REDUNDANCY
PRINCIPLES AND CALCULATIONS REVISITED

Introduction

1. This article has been prepared by two barristers at 33 Bedford Row outlining the basic principles in relation to redundancy as well as calculation of any redundancy payment.

2. It will seek to elucidate the general principles that will be applied when considering whether a redundancy situation has arisen as well as the duties and obligations on both employers and employees.

3. A logical starting point is to consider the definition of redundancy.

Definition of Redundancy

4. The statutory definition of redundancy is to be found in section 139 of the Employment Rights Act 1996 as follows:

> (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
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> a. the fact that his employer has ceased or intends to cease—
> i. to carry on the business for the purposes of which the employee was employed by him, or
> ii. to carry on that business in the place where the employee was so employed, or
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> b. the fact that the requirements of that business—
> i. for employees to carry out work of a particular kind, or
> ii. for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

5. In practice, the Employment Tribunal will not examine too closely the employer's assertion that a redundancy situation exists such as by considering an argument that a redundancy situation could have been avoided by making savings elsewhere. It cannot interfere with the management prerogative of the employer to manage its own affairs as it considers appropriate[1]:

6. The case of *Safeway Stores v Burrell* [1997] IRLR 200 established that the test to be applied is one of causation.

7. The statutory provision requires a three-stage process:

[1] *James Cook & Co v Tipper* [1990] ICR 716

a. Establish whether a dismissal has taken place
b. Establish that the requirements of the employers' business for employees to carry out work of a particular kind had ceased or diminished, or were expected to cease or diminish, and,
c. Establish that the dismissal was *caused* wholly or mainly by that cessation or diminution.

8. This approach was approved at the highest level in the Northern Irish case of *Murray v Foyle Meats Ltd* [1999] IRLR 562 HL.

9. It is worth noting at this point that the "contract test", which focused on an employee's contractual terms, and the "function test", which focused on the actual duties performed, are irrelevant in deciding the issue of redundancy. What has to be established is that the dismissal is "attributable" to the diminution of work.

The Procedure for Making Redundancies

10. Once a decision to make redundancies has been made, the duty is on the employer to carry it out using a fair and objective procedure.

11. There is a difference in the procedure that is to be adopted depending on the number of redundancies that are proposed. In short, where the employer wishes or would seek to make 20 or more employees redundant within a 90 day period a more rigorous procedure applies. These are known as 'collective redundancies'.

Fairness of redundancy process – collective redundancies

12. In terms of the Trade Union and Labour Relations (Consolidation) Act 1992, the key points are in relation to:

a. Giving forewarning and
b. Consultation with the workforce.

13. The issue in relation to forewarning and consultation presents a double edge sword. A balance needs to be struck between business efficacy as well as fairness to employees.

14. Understandably, an employer may not wish to flag the need the need for redundancies too early as it will advertise to the market that it is in difficulties and may create uncertainty. Conversely, employees will require as much forewarning as possible so that they might get their affairs in order and seek a position outside the organisation if necessary.

15. Section 188(1) of TULRCA 1992 Act places a duty on employers to consult when proposing to dismiss as redundant 20 or more employees, at one establishment, within a period of 90 days or less. That consultation has to begin at least 30 days — and if there are more than 100 dismissals, at least 45 days — before the first dismissal.

16. Generally, consultation will be with the union. If the workforce is not unionised, an employee representative for consultation purposes will require to be elected.

188 (2) The consultation shall include consultation about ways of:
(a) avoiding the dismissals,

(b) reducing the numbers of employees to be dismissed, and
(c) mitigating the consequences of the dismissals,

17. The consultation requires there to be meaningful discussion and for the employer to take on board the views expressed by the relevant representatives of the workforce. For example, would an employee be willing to accept a pay cut in order to maintain their job, or reduced hours, or move elsewhere within the organisation? This will also be considered later in this article.

18. Section 188(4) lists the matters about which the workforce must be informed in writing. These include:

> (1) the reasons for the employer's proposals
> (2) the numbers and description of employees whom it is proposed to dismiss as redundant
> (3) the proposed method of selecting the employees who may be made redundant
> (4) the proposed procedure for carrying out the dismissals and
> (5) the proposed method of calculating the amount of any redundancy payments to be made.

19. Section 188 (7) provides that where there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection (1A), (2) or (4), the employer shall take all such steps towards compliance as are reasonably practicable in those circumstances.

20. It might be that employers will in future cases cite Covid-19 as being a special circumstance whereby compliance with subsection 1A, (2) or (4) was not practicable. However, this remains to be tested.

21. The collective consultation duty set out in TULRCA is engaged where an employer is '**proposing'** to dismiss as redundant 20 or more employees. The Directive which Section 188 of the 1992 Act implements talks about the duty arising when dismissals are **'contemplated'**.

22. That distinction used to be considered quite important. In the case of *Junk v Kühnel: C-188/03,* [2005] IRLR 310, the European Court of Justice held that on a natural reading 'contemplating' conveys a sense of some thought being given to dismissals whereas 'proposing' comes at a later, more concrete, stage.

23. However, any difference between the two largely became redundant with the case of *Atavan Erityisdojen AEK v Fujitsu Siemens Computers: C-44/08, [2009] IRLR 944* which effectively merged the prior distinction.

24. The consequence of a failure to abide by the requirements is the possibility of an Employment Tribunal making what is known as a protective award which can be up to 90 days' pay, irrespective of length of service. This is effectively a punishment for failure to comply with the requirements of TULRCA. In a large employer, multiplying say, 45 workers, by 90 days' pay may amount to a rather hefty cost.

Fairness of redundancy process – smaller businesses

25. But what of employers where fewer than 20 employees are facing redundancy? The simple point is that fairness is still required.

26. It is at this stage that we must consider Section 98 ERA.

27. Under section 98(2) redundancy is a potentially fair reasons for dismissal. There is also a potentially fair reason following a reorganisation under the banner of 'Some Other Substantial Reason' under section 98(1).

28. In either case, section 98(4) requires fairness of the decision to dismiss to be assessed by reference to the relevant circumstances and the size and administrative resources of the employer.

29. The cornerstone authority in relation to fairness is the case of *Williams v Compair Maxam Ltd* [1982] IRLR 83. Although it is of some vintage and arose during a time when the workforce was far more unionised than it is now, it nonetheless contains principles which are still relevant today:

30. Browne-Wilkinson J in the EAT provided the following guidance which sets out sound industrial practice rather than inflexible rules of law:

> 1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
>
> 2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. This consultation will often involve considering whether there should be pools for selection.
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> 3. It was suggested that to avoid opinion-based decisions it was necessary to use criteria like attendance record, efficiency at the job, experience, and length of service that do not depend solely upon the opinion of the person making the selection but can be assessed objectively.
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> 4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.
>
> 5. The employer will seek to see whether instead of dismissing an employee he could offer him or her alternative employment.

31. There is potentially the question as to whether consideration of the above principles might for example include an obligation to consider furlough under the Government's job retention scheme as an alternative to redundancy. Again, this is not a point that has been tested but one that may certainly be a feature in cases to come.

32. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the workforce and the employer requires to satisfy the Tribunal that the selection has been made as *fairly and as objectively* as possible.

33. Incidentally, it can be seen that the later provisions of s 188 TULRCA have been informed by the earlier case of *Compair Maxam*.

34. As with the mass redundancy situation, there is a defence for an employer to state that it was not reasonably practicable to comply with best industrial practice as set out in *Compair Maxam*. That is to say that, even if all of the desired warning and consultation had been complied with, it would have made no difference whatsoever to the final outcome.

35. In those circumstances, it is possible that it might be found that whilst the dismissal was unfair, the amount of the award of damages ought to be adjusted to nil to reflect that inevitable outcome applying the principles set out in *Polkey v AE Dayton Services* [1988] AC 344

36. A recent application of the *Compair Maxam* principles can be found in the case of *Gwynedd Council v Barratt* UKEAT/0206//18/VP (decision of 3 June 2020). An interesting feature, apart from affirming Browne-Wilkinson's guidance, is that the possibility of a *Polkey* reduction was excluded from consideration by the original Employment Tribunal in view of the unfair procedures adopted by the employer.

Alternative Employment

37. When considering making redundancies, the employer has a duty to ascertain whether there is another role which might suit that particular employee as an alternative to dismissal. That is necessarily based on the consideration that an employee has been provisionally selected for redundancy.

38. Failure to consider alternative employment will potentially, but not in every circumstance, render a dismissal unfair.

39. It is worth noting at this stage that that duty extends to consideration of positions of a lower seniority or lower wages than the employee's current position. Whilst potentially this might provide a ground for an employee to refuse the alternative employment offered, the option should nevertheless be canvassed.

40. When considering other vacant roles within the company, the primary point to consider is that the employer should not invite applications for those roles from the entirety of the workforce, at least at first. Those positions should only be offered out once the employer has satisfied themselves that the potentially redundant employees are not suitable for that vacant role.

41. This would also potentially beg the question as to the selection process. This is understandable given the somewhat internal and subjective nature of job assessment especially in light of shrinking financial resources.

42. The process, on the whole, must meet some criteria of fairness.[2] However, it should be noted that this is not necessarily as stringent as for a general selection procedure, and employers must use their judgement to appoint the most suitable candidate for a role in the future: Seen *Morgan v Welsh Rugby Union* [2011] IRLR 376, EAT.

43. The case law presents a nuanced distinction between the selection of employees for an already established position and those for which a new position is created. It would appear that although

[2] *Ralph Martindale v Harris* [2007] 12 WLUK 606

a tribunal can have reference to good business practice in both circumstances, employers have more leeway when considering selection criteria and processes for a newly created position.

44. The above case of *Morgan* illustrates this point. In that case, a rugby union was reformulated and two leagues were essentially merged into one. The tribunal considered that in that scenario of reconstitution, the employer would be considering a new position rather than an already established vacant position.

45. When considering any alternative employment, the employer should always seek to inform the employee of any proposed salary or benefits of the alternative position[3] in addition to providing updates to the job specification if appropriate.[4]

46. The final point to note in relation to alternative employment is that the suitability of any alternative position is judged from the perspective of an objective employer and not from the employee's perspective.

No Consideration of Alternative Employment

47. There may be circumstances in which the employer may not consider alternative employment at all.

48. If there is no consideration given to alternative employment, but the employer can show it would not have appointed the employee to the vacant position in any event, the decision to make the employee redundant might still be regarded as fair if the breaches in procedure were not so serious as to make the decision to dismiss unreasonable (*Loosley v Social Action for Health* UKEAT/0378/06).

Procedure for Offering Alternative Employment.

49. If the employer is able to identify suitable alternative work, either within its own company or with an associated company, which is substantially similar to the employee's previous position and commands a similar wage package, it is to the employer's advantage to offer such a job to the prospectively redundant employee.

    a. The job offer, which should be made before termination, to start within four weeks of the termination of the redundant job, is then generally subject to a four-week trial period (although the trial period may be extended if the employee has further training).

    b. If the employee accepts the job offer and continues to work after the trial period, there is no redundancy.

50. When considering an offer of alternative employment, the tribunal will traditionally look to various aspects to consider whether the offer is a suitable one.
51. This will include such characteristics as the pay, status and location of the prospective position. In addition, the tribunal will also consider whether the new position can reasonably be contemplated to be within the employee's current skill set or whether any further training would be required.

52. If further training would be required, then the trial period outlined above may be extended.

[3] *Fisher v Hoopoe Finance Ltd* [2005] 0043/05, EAT
[4] *Somerset County Council v Chaloner* [2013] UKEAT0600/12, EAT

Refusal of Alternative Employment.

53. A separate consideration relevant to both employers and employees is any potential refusal of alternative employment.

54. There are circumstances in which an employee may, rightly or wrongly, take the view that the position offered is not a suitable one and seek to refuse any such alternate employment in favour of a straight redundancy payment.

55. Perceptions in relation to the parties' relative positions will necessarily be dependent on the relevant circumstances. However, there are certain key principles that need to be considered from an employee's perspective if they were contemplating refusing alternative employment, or from the employer's perspective if they are faced with such a refusal.

56. One of the key principles to consider is that of reasonableness. If there has been a refusal of alternative employment there needs to be a consideration as to whether that refusal was reasonable in nature.

57. In those circumstances, the Tribunal would seek to apply a subjective test in this regard which is conducted from the employee's perspective. It is therefore necessary, for the employer, to show that the employee has acted unreasonably.[5]

58. This will necessarily depend on the circumstances of each case and be fact specific, however what should be considered is whether the new post being offered is overwhelmingly suitable as a form of alternative employment.

59. If the employer is unable to show that the post is overwhelmingly suitable as opposed to partially or marginally suitable then they may face an uphill battle in showing that the employee was unreasonable in refusing that offer.

Calculation of Redundancy Payment

60. The final point to consider in this brief summation of the principles in relation to redundancy is how redundancy payment is calculated.

61. The redundancy payment is calculated according to a fixed formula. Provided that the employee has been employed for a minimum of two years, or would have been if given the requisite statutory notice: ERA 1996, ss 155 and 145(5).

62. The employee will receive a redundancy payment calculated by multiplying his/her weekly gross remuneration (subject to a maximum payment, which, for dismissals on or after 6 April 2019 is set at £525) by a factor determined in accordance with age and length of service.

63. Length of service means the period from commencement of employment to the effective date of termination (EDT). If an employee is not paid a redundancy payment, he or she can bring a claim in the employment tribunal: ERA 1996, s 163.

[5] *Hudson v George Harrison Ltd* EAT/0571/02

64. When considering the calculation of any redundancy pay, employers must give effect to any contractual terms that enhance or increase the amount redundancy pay an employee is entitled to. Whilst outside of the scope of this article, the main places an employer or employee may find such a term would be:

    a. The employment contract itself.
    b. In a collective agreement incorporated into the employment contract (even if it expired before the redundancy took effect).
    c. A staff handbook.

65. This is always worth considering because there is a chance that if an employer has regularly paid an enhanced redundancy payment, that can then be used as the basis to establish that the employer should continue to do so with future employees.

Conclusion

66. Redundancy is an area of employment law whose focus may vary depending on prevailing economic circumstances. In times of prosperity and abundance, employers are more likely to turn their eyes towards profitability and less towards a reduction in overhead costs.

67. But as current circumstances have demonstrated, markets are inherently volatile and prone to fluctuation and certain hitherto unknown circumstances can cause a cataclysmic knock-on effect for businesses great and small.

68. It may well be the case in the near future that more and more people are faced with the prospect of a redundancy situation. In that event, they may be faced with a procedure that they are either unfamiliar with or in respect of which they are unable to articulate their disagreement if they feel they are not being treated or compensated fairly.

69. Should you require assistance with any of the issues that been presented in this article, please contact the clerks at 33 Bedford Row Chambers who will put you in touch with a suitable barrister who will be able to take matters forward (clerks@33bedfordrow.co.uk).