RESTRUCTURING & REDUNDANCY

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Unite has issued this guidance to help members understand what your employer can and can't do during a restructuring process.

Consultation

If your employer is proposing to restructure your department, delete your role, or make fundamental changes to it, they are required to consult with you. Where 20 or more roles are proposed to be deleted within the workplace, consultation must start at least 30 days before anyone is dismissed. Where 100 or more roles are proposed to be deleted within the workplace, consultation must start at least 45 days before anyone is dismissed.

Where 20 or more roles are proposed to be deleted within the workplace, the obligation to collectively consult is triggered. The fact that less than 20 employees may end up being dismissed is not relevant: what matters is the number of roles that the employer proposes to delete at the start of consultation. Where an employer recognises Unite, they are required to collectively consult with Unite with the aim of avoiding or mitigating the effect of dismissals. Where a union is not recognised, employees must be allowed to elect representatives for the purpose of collective consultation.

Consultation must take place while proposals are still at a stage where employees and their representatives can exercise genuine influence over the outcome. An employer cannot escape its duty to consult in good time by claiming that it does not yet have all the necessary information. If an employer states from the outset that their proposals are non-negotiable, they are not engaging in meaningful consultation as required by the law.

Regardless of the number of roles which your employer proposes to delete, they should provide adequate time for affected employees and recognised unions to understand the proposals, have their questions answered and counter-proposals considered.

All representations and counter-proposals require a response from the employer, and where consultation results in revised proposals, these must be consulted on too. Consultation should only end when the employer, union and affected employees have either reached agreement or when agreement proves impossible. Notice of dismissal should only be provided once consultation is complete.

The method of individual consultation should cater for a worker's individual needs, for instance by applying reasonable adjustments for a disabled employee.

The obligation to consult does not mean that the employer has to accept any counter-proposals from employees or their representatives, and generally the law does not assist employees who disagree with the employer's proposals on how they wish to restructure their business.

As long as there is a genuine business reason for restructuring, employment tribunals do not have the power to interfere with that reason. Employers do not need to show that they are required to delete or fundamentally change roles for financial reasons and bad employers often restructure simply to increase their profitability.

Successfully challenging an employer's decision to restructure a department against the wishes of the workforce usually requires industrial action (which in turn requires high union membership). If you believe that your colleagues would be prepared to resist the employer's proposals through collective action, please discuss this with your regional officer by contacting the Unite London and Eastern regional office.

Redundancy

Redundancy is where an employer deletes an employee's role because they no longer wish employees to carry on the work for which that employee was employed in the place they are employed, or because the need for employees to carry on that work in the place the employee is employed has diminished or is expected to do so.

If your employer dismisses you at the end of a fixed-term contract for one of the above reasons, you would be dismissed by reason of redundancy.

If your employment contract contains a "mobility clause", your employer may have the right to reasonably instruct you to change workplace in which case you would not be entitled to a redundancy payment.

Redundancies have to be genuine and should always be about the role and not the individual. It would be unlawful for instance for an employer to make one employee "redundant" and then employ another individual to carry out the same work. Sometimes an employer will want to reduce the number of employees carrying out a particular role and this is lawful where they use a fair selection process for selecting certain individuals for redundancy dismissal.

The following is a list of ideas that an employer should explore to avoid redundancies:

- Finding savings elsewhere
- Freezing recruitment
- Cutting the use of agency staff and/or overtime
- Any temporary changes to terms and condition proposed by affected employees

Selection processes

Where employees are to be selected for redundancy, there has to be a fair selection process. This involves the employer considering the "selection pool", i.e. those employees who are at risk and may have to face a competitive selection process.

The selection pool is something that can be challenged by the employee within the consultation process. Usually where an employer is deleting all of its employees that carry out a particular role or roles, the pool can be restricted to those employees alone.

The selection process should be contained within a policy and where there is a recognised union, the employer should seek to agree this policy with the union. The selection process will typically involve competitive interviews or assessments or scoring of those within the selection pool based on past performance or other criteria such as disciplinary record or attendance levels. Where scoring is used, employees and the union should be pressing the employer to use criteria that are objectively verifiable rather than relying on subjective management opinions.

An employer should provide details of selection criteria and an employee's scores in order to provide them with an opportunity to challenge their decision, but do not need to provide the scores of other employees.

Challenging redundancy selection is very difficult and will not succeed if the selection process is broadly fair, employees have a chance to challenge their selection, and there is no evidence of discrimination or another unlawful motive. An employment tribunal will not re-score an employer's redundancy scores unless the employer has shown obvious bias, for example if an employee were scored lower on attendance than a colleague who had in fact missed work on a greater number of occasions, or has committed an error which has a material effect on the redundancy process outcome. A tribunal will not interrogate other less objective types of criteria and will give wide scope to the employer to exercise discretion in selection processes. An unfair dismissal claim will only succeed if the outcome is one that no reasonable employer could reach.

If you believe that proposed selection criteria unlawfully discriminates against you (for instance because you are disabled or because you work part-time), please contact your regional office for advice. Some key points to note:

- Disability-related absence should be excluded from redundancy selection exercises;
- Employees should not be required to undergo competitive interviews whilst recovering from major illness;
- "Last-in-first-out" selection which favours staff with longer service can constitute discrimination against younger, female and ethnic minority workers who may have less continuous service;
- It is unlawful to target a worker for redundancy on the basis of their trade union membership or activities;
- Selecting employees for redundancy on the basis of fixed-term status is unlawful under the Fixed-term Employees Regulations 2002 and may also amount to indirect sex discrimination in sectors where women are more likely to hold these posts;

- Scoring employees for their ability to work flexible hours is likely to constitute indirect discrimination against women who are more likely to have caring responsibilities;
- Apprentices should not be made redundant unless the part of the business in which they work is closing and there is no suitable alternative which allows them to continue working.

A good employer will allow those which want to leave the business with an enhanced redundancy payment the option of doing so before considering making anyone who does not want to lose their job compulsorily redundant. This is called offering "voluntary redundancy" but there is no legal obligation for an employer to do this. Often an employee whose application for voluntary redundancy is accepted will be required to sign a Settlement Agreement preventing them from pursuing future tribunal claims against the employer.

"Bumping" is when an employer offers an employee facing redundancy the job of another employee, resulting in that other employee's dismissal. This can be legal and the employee that is dismissed will have been dismissed by reason of redundancy.

Alternative work

Where an employee is facing redundancy from their role but there are other vacancies within the company that the employee is likely to be able to undertake, the employee should be considered for these vacancies. The possibility that an employee not at risk of redundancy or an external applicant may be better suited to the vacancy does not justify an employer not appointing an employee at risk of redundancy provided it is reasonable to take a view that the at-risk employee would be able to do the job (which may involve a small amount of additional training). If there are multiple employees at-risk of redundancy, the employer may select whoever they think is most suitable from this group. The employer is under no obligation to create suitable alternative employment, but a failure to offer a suitable vacancy to an employee facing redundancy is likely to make the dismissal unfair.

Both the affected employee and the employer should start identifying suitable alternative employment as soon as they realise a role is at risk, and the obligation to seek alternative work continues up to the date of dismissal. Whilst legal responsibility rests with the employer, a tribunal in an unfair dismissal case will be more sympathetic to an employee if the employee proactively seeks alternative employment, so keep a record of all roles you have applied for or enquired about.

An employee who unreasonably refuses an offer of suitable alternative employment will lose their entitlement to redundancy pay.

The suitability of alternative employment will take into account the skills required and the duties, status, location, hours and terms and conditions of the alternative role.

If the alternative role involves a reduction in terms and conditions of employment or status, the employee should be entitled to decline the role and accept a redundancy payment instead. Nevertheless, the failure by an employer to allow an employee to accept a more junior vacant role as an alternative to redundancy may make a dismissal unfair.

If you are considering accepting a more junior role to avoid redundancy it is worth trying to negotiate pay protection, at least for a period of time. If you are willing to accept different or less favourable terms to avoid redundancy, for example a job share, part-time/ shift work or relocation, you should communicate this clearly in writing to your employer early in the redundancy process.

An employer should provide sufficient information about alternative roles for the employee to be able to make their decision, including the terms and conditions attached to the alternative role. If you are disabled, your employer must apply reasonable adjustments to any suitable alternative role. Employees at risk of redundancy during maternity, adoption or shared parental leave have enhanced statutory rights to be offered suitable alternative employment and must be given preference for any suitable alternative post over other employees also facing redundancy.

All employees have the right to a statutory trial period of four calendar weeks in a new role. The trial period can be longer if this is agreed with your employer. If the post proves unsuitable and is rejected for good reasons by the employee within the trial period, they are entitled to leave with a redundancy payment. Where an employee seeks to decline an offer of suitable alternative employment, an employer must take into account the employee's individual circumstances such as its effect on their domestic life, health or career. A refusal to work a trial period can make it harder to show the new job is unsuitable. You will not be entitled to a redundancy payment if you choose to leave after the trial period has ended.

Notice and redundancy pay

Employees are entitled to receive notice of their dismissal in line with the notice entitlement contained within their employment contract and not less than the statutory minimum of one week per full year of service up to a maximum of 12 weeks. Whilst under notice of redundancy, employees with at least two years' service have the right to reasonable paid time off during working hours to look for alternative work.

Employees with at least two years' service have the right to receive statutory redundancy pay if they are dismissed by reason of redundancy and do not secure an alternative job with their employer. Statutory redundancy pay is calculated using a statutory formula based on age and length of service. You are entitled to:

- Half a week's pay for each full year of employment when the employee was aged below 22;
- A week's pay for each full year aged 22 to 40;
- A week-and-a-half's pay for each full year aged 41 and over.

The maximum number of years that are taken into account when calculating statutory redundancy pay is 20. A week's pay is based on the gross amount for your normal working hours, including pension contributions, but the maximum amount of a week's pay is capped at £538 (as of April 2020). Where your hours are irregular or have changed, statutory redundancy pay is based on average pay earned in the 12 weeks leading up to the redundancy notice (with any weeks without pay disregarded/ earlier weeks included to make up a full 12 weeks). This is important to consider in the event that your employer tries to reduce your hours whilst redundancy is on the horizon. You can calculate your statutory redundancy pay at www.gov.uk/calculate-your-redundancy-pay.

You may have a contractual right to enhanced redundancy pay if this is contained within your contract of employment or within your employer's redundancy policy. You are entitled to receive a written statement showing your redundancy pay calculation during your redundancy consultation. Redundancy pay (both statutory and contractual) is tax free up to £30,000, whilst notice pay is taxable.

If you find alternative work during your notice period, you should write to your employer informing them of this and requesting a shorter notice period should your prospective new employer require this. If you leave your employment or give notice to leave your employment before your employer provides you with notice of your dismissal you are not entitled to a redundancy payment.

Redundancy and unfair dismissal

Two years' continuous employment is required to bring an unfair dismissal claim in the vast majority of cases. The most common reasons that redundancy dismissals are found unlawful are:

1. Redundancy was not the real reason for dismissal;
2. There was inadequate consultation;
3. The employer's selection of an employee for redundancy was unreasonable;
4. There was a failure to offer suitable alternative employment.

It is important to engage with your employer's redundancy consultation in full and, where possible, appeal any notice of dismissal which you believe to be unfair. All employees have a right to raise a grievance against a redundancy dismissal and should always request that a senior manager to that which made the dismissal decision hears that grievance.

Please remember you must be a pre-existing member of Unite to benefit from the union's advice and representation. There is no statutory right to be accompanied by a union representative at redundancy consultations meetings, and it is not typical for a full-time Unite official to attend these.

You will have 3 months less one day from the date of the act complained of to lodge an Employment Tribunal claim.

This booklet provides general guidance only. If you believe that you are being or have been unfairly dismissed or have not received your redundancy pay entitlement, please contact your Unite representative or the Unite London and Eastern Regional Office without delay.