Managing Redundancies
12 common errors made by employers

This guide is designed to highlight the common errors and mistakes employers make in redundancy situations; raise awareness and in turn help reduce the frequency of occurrence.

It must be stressed that this is not an exhaustive listing of cases. Every case will turn on its own merits and context. Additionally, laws are changing all the time, sometimes in the face of caselaw and sometimes through new legislative initiatives. It is therefore that employers facing redundancy situations seek guidance from ACAS, redundancy related agencies and their organisation's legal advisers.
Links to HM Courts and Employment Tribunal enquiry search engines as well as others to ACAS guidance and the Equalities and Human Rights Commission (EHRC) appear as a footnote to this guide.

12 COMMON ERRORS

1. Defining the pool for redundancies incorrectly
An employer must guard against defining the redundancy pool too narrowly. This was shown in Highland Fish Farmers v Thorburn, where the Employment Appeal Tribunal (EAT) ruled the former had acted unreasonably in treating two fish-farming sites separately for the purposes of redundancy selection.

Employers also need to guard against 'bumping' redundancies – where an employee whose job is not at risk is dismissed. This can lead to discrimination, as seen in Leung and another v Elements Oriental Buffet House, where two employees were successfully bumped out of their jobs 'in favour of men from another workplace who were in their 30s', as the employment tribunal notes.

They successfully claimed unfair discrimination and unfair dismissal. The ACAS and EHRC links at the footnote provide full definitions and context for these terms.

2. Not offering suitable alternative employment
Employers are obliged to identify suitable alternative employment for the redundant employee, and to avoid expecting them to accept an alternative, but unsuitable, role.

In Sturdy v Leeds Teaching Hospitals NHS, an employment tribunal found the employer unlawfully discriminated against senior NHS manager Linda Sturdy during a reorganisation, by failing to appoint her to a new position for which she was well suited. The trust was also found guilty of victimising Sturdy when she persisted with complaints about her treatment and refused to take up a post at a significantly lower level. She ultimately won £33,500 for injury to feelings. Another potential pitfall is failing to give preference to an employee on maternity, adoption, or additional paternity leave when there is suitable alternative employment available. See also 11 below.

3. Absence of a genuine redundancy situation
Less principled employers may see an economic downturn as a great opportunity to get rid of underperforming staff. This is to be avoided at all costs – an employer failing to prove there is a genuine redundancy situation could end up facing a charge of unfair dismissal. During the course we looked in detail at the full definition of "genuine redundancy" and also touched briefly on related considerations centred on redundancy under cover of the Transfer of Undertakings Protection of Employment (TUPE) For the avoidance of doubt, a redundancy can occur in three scenarios. Broadly these are:

1. on the closure of a business;
2. the location in which the employee is working closes; or
3. there is a diminishing need for employees (i.e. the job disappears/fewer people required)

In some instances, such as with a reorganisation, it can be difficult to know if that reorganisation falls within the definition of a redundancy and such situations need to be carefully considered before any process is commenced. If the situation does not come within the statutory definition, then the reason for any proposed dismissals may still be a fair reason if it is "some other substantial reason".

4. Failure to carry out a fair selection procedure
To prove a role is genuinely redundant, employers must carry out a fair selection procedure, using transparent, consistent and objective redundancy selection criteria. They should avoid choosing an individual for redundancy because of a characteristic such as pregnancy, age or length of service. We explored on the course an extensive menu of objective considerations that can be incorporated within selection procedures based on objective scoring systems.

5. Failure to consult properly on collective redundancies
It's not enough just to carry out consultation. It must be done correctly, and employers should take particular care to consult on collective redundancies in a timely manner.

If an employer is proposing to dismiss 20 or more employees at one establishment within a 90-day period then they are required to collectively consult with appropriate representatives about any proposed dismissals.

Any consultation should involve:

- considering ways to avoid the proposed dismissals
- reducing the number of employees to be dismissed
- mitigating the consequences of those dismissals and must be undertaken with a view to reaching agreement with appropriate representatives.

6. Failing to provide information to appropriate representatives
Specific information must be delivered to appropriate representatives, who are either the union representatives (where a union is recognised in respect of the affected employees) or elected employee representatives. If an employer fails to elect employee representatives or if there is any other failure relating to engaging with the appropriate representatives, then a complaint can be made to the employment tribunal and a tribunal may make a protective award in respect of the dismissed employees. This could lead to an order being made that the employer pay remuneration for the protected period of up to 90 days per employee.

The consultation process is not just a formality and must not be a sham. Any consultation must be meaningful. A failure to do so can result in protective award claims per affected employee. There is indication that number of protective awards may be increasing. As mentioned above it is important for employers to keep up to date with the latest developments in an ever-changing landscape. The ACAS link in the footnote below is a very useful tool to use for prevailing news and expected changes.

The legal definition of “consultation” v “negotiation” anchored in ACAS guidelines is important. There are points of convergence and divergence between the two terms and it is important to check that your in-house definitions and use of these terms can be reconciled with recommended good practice.

A growing trend in all sectors involves employers setting up Employee Forums or Councils for non-union members that run independently or alongside established consultative/negotiating machinery with Trade Unions. These bodies with foundations in agreed standing orders, a constitution and clarity on membership and meetings will often bring about sustained positive dialogue on an extensive range of day-to-day workplace issues, policies, procedures and practices. This can include redundancy and of course under TUPE, mentioned in 3 above, there is a requirement to consult with “organised groupings”.

Concrew training have produced a briefing on the common consultative and negotiating models through which employee representatives can make their views and ideas clear. This can be found under the free guides section on our web site.

7. Failure to inform and consult on an individual basis

The individual obligation to consultation arises out of the statutory right not to be unfairly dismissed. Under section 98(4) of the Employment Rights Act 1996, an employer must act reasonably when treating redundancy as a sufficient reason to dismiss an employee – consultation is almost always an integral part of the process of acting reasonably. An employer failing to inform and consult could face an unfair dismissal claim with compensation running into many thousands of pounds.

8. Failing to consider alternatives to redundancy

Employers approaching redundancy in a rash or cavalier manner leave themselves at real risk of being left ill-equipped for business upturn. By failing to consider alternatives to redundancy, they may end up losing skilled and valuable employees, maybe even finding themselves short-staffed.

A wide range of alterative options exist, including many recommended by ACAS:-

- seeking applicants for voluntary redundancy or early retirement
- seeking applications from existing staff to work flexibly
- laying off self-employed contractors, freelancers etc.
- not using casual labour
- restricting recruitment
- reducing or banning overtime
- filling vacancies elsewhere in the business with existing employees
- short time working or temporary layoffs

9. Not training managers in how to carry out the redundancy exercise

While HR staff can go back to their own department once a redundancy announcement has been made, it is up to line managers to cope with redundant staff in the run up to their departure. Lacking the skills and experience to do so effectively and compassionately will make the situation worse for all concerned – including ‘surviving’ staff.

Communication is key – employers must make sure everyone involved, particularly those being made redundant – hears the news in a timely and appropriate fashion, through the right channels.

This is especially important today when so many people use social media for instant communication. Additionally specific process training leading individual consolations and/or representing the workforce helps to ensure legislation and good practice is met.

10. Not accounting for the extra costs and resources involved
Redundancy does not begin and end with breaking the news. Employers should be very careful to allocate resources – both time and money – for the duration of the consultation period, and often beyond. It's worth also considering the potential for challenges to the redundancy in employment tribunal.

11. Failing to apply the special rules to employees on family leave
If an employee is on maternity leave, adoption leave or shared parental leave and is selected for redundancy, they have additional legal protection. Such an employee who is at risk of redundancy has a right to be automatically offered any suitable alternative employment available and thereby jumping ahead of any other at-risk employees in the queue.

12. Failing to hold a dismissal meeting or providing a right of appeal
A redundancy is a potential fair reason for dismissal. However, a failure to follow a proper procedure may render a dismissal unfair. Any notice of dismissal should only be given once all alternatives to redundancy have been considered and the consultation process, including individual consolation, is completed.

An employer should hold a meeting with employees at risk of redundancy before making a final decision, and should allow the employee to be accompanied at that meeting. Any decision to dismiss should also be confirmed in writing. It is best practice to ensure that any letter of termination also includes a right to appeal to a more senior manager than the one who carried out the consultation process to ensure the fairness of the process followed.

Sources of useful advice and information: -

ACAS
https://www.acas.org.uk/manage-staff-redundancies

Equality and Human Rights Commission (EHRC)
https://www.equalityhumanrights.com/equality/equality-act-2010/dismissal-redundancy-and-retirement

Employment Tribunal Decisions
https://www.gov.uk/employment-tribunal-decisions

Employment Appeal Tribunal (EAT) Decisions
https://www.gov.uk/employment-appeal-tribunal-decisions