Redundancy dismissals - procedure for fair dismissal

Redundancy is recognised as a valid reason for dismissal, but redundancies can be unfair if:

- An employment tribunal is not satisfied that redundancy really was the reason for dismissal
- The employer has not consulted affected employees prior to the redundancies
- The employer has not selected those to be made redundant in a fair way
- The employer has not given adequate consideration to offering alternative employment

1. Reason for dismissal
There is a considerable amount of case law defining dismissals by reason of redundancy. It is impossible to cover this fully here. Broadly, the following are likely to be accepted as redundancy situations:

- Job losses due to closure of part or all of the business, e.g. ceasing a particular service
- Job losses because the workload has reduced
- Reorganisation so that fewer employees are required, even if overall the same amount of work is being done

Employment tribunals usually regard the decision to make redundancies in the first place as a matter for management. If there appears to be a redundancy situation, tribunals normally only enquire further if there is evidence of some hidden or illegal motive, e.g. where a redundancy situation is engineered to remove an individual for other reasons.

2. Volunteers
Compulsory redundancies can be avoided altogether by looking for volunteers. Employment tribunals have never said employers must look for volunteers, but it is often worth considering doing so, particularly if there are certain individuals you want to select for redundancy but have no reason that would stand up in a tribunal (e.g. adequate but plodding individuals). You could devise a voluntary redundancy scheme that is particularly attractive to those employees.

You do not have to accept all volunteers for redundancy, but if you want to reserve the right to refuse volunteers, make this known in advance. For example, if volunteers are sought via a notice board, the notice could specify that the organisation will choose which volunteers to select for redundancy. Unless there are good reasons, you will find it difficult to justify compulsory redundancies when volunteers are available.
Even where employees have volunteered for redundancy, there will normally still be a dismissal and so you should follow the minimum statutory dismissal procedures set out below, unless there are more than 20 dismissals, in which case the statutory procedures will not apply. In practice, the ‘dismissal meetings’ and right of appeal are normally completely pointless in the case of volunteers, but if there is any possibility of a complaint arising from the voluntary redundancy (e.g. the employee may argue they were forced in to accepting voluntary redundancy if they had been told the redundancy was inevitable anyway) then the minimum procedures should be followed.

3. Selection criteria
First, decide the criteria on which to select for redundancy. Selection criteria should be as objective as possible, and should be relevant to the job in question. Common criteria are competence, attitude, skill, disciplinary history, and so on, but there may well be others which are specifically relevant for the job in question. We can help devise your selection criteria with you.

Individuals should then be provisionally marked against each criterion and a record kept. Sometimes some subjectivity is inevitable. Wherever possible criteria which may bring allegations of subjectivity such as competence, attitude, and skill should be measured against objective records, if there are any, e.g. performance records to measure competence and skills, disciplinary records and attendance records to measure attitude. If you do not have any such records, then it is a good idea to have any opinions about a person’s skills, for example, upon which the selection is based, confirmed by a second manager.

If you use attendance records as a criterion, you should ignore absences of disabled employees caused by their disability - otherwise you may be treated as discriminating unlawfully on grounds of disability. You should also ignore absences related to pregnancy or maternity.

Clients often come to us with a list of the employees they want to make redundant, without first having thought about the selection criteria. This is the wrong way round. The selection criteria should be determined first. Often we can rescue the situation by identifying the reasons why the client wants those employees to be selected, for example, poor work output, poor attendance etc. Those reasons can then be used as the selection criteria. The application of those selection criteria often (but not always) leads to the selection of the same employees that the employer first had in mind.

4. Announcing redundancies
If 20 or more redundancies are proposed, then employers are required to consult with employee representatives/trade union representatives (see below). How redundancies are announced is then likely to be one of the matters to be discussed with the representatives.
If fewer than 20 redundancies are planned (but more than one or two, when employers may want to handle matters more discreetly), the organisation might wish to announce the redundancies either at a general meeting of those sections of the workforce within which redundancies are to be made, or at individual meetings. This has the advantage that individual consultation over redundancy will not come as a complete shock and employees may be better prepared for the consultation meetings.

At a general meeting, the following should be explained:

- The reason why redundancies are considered necessary
- The proposed method of selection
- The proposed time-scale for individual consultation (and collective consultation if applicable)
- If volunteers are sought, how people can volunteer, whether any enhancements are proposed for volunteers and who people can talk to confidentially if they have any queries about volunteering. Emphasise that the organisation reserves the right to refuse volunteers if necessary to retain sufficient skills. It is a good idea to identify in advance of this meeting if there are any criteria you would want to apply to disqualify certain people or groups from volunteering

5. Individual consultation
Once the selection criteria has been finalised and employees have been scored against those criteria, the individuals provisionally selected should be consulted before any final decision is made. The reason for this is that there may be matters of which you are unaware which might influence the decision.

Prior to any consultation meeting you should send all employees who have been provisionally selected for redundancy a letter inviting them to a meeting. This letter should include the following:

- A summary of the relevant facts, e.g. the reasons for the proposed redundancies and any selection criteria to be adopted, together with details of their scores - see below
- Notification of the time, date and place for a meeting to discuss the situation
- Notification of the employee’s right to be accompanied

Quite often, employees will try to challenge their selection and say that they were not marked fairly - and often ask for their scores, together with the scores for other staff. This needs to be
handled carefully - if not, you will simply end up in an argument over the candidate who has been selected over other people’s scores against the relevant criteria. It is also worth knowing when details of scores should be disclosed anyway - before a consultation meeting, in the letter of dismissal, or at all?

You should provide employees with details of their own scores at this stage, as well as the overall scores of other staff in the pool of selection (albeit anonymised), in a letter inviting them to their first consultation meeting so that they can be discussed as part of the consultation process. Failing to do this could give rise to an argument that the employee was not able to comment properly on their circumstances and put all of their points across before a decision to dismiss at the end of the consultation process is made. It should also be remembered that not being transparent or looking like you have something to hide might simply aggravate the situation and lead to an employee asking for disclosure of this information as part of a Tribunal claim.

Reasonable notice of the meeting should be given. Two clear days should normally be enough.

You should always attempt to find a time for the meeting which is convenient for all parties. If the date for the meeting turns out to be inconvenient for the employee then a further meeting should be arranged. If the employee fails to turn up for a second time for an unforeseen reason then you will be treated as having complied with the statutory procedure and you can proceed with the meeting in the employee's absence. At this meeting, the reasons for the redundancies should be outlined, as should the selection criteria. The employee should be given all the relevant facts upon which you have relied in coming to the provisional conclusion that that employee should be selected.

Then explain to affected employees that this conclusion is provisional only and that, before coming to a final conclusion, you would like to hear what comments they have. For example, they may say they would be prepared to take an alternative position at a lower salary or part-time work, or may suggest alternative ways to make savings.

If there are other vacancies, these should be mentioned to the employee even if you think he or she is unlikely to accept them. You are under no obligation to offer alternative employment, but employees should at least be given the opportunity to apply and be considered for them. If they are not informed about other vacancies, they will have been denied that opportunity. Notes should be kept of the meeting. It is useful to confirm the contents of the meeting in writing, either by sending a copy of the notes of the meeting or in a letter - this gives a further opportunity to emphasise that no final decisions have been taken; also set out in the letter confirming the meeting, any points
made by the employee to show that you are taking into account any comments they have made.

Generally it is unreasonable to expect employees to respond immediately with comments on your proposals. They should be given enough time to think about what you have said, take legal advice or discuss matters with their family and so on. Therefore, another meeting should be arranged. This should be done in writing, setting a specific date and should set out the fact that dismissal is contemplated on the grounds of redundancy, the basis for that, anything discussed at the previous meeting, the fact that the employee has a right to be accompanied by a trade union official (whether a member of a Trade union or not) or a colleague and that the employee will have the opportunity to say why s/he should not be made redundant and to raise any other matters. The longer the period the employee is allowed to think about the proposals, the better, but generally three days working will be sufficient.

At this further meeting, you should invite the employee to make whatever comments s/he wishes. Any proposals s/he may make to avoid the redundancy or to avoid him/her being selected for redundancy should be fully considered. To ensure you give any comments proper consideration, take notes of everything that is said and look at them again after the meeting.

If you still think the employee should be made redundant, inform him/her in writing, giving reasons for rejecting any alternative proposals s/he may have made. The employee is entitled to notice, statutory redundancy pay and other accrued sums such as holiday pay, and is also entitled to a right of appeal. This should all be confirmed in that letter.

One question which often arises is whether an employer can tell an employee to go home during the consultation period. Many employers want the employee(s) off site for obvious reasons. It is a case of risk management. There might be good reasons to do so, such as the fear of theft of confidential information or other disruption to the business and lowering of morale amongst any remaining staff. This must be balanced against the employee’s potential argument that the decision to make them redundant has already been made as the employer can do without them - and furthermore, there is generally no right for an employer to exclude an employee from the premises. This should be managed carefully, and before a decision to send staff home is made, specific advice on the particular circumstances should be sought.

6. Collective consultation
If you are making 20 or more employees redundant within 90 days at one establishment, in addition to consulting individually, you will have to consult with employee representatives, i.e. representatives of a recognised trade union or any other representative elected by employees if
there are any non-union represented groups. If there are no such representatives, invite the employees to elect some. The consultation must explore ways of avoiding or reducing the redundancies and mitigating their consequences and is to be with a view to reaching agreement. This does not require you to reach agreement, merely to make an effort to do so.

There are minimum periods of consultation, which vary depending on the number of employees to be made redundant. If between 20 and 99 (inclusive) redundancies are proposed, the consultation period (i.e. the period between the start of consultation and the first redundancy) must be at least 30 days. If 100 or more redundancies are proposed, the consultation period must be at least 90 days. Consultation must commence in ‘good time’ and should start at such a time when the proposals are still formative, rather than when final decisions have been made.

Representatives should be given the following information in writing:

- The reasons for the proposals
- The numbers and descriptions of employees whom it is proposed to make redundant
- The total number of employees of such description employed at the establishment in question
- The proposed method of selection
- The proposed method of carrying out the redundancies, e.g. timing and method of notification and individual consultation
- The proposed method of calculating redundancy pay (if the employer proposes to pay more than the statutory payment)

The consultation period is treated as starting when this information is given in writing to the employee representatives. During the consultation period, you should try to reach agreement on, for example, the method of selection, the timing of announcements and the calculation of redundancy pay (if additional benefits are offered in excess of the usual contractual).

Failure to comply with the collective redundancy consultation obligations could result in employees being awarded up to 90 days’ gross pay each by an employment tribunal.

7. Alternative employment
Make sure employees are aware of any job opportunities, e.g. by circulating lists of vacancies or putting them on a notice board and encouraging those affected to apply. Alternatively, you could draw employees’ attention to specific vacancies during the consultation process, but in deciding which jobs to draw to someone’s attention, do not make assumptions about what they want - let the employees decide themselves. For example, employees may be prepared to accept a job at a
lower salary as this would be better than being unemployed. You should discuss this option with employees. If an employee does apply for another vacancy, you should give the application reasonable consideration.

You do not have to accept that employee. For example, it would probably be reasonable to refuse an application from an employee for a job at a considerably lower salary than his/her previous one, because the employee is likely to start looking for another job. Similarly, it may be reasonable to reject an application for a job from someone who would need considerable training to do that other job. The purpose here of the redundancies is to save money and that object would be defeated if what you saved in terms of wages had to be spent on training.

8. Appeal
If the employee disagrees with the decision to dismiss on the grounds of redundancy then they are entitled to appeal against the decision. The written confirmation of dismissal should include reference to the employee's right of appeal and specify to whom and the time within which an appeal should be made. A period of three - five days is probably reasonable.

The appeal hearing should be conducted by someone not previously involved in the selection process and by someone senior to the person conducting the selection process. The person conducting the appeal should listen to any representations the employee may wish to make and then review the decision to make him/her redundant. Again, take notes.

As with the initial meeting, the employee has the right to be accompanied to the appeal meeting. Again, you should attempt to find a time for the meeting, which is convenient for all parties. If the date for the meeting turns out to be inconvenient for the employee then a further meeting should be arranged. If the employee fails to turn up for a second time then you will be treated as having complied with the statutory procedure and you can proceed with the meeting in the employee's absence.

9. Summary

Timescale:

- Commence preparations of putting together proposals
- If more than 20 employees to be dismissed, commence collective consultation in good time
- You must as a minimum start:
  - 20-99 employees - at least 30 days before the first dismissal is to take effect
  - 100 plus - at least 90 days before the first of dismissal is to take effect
- Notify the Secretary of State of the intended redundancies at the same time on form HR1
- Complete collective consultation
- Conduct individual consultation and ensure compliance with the statutory dismissal procedures
- Following consultation serve notice of termination of employment - in accordance with contractual entitlement (subject to minimum of one week for each year of service up to 12 weeks)

This guidance note reflects the current legal position, but in view of the fact that each redundancy situation is different, you should ask a member of the team to assist you tailoring a specific strategy to your given circumstances.

The content of this guidance is provided for the purposes of general interest and information. It contains only brief summaries of aspects of the subject matter and does not provide comprehensive statements of the law. It does not constitute legal advice and does not provide a substitute for it.