

**Berg Kaprow Lewis**

Redundancy

Redundancies are a fact of life in the smaller business, where carrying surplus staff is a short cut to disaster. A shift in the economic or business climate, a merger or a move to a new location can all make redundancies inevitable.

Redundancy is a complex issue, full of pitfalls. To avoid falling foul of employment tribunals, it is essential to follow demonstrably fair procedures.

This briefing covers:

- The timetable and procedure to follow.
- How to choose who to make redundant.
- Calculating statutory redundancy pay.
- How to avoid legal and practical problems.

1 Genuinely redundant?

It is the job, not the person, that is redundant. People unfairly dismissed under the pretence of redundancy can ask an employment tribunal to order a compensation award or reinstatement.

1.1 Genuine redundancy only arises when an employee is dismissed wholly (or mainly) for one or more of these reasons:

- The business stops doing what the person was employed to do (eg it closes down).
- The business stops doing it where the employee was employed to do it.
- There is a reduced need for people in the employee's category doing that kind of work in that place.

1.2 Most employees who are made redundant are entitled not to be **dismissed unfairly**.

- Part-timers enjoy the same protection as full-time employees.
- Employees with less than one year's service do not have this right, unless unlawful discrimination is involved in the dismissal.
- Employees with two years' service or more usually qualify for redundancy pay (see **6**).

1.3 Employees cannot usually **sign away** their rights to statutory redundancy payments.

2 The redundancy process

In redundancy situations, it is essential to stick strictly to the correct process and timing.

2.1 Plan well in advance and put everything you do in writing.

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- It may be useful to have a written procedure for redundancies, though this might also limit your freedom of action.
- Log every stage. If there are problems, tribunals like to see a clear paper trail.

2.2 Consult and notify in time.

- If there are 20 or more people involved, you must begin consultations with employees or their representatives (see 3.2) and send form HR1 to notify the Department of Trade and Industry (www.dti.gov.uk/er/redundancy/forms.htm) at least 30 days before the dismissals are due to take effect (90 days if 100 or more). Failure to do this is potentially costly, as any individual can then ask a tribunal for a 'protective award', giving up to 90 days' full pay to every employee involved.
- You must also be able to show that you have consulted each employee individually. The first meeting is usually to describe the process and timescales, discuss possible alternative work and explain redundancy pay calculations. Further meetings may be needed to give feedback and ultimately to give notice and explain the appeals procedure.

2.3 Define the pool from which employees will be chosen for redundancy, decide what

What goes wrong?

If you mishandle redundancies, you can easily find yourself facing unfair dismissal claims that will be hard to defend.

A The most common **mistakes** are:

- Not following the right procedures or departing from the correct timetable.
- Using unfair redundancy selection criteria or methods.
- Failing to consult properly with the individuals involved.

B Employment tribunals can make **compensatory awards** in unfair dismissal cases of up to £60,600.

- Awards do not include compensation for injured feelings, but are based on a simple calculation of the employee's present and future loss.

C A tribunal can order you to reinstate or **re-engage** a redundant employee who has not been treated correctly, although this is rare.

criteria you want to use and **select** fairly from the pool (see 4).

- Selection criteria, but not individual scorings, should be disclosed to employees as part of the consultation.

2.4 Give redundant employees **notice**, in line with the terms of their contracts (and at least the statutory minimum notice period).

2.5 Implement the dismissals.

3 Avoiding redundancies

3.1 You are legally obliged to take reasonable steps to **avoid** compulsory redundancies.

- The possibilities include short-time working, overtime bans, shedding temporary or contract labour, lay-offs, transfers, redeployments, early retirements, or calls for volunteers. These should usually all be considered and rejected as impractical before there are any compulsory redundancies.
- Over time, natural wastage or a freeze on recruitment might achieve the same result.

3.2 If your plans involve 20 or more redundancies, you must **consult** with employees' representatives or trade union.

- Employee representatives can be existing representatives, information consultation (I&R) representatives or new ones specially elected for the purpose.
- The process must include consultation on how to avoid dismissals, how to reduce the numbers dismissed and how to minimise the consequences.
- Discussions must be genuine. There is a legal duty on the employer to consult 'with a view to reaching agreement'.

4 Choosing the people

You have wide scope to choose whatever selection criteria suits your business needs. Your choice will not be challenged by an employment tribunal unless it is unreasonable or discriminatory. But you must be able to show the criteria were applied fairly and consistently.

4.1 One common, traditional approach is **LIFO** (last in, first out).

- If no other criteria are published, LIFO will usually apply.

➔ Employment law is complex and is changing rapidly. This briefing reflects our understanding of the basic legal position as known at the last update. Obtain legal advice on your own specific circumstances and check whether any relevant rules have changed.

➔ See Dismissing employees, Discrimination and Rights for working parents and carers.

“You may be able to avoid many of the disputes that arise from redundancies if you have a reasonable and workable written procedure — and you stick to it.”

David Bishop,
Federation of
Small Businesses

“If you cannot think of a good answer to the question 'Why me?', you will probably have difficulty at tribunal.”

Ken Bexon,
Croner Consulting

- 4.2** Selection could be based on **skill levels**, experience or attendance records.
- 4.3** Selection could be based on **performance**, but only if objective measures exist (perhaps through an existing appraisal system, see **Performance appraisals**).
- 4.4** Selection must not be based on **discrimination** by gender, age, race, disability, marital status, pregnancy or recent childbirth, sexual orientation, religion, philosophical belief, membership or non-membership of a trade union, or part-time status.
- Do not make someone who is away on maternity leave redundant. Involve the woman in the consultations and reassess

matters on her return. You have a legal obligation to offer any available alternative work to those on maternity leave.

- 4.5** It is illegal to single a person out for redundancy because of participation in activities as an **employee representative**. These activities might include:

- Acting as an I&C representative.
- Acting as a safety representative or safety committee member.
- Acting as a trustee of a pension scheme.
- Acting as a union representative (or as an employee-elected representative in redundancy consultations).

No one can be penalised for trying to assert any of their statutory employment rights.

“Unless you have a pre-agreed redundancy policy, you don't have to select employees for redundancy on a last-in, first-out basis. But you will need to show that you've used objective criteria. Choose these carefully — while experience and flexibility are acceptable, commitment and attitude are not.”
Tim Russell,
Norton Rose
solicitors

Takeovers and TUPE

The chance to 'take costs out of the business' may be one of the major motives for a takeover. In this case, redundancies may be part of the logic of the move. But they must be genuine (see 1), and appropriate selection criteria must be applied (see 4), possibly involving the new owner's existing employees.

- A** If you take over the running of a business, you usually have the same **responsibilities** to employees as the previous owner. Under TUPE — the Transfer of Undertakings (Protection of Employment) Regulations — all contracts transfer to the new owner.
- An employee with one year's service or more who is made redundant primarily because of the sale of the business will normally be regarded as unfairly dismissed.
- B** In theory, a new owner cannot **pick and choose** who to keep on. But the regulations note that an employer may have acceptable reasons for trimming the workforce at the time of a takeover.
- You are permitted to declare people redundant if there are good commercial reasons for the decision. This is known as the 'ETO' test — are there sound 'economic, technical or organisational reasons entailing changes in the workforce'? If you follow a fair procedure, dismissals for these reasons will not be unfair.

5 Voluntary redundancy

Voluntary redundancy programmes can only be launched in genuine redundancy situations.

- 5.1** Set out the **terms** of the package.
- 5.2** Specify **who** can apply for voluntary redundancy payments. For example, people at a certain level.
- 5.3** State that you may be unable to **accept** all volunteers for redundancy.
- 5.4** Consider offering **early retirement**, if your pension scheme allows it.
- This is usually more acceptable to the workforce than compulsory redundancies.
 - Unlike enhanced lump-sum payoffs, it can create costly long-term commitments.

“Dismissals for redundancy have been found to be unfair where the union has been consulted, but not the individual.”
Christine O'Brien,
Baker & McKenzie
solicitors

6 Statutory payments

Statutory redundancy payments are calculated according to the number of years a person has worked for you, and the employee's weekly earnings.

- 6.1** There will be an entitlement to **statutory redundancy payments** for everyone dismissed because of the situation, except:
- People with less than two years' service (technically, two years since the employee's 18th birthday).
 - People at or above the normal retiring age (usually 65 or the norm for the job, but this must be the same for both sexes). There are proposals to make 65 the 'default'

“Set up an appeals procedure for employees who feel they have been wrongly selected for redundancy. Resolving such issues internally is likely to be a lot less costly than going to an employment tribunal.”
Julie Calleux,
EmployEase

retirement age in 2006, meaning this will be the retirement age for all employees, except where both sides are happy for them to continue or there are special circumstances.

- People who unreasonably refuse an offer of suitable alternative employment.

6.2 Service is counted up to a maximum of 20 years, with up to 1.5 weeks' pay for each year of service.

- Each year from age 41 onwards entitles a redundant person to 1.5 weeks' pay.
- Service between ages 22 and 41 counts for one week a year.
- Service between ages 18 and 22 counts for half a week a year.

6.3 A 'week's pay' is based on actual income (or average weekly earnings), but is capped at £310 a week.

- Maximum statutory redundancy pay is therefore $20 \times 1.5 \times £310 = £9,300$.

7 Normal payment practice

In practice, some employers pay more — sometimes a lot more — than the minimum.

7.1 You may pay **more** for several reasons.

- To encourage people to volunteer.
- Out of goodwill, to maintain good relations with ex-employees, or to keep up the morale of employees who remain.
- Because of provisions written into your employees' contracts, or because of custom and practice in your industry.

If you always pay more than the minimum, this can become established as an implied right for your employees.

7.2 Redundancy pay of up to £30,000 is usually **free of tax**.

- Check your redundancy payment plans in advance with HM Revenue & Customs.

8 Employees' rights

Employees under notice of redundancy have rights, apart from any redundancy payments.

8.1 People who are declared redundant have the right to be offered '**suitable alternative employment**', if possible.

- This can be offered by the existing employer or by an associated employer.
- If an offer is unreasonably refused, the employee loses the right to a statutory redundancy payment (eg if the differences between the new job that is offered and the old job are insignificant).
It is wholly up to the employer to prove that alternative employment is suitable and refusal is unreasonable.
'Reasonable' refusal might be based on a major change in working hours, a cut in pay or the need to travel or move house.
- An employee can try out the new job for four weeks — or longer, by agreement. If it proves unsuitable, he or she may leave and still get full statutory redundancy pay.

8.2 The employee has the right to reasonable **time off** during the notice period for job-hunting or to arrange training (on full pay).

- This is usually taken to mean at least two days, in total.

9 Keeping up morale

9.1 Demonstrate that you are handling all redundancies fairly and with sensitivity.

- Being seen to make generous provision to soften the blow (eg outplacement support) may defuse tensions.

9.2 Take action on **internal morale** among employees who remain (see **Managing change**).

9.3 Take action to counter **negative publicity**.

- Tell suppliers and customers at the same time as you tell the workforce. Explain the reasons and the long-term benefits.

9.4 People under notice of redundancy are **hard to manage** and may do poor work.

- Consider inviting non-essential people or those who may cause unrest to leave before their notice is up, with pay in lieu. Legal problems may arise if you let them go before the consultation period is over.
- People under notice should not be made responsible for key customers, essential machinery or confidential databases.

Expert contributors

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Further help

There are other Directors' Briefing titles that can help you. These briefings are referred to in the text by name, such as **Managing change**.

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