C/M/S/ Cameron McKenna

Redundancy

Practical issues and tips

2009

"Clients find the team has real depth of experience on stand-alone employment issues".

Chambers & Partners 2008

Contents

A sign of the times

We have all watched with a mixture of horror and fascination as institutions around the globe have struggled to cope with the latest financial crisis. No area of business appears to be immune to the after-effects of the sub-prime debacle and, as economy after economy heads towards recession, every day seems to bring fresh announcements of trading difficulties, bad results and the possibility of redundancies.

Although never the cheeriest of subjects, there can be no argument that redundancy is a topical one. In the pages that follow, we offer some practical hints, tips and guidance on a variety of issues that come with this particular territory - always with a legal flavour but never intended as a substitute for formal advice.

There may of course be other issues affecting your business in the current economic climate: changes to terms and conditions, TUPE implications of business sales or acquisitions (perhaps from insolvent companies), tightening up performance appraisals and making related dismissals or taking on teams of people may be a few of the employment law issues on your mind. For all these we are at your disposal - by telephone, email or in person.

Redundancy in a legal context

'Redundancy' is a term which is often used, but sometimes beyond its legal meaning. Redundancy within the strict legal definition only occurs when a business needs fewer employees either because the employer's business (or the employee's workplace) closes, or the employer needs fewer employees to do work of a particular kind.

In general, employees facing and ultimately dismissed due to redundancy have rights to:

- fair selection for redundancy
- proper consultation before dismissal
- permission to take reasonable time off to look for another job
- a redundancy payment

Where 20 or more employees are being dismissed at one business unit in a 90-day period, employers must inform and consult employee representatives (and notify the Redundancy Payments Office at BERR). This is called 'collective redundancy' but in fact applies when 20 or more employees are dismissed for any reason other than a personal one (such as misconduct, poor performance, incapacity or retirement). It therefore includes situations such as where the employer is seeking to harmonise terms and conditions by dismissing and re-engaging the workforce.

Looking for alternatives

When redundancies loom, employers should not overlook the alternatives, such as relocation, retraining or redeployment.

The starting point is always the employee's contract - does it allow you to relocate them or redeploy them to do different work?

Relocation

- The courts have ruled that you are entitled to invoke your employees' contractual mobility obligations rather than follow a redundancy procedure.
- However, you must choose at the outset either to invoke a mobility clause or to treat the employee as redundant.
- This means your decision must be made before the redundancy situation is set in stone. Where it involves the closure of an office or site, it must be made before the closure is announced.
- The mobility clause must be properly worded and invoked genuinely and not simply brought up retrospectively as a defence to a redundancy claim.
- Once an actual (rather than potential) redundancy situation has arisen, your redundancy procedure will automatically apply and it could be a constructive dismissal (by breach of trust and confidence) to use the mobility clause to avoid honouring your obligations under that procedure.

Redeployment

- If you want to assign different work to employees, you must check whether their contractual duties or job description provide sufficient flexibility to do so.
- If their contracts are not sufficiently flexible, you must either get your employees' agreement to change their duties or give notice to terminate their contracts and offer to re-engage them on different terms.
- Some contracts do not describe duties in any detail but may specify a job title and require the employee to perform the duties of that role. Redeployment to a different role would not be permitted under such a contract without the employee's consent.
- Sometimes you will want to change the way your employee performs the role rather than change the role itself, and in general you will be permitted to do this. The courts have considered this situation in the case of some financial advisers whose employer wanted them to spend less time visiting customers and doing administrative tasks and more time doing desk-based selling. When the employees were dismissed for refusing to accept the change, the court upheld the employer's right to do so because it essentially involved them doing the same work but in a different way.
- Retraining is a form of redeployment but, for obvious reasons, one which requires the employees' agreement as they would only need training for jobs which are outside the scope of their current duties.

Top 10 tips when handling redundancies

1. Make sure it is a genuine redundancy situation. It will not be unless you are closing a site or stopping a particular kind of work or cutting back on the number of employees needed to do it.

2. Consider alternatives to redundancy, such as invoking mobility clauses, changing duties (with or without retraining) or offering suitable alternative employment.

3. Handle selection for redundancy very carefully. Selecting employees because they are pregnant or on maternity leave, for example, would be automatically unfair.

4. Follow the statutory dismissal procedures when making individual redundancies. These do not apply to collective redundancies.

5. Employees with at least two years' service are entitled to a statutory redundancy payment. The payment increases with age and length of service up to a maximum of £9,900 per employee*. Employers should also provide a written statement of how it is calculated or risk a fine.

6. Check your policy on paying redundancy payments above the statutory level. Even discretionary policies can become contractual rights where employees have a reasonable expectation of receiving an enhanced payment because others have done so in the past. Also, make sure the relevant formula complies with age discrimination legislation.

7. Remember to give notice (or pay in lieu) as well as any redundancy pay. You can choose either approach but have a back-up plan for employees who are given notice but want to leave early.

8. If you are proposing to dismiss 20 or more employees at a single business unit within 90 days, you must inform and consult the employees' representatives as early as possible so that they know the situation and employees can consider possible alternatives or start looking for another job.

9. If you are proposing to dismiss 20 or more employees at a single business unit within 90 days, you must also notify the Redundancy Payments Office at BERR on form HR1 or risk a fine of up to £5,000.

10. Compromise agreements may be advisable in certain circumstances to minimise ongoing claims such as unfair dismissal and discrimination.

*This maximum will increase to £10,500 from 1 February 2009

Selecting for redundancy

If you are looking to make redundancies, there are four steps you must follow unless you are making all your employees redundant:

- where appropriate, identify a fair pool of employees from which to make the selection
- adopt fair selection criteria
- apply them fairly
- consider alternative employment within the business or group

Here are some 'Dos and Don'ts' for all four stages

Identifying the pool

- Don't automatically limit the pool to those doing the type of work for which you have a reduced or no demand
- Don't exclude employees from the pool simply because they are absent on maternity or other long-term leave
- Don't forget to consider including in the pool employees currently doing other jobs which the employees whose jobs are redundant are capable of doing and could be contractually required to do
- Don't forget that the same principle applies where employees have interchangeable jobs
- Don't forget to consider including in the pool employees doing the same kind of work at a more junior or senior level than the grade or level you have identified as redundant – whether or not they should also be in the pool depends on whether the employees whose jobs are under threat are capable of and could be required to do the more senior or junior jobs too

Considering alternative employment

- Do seek to find the selected employees alternative employment within your business or group and consult them about their willingness to consider the alternative position
- Don't assume they will be unwilling to accept a demotion: consult them!
- Don't think it will usually be enough to put a redundant employee forward for an interview: they should be offered the post ahead of external candidates and even, in some cases, other internal candidates
- Do give priority to those on maternity leave. Give any suitable vacancy to an employee on maternity leave in priority to others. Also bear in mind that disabled employees who become unable to do their jobs due to disability may have priority for vacancies too
- Do think about possible adjustments to vacancies for disabled redundant employees
- Do also use fair criteria when choosing between more than one redundant employee for a vacant position
- Do remember that you are only expected to take reasonable steps, not to take every conceivable step possible to find the employee alternative employment
- Do remember that employees have the right to a four-week trial period in the alternative job and, if they don't like it, can opt to take their statutory redundancy payment instead

Adopting fair selection criteria

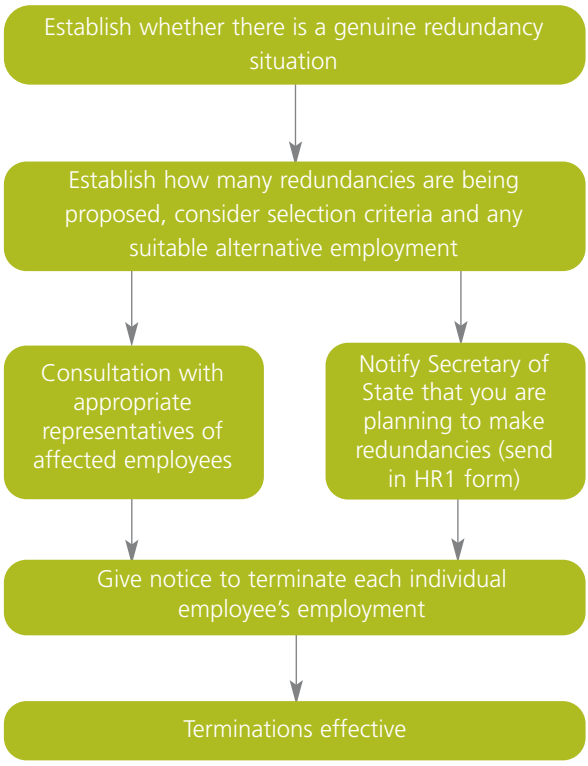
- Do be careful when using seniority or length of service as they may be age discriminatory criteria. This includes the classic 'last in, first out' selection criterion
- Don't overlook the possibility of using a points-based selection system which rewards (rather than penalises) age or long service with (say) a point for each year of service (where those with the fewest points are selected for redundancy)
- Do remember, if using absence as a criterion, to exclude absences which are connected to a disability or due to maternity leave, pregnancy-related illness, suspension from work on maternity grounds, parental leave, dependent care leave, paternity leave or adoption leave
- Do make sure scores are checked and ratified by at least one other senior person, where using criteria which involve an element of subjectivity
- Do make sure scores based on a subjective criterion can be substantiated with objective and verifiable evidence (such as meeting or missing performance targets or the employee's own acceptance of appraisal ratings)

Applying the criteria fairly

- Do make reasonable adjustments when applying the criteria (apart from length of service and disciplinary record) to employees with a disability where a failure to do so would place them at a substantial disadvantage compared to employees without a disability
- Do remember that you will have to show each employee the scores they received as part of a fair redundancy procedure
- Do remember that, in an unfair dismissal claim, you can be required to disclose the scores given to all employees if there is evidence to suggest that your selection criteria were not applied fairly
- Do remember that tribunals can interfere only if no reasonable employer could have adopted the criteria you used or applied them in the way that you did
- Do remember to allow appeals – it will be unfair to dismiss an employee for redundancy without allowing him to appeal against his selection

Collective redundancies

An additional duty to consult employee representatives exists when an employer makes collective redundancies. The consultation includes consultation about ways of avoiding dismissals, reducing the numbers of employees to be dismissed and mitigating the consequences of the dismissals.



When it applies

- Where an employer is proposing to dismiss 20 or more employees at one establishment within a period of 90 days or less.

Timing

- The consultation shall begin in good time and in any event
  a) where the employer is proposing to dismiss 100 or more employees, at least 90 days, AND
  b) otherwise, at least 30 days
  before the first dismissal takes effect.

Costs

- Regular remuneration during notice periods (or payment in lieu of notice).
- Employees with 2 years' service are entitled to a statutory redundancy payment calculated following a formula based on age, length of service and weekly pay. The maximum amount payable is £9,900*.
- Additional payments such as an enhanced redundancy payment may be payable if there is a legally binding policy.

Legal issues

- Selection criteria of employees for dismissal must be fair and not discriminatory.
- Some employees have special protection (e.g. pregnant employees) and any dismissal related to those reasons will be automatically unfair.
- A dismissal will be unfair if it is not a genuine redundancy or an inadequate procedure is followed.
- Failure to inform and consult properly can lead to an award of 90 days' actual pay per affected employee.

*This maximum will increase to £10,500 from 1 February 2009

Enhanced redundancy schemes

Enhanced redundancy schemes have often been used to make redundancies more acceptable.

Care needs to be taken to ensure that they do not inadvertently discriminate on the basis of age.

Statutory redundancy payments are still calculated using a multiplier that varies according to the employee's age, as the Government considered that this was a justifiable form of age discrimination.

Enhanced redundancy payments that mirror the calculation of the statutory redundancy payment benefit from a similar statutory exemption.

Any other basis of calculation in which age is a factor is unlawful unless it can be objectively justified as a 'proportionate means of achieving a legitimate aim'.

Legitimate aims

Schemes could have many legitimate aims, such as encouraging and rewarding loyalty, or reflecting the greater difficulty for older workers to find another job, or making room for new blood by incentivising long-servers to leave.

Proportionality of the age-related measure to the legitimate aims

There must be an objective balance between the age-related factor, the enhancement and the purpose of the scheme.

Schemes which are weighted in favour of a certain age group or employees with a certain amount of service will be unlawful unless the weighting can be properly justified.

Schemes may also be justified if payments are enhanced according to age and length of service and then reduced once an employee reaches a certain age so that they receive no payment once they have reached retirement age. As always, it depends on the precise terms of the scheme but there is potential justification for excluding those who are entitled to immediate benefits from their pension fund and for using a system of tapering in the years leading up to it.

It may also be easier to establish proportionality where you can produce evidence of having consulted employees (or their trade union representatives) before introducing any age-related or service-related differential treatment and having explained your reasons for doing so.

The statutory dismissal procedure

Where the number of redundancies does not meet the threshold for collective consultation, you must follow the three-step statutory disciplinary and dismissal procedures - at least until April 2009.

Failure to follow the procedures can lead to a finding of automatic unfair dismissal and also an uplift of up to 50% in compensation payable to the dismissed employee.

Preliminaries

Before starting, make sure you review your internal policies to find out whether they set out timescales for complying with certain steps or contain additional requirements which go beyond the statutory steps.

However, the fact that you follow your own internal policies will not prevent a finding of unfair dismissal if you do not follow the statutory steps.

Step 1

Send the employee a letter stating that there is a redundancy situation and that they have been provisionally selected for redundancy, and invite them to a meeting to discuss this.

It is good practice to allow employees to bring a companion – but this should only be a trade union representative or a colleague and not a legal adviser, family member or non-work friend. If you do allow any employee to be accompanied, you should allow it for all employees. The role of the companion is no longer just to be a witness and/or note-taker — they can act as the employee's advocate, putting their case and conducting any cross-examination, but they cannot answer questions on behalf of the employee.

In addition to the letter, you should provide the employee with sufficient information to allow them to understand why they were selected and challenge the criteria used to make that selection. This doesn't have to accompany the letter but should arrive in sufficient time to allow them a reasonable opportunity to consider the information and their response to it before the Step 2 meeting.

Step 2

Hold the meeting.

Listen closely to what the employee has to say. Don't get drawn into an argument. Be careful not to talk as if your mind is already made up. Tell the employee when you expect to make your decision and remind them that they have a right of appeal.

The meeting is likely to involve some discussion of alternative employment, in which case you will have to adjourn the meeting to give the employee a fair chance to consider their options.

When the (reconvened) meeting is over, review the position to take account of any new points raised and reach your decision step by step, resolving any disputed issues one by one and noting the evidence you rely on in each case.

Then notify the employee – you don't have to do this in writing or wait an extra day to make it look like you have thought extra-hard about the decision. But make sure that you allow enough time for careful consideration of the available evidence before reaching a conclusion. If you notify the employee in person, make sure you follow this up with a letter setting out the decision and your reasons for it, to show that you have complied with the statutory procedure. Include a reminder of their right of appeal and of the appeal procedure to be followed.

Step 3

No appeal need take place unless the employee exercises their right to request one.

Employees don't have to give detailed reasons but should be asked to indicate the grounds of their appeal so that you can prepare for the meeting and gather evidence to deal with all relevant issues. This will also help focus the employee's mind on the issues.

As far as reasonably practicable the employer should be represented by someone more senior than the manager attending the first meeting.

Listen closely to what the employee has to say. Don't get drawn into an argument. Be careful not to talk as if your mind is already made up.

Tell the employee when you expect to make your final decision. Remind them that there is no further right of appeal.

Once the appeal hearing is over, inform the employee of your final decision.

Change is on its way

The three-step process — and automatic unfairness where it is not complied with — is set to be repealed from April 2009. However, the change may not be that great:

- you will still need to follow a fair procedure to prevent an unfair dismissal
- in deciding whether your procedure was fair, the tribunal can take into account the new statutory Acas code – although this does not apply to dismissals due to redundancy
- compensation can be increased by 25% if the code is not followed
- compensation can be reduced where you do not follow a fair procedure because you have reasonably taken the view that there was no possibility that your decision to dismiss could be changed by following a fair procedure.

10 Dos and Don'ts in a recession

Do

1. Consider using a more flexible workforce, such as agency workers
2. Consider introducing more flexible working to deal with a slow-down of work
3. Consider implementing changes to terms and conditions of employment to reduce costs
4. Take time to plan your strategy if making redundancies
5. Inform and consult properly when making redundancies
6. Respect contractual and statutory notice rights on termination
7. Use compromise agreements where appropriate
8. Comply with company, contractual or statutory procedures
9. Keep proper records of your actions, conversations and decision making process
10. Act reasonably: consider how your actions will look to an employment tribunal

Don't

1. Take any action which could breach the employee's contract
2. Discriminate against or bully an employee to encourage them to leave
3. Tolerate poor performance without taking measures to improve performance or discipline the employee as these measures can ease any subsequent dismissal
4. Make up your mind to dismiss before consultation, both individually or collectively, in a redundancy situation
5. Dismiss anyone who is pregnant or on maternity leave without taking specific advice
6. Claim dismissal is for a reason other than the real one
7. Dismiss anyone without identifying a clear and fair recognised reason for dismissal
8. Dismiss anyone without following an appropriate procedure
9. Rush or skip stages in any disciplinary, dismissal or grievance processes
10. Forget about any employees who are being retained – make sure they know the score!

What happens when a contractor or subcontractor goes bust?

If your contractor or subcontractor goes bust and you take over or get someone else to finish off their work (whether formally or informally) this is not necessarily a redundancy situation. Whoever finishes off the job could inherit the first contractor's or subcontractor's employees under TUPE (or face unfair dismissal claims from them).

It all depends on how long the original job was, how much is left and what kind of insolvency proceedings (if any) are involved.

Here's a quick guide to help you decide:

Was the contractor or subcontractor made bankrupt or put into insolvent liquidation?
If a formal court order has been made, there will be no transfer of employment or employee liabilities.

What if the contractor or subcontractor entered into a personal IVA or went into corporate administration?
Even so, it is still possible that the employees and employee liabilities could transfer.

What if the contractor or subcontractor went into administration?
If so, the employees would transfer to the new contractor or subcontractor together with most of the employee liabilities but not:

- unpaid wages up to £330 a week for 8 weeks*
- unpaid holiday pay up to £330 a week for 6 weeks.*

Were the services provided by the contractor or subcontractor long-term or short-term?
If they were short-term, there will be no transfer of employment or employee liabilities. If they were longer than short-term, it is still possible that employees and employee liabilities could transfer.

Were the services provided by the contractor or subcontractor almost complete?
If so, it is likely that there will be no transfer of employment or employee liabilities: European case law says that employees are not transferred when a second contractor or subcontractor is engaged to finish off the final part of a bust contractor's or subcontractor's work on site. If not, it is likely that the employees and employee liabilities could transfer.

What happens if the contract is given to more than one new contractor or subcontractor?
Sometimes this just demonstrates that the job was in fact two separate activities with their own separate workforces, so the dividing line is clear.

Where the employees are not allocated to one or other activity and work on both, deciding who inherits who is tricky and depends on a number of factors, such as time spent, value given, employment contract terms, and cost allocation. But the general rule seems to be that a successor who gets the lion's share of the work runs the risk of being saddled with all of the employees.

*Maximum amount of week's pay will increase to £350 from 1 February 2009

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