LEWIS SILKIN

Ius Laboris UK Global HR Lawyers
LEWIS SILKIN

Redundancy

Inside

This Inbrief looks at how employers can minimise the risk of legal claims when dismissing employees by reason of redundancy. The starting point is making sure that there is a genuine redundancy situation. The crucial thing then is to follow a reasonable procedure, including consulting the affected employees, applying a fair selection process and considering alternative employment. Finally, those dismissed should be given their correct redundancy pay.

For information on the procedures to be followed in circumstances where the employer is proposing to make 20 or more employees at one establishment redundant within a period of 90 days, please see our Inbrief on collective redundancies.

Main points

In order to avoid a successful claim for unfair dismissal arising out of a redundancy situation there must be:

- a genuine redundancy situation
- adequate warning and consultation of affected employees
- a fair selection process
- consideration of alternative employment
- a fair procedure

An employee must have two years' service in order to claim unfair dismissal.

What is a genuine redundancy?

There is a rather technical legal definition of redundancy. In essence, a redundancy situation exists where:

- the business as a whole is closing down;
- the particular part of the business in which the employee works is closing down;
- the business is closing down in a particular location; or
- the business needs fewer employees with the redundant employee's skills.

The procedure to follow

Consultation

Individual consultation is crucial to a fair redundancy. It should be a means by which information is gathered to assist an employer in making its decision and give employees the opportunity to ask questions and have their say. It is essential that the consultation meetings occur before the final dismissal decisions have been taken. It is also important that during consultation the employer does not assert or imply that the employee will definitely be made redundant.

When arranging a consultation meeting, an employer should give the employee adequate time and information to prepare properly for it. Whilst there is no obligation to allow an employee to be accompanied to consultation meetings, the employer may choose to give the employee that option.

Issues to be discussed at individual consultation meetings include:

- the reason for the redundancy
- an explanation of the pool for selection
- the selection criteria
- why the individual has been provisionally selected for redundancy according to the criteria (including the scores given)
- whether any factual matters relied upon are accurate
- the timescale
- the financial package
- available vacancies, including details of the nature of the job, the location and terms and conditions
- details of any other support available, e.g. outplacement services
- other suggestions to avoid the employee's redundancy

Consultation involves a two-way discussion between the employer and the employee, potentially over a number of weeks.

All employees who are at risk of being made redundant must be consulted. Employers should therefore ensure that they do not forget to consult employees who are on maternity leave, on long-term sick leave or on secondment, for example.

The selection pool

Before applying any selection criteria, it is important to identify the correct "pool" of employees to whom the criteria are to be applied. Employers

have some flexibility in defining the pool and it will be difficult for an employee to challenge an employer's choice of pool where the employer has genuinely applied its mind to the issue. Once a provisional view of the appropriate pool has been taken, it is useful to check the following:

- Is there a procedure for identifying the pool which has been agreed by the union or employee representatives? If so, this should normally be followed.
- Are there other groups of employees doing similar work to the employees within the provisional pool? If so, it is likely that these employees should also be included in the pool unless there are good reasons not to include them.
- Are there other employees working at different sites but doing similar work? Just because a particular site is being closed it does not mean that the pool should necessarily be drawn from the employees working at only that site.
- Are there employees whose jobs are interchangeable with any of those in the pool? If so, again, it may be appropriate to include them unless there is a good reason not to.

Fair selection criteria

If an employer is proposing that all employees within a selection pool will be redundant (e.g. everyone in a particular role or at a particular location) then detailed selection criteria are not needed.

Fair selection will simply be a question of whether they are performing that role or working at that location.

If an employer is proposing to reduce numbers by keeping some people within a pool but making others redundant, then it will need a mechanism for choosing who out of the selection pool will be provisionally selected for redundancy.

The selection criteria should, as far as possible, be objective. Some care needs to be taken so as not to fall foul of discrimination legislation when applying the criteria. For example, although selection on the basis of attendance is fair on the face of it and the facts are objectively verifiable, employers should check the reasons for absence to ensure that this does not put women or disabled employees at a particular disadvantage. Absences for pregnancy related illnesses, maternity or other family friendly leave as well as absences related to an employee's disability should therefore be discounted.

Similarly, although "Last In First Out" has been used by employers in the past, it runs the risk of falling foul of the age discrimination legislation as younger employees are more likely to be selected for redundancy.

In practice, most employers use a matrix of criteria which takes account of a range of issues such as:

- relevant skills and knowledge
- relevant experience
- relevant qualifications or training
- disciplinary record
- attendance record
- communication skills (verbal/written)
- time management/productivity

Criteria should always be appropriate in the circumstances. There should be a business justification for the use of each criterion.

Employers should be cautious about using subjective criteria such as "attitude" or "team player".

Even if the selection criteria are reasonable in themselves, they must be applied in a reasonable manner. For example, employers should not concentrate on performance which may have been poor for a short period, whilst ignoring previous sustained good performance.

Suitable alternative employment

An employee who is selected for redundancy should be offered any available vacancy that they could fill, even if it is at a lower salary or at a lower status than the post from which the employee is being made redundant. Some employees would rather be working at a lower salary than be unemployed and an Employment Tribunal may criticise an employer who fails to at least offer an employee that possibility.

If an employee has been given notice of termination by reason of redundancy the employer has a duty to search for suitable alternative employment until the end of the affected employee's notice period.

Any offer of alternative employment must be made before the end of the employment under the previous contract. It must also take effect either immediately on the ending of the employment under the previous contract or after an interval of not more than four weeks.

If the terms and conditions of the new or renewed contract of employment differ in any way from the corresponding provisions of the previous contract, there is a statutory four week trial period for the employee to decide whether the alternative employment is suitable. If the employee terminates the contract during the statutory trial period, they are treated as having been dismissed on the date at which the original contract ended. If the termination is unreasonable, the employee will not be entitled to any redundancy payment.

Where an employee's role is made redundant during maternity, adoption or shared parental leave and a return to the old job is not possible, the employer must offer a suitable alternative vacancy if there is one. An employee on maternity, adoption or shared parental leave has priority over other employees who may be candidates for the alternative role. If the employee is not given priority, the dismissal will be automatically unfair. From 6 April 2024, this priority status is extended to cover employees who are pregnant or returning from maternity, adoption or shared parental leave (if more than six continuous weeks of shared parental leave has been taken). Pregnant employees will be protected from when they notify their employer of the pregnancy, and employees returning from such leave will be protected for 18 months from the child's birth/placement date.

A fair procedure

A fair procedure must be followed before individual employees are dismissed. What is fair will depend on the circumstances of each case.

A fair procedure should involve all the considerations mentioned above as well as clear communication with the potentially affected employee(s), through one-to-one meetings and in writing. In terms of procedural steps, a fair procedure is likely to involve:

An initial meeting with the potentially affected employee(s) explaining the reasons for the potential redundancy and the selection process that the employer will follow. This should be confirmed in writing.

Once the selection criteria have been applied, a letter to the provisionally selected employee(s) setting out the reasons for redundancy and their selection and inviting them to a consultation meeting. The employee(s) will need to be given information about their selection assessment.

A first individual consultation meeting to discuss the employee's provisional selection for redundancy, alternatives to redundancy, and proposed redundancy pay terms.

Discussions in relation to alternative vacancies and any application procedure.

A final individual consultation meeting confirming selection for redundancy and discussing redundancy pay terms. This should be confirmed in writing.

The employer should allow an employee to appeal against the decision to make them redundant.

As there can be no guarantee as to what will be considered to be fair in a particular case, additional or alternative steps may be necessary depending on the circumstances.

Who is entitled to a redundancy payment?

Only employees with two or more years' continuous service are entitled to receive a redundancy payment.

A redundant employee is entitled to a payment no less than the statutory redundancy payment which is calculated according to age and length of service. The payment is calculated as follows:

- One and a half week's pay for each year of employment which consists wholly of weeks in which the employee was not below the age of 41;
- One week's pay for each such year of employment which consists wholly of weeks in which the employee was not below the age of 22; and
- Half a week's pay for each such year of employment not falling within either of the above.

The maximum number of service years to be taken into account is 20 and the maximum amount of a week's pay is £643 as of 6 April 2023. Applying the above calculation, the maximum redundancy payment is £19,290 as of 6 April 2023.

In practice, many employers choose to make "enhanced" redundancy payments. If such payments are calculated using the statutory redundancy payment formula with permitted uplifts they will not be discriminatory on grounds of age. Other schemes that include age or length of service criteria as factors in calculating a redundancy payment may need to be objectively justified.

An employee who is dismissed by reason of redundancy loses the right to a redundancy payment if they unreasonably refuse an offer of suitable employment.

Whilst an offer of alternative employment may be suitable on objective grounds, the reasonableness of the employee's refusal can be determined on subjective grounds. The personal circumstances of the particular employee should therefore be taken into account when considering the question of whether or not an employee has unreasonably refused a suitable offer of alternative employment.

Immigration issues

When employers are considering redundancies (or changes such as lay-offs or salary reductions), they should assess whether this has any effect on the immigration status of any of the employees affected – particularly for those on employer-sponsored visas. Lewis Silkin's immigration team can assist you in navigating this part of the process.

For more information on this subject please contact:

Steven Lorber
Consultant Partner

+44 (0)20 7074 8078
steven.lorber@lewissilkin.com

LEWIS SILKIN

Arbor, 255 Blackfriars Road
London SE1 9AX

T +44 (0)20 7074 8000 | F +44 (0)20 7864 1200

www.lewissilkin.com