an Employment Tribunal and workers may be eligible for a 'protective award'.

Practical issues arise over when the consultation period covers, say, the Christmas break or a period when the business is closed. In a case called Cable Realisations Ltd v GMB Northern, the Employment Appeal Tribunal decision upheld a tribunal's decision that consultation could not take place during an annual shutdown.

When does consultation begin?

Consultation will typically begin with the announcement of proposed redundancies and the provision of information to the employee representatives. Where it is necessary to elect those representatives, consultation cannot begin until after the representatives have been elected. The date on which the requisite statutory information is provided to the representatives will typically be taken to be the date consultation begins.
Information to be provided

The following written information must be provided as a minimum (s.188 TULRCA 1992):

1. The reasons for the proposed dismissals.
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. (Following the European Court of Justice (“ECJ”) decisions in Woolworths, Bluebird and Nexea the ECJ has ruled that collective consultation obligations are not triggered by the number of staff across an undertaking. Instead they were triggered by the number of staff at risk of redundancy in the local business unit).
4. The proposed method of selecting employees who may be dismissed.
5. The proposed method of carrying out the dismissals, with due 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 (over and above the statutory redundancy payment) to employees who may be dismissed.
7. "Suitable information" about its use of agency workers (Section 188(4)(a)-(i), TULRCA.)

Although section 188 provides that this information must be disclosed "for the purposes of the consultation", it does not specifically require the union to consult on all the matters set out.

The matters that must be covered by the consultation are set out in Section 188(2) – i.e. consultation about ways of avoiding the dismissals, reducing the numbers of employees to be dismissed, and mitigating the consequences of the dismissals, and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

However, failure to consult over such matters as the selection criteria and whether in due course those criteria have properly been applied to the employees in question may in some cases lead to findings of unfair dismissal (Williams and others v Compair Maxam Limited [1982] IRLR 83 (EAT))

CHECKLIST: What Employers should do during a consultation process?

1. Employers should inform the Secretary of State for Business, Innovation and Skills on the number of proposed redundancies;
2. Employers should provide the information set out in s.188 TULRCA to Trade Unions/Employee representatives.
3. Employers must consult with any recognised trade union;
4. Employers should allow sufficient time in order to consult with the workforce i.e. 30 or 45 days depending on the number of redundancies proposed (the statutory consultation period in Northern Ireland remains at 90 days where 100 or more employees are affected).
5. Employers should consult on ways of avoiding or reducing the number of proposed redundancies, and mitigating the consequences of dismissal.
6. Employees at risk should be involved in the consultation and can influence the discussions and decisions made during this part of the process – ACAS have issued guidance on the issues that should be discussed during the consultation process (LINK);
7. Employees on fixed-term contracts ‘which have reached their agreed termination point’ are excluded from collective redundancy consultation obligations.
8. No dismissals can take place until after the consultation period has finished.
9. Redundancy notices should not be issued until collective and individual consultations have taken place and the statutory time limit has ended.
10. Branches should note that even if at the end of the redundancy process less than 20 employees are made redundant, the law still states that employers have a statutory duty to consult.
Case Study – UNISON v Capita Business Services Ltd – March 2013

A tribunal decision ruled in favour of UNISON after the union highlighted Capita’s failure to consult fully over proposed collective redundancies.

Following the transfer of 36 call-centre staff from the London Borough of Lambeth to Capita, Capita announced their decision to move their call-centre service to another location outside of London. During the consultation process UNISON requested information from Capita under the Trade Union and Labour Relations (consolidation) Act 1992 on the number of agency staff they had working for them, their locations and details of the types of job they were undertaking, in order to make the case to the employer that agency staff should be replaced by employees.

Capita did not supply this information and replied that they had complied with all the obligations surrounding all legislation and made the 36 call-centre staff redundant at the end of the consultation. The tribunal ruled that this information should have been disclosed as part of the collective redundancy consultation and awarded each of the call centre staff protective awards of 45 days gross pay.

Redundancy Procedure

It is important for there to be objective, unbiased and non-discriminatory criteria used in selecting workers for redundancy. If this is not the case, dismissal may be ‘unfair’.

Selection pool

The first step is determining the ‘selection pool’ of employees who at risk of being made redundant. This varies depending on if the redundancy is due to a need to reduce staffing across the whole organisation (in which case it can include most staff) or just one section. In the later case, the selection pool may include everyone in that section or those whose jobs are being reorganised. However, the selection pool may also be wider than this. If one cleaning post is being made redundant this is also part of the whole cleaning function, so the selection pool for the single cleaning redundancy could cover all cleaners, rather than just the specific department.

Selection criteria

Once the selection pool of employees is determined, trade unions should be consulted on the ‘selection criteria’ to be applied to those in the selection pool. It can be difficult finding set selection criteria common to every case, so try to agree criteria appropriate to the specific redundancy situation.

Criteria must be fair, objective, consistently applied job related criteria, backed by evidence where possible, and non-discriminatory on grounds of sex, sexual orientation, race, disability, religion or belief or age. They should also not discriminate on grounds of trade union membership, pregnancy, part-time status or fixed-term contract status.

In the past, selection criteria were often quite simple (for example, ‘last in, first out’) but now they are often on the basis of a point scoring system, or matrix. The scoring system should be open and fair, with workers entitled to know their own score and the evidence on which it was based, as well as having the option to appeal against the score.

Criteria might be skills based (for example, the ability to operate certain machinery) or performance based. ACAS gives an example of using skills, experience and aptitude, along with standard of work, attendance and disciplinary record. It is important that objective criteria are used to measure these. Each factor will be graded - for example, five points for ‘consistently exceeding objectives’ and one point for ‘failing to meet objectives’ - and the individual factors may be weighted - for example, the standard of work score is multiplied by three while the attendance the score is multiplied by two. The total number of points for each person then determines who is made redundant.

Equality considerations

It is important to be careful to avoid discrimination in selection criteria, and the new age equality regulations specifically mean that:

- Lower and upper age limits are scrapped for statutory redundancy payments scheme;
- Redundancy entitlements should not taper for employees aged 64;
- Selection criteria must be free from age discrimination.

Length of service is likely to indirectly discriminate against younger workers, but using it as just one criterion amongst many could be ‘objectively justified’ on the grounds that it encourages retention of staff.

Each equality area needs to be looked at. Attendance (or sickness absence) may discriminate against disabled staff if it includes time they are off work which is related to their impairment. A good employer will have a disability leave agreement to cover this. If the employer has recently been trying to address inequalities in the workforce by recruiting staff in a certain group then a length of service criterion might discriminate against them. Employers should make reasonable adjustments to the selection procedure to remove any disadvantage that a disabled employee would otherwise have.

Right to appeal
As a general rule, the employer must comply with the three-step standard dismissal procedure during a redundancy. In other words, it will be required to write to the employee setting out the grounds on which it is contemplating dismissing him or her, attend a meeting with the employee to discuss the matter and give him or her an opportunity to appeal against this decision.
Flow Chart for Reps - Issues to consider before consultation begins

- **When does the redundancy consultation start?**

- **What is meant by “an establishment”?** (may need to seek some advice)

- **How many employees are involved?**

- **Who do you need to consult with?**

- **Discuss with the employer how the consultation should be conducted?**
  - Stress UNISON’s position that there should be no compulsory redundancies.

- **Check that the employer has provided / disclosed all relevant information?**

- **Are there less than 20 people at risk?**

- **How long should the consultation last?**

- **When would any dismissals take effect?**

- **If an employer has not consulted on a collective redundancy – seek legal advice**
Service Group Agreements

Public sector workers in Health and Local Government are covered by national agreements covering redundancy procedures and pay. National agreements may also be in place for some of the bigger private companies that have had staff from the public sector transferred out to them. If you are unsure and want to check if a national agreement exists with a private company get in contact with private.contractors@unison.co.uk.

Health

The Agenda for Change Terms and Conditions Handbook covers terms of redundancy for NHS staff. Agreements in England differ from those in the other devolved countries:

- In England staffs with two year’s service are eligible to a month’s pay per year of service subject to a total of annual earnings floor of £23,000 and cap of £80,000. NHS staff who have reached the minimum pensions age and are members of the NHS pensions scheme can take their pension early.
- In Northern Ireland, Scotland and Wales NHS staffs with two year’s service are eligible to a month’s pay per year of service and are not subject to a floor or cap in redundancy pay.

Local Government (England, Wales & Northern Ireland)

The national ‘Green Book’ agreement only provides for statutory redundancy pay, but local authorities have discretion powers to enhance this. They may:

- Pay redundancy pay based on actual weekly earnings, rather than using the statutory system which has a weekly pay cap.
- Grant additional pension of up to £65,000 per annum and this can be awarded up to six months after the member’s redundancy date.
- Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 allows employers to give up to 104 weeks in pay in compensation for early termination of employment.

Higher Education - Post-92 Sector institutions

The national contract covering staff in the post-92 sector provides for 3 months’ notice of dismissal by the employer. However, some institutions might have local agreements which provide up to a year’s notice in the event of redundancy.

Further Education (England and Wales)

There are no national agreements covering further education colleges; however there are joint national guidelines between the Association of Colleges and teaching unions which set out how to avoid and reduce the number of redundancies.
Further information

UNISON factsheets / guidance on related issues can be found by clicking on the links below:

- **Public Sector Equality Duty Factsheet**
- **Unfair Dismissal Factsheet**
- **NHS Agenda for Change Handbook 2015 – the national agreement for non-medical staff in the NHS**
- **Tackling Dismissal and Re-engagement Strategies**
- **UNISON fighting redundancies in local government guide**
- **UNISON guide to negotiating and campaigning with the freedom of information acts**
- **Disclosure of information to trade unions for collective bargaining purposes**
- **http://www.unison.org.uk/upload/sharepoint/Briefings%20and%20Circulars/Public%20Sector%20Equality%20Duty%20Factsheet.pdf**
- **ACAS Handling Large Scale Redundancies Factsheet**
- **New Updated (June 2015) Facility Time Guidance**