DISMISSALS, REDUNDANCY AND TRANSFERS

Introduction
This guide is principally concerned with bargaining to achieve maximum protections for staff when an employer comes forward with proposals. This guide gives an overview for branches of the basic legal rules covering dismissals, redundancy and transfers in the workplace with some examples of case law rulings.

This guide focuses mainly on the legal duty of employers to ‘consult’ in redundancy and transfer situations and looks at how branches can negotiate an improved redundancy agreement as well as benchmarking redundancy pay by sector.

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 timelines. This is to ensure the best possible protection is in place for UNISON members. It may be advantageous for branches to note some of the legal avenues that are available to them in responding to collective redundancies (e.g. failure to consult with unions/employee representatives - London Borough of Wandsworth v Vining and others) or redundancies related to TUPE transfers.

An organising response to resisting redundancies is set out in other guidance and links to these guides can be found in the further information section of this guide.

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Fair and Unfair Dismissals
A dismissal happens when an employer ends an individual's employment. An employer can dismiss an employee as long as they have a valid reason that they can justify and show they have acted reasonably. An employer’s actions must be consistent and fair – they must be able to show that they have investigated any situation fully before they have dismissed the individual.

Employees should receive the notice stated in their contract or the statutory minimum notice (whatever is longer). This is not applicable to all cases where employees are dismissed for gross misconduct – there may be some situations where you can be dismissed immediately.

A dismissal is usually fair if an employee has been dismissed for one of the following reasons:
- A reason relating to an employee’s conduct
- A reason relating to an employee’s capability
- A redundancy situation
- A statutory duty or something prohibiting an employee’s continued employment
- Some other substantial reason

In all cases employers should follow their own (capability, disciplinary and redundancy) polices, consult with recognised unions and act fairly otherwise an employee can claim the dismissal is unfair.

Fair Dismissal Definitions

**Capability** – Defined as when a member of staff can no longer perform their role to the desired standard. This includes illness as persistent or long term illness can make it impossible to do a job but before an employer takes any action they should offer support and give reasonable time off to recover from an illness. If an individual has a disability they have more protection in law and if they are dismissed due to their disability they can claim unlawful discrimination;

**Organisational Change** – An employer may be changing the organisation of its operations, changing location or closing down. Branches should make sure that the selection process for redundancy is fair. Dismissal due to ending and non-renewal of a fixed-term contract is likely to be a fair dismissal if the contract is not renewed and if it was advertised as a temporary or fixed-term arrangement. If it is not renewed because there is a need to reduce employees, than this is a redundancy situation;

**Summary dismissal (misconduct)** – An employee is dismissed for gross misconduct;

**Dismissal to comply with a legal duty or restriction (contravention of law)** – It is fair to dismiss an employee if continuing to employ them would contravene a legal duty or statutory restriction – this includes immigration status cases as employers have a legal duty to carry out immigration checks to ensure their workers have the right to work in the UK;

**Dismissal for some other substantial reason** – this is a provision within the Employment Relations Act 1996 (ERA 96) that makes it fair to dismiss an employee. There is no statutory list of situations which would fall under this provision but examples include
business reorganisations where employees are not made redundant but they refuse to accept unfavourable changes to their contract. Branches should seek advice from their regional organiser in these situations. This also includes cases where members have been dismissed due to a breakdown in trust and confidence. This is an implied contractual term and a breakdown of trust and confidence can lead to a fair dismissal for some “other substantial reason”;

Unfair Dismissal

Failure to consult with the employee or his or her representative may make a dismissal unfair, and so give the employees an additional ground of complaint against the employer. However, compliance with Section 188 of the ERA 96 does not automatically mean that the employer has behaved reasonably with regard to consultation and failure to comply with s 188 does not automatically mean that the dismissal is unfair.

In England, Scotland and Wales, to have full protection from unfair dismissal an employee whose employment began on or after 6 April 2012 must have two year’s continuous service with the same employer (if their employment began before 6 April 2012 they need only one year’s continuous service). In Northern Ireland, the qualifying period remains one year.

Case Study - Stratford v Auto Trail VR Ltd UKEAT/0116/16
The outcome of this Employment Tribunal could have implications in unfair dismissal claims where employees have previous lapsed disciplinary warnings on their employment record. Mr Stratford had worked for this employer for approx 13 years and over this time he was subject to around 17 disciplinary issues (some included warnings). All these previous warnings had lapsed when in October 2014 he was issued a final written warning for contravention of staff handbook rules. The employer proceeded in dismissing Mr Stratford even though all his previous warnings had lapsed. Mr Stratford’s claim of unfair dismissal was dismissed by the Employment Tribunal and the tribunal stated that the employer could count Mr Stratford’s previous disciplinary warnings within their decision to dismiss him, as there was enough evidence to suggest (judging from previous disciplinaries) that Mr Stratford’s employment record would not improve. This is an important ruling in unfair dismissal cases as it confirms that Employment Tribunals will examine and may choose to take into account a claimant’s disciplinary record even if previous sanctions have lapsed.
**An overview of your legal rights**

- An individual has the right to request a written statement detailing the reasons why they have been dismissed. They have to have the employment status of an ‘employee’ and have 2 years continuous service. Unfortunately if they have the employment status of a ‘worker’ (they do not have a contract of employment) or have less than 2 years continuous service then that individual has limited protection under the law;
- An individual’s employer must provide them with this statement within 14 working days;
- An individual’s employer must provide them with this statement if they are dismissed while on maternity leave – regardless of how long they have worked for the employer;
- Employees who are dismissed unfairly and who have 2 years continuous service can submit a claim for unfair dismissal. There are tight legal deadlines to adhere to and employees have 3 months less one day from the dismissal date to submit a claim;
- All claims must be submitted to ACAS for early conciliation before being heard at an Employment Tribunal (ET) – An ET will not hear a claim without the Early Conciliation Certificate;
- If a member of your branch thinks they have been dismissed for trade union related reasons, please contact your regional officer as soon as possible - there are extra protections within the law which guard against victimisation on union grounds. In these cases the individual may be able to make an application for ‘interim relief’ and they are exempt from the early conciliation process, but an application must be made within 7 days of the incident of victimisation;
- A dismissal must be carried out using a ‘fair’ procedure and an employee must have the opportunity to explain their side of the story, challenge any redundancy proposals and be given enough notice of the dismissal;
- Employees have the legal right to be accompanied by a trade union representative;
- There are some situations where a dismissal is “automatically unfair” – for example some cases of whistleblowing or applying for maternity leave;

**Branch Checklist**

In judging whether a dismissal can be challenged the following points are key indicators:

- Does the employee have 2 year’s continuous service with the same employer?
- Was the member on a fixed term contract? What were the reasons for its non-renewal?
- Was the dismissal linked to trade union membership or activity? If yes, seek urgent advice from your Regional Officer
- Were the employer’s actions “consistent and fair”
- Looking at the list of definitions for dismissal – would the dismissal fall into one of these categories?
- Did the employer follow its own workplace policy relating to the dismissal (e.g. capability, disciplinary, redundancy, etc)?
- If the employee was made redundant, did the employer consult with the employee over the dismissal?
- If the member has been dismissed for ‘some other substantial reason’ including a breakdown in trust and confidence, seek advice from your Regional Officer. If your member has been dismissed through a disciplinary process and also has registration of a professional body (NMC) seek advice from your Regional Officer.
- Has the dismissal taken place as a result of a TUPE transfer? If yes, seek urgent advice from your Regional Officer
Constructive Dismissals

Constructive dismissal is where an individual has been forced to leave their job against their will because of the actions of their employer. The reason for resigning and claiming constructive unfair dismissal must be a serious one – a fundamental contract breach.

The employee must be able to show an ET that they resigned in response to their employer’s behaviour and this (in a majority of cases) can be very difficult to prove. If managers have attempted to address some of the issues highlighted by the employee, an ET may rule that they have taken adequate steps to prevent a breach of contract. If an employee stays in a job, despite the behaviour of the employer, for a period of time before resigning and bringing a claim, an ET may rule that the employee had “acquiesced” and accepted the conduct or treatment.

Resignation from a job should be the last resort and any members contemplating making an unfair constructive dismissal claim should speak immediately with their branch secretary who can seek advice. Some examples of a fundamental contract breach include:

- An employer unilaterally cutting pay or hours
- An employer moving employees to a new site, a significant distance from an old site (see case study on page 11: UNISON v Capita Business Services Ltd – March 2013)
- Withholding contractual sick pay

Branch Checklist

Constructive dismissals are notoriously difficult to prove. Here are some key points to consider if a member thinks they may have a case for constructive dismissal. Branch Secretaries should seek advice from their Regional Official on cases relating to constructive dismissal as a legal opinion will need to be sought

- Does the employee have 2 years continuous employment in the same employer?
- Has the employer attempted to address the issues that the employee is citing as a breach of contract?
- Has the member already resigned and did they state in their resignation letter the reasons for this resignation?
- Is there evidence to provide an Employment Tribunal that there has been a fundamental contract breach?
Dismissal and Re-engagement (varying contracts of employment)

In the case of dismissal and re-engagement, the reason put forward by the employer for dismissal would fall within the “some other substantial reason” category as this encompasses the need to impose dismissals for a “sound business reason.”

In general though employment tribunal decisions suggest that the burden of proof needed to show a sound business reason for the dismissals is fairly low. The other avenue for seeking to demonstrate unfair dismissal lies in the fairness of the procedure followed. An employment tribunal would focus on the following key points in determining whether the employer acted reasonably.

- The employer’s motives for introducing the changes to terms and conditions;
- The employees’ reasons for rejecting the changes;
- Whether the employees were given reasonable warnings of the proposed changes;
- Whether the changes and their impact were sufficiently explained to the employees;
- Whether the employer undertook an assessment of the impact of the changes on employees and whether alternatives to any changes were considered;
- Whether the employer attempted to obtain the employees’ voluntary agreement to any of the changes;
- Whether a reasonable and genuine consultation process was undertaken with the affected employees. This would include the employer listening to their reasons for rejecting the changes, responding reasonably to objections and making concessions where reasonable to do so;
- Whether a majority of the employees accepted the changes;
- Whether any recognised trade union recommended or objected to the changes.

An employee may be unfairly dismissed even if they choose to sign up to a new contract of employment (i.e. where there has been a dismissal and an immediate re-engagement on inferior terms and conditions) with the employer.

Other potential claims

The adequacy of the public authority’s steps to examine the equality impact of its proposals and the resulting steps taken to meet the general duties of the Public Sector Equality Duty offers another possible area for challenge

Branch Checklist

Here are some points to consider when a branch is dealing with proposals to dismiss and re-engage employees.

- Proposals to dismiss and re-engage 20 or more employees within a 90 day period will trigger the duty to consult collectively
- Did the employer consult employees / trade unions over changes to contractual terms and conditions?
- Were members consulted and balloted on changes? If so, did members accept the changes?
- Does the employer have a “sound business reason” to vary employees’ terms and conditions?
- Did the employer offer an incentive to “buy out” clauses of the existing contract? And was this accepted by the member(s)?
- Has the employer varied terms and conditions as a result of a business transfer or service provision change? Please Note: there are special protections and rules that need to be followed - seek advice from your Regional Official
- Did the employer follow their internal policies regarding this process e.g. employee’s grievances regarding the changes to the employment contract?
- The branch should seek advice from their Region Official and get legal assistance if there has been a breach of contract

**Redundancies**

For the purposes of consultation rights, proposals to dismiss employees in order to re-engage them on new terms must be treated as redundancy, even if it is not intended that any employee will be left out of work.

UNISON has won a landmark court victory which makes it harder for employers to ignore staff when making major changes in the workplace. The Court of Appeal ruling in London Borough of Wandsworth v Vining and others means that for the first time employers will be obliged to consult with unions around any workplace issues that affect their members. Before this ruling employers were obliged to consult with the unions where the law required it (e.g. TUPE transfers and redundancy cases). Now employers will need to consult unions in issues involving working hours and holiday pay.

**Case Study: London Borough of Wandsworth v Vining and others**

In London Borough of Wandsworth v Vining, the Court of Appeal (The Master of the Rolls, Beatson and Underhill LJJ) has held that the police service exception in s.280 Trade Union and Labour Relations (Consolidation) Act (‘TULRCA’)1992 amounts to unlawful interference with UNISON’s rights under Article 11 of the European Convention on Human Rights (‘ECHR’).

The individual Appellants, Mr Vining and Mr Francis, were employed by the London Borough of Wandsworth as parks constables. In doing that job, they had been attested as constables and had the powers of a constable to enforce park by-laws – but not any of the wider powers of a constable. They were dismissed as part of a mass redundancy exercise when the Metropolitan Police took over Wandsworth’s parks police service. UNISON complained about the adequacy of the consultation exercise in relation to those redundancies.

Source: Old Square Chambers

During a collective redundancy or transfer of undertakings (TUPE) situation, under the standard information and consultation provisions, employers must:
• provide the employee representatives with information on decisions likely to lead to substantial changes in work organisation or in contractual relations referred to in Section 188 of the Trade Union and Labour Relations Consolidation Act (article 216 of the Employment Rights (NI) Order 1996 in Northern Ireland) (collective redundancies) and TUPE;

• provide the information in such time and in such fashion and with such content as appropriate to enable the representatives to conduct and adequately study and prepare for consultation;

• consult with the employee representatives in respect of these matters.

This position rests on the Collective Redundancies Directive (Directive 98/59/EC) which defines “redundancy” as a situation where workers have become surplus to requirements or where they are dismissed because of a reorganisation or restructure. Such a dismissal does not have to be because the amount of work or business the organisation is receiving has diminished.

The application of collective redundancy consultation to dismissals for the purpose of changing contract terms was clarified in the case of GMB v Man Truck & Bus UK Ltd [2000] IRLR 636 EAT. In this case, the company sought to harmonise two different sets of terms through dismissal and re-engagement. However, the Employment Appeals Tribunal ruled that the dismissals were not connected to the employees and therefore were redundancies for the purpose of collective consultation, even though no jobs had been lost.

This means that, for any proposals involving the dismissal and re-engagement of 20 staff or more, Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (article 216 of the Employment Rights (NI) Order 1996 in Northern Ireland) applies.

Period of consultation

This legislation places a requirement on the employer to consult representatives of the affected employees according to the minimum timetable set out below.

• Open consultation at least 30 days before the first of the dismissals takes effect where between 20 and 99 staff are facing dismissal at one establishment.

• Open consultation at least 45 days before the first of the dismissals takes effect where 100 or more staff are facing dismissal at one establishment.
This is a minimum requirement and ACAS recommends that consultation should be at "an early enough stage to allow discussion as to whether the proposed redundancies are necessary at all."

It is important to guard against any employer attempts to chop up the proposals in a way that enables them to argue that “establishments” are individual workplaces containing fewer than 20 or 100 employers and therefore Section 188 does not apply or only the lower consultation period takes effect. Wherever possible, the union should build the case for the “establishment” to cover the whole workforce and thereby seek the maximum consultation rights. Branches should refer cases to the region to seek legal advice if employers seek to escape from the requirements of Section 188 by manipulating the definition of an “establishment.” The workers’ position on this point was strengthened in 2013 by the case of USDAW v Ethel Austin Ltd, which set a precedent that Section 188 applied even if the 20 employees were spread across separate offices, branches or stores.

**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.

**Content of consultation**

Section 188 specifies that consultation shall cover ways of:

- Avoiding the dismissals;
- Reducing the numbers of employees to be dismissed;
- Mitigating the consequences of the dismissals.

Employment tribunals have made it clear that consultation must be genuine and meaningful, while proposals are still at a formative stage. This position was bolstered by the ruling in *Middlesbrough Borough Council v TGWU and UNISON* [2002] IRLR 332, where the Employment Appeals Tribunal established that it was insufficient for the employer to consult over ways of reducing the numbers to be made redundant, it also had to consult over ways of avoiding the dismissals altogether. The European case of *Junk v Kühnel* [2005] IRLR 310, went one step further to say that consultation must begin before any notice of dismissal is given, not just before any notice ends.

However, in the context of dismissal and re-engagement, consideration of these issues takes on a slightly different character to standard proposals for collective redundancies. Consultation needs to address the proposed changes to terms and conditions that lie behind the proposed dismissals, exploring their justification in equality, financial or other terms, the possible alternatives that would avoid dismissal or the changes that could limit the number of staff affected.

As part of the process, Section 188 specifies that the employer must disclose in writing (by post to the trade union’s head office or handed to representatives) the following information:

a) The reasons for the proposals;

b) The numbers and descriptions of employees it is proposed to dismiss as redundant;
c) 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).

d) The proposed method of selecting the employees who may be dismissed;

e) "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.

f) The proposed method of carrying out the dismissals, taking account of any agreed procedure, including the period over which dismissals are to take effect;

g) The proposed method of calculating any redundancy payments, other than those required by statute, that the employer proposes to make.

It is for the employer to provide information in relation to each of these items and it is no excuse for the employer to say that the representative already knew the answer and so did not suffer any prejudice. In *Securicor Omega Express v GMB 2004* [IRLR 9, the Employment Appeals Tribunal found that there had been a technical default on items c) and g), and the sanction for the employer was a one-day protective award (i.e. one day’s salary) per employee.

In addition to the Section 188 requirements, the general duties of the Public Sector Equality Duty place a requirement on a public authority to examine the possible discriminatory impact of its proposed changes to terms and conditions and take appropriate steps prior to any implementation. Wherever possible, a branch should press for a full equality impact assessment to fulfil this requirement.

**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.

**Failure to Consult**

If an employer does not consult with reps a complaint can be made to the employment tribunal. The claim needs to be brought within three months (less one day) of the last dismissal. This is a punitive award against the employer and the tribunal has the power to make a protective award, which is an award for each affected employee. The award can be up to 90 days’ pay; the case study below is an example of where a UNISON branch was successful at bring a claim of failure 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.

**Branch Checklist**

In judging whether a redundancy can be challenged as an ‘unfair dismissal’, the following points are key considerations:

- Has your employer followed their own redundancy policy?
- The branch should be fully consulted during any organisational change and redundancy situation and information regarding the redundancy proposals should be given to the branch
- Why are the redundancies happening?
- When does the consultation start? How many employees are involved and how many are affected by the proposals? How long is the consultation 30/45 days?
- Consultation should be genuine and must include ways of avoiding dismissals – is there possible alternative employment for staff at risk?
- Have any members been unfairly targeted? Did the employer supply the branch with an Equality Impact Assessment of the proposed changes?
• Was the redundancy in connection with relocation of the employer? Is there a mobility clause in the employee’s contract?
• How are they calculating redundancy pay? Will they enhance redundancy pay?
• If the employer has withheld redundancy pay from a member, speak to the employer and ask for the reasons why the payment has been withheld in writing and seek advice from your Regional Officer.

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.

Possible grounds for legal challenge

Collective claim

Where there is a breach of a “collective” obligation in Section 188, then the remedy is for the trade union (and not the individual employee) to bring a claim to the employment tribunal.

The remedy is in two stages.

1. The first stage is a complaint seeking a declaration that the employer is in default, and, if appropriate, a “protective award” (the employee’s gross earnings for a maximum of 90 days). If the employer is liable, then the award is payable in respect of all those employees who have been dismissed as redundant or all those that the employer proposed to dismiss as redundant.

2. The second-stage remedy is that any aggrieved employee may complain to an employment tribunal to enforce payment of any sums due to him or her.

A complaint may be presented to an employment tribunal by the union that the employer has failed to comply with any requirement of s 188 (duty to consult) or s 188A (election of “special” employee representatives) within three months less one day of the date of dismissal.
Case Study – Termination Notice
In Newcastle Upon Tyne NHS Foundation Trust v Haywood the court of majority ruled in favour of Ms Haywood.

In April 2011, Ms Haywood was informed that she was at risk of redundancy. Ms Haywood was contractually entitled to be given 12 weeks’ notice, but her contract was silent about how notice was deemed given.

Ms Haywood turned 50 in July 2011 which meant that she would be entitled to a more generous pension than redundancy, if she was made redundant after her birthday.

Ms Haywood took annual leave and went on holiday for a week returning on the 27th April. On her return she found out that her employer had sent notice of termination on 20th April by recorded delivery, ordinary post and had sent an email to her husband’s email address.

The judges ruled that contractual notice of termination was given on the actual receipt of the notice rather than the delivery. This ruling meant that Ms Haywood received her notice on 27th April and her termination then took place after her 50th birthday.

Source: Daniel Barnett

Small “establishments”

Where an establishment genuinely covers less than 20 employees, legal rights to consultation are limited to the requirements set out by the Information and Consultation of Employees (ICE) Regulations 2004. These consultation rights can be entered into voluntarily by an employer or triggered by a request from 10% of employees within an “undertaking” of more than 50 employees. The ICE regulations are summarised in the Information and Consultation Factsheet that can be accessed through the link at the end of this document.
Benchmarking redundancy rates

Statutory rates

All employees who have worked for the same or an associated employer for two years or more are entitled to statutory redundancy pay, regardless of the hours they work each week. This is the minimum that workers can receive, but employers can provide more. How much money a worker receives depends on their age, and how much service they have accrued with their employer.

You can use the following statutory redundancy payment (SRP) calculations to work out how much money each member is entitled to:

- 0.5 weeks’ pay for each full year of service where the age of the member during the year is less than 22
- 1 week’s pay for each full year of service where the age of the member during the year is 22 or above, but less than 41
- 1.5 weeks’ pay for each full year of service where the age of the member during the year is 41+

There is a maximum figure for a week’s pay which is revised in April each year. If you earn more, your redundancy pay is capped at this amount. For April 2017 in England, Wales and Scotland weekly pay is capped at £479 a week and in Northern Ireland weekly pay is capped at £500 a week. A maximum of 20 years’ employment will be included in the calculation.

In appendix 1 of this guide we have copied the redundancy ready-reckoner used for police staff and civil service when calculating redundancy payments.

Employees are entitled to contractual redundancy pay (which in some cases it can be on better terms than salutatory redundancy pay) if it is set out in their contract of employment or incorporated into the contract from a redundancy policy. This right to contractual redundancy pay will transfer under TUPE.

Enhanced redundancy pay (ERP)

Many local authorities, organisations and private companies have a more generous policy than the statutory minimum and it is up to the employer if they decide if they will enhance redundancy pay. CIPD conducted a survey of employers (November 2016) which identified that two-thirds of employers offered enhanced redundancy terms. Interestingly, the size of the organisation wasn’t necessary a factor in whether an employer offered enhanced terms, as many of the employers with less than 100 employees specified that they paid it. The pie chart below shows that 53% of employers surveyed offered some form of enhanced redundancy on favourable terms (number of weeks actual salary x additional multiplier x years of service).
It is essential for branches to develop a strong negotiating position and agree on an enhanced redundancy pay policy as early as possible, before redundancies are announced. Sometimes enhanced redundancy pay is offered to staff as a means of making voluntary redundancy more attractive to staff may want to consider leaving.

There are three ways that an employer can increase the redundancy payment for employees:

1. **Entitlement** – your employer can calculate enhanced redundancy payments using both age and length of service. This can be paid to all employees, including those with less than 2 years service.
2. **Multipliers** – The employer can decide to multiply the number of week’s pay by the same multiplier for each group.
3. **Increasing the maximum** – The employer can base a week’s pay on the statutory maximum or any figure between the statutory maximum and actual week’s pay.

Branches should be cautious as some local authorities are looking at reducing their multiplier or bring in a cap on redundancy pay when they revise their redundancy policy; however this move will make voluntary redundancy less attractive and is likely to lead to an increase in compulsory redundancy situations. If this is happening please seek advice from the Region.

The table below is a small sample of employers taken from Labour Research Department’s Payline data (May 2017). The data used has taken the median redundancy terms across the small sample of employers in each sector to find the average. It is important to note that more often than not redundancy payments are linked to an employer’s age and the agreements state the payment is an actual weeks pay rather than just statutory. The figures below are for an employee aged 22 - 41 years old (median average):
### Average Redundancy Payments

#### Public Sector – average 1 weeks pay per year of service
- Blackburn with Darwen Council (they use a ready reckoner depending on age and length of service): 1 weeks pay per year of service
- Liverpool John Moores University: 1 weeks pay per year of service
- Luton Borough Council: 1 weeks pay per year of service
- Milton Keynes Council: 1 weeks pay per year of service
- Oxford University: 1 weeks pay per year of service
- Sheffield University (SRP and ERP – depending on age and length of service): 1 weeks pay per year of service

#### Private Sector – average 1.5 weeks pay per year of service
- KLM Royal Dutch Airlines: 3 weeks pay per year of service
- Aircelle Ltd: 1.5 weeks pay per year of service
- Campden BRI: 1 weeks pay per year of service
- Cummins Inc (Darlington): 2 weeks pay per year of service
- Society of St James: 1 weeks pay per year of service
- Spooner Industries: 0.5 weeks pay per year of service

#### Voluntary Sector – average 2.3 weeks pay per year of service
- ActionAid: 2 weeks pay per year of service
- Amnesty International International Secretariat: 3.5 weeks per year of service
- Citizens Advice Bureau: 2.5 weeks per year of service
- Downland Housing Association: 2 weeks per year of service
- Canal and Rivers Trust: 1.5 weeks per year of service
- Riverside Group: 2.5 weeks pay per year of service
**Transfers**

Branches dealing with voluntary and compulsory redundancy consultations may also find that they have to deal with redundancies in conjunction with TUPE transfers. TUPE is the process, following the award of a contract to a new service provider, by which employees delivering that service are transferred to the new provider.

TUPE may not apply to every transfer; however the greater the similarity between activities delivered before and after a change of employer, the more likely it is that TUPE rights will apply.

TUPE protections including statutory consultation rights are designed to preserve the continuity of employment of employees between transferor and transferee. These rights only cover ‘employees’ and not agency workers. As discussed previously in this guide two years continuous service is required for an employee to claim unfair dismissal based under TUPE unless it is an automatic unfair dismissal.

Following changes in TUPE regulations (detailed in the chart below), an employer is now able to carry out pre-transfer consultation on collective redundancy dismissals. They can start consulting with a transferor’s workforce on proposed redundancies before the transfer date. This pre-transfer consultation can count towards the minimum statutory consultation period of 30/45 days.

Where a potential redundancy situation arises as a result of the transfer, employers must consult individually with affected employees and trade unions when the incoming employer is intending to make 20 or more redundancies within a 90 day period. Where there are fewer than 20 employees there is still a legal duty to consult with employees individually.

It is important to note that the new employer cannot make employees redundant just because they were transferred from another employer – this would make the dismissal automatically unfair.

UNISON has produced some comprehensive [branch guidance on TUPE](#) which covers all aspects of TUPE from the procurement phase to the transfer.

Branches should note that changes to TUPE Regulations came into effect on 31 January 2014. The table below sets out the main changes to TUPE legislation:

<table>
<thead>
<tr>
<th>Relevant Transfers – Service Change Provisions</th>
<th>The activities carried out following a transfer must be “fundamentally the same” for TUPE to apply</th>
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<tr>
<td>Changes to Terms and Conditions</td>
<td>Altering contractual terms and conditions is permissible if it is not because of the transfer or it is for an economic, technical or organisational reason entailing changes in workforce; Dismissals no longer automatically unfair because of change to a workplace location; Terms and Conditions from collective agreements may be</td>
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varied one year after transfer provided that the employees agree and the contract is no less favourable overall to the employee; Any changes to collective agreements which take place after the transfer will not apply to the transferred employees.

| Dismissal | An employee will be automatically unfairly dismissed if the sole or principal reason for the dismissal is the transfer |
| Redundancy | Redundancy consultation can begin before the transfer if both employers agree |
| Employer Liability Information | Information about transferring employees should be given earlier |
| Who should be consulted | Businesses with fewer than 10 employees are not required to invite the election of representatives for consultation purposes if no existing arrangements are in place. |

Source: ACAS 2014 TUPE Changes

**Case Study - example of successful defence**

UNISON brought a case against the London Borough of Bromley in July 2014. The case centred on offers to UNISON members that gave effect to a 2012 council decision to withdraw from national (NJC) and regional (GLPC) pay bargaining. Bromley wanted to control the pay setting process completely and was expressly unhappy with the delays encountered in the NJC collective bargaining process.

The series of offers made by Bromley asked employees to vary their employment contracts and agree to a localised pay setting process which replaced national and regional collective agreements with future pay awards determined solely by the Full Council. Most of the employees agreed. However, this case was bought by a number who did not and who were ultimately dismissed and re-engaged on new terms of employment that included the localised pay setting process.

The council conceded everything in this case except the issue of whether or not the offers were made for the prohibited purpose of getting out of collective bargaining.

The employment tribunal found in the claimants’ favour. They held that the council had made a series of similar offers, the effect of which was for the prohibited purpose that the claimants’ terms and conditions of employment (in particular pay) were no longer determined by collective agreement. It awarded each of the claimants’ compensation of £3600 for breaches of section 145B (this is a fixed penalty per claimant).

**Exit payments in the public sector**

The Government is set to introduce a set of reforms to exit payments including redundancy payment. UNISON is currently waiting for clarification on their implementation date and it is unclear at the time of writing if these proposals will be brought into force.

In summary there are three sets of proposed reforms:
1. To recover exit payments given to anyone earning £80,000 or above at the time of exit if you return to a public sector within 12 months;
2. Cap exit payments to no more than £95,000 in total;
3. Reform existing agreements to reduce the factors relating to calculating an exit payment.

The proposals apply to anyone who works within the public sector and covers “bodies where employment and remuneration practices are the direct responsibility of the UK government, the Northern Ireland Executive or the Welsh government.”

The £95,000 cap legislation applies to England, Wales and Scotland but which exact bodies are included still needs to be clarified. All employees in housing associations, higher education and further education are excluded from the proposals.

The exit payments are those made to an employee leaving employment, or a third party on behalf of the employee, including:

- Redundancy payments
- Pensions top-ups which enable early retirement
- Any payment made as part of an agreed settlement between employer and the employee
- Pension lump sums (received by you as part of your pension) are not included in the maximum cap of £95,000

The proposed reforms will mean that exit payments can be recovered if you return to the public sector within 12 months. It will affect anyone earning £80,000 or more at the point of leaving public sector employment if they return to any job, anywhere in the public sector within 12 months. If a member takes early retirement and receives his / her pension, there would need to be special arrangements to recover the pension top-up given to the scheme by the previous employer.

The absolute cap on the value of any exit payment is set at a maximum of £95,000. This will affect anyone working in the areas of the public sector covered by these proposals who receives an exit payment. The cap will affect high earners but they may also hit moderate earners if they have long service.

Further information
Useful guidance on related issues can be found by clicking on the links below:

Dismissal
Unfair dismissal government guide¹
ACAS rights at work guide²

¹ https://www.gov.uk/dismissal
Redundancy

Public Sector Equality Duty Factsheet

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

ACAS Handling Large Scale Redundancies Factsheet

Facility Time Guidance

UNISON Information and Consultation Factsheet

Exit payments in the public sector

Transfers

ACAS Handling TUPE Changes

2014 Changes to TUPE

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5 https://www.unison.org.uk/content/uploads/2013/06/On-line-Catalogue150073.pdf

6 http://www.acas.org.uk/media/pdf/2/q/CP02_1.pdf

7 http://www.acas.org.uk/media/pdf/2/q/CP02_1.pdf


12 http://www.acas.org.uk/media/pdf/t/r/9908-2901767-TSO-ACAS-TUPE_is_changing-ACCESSIBLE.pdf
Appendix 1 – Sample redundancy ready reckoner (Police staff and civil service)

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</tr>
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<td>22</td>
<td>23</td>
</tr>
</tbody>
</table>

Dismissal, Redundancies and Transfers  Last updated: December 2017
### The table starts at age 17, as it is possible for a 17 year old to have 2 years service. Compulsory school leaving age can be 15 ¾ or 15 4/5 where a child is 16 before 1 September.

### 20 years is the maximum that can be taken into account