

Redundancy

10 Considerations for a Fair Process

Introduction

One of the unfortunate consequences of the Covid-19 pandemic is that it is widely predicted that a deep recession will follow and unfortunately, this will result in job losses.

In implementing redundancies, it is crucial that employers ensure there is a genuine redundancy (which meets the statutory definition) and that the employer complies with the requirement of reasonableness set out in Article 130(4) of the Employment Rights (NI) Order 1996 (ERO) as well as the principles set out by the House of Lords in *Polkey v AE Dayton Services Ltd [1987] IRLR 504*. Therefore, employers must follow a fair and reasonable procedure before making any decision to dismiss including applying a fair selection process, consulting affected employees, and considering alternatives.

The precise procedure that should be followed will vary from case to case. However, there are 10 key considerations that employers should take into account to ensure their redundancy process is fair and reasonable and I have outlined these below.

1. Ensure that there is a proper Redundancy

The definition of redundancy is set out in Article 174 of the ERO. In order to amount to redundancy, the dismissal must be “wholly or mainly attributable to” the employer:

- Ceasing or intending to cease to carry on the business for which the employee was employed (business closure);
- Ceasing or intending to cease to carry on the business in the place where the employee was employed (workplace closure); or
- Having a reduced requirement for employees to carry out work of a particular kind or to do so at the place where the employee was employed (reduced requirement for employees).

It is imperative that employers consider why they are considering making redundancies in the first instance. We recommend that employers prepare a rationale for any decision to implement redundancies as a preliminary step. Where an employer has spent time working on a rationale, this helps determine whether there is a genuine redundancy and can also help identify the potential numbers and selection pool for redundancies, and can also prove invaluable in consultation process.

2. Consider the numbers affected

Having decided that there is a need for redundancies, it is then important to consider how many roles may potentially be affected. Where an employer proposes to make 20 or more employees redundant at one establishment within a period of 90 days or less, they have a duty to inform and consult appropriate employee representatives at least 30 days before the first dismissal takes effect. Where 100 or more redundancies are proposed the employer must consult for at least 90 days in Northern Ireland (45 in GB).

They must also notify the Department for the Economy at least 30/90 days before the first dismissal takes effect, depending on the numbers proposed as outlined above.

A Tribunal may make a protective award of up to 90 days' pay in respect of each employee for breach of the duty to inform and consult and may be fined for failure to notify the Department for the Economy.

This article deals with redundancies where less than 20 employees are affected. We recommend that specific advice is sought where collective redundancies are proposed on matters such as the meaning of establishment, whether the duty is triggered, election of employee representatives, statutory information and consultation process etc., which is outside the scope of this article.

3. Consider ways to Avoid redundancy

Before embarking on any redundancy process (and indeed throughout the consultation process), an employer should consider whether it can avoid making redundancies or reduce the number of redundancies proposed. Therefore, we recommend that employers consider alternatives such as:

- Recruitment freeze
- Reduce or remove overtime
- Retrain/redeploy staff
- Cease/reduce use of agency workers/contractors (assuming no employment status issues)
- Seek volunteers for redundancy
- Seek expressions of interest in early retirement under a pension scheme (if available).
- Temporarily lay off employees or reduce their hours (this requires a contractual right or agreement)

If having considered any ways of avoiding redundancy, there appear to be none, this should be documented and it will be necessary to proceed to select which positions may need to be made redundant.

4. Consider the selection pool

It is also important to identify the correct 'pool' of employees who are to be placed at risk of redundancy. In defining the pool employers should consider any procedure for identifying a pool which has been agreed by the Union or employee representatives and should bear in mind that the provisional pool should include employees in the area of work changing and:

- Employees doing the same or similar work to the employees
- Employees working at different sites but doing similar work
- Employees whose jobs are interchangeable with any of those in the pool

Employers usually wish to keep the selection pool as narrow as possible, often to limit the stress and damage to morale that can be caused by a redundancy process. However, if they get it wrong it can render the redundancy process, and thus the dismissal unfair.

Therefore, employers need to carefully consider the correct parameters of the selection pool in order to avoid the risk of a finding of unfair dismissal.

5. Consider the appropriate selection criteria

The selection criteria should be in accordance with any agreed procedure or, where there is none, should be non-discriminatory and should, so far as possible, be objective and capable of verification. In practice, most employers use a matrix of criteria which takes account of a range of issues such as:

- Skills/knowledge/experience
- qualifications or training
- performance
- disciplinary record
- attendance record
- length of service

Criteria must be appropriate and relevant. For example, requiring someone to have an accountancy qualification for a book keeper role, would not be justified by the business case and therefore is unlikely to be reasonable. Where using criteria such as skills, knowledge or performance it is important where possible to use independent evidence such as performance appraisals to justify scores awarded. Employers should be cautious about using subjective criteria such as 'attitude' or 'team player' which can be difficult to justify objectively. Scoring should be done by at least 2 managers where possible.

Employers should also be mindful that certain selection criteria can appear fair but nonetheless put certain categories of employees at a disadvantage and therefore become potentially discriminatory. For example, attendance may put women or disabled employees at a particular disadvantage unless absences for pregnancy related illnesses, maternity or other family leave as well as absences related to disability are discounted.

Similarly, 'Last In First Out' may amount to discrimination may amount to discrimination on grounds such as age, sex or religion as younger employees, females who have taken career breaks, or employees recruited as part of affirmative action campaign are more likely to have shorter service. However, it is more likely to be viewed as acceptable if used as part of a balanced set of criteria or a "tie break" criteria where all other factors are equal (see *Rolls-Royce Plc v Unite the Union [2009] IRLR 576*)

Employers must also apply the selection criteria fairly. Even if the selection criteria are reasonable in themselves, they must be applied in a reasonable manner. For example, employers should not concentrate on performance which may have been poor for a short period, whilst ignoring previous sustained good performance.

6. Carry out a Fair Consultation

Consultation is crucial to any fair redundancy process. It should be a two-way process involving the employer giving the employee information about its proposals and inviting questions and suggestions as to alternatives and ways for avoiding or reducing the need for redundancies from employees. A fair procedure should include clear communication with potentially affected employees, one to one meetings with notes taken and follow up letters. It is essential that no final decision is made before the consultation process has concluded.

Generally, the more planning that has gone into a potential redundancy process, the more smoothly the process will run. It is good practice to draw up an outline timetable for the redundancy process and matters to be dealt with at each stage (with inbuilt flexibility) to assist with this.

Employers should ensure that they do not forget to consult employees who are on maternity leave, long-term sick leave or on secondment. They should be invited to meetings in the same way as other employees but making appropriate adjustments to the process to accommodate their needs.

A fair procedure is likely to involve:

- An initial “at risk” meeting where employees are advised that they are at risk of redundancy the reasons for same and that a consultation process will now commence;
- A letter confirming the above and inviting the employee to a first consultation meeting, providing details of the selection pool and criteria to be used (if applicable);
- First consultation meeting where employees have the opportunity to discuss the selection pool and criteria and provide any suggestions / alternatives as to ways to avoid redundancy.
- Employer considers and responds to any issues/queries raised re the selection pool and criteria and other suggestions made.
- The employer should apply the selection criteria and write to provisionally selected employees confirming their provisional selection and inviting them to a second consultation meeting. The employees should be provided with their scores and information about their selection.
- Second consultation meeting to discuss why the employees have provisionally been selected for redundancy, scores awarded, potential alternatives to redundancy, and proposed redundancy terms including any financial package, outplacement services etc.
- Follow up letter following up on any matters discussed or raised in the second consultation meeting and inviting the employee to a further consultation meeting, if necessary.

The consultation process can last for a number of weeks, even where there are fewer than 20 employees at risk and no collective redundancy consultation required. As it is impossible to foresee what questions may be raised or alternatives proposed, additional or alternative steps may be necessary depending on the circumstances. However, it is important to ensure that the requirement of reasonableness is met.

7. Suitable alternative employment

An employee who is selected for redundancy should be offered any available vacancy that he/she could fill, even if at a lower salary or status than their current post. This duty continues until the end of the employee’s notice period.

An employee who is dismissed by reason of redundancy loses the right to a redundancy payment if he or she unreasonably refuses an offer of suitable employment. Suitability of employment such as to disentitle someone to a redundancy payment requires consideration of complex legal tests and we would recommend that specific advice is sought if this is being considered.

If the terms and conditions of the new or renewed contract of employment differ in any way from the corresponding provisions of the previous contract, the employee is entitled to a statutory trial period of four weeks to decide if the alternative employment is suitable. If the employee terminates the contract during that trial period, he/she is treated as having been dismissed by reason of redundancy on the date at which his/her original contract ended.

Where an employee's role is made redundant during maternity, adoption or shared parental leave and a return to the old job is not possible, the employer must offer a suitable vacancy. An employee on maternity, adoption or shared parental leave has priority over other employees who may be candidates for the alternative role. If the employee is not given priority, the dismissal will be automatically unfair.

8. Statutory dismissal procedure

Any consultation process in Northern Ireland employers must comply with the requirements of Statutory Dismissal procedures in order to avoid a finding of automatic unfair dismissal. These requires:

- Written notice that the employee is being invited to a meeting to consider termination of their employment on grounds of redundancy;
- A meeting is held to discuss all of the steps taken as part of the redundancy process outlined above and consider any further suggestions or alternatives put forward to avoid redundancy. If nothing has changed the decision should be confirmed in writing and the employee should be provided with details of any Statutory redundancy pay, notice and other contractual entitlements. They should be advised of their right to appeal.
- Any appeal hearing should be held by someone not previously involved in the process, and preferably more senior than the decision maker.

The employee has a statutory right to be accompanied by a work colleague or trade union representative at the final meeting and appeal meeting and should be advised of this fact in the letter inviting him/her to the meeting. Whilst this is not strictly speaking required at consultation meetings, we recommend that the right of accompaniment is permitted at redundancy consultation meetings as a matter of good practice.

9. Redundancy payments

Employees with a least 2 years' continuous employment at the termination date are entitled to a statutory redundancy payment if dismissed on grounds of redundancy.

Statutory redundancy pay is calculated according to a formula set out in Article 197 of the ERO, which is based on age, length of service as follows:

- 1.5 week's pay per year of employment over the age of 41;
- 1 week's pay per year of employment over the age of 22 and below 41; and
- 0.5 week's pay per year of employment under the age of 22.

The maximum number of service years to be taken into account is 20 and the maximum amount of a week's pay as at 6 April 2020 is £560 in NI (£538 in GB). This is reviewed annually.

In addition, an employee may be entitled to contractual redundancy payments or an employer may offer 'enhanced' redundancy payments. Such additional payments will usually be made conditional upon an employee signing a compromise agreement or non-ET1 agreement through the LRA in full and final settlement of any employment claims that may be made.

10. Unfair dismissal claims

Employees can bring a claim for unfair dismissal to a Tribunal which may award:

- Re-instatement;
- Re-engagement; or
- Compensation comprising:
 - (i) basic award- (calculated in same was as SRP and cannot be claimed twice); and
 - (ii) compensatory award of up to £88,693 (NB: there is no 1year cap in NI as in GB).

In addition, the employee may allege that the decision was for other reasons, e.g. discrimination or whistleblowing where there is no cap on compensation.

Conclusion

Whilst some redundancies may be almost inevitable in the wake of the Covid-19 pandemic there are many considerations for employers to take into account when proceeding with redundancy processes and the risks of getting it wrong can be significant in terms of claims for unfair / automatically unfair dismissal, discrimination, breach of contract etc. The benefits of early and proper planning cannot be underestimated.

This article is a general summary of the legal issues and is not intended to be a thorough review or a statement of the law. Specific advice should be sought on a case by case basis.