

Redundancy – Some Guidance For The Employer

In these troubled economic times many employers are finding themselves faced with tough choices, and regrettably more and more are finding that they have no other option but to make redundancies.


Employers may well have considered action short of redundancy, such as an agreed salary reduction or reduction in working hours with their staff. These measures may have been put into practice but after a period of time have not had the desired financial result for the employer. Alternatively the employer may have considered this as an option but decided to go straight to redundancy.

Once a decision has been made to make compulsory redundancies, the employer must set about deciding what criteria to apply when selecting employees for redundancy. This article considers the steps an employer should take when considering which employees to make redundant, and the legal issues of which they must be aware.

Employers must act with caution when selecting employees for compulsory redundancy. Under the Employment Rights (Northern Ireland) Order 1996, even if there is a genuine redundancy situation, in that the requirement of the employer for workers has ceased or diminished or is expected to cease or diminish, a redundancy may still constitute unfair dismissal if proper procedures are not followed and the 'reasonableness' test is not met.

The Selection Pool

The first step to be taken by an employer in a redundancy situation is to define a 'pool' of employees from which the redundancies will be made. Employers will often wish to make this pool as large as possible. This allows employers to select less able staff from across the organisation, rather than being forced to lose highly valued staff from a small group. These highly valued staff may then be used to develop the business into new areas. Another important factor for an employer to bear in mind is the retention of key personnel who are vital to the existing business and who the employer feels will be required should circumstances change and business begins to pick up. An employer still needs to maintain a service level for clients / customers. Creating a larger pool for selection allows for the option of 'bumping'



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redundancies. This occurs when an employee, A, whose job is redundant, is transferred to a different department or role, and the employee, B, who previously held that job, is dismissed. Although B's job was not actually redundant, B's dismissal is attributable to redundancy and he is entitled to a redundancy payment. Bumping redundancies allow employers to retain valued employees. However, this is a complex area and care must be taken to ensure that there are clear, well-documented reasons for choosing this option, such as a need to retain the business's most skilled workers.

The Selection Criteria

Once the pool for selection has been established, the employer must next set out the criteria which are to be applied within the pool. The criteria must be fair, objective and capable of being quantified by documentary evidence, for example, length of service, attendance, productivity, disciplinary records or skill and knowledge. Case law in this area has shown that criteria which are lacking in objectivity will result in the subsequent dismissals being deemed unfair. For example, criteria such as 'attitude to work' and 'best suited to the needs of the business' have both been held to be subjective and unreasonable.

As a result of recent equality legislation employers must also be aware of the risk that the criteria they set may discriminate against certain employees. For, example, the use of a 'last in, first out' method

of determining redundancies may indirectly discriminate against younger workers. However, with regard to 'last in, first out' procedures the English High Court recently held that although such policies are discriminatory they may be justified, for example by a desire on the part of the employer to achieve a fair and peaceful selection procedure. It can also be argued that giving preference to employees with long service constitutes a service-related benefit, which may be permitted under age discrimination legislation.

After establishing the criteria which are to be applied, the employer must give equal consideration to the application of these criteria. Even if fair criteria have been set out, unfair dismissals may arise if the criteria are not properly applied. It is important to ensure that the application of the criteria is carefully recorded and supported by documentary evidence such as personnel and appraisal records. Where possible, the exercise should be carried out by more than one assessor. Where employees from several different groups within a workforce are being considered for redundancy, involving several managers, employers should ensure that these managers are applying the criteria in the same way and marking their teams to a similar standard.

The Potential Claims

It is essential that employers seek legal advice when considering carrying out a redundancy exercise. There are many potential areas of difficulty and employers who get it wrong

could face Industrial Tribunal claims seeking compensation under one or more of the following headings –

- redundancy payment where an employer has failed to make a statutory redundancy payment to a redundant employee who qualifies for such a payment;
- unfair dismissal where an employee believes that there was not a genuine redundancy situation to start with and the real reason for an employee's dismissal was for a reason other than redundancy;
- unfair selection for redundancy which is an unfair dismissal claim where an employee believes that they have been unfairly selected by the employer for redundancy, for example in the selection of the pool or the criteria; and
- discrimination if the employee believes that they have been selected for redundancy due to one or more of the protected grounds of discrimination, directly or indirectly, namely sex, sexual orientation, race, disability, religion, political opinion or age.

No employer will want to be faced with having to defend an Industrial Tribunal claim and be the subject of an award of compensation especially in these difficult economic times.

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