Redundancy

Member resource

The law is stated as at 06 February 2009
Please click on the individual questions below to see the answers.

- **What legislation covers redundancy?**

The main legislation governing redundancy is:

- The Trade Union and Labour Relations (Consolidation) Act 1992
- The Collective Redundancies and Transfer of Undertakings (Protection of Employment) Regulations 1995 (SI 1995/2587)
- The Employment Rights Act 1996
- The Collective Redundancies and the Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999 (SI 1999/1925)
- The Collective Redundancies (Amendment) Regulations 2006 (in force from 1 October 2006).

Other legislation which may be relevant in a redundancy situation, includes:

- The Information and Consultation of Employees Regulations 2004 (SI 2004/3426)
- The Employment Equality (Age) Regulations 2006 (SI 2006/1031).

For a summary of the main provisions in the Employment Equality (Age) Regulations 2006 which have an impact on redundancy see the question on what legislation provides protection on the grounds of age in our Age discrimination and retirement FAQ.

- View Age discrimination and retirement FAQ

- **When does a redundancy situation arise?**

Redundancy only arises in the three very narrowly defined circumstances summarised below. Confusion often arises because ‘making someone redundant' is often used as an euphemism for saying an employee is being dismissed for some reason other than redundancy.

Redundancy arises when either there has been, or is going to be either:

- the closure of the business
- the closure of the workplace
- a diminution in the need for employees

If, and only if, one of these situations has arisen will the redundancy be a genuine one.

The full definition of redundancy for redundancy payment purposes is that 'an employee ... [is] dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:

a) the fact that his or her employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed

b) the fact that the requirements of that business for employees to carry out work of a particular kind in the place where the employee was employed, have ceased or diminished or are expected to cease or diminish.'

(Section 139 (1) (a) and (b) of the Employment Rights Act 1996)

The definition used for the purposes of consultation is wider than the above and would include, for example a reorganisation where there is no reduction in the overall numbers.

- **What procedure should be followed in implementing a redundancy situation to ensure it is as trouble-free as possible?**

Some organisations will have an established redundancy procedure set out in the organisation's handbook. Some will deal with matters informally or only start to consider the appropriate procedure for the first time when a redundancy situation arises. At the very least in order to plan and implement a redundancy situation properly the following stages will be followed in most redundancies:

- planning
- identifying the pool for selection
- invitation of volunteers
- consultation - both collective (in large scale redundancies) and individual consultation in all cases
- notification to the Department of Trade and Industry (now Department for Business, Enterprise and Regulatory Reform (BERR) in large scale redundancies
- use of objective selection criteria
- compliance with all three stages of statutory dismissal procedures (which must be followed in small scale redundancies until the procedures are abolished in Great Britain with effect from 6 April 2009)
- advance notice of individual consultation meeting
- permitting a colleague to be present at consultation meetings
- opportunity to appeal
- allowing seeking of suitable alternative employment
- statutory or other redundancy payment
- relocation expenses
- helping redundant employees obtain training or alternative work.

Of course the exact procedure varies according to the timescale and size of the redundancy.

Redundancy procedures should be based on business needs rather than using age as a factor for selection. For further information on how to avoid age discriminatory criteria see the question on what employers should do to comply with the age legislation in our Age discrimination and retirement FAQ.

- View Age discrimination and retirement FAQ

Many employers are predicted to attempt to make redundancies in 2008/2009 due to the economic situation. Therefore, it has never been more important for employers to follow the correct procedure to avoid claims. The Department for Business, Enterprise and Regulatory Reform (BERR) has published a new simplified guide to redundancy which includes a redundancy checklist.

- View guide and checklist

For information on the changes to the statutory dismissal procedures and the transitional provisions see our Discipline and grievance procedures FAQ.

- View FAQ

Information on redundancy in Northern Ireland is available on the Labour Relations Agency and nibusinessinfo.co.uk websites.

- Go to LRA website
- Go to nibusinessinfo.co.uk

- **Should all employers have a formal redundancy procedure?**

As indicated in a previous question on trouble-free redundancy, employers can deal with redundancies by an informal arrangement with a practice which varies for each redundancy, or by a more formal policy setting out the approach to be adopted when redundancies arise. A more formal agreement may have been negotiated and agreed between management and trade union or employee representatives.

It is best practice to establish a formal procedure on redundancy which should be made known to all employees for example by inclusion in the organisation's handbook. If possible, the procedure should be drawn up with the involvement of trade union officials, employees and their representatives when redundancies are not imminent, otherwise fears and suspicions may arise.

- **If an employer has a formal redundancy procedure what should it contain?**

Depending on the size and nature of the organisation, a formal procedure on redundancy would normally contain the following:

- an introductory statement of intent towards maintaining job security wherever practicable
- an indication of scope, that is who the procedure applies to
- details of the consultation arrangements
- the measures for minimising compulsory redundancies
- guidance on the selection criteria
- details of the severance terms
- details of any relocation expenses
- details of any appeals procedures
- compliance with all stages of the statutory dismissal process for small scale redundancies (which must be followed until the procedures are abolished in Great Britain with effect from 6 April 2009)
- assistance with job seeking
- counselling
- severance payments
- appeals.

For information on the changes to the statutory dismissal procedures and the transitional provisions see our Discipline and grievance procedures FAQ.

- View FAQ

- **Do employers have to make the same redundancy payments as in previous redundancy exercises because they are now an implied contractual term?**

For any term or condition to be implied into a contract including a contractual redundancy payment:

- it must be necessary to give the contract business efficacy, or
- incorporated by custom and practice in relation to the employees in question, or
- can be demonstrated by the way the contract has been performed or carried out, or
- the term is so obvious that the parties must have intended it to be incorporated.

For example enhanced redundancy terms will be incorporated into the employees' contracts if:

- the terms were well known by all concerned,
- there was a collective agreement containing those terms with the parent company which been applied on previous occasions.
- the employees concerned had a reasonable expectation that these terms should apply.

See *Albion Automotive Ltd v Graham Walker and others (unreported, [2002] EWCA Civ 96, LTL 21 June 2002, CA).*

- **What is individual consultation in a redundancy situation?**

In all redundancy situations employers must meet with all potentially redundant employees individually, even if there is to be collective consultation. Previous case law has shown that dismissals have been found to be unfair where a union has been consulted but not the individual. The employer should arrange for consultation to start at a formative stage and must ensure that individuals have sufficient time to consider the proposals. The law does not provide definitive time scales for individual consultation but requires reasonable consultation in the circumstances. The rules governing individual consultation currently differ depending upon whether more than 20, or less than 20 employees, are to be made redundant within a 90 day period.

Fewer than twenty employees to be made redundant

Before 6 April 2009, all three stages of the statutory standard dismissal and disciplinary procedures apply to redundancy dismissals which:

- affect less than 20 employees, or
- where more than 20 redundancies will take effect but in a period longer than 90 days.

These procedures will be repealed from 6 April 2009, under the Employment Act 2008. (The Act does not apply to Northern Ireland). However, the procedures must be followed to the letter until they are repealed. The procedure includes a written statement of the grounds for dismissal, a meeting and appeal stage.

On and after 6 April 2009, for most dismissals, the Acas code of practice on disciplinary and grievance procedures will apply.However this code does not apply to dismissals by reason of redundancy. There is separate Acas guidance which covers redundancy dismissals and is referred to below.

(For further details of the changes to the statutory procedures and the transitional provisions see our Discipline and grievance procedures FAQ).

- Go to Discipline and grievance procedures FAQ

Employers must be able to demonstrate that the employee has had an opportunity to discuss in the meeting the reasons for the redundancy, the pool for selection, the criteria, and any alternative employment. In the course of the consultation process the employee will be notified that they are 'at risk' of redundancy and are kept informed of developments. They will be able to comment on the proposals and be informed of any redeployment procedure and options available. It is good practice if the discussions and outcomes of the meeting are documented. Employers should allow the employee to bring a trade union representative or work colleague to the formal individual consultation meeting in the usual way - see the question below on the right to be accompanied at consultation meetings for more details.

Failure to follow the statutory procedures before 6 April 2009 will make any dismissal automatically unfair and leaves the employer vulnerable to unfair dismissal compensation which may be increased by between 10-50 %. - see for example *Davies v Farnborough College of Technology [2008] IRLR 14*.

Twenty or more employees to be made redundant

Collective dismissals of 20 or more employees are exempt from the statutory procedures as they are already covered by other procedures. When an employer wishes to make 20 or more employees at the same establishment redundant within a 90-day period, the employer is under a statutory obligation to consult representatives of the affected employees anyway (see question below on collective consultation). Where these collective procedures apply there will be no requirement to follow the statutory procedures as well which will be abolished on 6 April 2009 in any event.

However, employers must be able to demonstrate that the employee has had an opportunity to discuss in a meeting the reasons for the redundancy, the pool for selection, the criteria, and any alternative employment as described imediately above. As there is still an obligation to consult individually, at present this may as well follow the three stage statutory dismissal pattern.

Further guidance on redundancy procedure and consultation is available on the Acas website and the Employment matters section of the Department for Business, Enterprise and Regulatory Reform website.

- Read Acas guidance
- Go to BERR website

Information on redundancy in Northern Ireland, including consultation, is available on the Labour Relations Agency (LRA) and nibusinessinfo.co.uk.

- Go to LRA website
- Go to nibusinessinfo.co.uk

- **Does an employee have a right to be accompanied by a colleague or a trade union representative at the redundancy consultation meetings?**

In the course of the redundancy process there will be several meetings with the employee. Although the precise number of meetings will vary from redundancy to redundancy there will at least be a first meeting (usually with all the potentially redundant employees) to explain the reasons for the potential redundancies and that, there do not appear to be any viable alternatives, how many jobs are at risk etc. There will then usually be an individual consultation meeting where the employer consults with the potentially redundant employee about their potential redundancy, their scores in the selection process etc. Assuming nothing changes, there may then be a final formal meeting at which the employer confirms to the employee that they are being made redundant. If the employee exercises their right to appeal there may be one further appeal meeting.

The way in which the law governing the right to a companion, applies to these meetings is set out below. However the concise answer is that an employee does not have an absolute legal right to be accompanied to all of the redundancy consultation meetings, but that for many years the best advice for employers has been to allow the request for a companion for those employees who wish to be accompanied. This is especially the case at the formal meeting at which the employee is informed of their selection for redundancy.

The relevant legal points to take into account are set out below:

- There is a statutory right to be accompanied by a trade union official or a fellow worker, which arises under the Employment Relations Act 1999, Section 10.
- This right to be accompanied applies to a ‘disciplinary or grievance’ hearing.
- A 'disciplinary hearing' includes hearings that could result in a formal warning or a dismissal.
- It is open to legal debate whether a hearing or meeting simply to inform an employee that they are to be dismissed by reason of redundancy, is a ‘disciplinary’ hearing within the meaning of Section 10. See for example *Heathmill Multimedia ASP Ltd v Jones and Jones [2003] IRLR 856 EAT* which

decided that the right to be accompanied did not apply to a redundancy meeting (although for technical reasons this decision was outside the Employment Appeal Tribunal's powers).

The combined effect of the above points is that there are potential legal arguments about when the right to be accompanied applies in a pure redundancy context. An employer who only wishes to comply with the bare minimum necessary may argue that the right to be accompanied does not apply to redundancies at all. However this is an unattractive argument and the safest option is to allow employees to be accompanied at the formal meeting at which they are informed of their redundancy; it is also best practice and fair to allow any requests for a companion at the earlier meetings where the employee is told they are at risk of redundancy.

(Until 6 April 2009 the statutory dispute resolution procedures also apply to redundancies other than collective redundancies; it has been common practice to allow the right to be accompanied at the Step 2 meeting that is the formal meeting at which the employee is told that they are being made redundant and at any Step 3 Appeal. The changes do not apply to Northern Ireland).

For further information on the abolition of the statutory dispute resolution procedures and the right to be accompanied see our Discipline and grievance procedures FAQ.

- Go to Discipline and greivance procedures FAQ

- **In a redundancy situation, what is collective consultation?**

Employers who propose to dismiss as redundant 20 or more employees at one establishment over a period of 90 days or less must consult representatives of any recognised independent trade union. If no trade union is recognised, consultation must take place with other elected representatives of the affected employees. (See Trade Union and Labour Relations Act (TULRCA) 1992 section 188(1A) as amended). If there are no employee representatives they must be elected solely for the purpose of the redundancy consultation. Detailed requirements govern the election procedures.

The consultation should include:

- ways of avoiding the dismissals
- reducing the number of employees to be dismissed
- mitigating the effects of dismissals, and
- the reasons for dismissal.*

Consultation must be undertaken by the employer with a view to reaching agreement with appropriate representatives on these issues. This duty applies even when the employees to be made redundant are volunteers.

It was previously thought that the duty to consult only concerned how a redundancy programme would be carried out, not if there should be redundancies at all. However, in the following case the Employment Appeal Tribunal has decided that where a business is closing down the obligation to consult over avoiding the dismissals must involve consultation over the reasons for the closures - see *UK Coal Mining Ltd v National Union of Mineworkers and the British Association of Colliery Management [2008] IRLR 4.*

- **Does collective consultation only apply in a redundancy situation?**

The collective consultation provisions referred to in the above question on what is collective consultation only apply in a redundancy situation. However there may be a need for collective consultation in other circumstances, for example under the following regulations:

Transfer of Undertakings (Protection of Employment) Regulations 2006

Where a relevant transfer of an undertaking is proposed and the employer will be taking measures in relation to affected employees then consultation must take place with a view to seeking the employees' agreement to the intended measures.

For further information go to our Transfer of undertakings (TUPE) FAQ for further information and in particular the question on when should consultation regarding a transfer of an undertaking take place.

- Go to FAQ

Information and Consultation of Employees Regulations 2004

The Information and Consultation Directive (2002/14/EC) gives employees in the UK rights to be informed about for example:

- the businesses economic situation,
- anticipatory measures envisaged where there is a threat to employment within the undertaking,
- decisions likely to lead to substantial changes in work organisation or in contractual relations,*
- employment prospects.

*This category clearly includes redundancies and transfers of undertakings which are already covered by other statutory obligations to consult employee representatives. Therefore employers do not need to consult under the standard Information and Consultation provisions where they notify representatives that they will be consulting under the legislation on collective redundancies or business transfers.

Employers are already familiar with the need for consultation with respect to redundancies, but are not used to consulting concerning other decisions which may lead to substantial changes in work organisation.

The key points are:

- The Regulations apply to businesses with 50 or more employees.
- The Directive does not require the regulations to apply to businesses with fewer than 50 employees.
- An enforced information and consultation arrangement will only arise if ten per cent of the workforce requests such an arrangement (or the employer chooses to initiate negotiations).
- If there is no request from the workforce and the employer does not wish to put an arrangement in place, then there is no obligation to do anything.
- If ten per cent of the workforce do put in a request if the employer fails to agree an arrangement after six months then an automatic statutory scheme will apply.
- The obligations imposed by the statutory scheme provide both employer and employee representatives with a degree of flexibility to tailor the arrangements.
- If the statutory scheme applies there must be one representative per 50 employees, subject to a minimum of two representatives and a maximum of 25.
- Under a negotiated scheme there can be as many or as few representatives as the organisation and the representatives choose.
- Under a negotiated agreement it can be decided that the employer communicate directly with employees, dispensing with the need for employee representatives.

Further information may be obtained from the Department for Business, Enterprise and Regulatory Reform (BERR).

- Go to BERR website

- **When should collective consultation take place in a redundancy situation and how long should the consultation continue for?**

Consultation should begin as early as possible and allow for longer than the statutory period of consultation, wherever feasible. At the very least collective consultation must begin:

  - 30 days before the first dismissal takes effect if 20 to 99 employees are to be made redundant at one establishment over a period of 90 days or less
  - 90 days before the first dismissal takes effect if 100 or more employees are to be made redundant at one establishment over a period of 90 days or less.

The provisions apply where an employer is proposing the redundancy of 20 or more employees at one establishment within a period of 90 days or less. So even if the redundancies are proposed in two batches the overall effect is that an employer proposing to dismiss a total of 20 or more employees at one establishment must complete the consultation before any of them are given notice.

No time is specified for the overall length of the consultation although it will be at least 30 or 90 days, plus the length of the notice period required for each employee. Redundancy consultation must begin in 'good time' when the proposals are still at a formative stage, to ensure there is reasonable time for meaningful consultation -see Trade Union and Labour Relations Act (TULRCA)1992 s.188(1A) as amended.

For example, in the case of *MSF Union v Refuge Assurance Plc 2002 ICR 1365, EAT* the employees took their employer to an employment tribunal complaining that it had failed to begin consultation with the representatives 'in good time' in connection with a proposed merger with United Assurance. The Employment Appeal Tribunal said that an employer must consider the probable date of any redundancies and how long will be required for effective, good-faith consultation. That will set the date when consultation should start.

Please also see the question below on collective redundancies and notice of dismissal.

- **Should collective consultation be completed before notices of dismissal are sent out in a redundancy situation or before they take effect?**

Collective consultation should be completed before notices of dismissal are sent out.

From 1 October 2006 The Collective Redundancies (Amendment) Regulations 2006 have provided that employers who are dismissing 20 or more employees at one establishment by reason of redundancy must make the requisite notification of collective redundancies before providing any of the employees with notice of dismissal. This increases the time it takes for redundancy dismissals to take place.

These Regulations are a result of the judgment of the European Court of Justice in the case of *Junk v Wolfgang Kuhnel [2005] IRLR 310, ECJ* in which it was decided that when collective consultation is required, it must be completed before notice of dismissal is given to any of the employees concerned.

A notice of dismissal issued by an employer during the consultation period will be invalidated. It will still be invalid even if it does not expire until after the end of the consultation period.

In the UK the EAT agreed with the approach in the Junk case before these new regulations were announced - see *Leicestershire County Council v Unison [2005] IRLR, EAT*.

- **Should part time, temporary and fixed term staff be included in a redundancy consultation and should they receive a redundancy payment?**

The short answer to this question is that some temporary and fixed term staff must be included in a redundancy consultation and some will not need to be included. Just because a member of staff has been included in a consultation does not mean they will necessarily qualify for a redundancy payment.

A prudent employer will have a written redundancy procedure in place. Most well drafted redundancy procedures will encompass a clause headed 'Scope'. In this section there will be an explanation of which employees are included. Normally full time and part time employees will be included. This usually includes those on fixed term contracts and temporary employees unless there are on very short term contracts. For example those with continuity of service of three months or less will often be expressly excluded.

If there is no express policy in place, then an employer must decide carefully which members of staff must be included in the consultation process. Obviously if an employer is in doubt then they should err on the side of caution and include the individual in the process. The following points should be borne in mind:

- Protection from unfair selection for redundancy applies to those falling within the definition of'employees'. Therefore those workers who genuinely do not have employee status need not be included in the consultation process unless the employer is unsure of their status. For further information go to our Terms and conditions of employment FAQ.
- Go to FAQ
- Temporary or fixed term workers who are employees enjoy the same statutory employment rights including the right to be included in the consultation process and to a redundancy payment as their permanent counterparts.
- Whilst employees with less than one years or two years service may be included in the consultation process if an employer is relying on the statutory redundancy payment scheme then only employees with two years continuity of employment will actually qualify for a redundancy payment at the end of the process. Similarly only those with more than one year's service will qualify to complain that they have been unfairly dismissed as a result of the process unless they fall within one of the exceptions to the one year rule. Go to our Unfair Dismissal FAQ for further information and in particular the question on what reasons for dismissal are automatically unfair and what it means.
- Go to FAQ
- It is a breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, to choose employees for redundancy or treat them any differently in the redundancy process just because they are part time workers. Part time employees can be included in the redundancy process in the normal way. For further information go to our Part time workers FAQ and in particular the question on part time workers and redundancy.
- Go to FAQ
- Under the Employment Rights Act 1996 the expiry of a fixed term contract counts as dismissal for redundancy purposes. Therefore fixed term employees must also be included in the redundancy process in the normal way. If they are not there may also be a breach of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002. For more information go to our Fixed term workers FAQ for further information and in particular the question on redundancy payments.
- Go to FAQ
- Every temporary, part time and fixed term worker (whether an employee or otherwise) has the right not to be discriminated against or otherwise victimised on grounds of sex, race or disability.

Employers should take great care to ensure that women on maternity leave, those employees on sabbaticals or on secondment, and those on sick leave are included in the consultation process. See question below on pregnant employees and employees on maternity leave.

- **What information needs to be supplied to the appropriate employee representatives in a redundancy situation?**

An employer is required to submit to the appropriate employee representatives for the purposes of collective consultation:

- the reasons for the proposals
- the numbers and descriptions of the employees whom are at risk including the total number in the pool for selection
- the method proposed for selecting employees to be dismissed including any agreed procedures and timescales for the dismissals
- if there are to be enhanced redundancy packages, the proposed method of calculating such redundancy payments.

This information must be given to the representatives or sent by post to an address that they have given to the employer. In the case of trade union representatives, the information is sent by post to the union at the address of the head office.

Section 188(4) of the Trade Union and Labour Relations (Consolidation) Act 1992 sets out the above information which is required to be submitted.

This important case of *UK Coal Mining Ltd v National Union of Mineworkers and the British Association of Colliery Management [2008] IRLR 4* impacts upon the information that employers should provide to employee representatives at the start of a consultation. Where closure of a workplace is for economic reasons the consultation will necessitate the disclosure of sensitive economic information relating to the commercial basis for the decision. See question above on what is collective consultation.

- **Is it easy to elect employee representatives for collective consultation over redundancies?**

No, it is not easy to elect employee representatives for collective consultation over redundancies: there has to be a detailed confidential election process.

The Department for Business, Enterprise and Regulatory Reform website has guidance on collective consultation requirements and the process for election of appropriate employee representatives.

- Go to BERR website

Appropriate representatives will be either the representatives of a recognised trade union or employee-elected representatives:

- where an independent trade union is recognised, the employer must consult with its representatives
- where there is no union recognition agreement, the employer must make a choice to consult with either employee representatives elected for another purpose, or new representatives selected specifically for the purpose of consulting on this issue.

The following is a brief summary of key points which apply where representatives need to be elected:

- the employer needs to make arrangements as are reasonably practical to ensure the election is fair
- the employer determines the number of representatives but there must be sufficient representatives from all affected areas of staff
- the employer determines the representatives terms of office, how long will they be elected for etc
- all affected employees must be allowed to present themselves for election as an employee representative, and no employee must be unreasonably excluded
- the employer will facilitate the election and must ensure that as far as possible the voting is conducted in secret and the votes are accurately counted
- an appropriate term in office for the representatives must be established, of such length as will enable them to complete the consultation on behalf of their colleagues
- employees must be able to vote for as many candidates as there are representatives to represent their class of employees.

If no employees put themselves forward for election and employees fail to participate in the employer's attempts to collectively consult, the employer is required to give each individual affected employee the written information usually required to be submitted to employee representatives (see question on the information that is normally required).

For further information see the Department for Business, Enterprise and Regulatory Reform guidance on *Redundancy consultation and notification* and Section 188(A) of the Trade Union and Labour Relations (Consolidation) Act 1992 which sets out the method for the election.

- View guidance

- **What rights do appropriate employee representatives have in a redundancy consultation?**

Appropriate employee representatives have the right to:

- access to affected employees
- office accommodation and facilities if necessary
- a right to reasonable time off with pay to carry out their functions
- training in connection with those functions
- not be dismissed or suffer any detriment because of their status or activities
- automatically unfair dismissal if dismissed because of the employee's status or activities as a representative.

- **What are the consequences of failure to collectively consult over redundancies?**

If an employer fails to comply with its collective consultation obligations, an employment tribunal can make a protective award of up to 90 days' pay and in practice the maximum will usually be awarded.

A protective award requires employers to pay employees their normal week's pay for a period of time called the 'protected period'. The tribunal has discretion in fixing the length of that period up to a maximum length of a protected period of 90 days in all cases where 20 or more are to be made redundant. The purpose of this award is to punish a defaulting employer rather than to compensate employees.

The protected period begins either on the date on which the first of the dismissals takes effect, or on the date of the tribunal award - whichever comes first.

The maximum award will therefore be 90 days pay for each employee, regardless of the number of employees. The amount of the award may, however, be less if the tribunal considers that it would be just and equitable in the circumstances.

The only defence to failure to consult is where the employer can show that there were special circumstances that made it impossible to comply with the statutory obligations. Insolvency on its own will not generally be considered to be a special circumstance.

An example from a decided case is *Susie Radin Ltd v GMB and ors [2004] IRLR 400, CA.* Many of the 108 workers at the Susie Radin clothing factory in County Durham were members of the GMB. The employer was in financial trouble and on 6th April 2000, its solicitor sent letters to the GMB members and to other employees notifying them that subject to any consultations, there would be a 12 week notice of dismissal for reasons of redundancy anticipated to terminate on 14 July 2000.In June 2000 it went through the motions of what it considered to be consultation, but there was no real attempt to consult either the union or any employee representatives. The factory closed on 14th July 2000.

The GMB Union brought a claim for a declaration of failure to consult to that effect and a protective award . The company argued that any protective award should be nil because it had given an extended notice period of

twelve weeks to the employees which was not necessary. The tribunal rejected this argument and instead awarded each employee the maximum possible protective award (90 days' salary) at a total cost to the employer of around £250,000.

The company's appeal to the Court of Appeal failed finding that the Company was merely going through the motions of what it considered to be consultation which was a far cry from meaningful consultation with a view to reaching an agreement and that none of the information required to be supplied in writing was supplied. The purpose of a protective award is to punish a defaulting employer rather than to compensate employees and the argument that 'consultation would have made no difference anyway', which can sometimes be used by employers to reduce compensatory award in unfair dismissal cases has no relevance in connection with protective award.

Further guidance on the protective award suggests that:

- If the employer keeps the union informed of possible redundancies before the proposal is finalised that may reduce the protective award to below the full 90 days - see *Amicus v GBS Tooling Ltd (in administration) [2005]IRLR 683, EAT*.
- Although by contrast where the employer had kept the union informed but had deliberately refused to enter formal consultation with a particular group of employees a full 90 days protective award was made. The consultation prior to the making of the proposal to dismiss was not taken into account in these circumstances - see *Leicestershire County Council v Unison [2005] IRLR 920, EAT*.
- A trade union can only claim for a protective award in respect of those employees it actually represents. If a union secures a protective award then that award will also only benefit those whom the trade union represents. Any other employees must make their own claim (although they may do simultaneously with the claim made by the trade union). In cases where the trade union is not recognised in respect of the entire workforce (for example in relation to senior management) then consultation must take place with appropriate employee representatives, representing the non-unionised employees (in addition to the consultation with the recognised trade union) representing the unionised employees) - *TGWU v Brauer Coley Limited (in administration) (unreported, UKEAT/0313/06 27 October 2006, EAT*.
- Consultation over the underlying reasons for the closure must be adequate, otherwise the employer could still be exposed to the maximum protective award - *UK Coal Mining Ltd v National Union of Mineworkers and the British Association of Colliery Management [2008] IRLR 4.* See question above on what is collective redundancy.

- **Does notification to the Department of Trade and Industry (now Department for Business, Enterprise and Regulatory Reform) apply to all redundancies?**

Employers who are obliged to collectively consult (see question on what is collective consultation?) must also notify the Department of Trade and Industry (now Department for Business, Enterprise and Regulatory Reform) of the proposed redundancies in writing on form HR1. This notice should also be supplied to the employee representatives. Failure to comply may lead to criminal proceedings and a fine of up to £5 000.

For further guidance on the statutory provisions, see the Department for Business, Enterprise and Regulatory Reform guidance on *Redundancy consultation and notification*.

- View guidance

- **What are the common selection criteria for redundancy and how should they be applied?**

The key aspects of selection criteria for redundancy is that they must be objective and applied consistently. The selection process will involve the following:

Pool for selection

The first stage for an employer in carrying out a redundancy exercise is to identify the 'pool' of employees from which the candidates for redundancy will be selected. If the wrong pool is identified it could render any resulting dismissal(s) unfair. (See the question below on determining the initial selection pool).

Selection criteria

Where voluntary redundancy or early retirement have not produced suitable volunteers then employers, in consultation with trade union, or employee representatives, should identify the selection criteria to be used.

There may be a collective agreement with a recognised trade union which identifies the selection criteria to be used. All criteria should be completely objective and the overall test is one of reasonableness. Common criteria used in selection for redundancy include:

- skills or experience
- formal appropriate qualifications, advanced skills and other aptitudes
- attendance records (but excluding any absences which were due to pregnancy or disability, to avoid discrimination claims)
- disciplinary records (current offences)
- performance (there should be objective evidence to support selection on this basis, for example by reference to the company's existing appraisal system)
- once the selection criteria have been identified, consideration needs to be given to a relevant scoring mechanism.

If the score sheet method is being used as the proposed method of selection the employees will therefore be aware of this from an early stage and many employers will enclose a copy of the completed sheet with the notification of selection. Obviously it is preferable if the selection process is transparent.

Length of service was previously used as a criteria for selection. However, with the arrival of age discrimination in October 2006, relying on length of service as a sole or main selection criteria runs the risk of being found to be discriminatory on grounds of age and therefore unlawful. In most cases selection for redundancy by applying a LIFO (last in, first out) criteria will lead to the youngest being selected. In 2008 the High Court decided that LIFO as a criterion for redundancy selection can be used in certain circumstances, even though it is age discriminatory. For further information on this issue go to the relevant question below.

Employers will need to take even more care to ensure that their choice of objective criteria for redundancy selection are justifiable. If the choice of criteria means that employees are selected for redundancy:

- on the basis of their age, or,
- in a way that causes a disadvantage to a certain group of young or old employees

this could constitute age discrimination, unless the employer can objectively justify the use of the criteria. The employer can achieve objective justification by showing that the criteria have been chosen to achieve a legitimate business aim and are a proportionate means of achieving that aim.

- View also our Age discrimination and retirement FAQ

In addition, length of service may give rise to other discrimination claims. The period of continuous employment is normally used to calculate length of service. This should be whether full-time or part-time, as to only take account of full-time service might be indirect sex discrimination.

Even though the criteria may be objective the selection will still be unfair if they are carelessly or mistakenly applied.

In addition, selection criteria should be reasonably applied in the light of the circumstances of the individual. The Disability Discrimination Act 1995 makes it unlawful for an employer to treat a disabled person less favourably because of a reason relating to their disability, without a justifiable reason. Employers are required to make reasonable adjustments to working conditions or the workplace where that would help to

accommodate a particular disabled person. To summarise, whatever selection criteria are chosen, care needs to be taken to ensure that they are neither directly nor indirectly discriminatory on grounds of age, sex, marital status, race, disability, sexual orientation, or religion or belief.

- **Should the 'Last in First out' (LIFO) method or any other criteria related to length of service be used as a criteria for redundancy selection?**

The short answer to this question is that 'Last in First out '(LIFO) or any method based exclusively on length of service is probably best avoided. However if an employer does use a method based on length of service it must not be a sole criterion, but part of a more complex selection matrix and the employer must also be able to justify using that method.

Historically, employers regularly used LIFO as a reliable method of selection, but even before the the Employment Equality (Age) Regulations 2006 (Age Regulations) it became unfashionable and has been replaced by the more complex selection matrix approach. See the question above on the common selection criteria for redundancy and how should they be applied. Indeed, with the arrival of age discrimination LIFO has been seen as highly risky, as to use this approach may give rise to age discrimination claims because younger employees are likely to be selected.

An important recent case, *Rolls Royce plc v Unite [2009] IRLR 576, CA* considers the use of length of service as a selection criterion for redundancy.

In this case the employer and the union had agreed employees would be awarded points based on the following redundancy selection criteria, namely:

- Achievement of objectives.
- Self motivation.
- Expertise/knowledge.
- Versatility/application of knowledge.
- Wider personal contribution to team.

Points were also awarded for each year of continuous service. Employees with the least points were selected for redundancy. The employer applied to the High Court to determine whether using length of service as part of this selection matrix was permissible. The matter eventually reached the Court of Appeal.

The High Court and Court of Appeal agreed that using length of service as a selection criterion could be objectively justified under the Age Regulations. The 'legitimate aim' was the advancement of an employment policy which enabled peaceful and fair redundancies. The length of service criterion respected loyalty and experience and protected older employees who would be more vulnerable in the labour market. (In addition to being objectively justified this redundancy selection criterion fell within the length of service exception in the Age regulations. See the question on benefits and length of service for more information concerning the length of service exemption.)

- Go to FAQ

Length of service can therefore be used as a criterion for redundancy selection, but not be a sole criterion. The criteria used by Rolls Royce were only justified on the facts of this particular case. Other employers may not be able to justify its use. It is still a more careful course of action to avoid LIFO altogether rather than being placed in a position of having to justify the method used.

This question was updated on 24 July 2009.

- **Is a voluntary redundancy a resignation, and do volunteers have to be included in the calculation of the number of employees being made redundant?**

No voluntary redundancy is not a resignation. Individuals who volunteer for redundancy are in the same legal position as employees selected compulsorily, for example in relation to their right to receive a statutory redundancy payment. The volunteers have not had their employment terminated by mutual agreement, but have effectively been dismissed.

Volunteers do have to be included in the calculation of the total of more than or less than 20 employees being made redundant for the purposes of consultation - *Optare Group Ltd. v TGWU [2007] IRLR 93, EAT.*

- **In a redundancy situation how should an employer determine the initial selection pool ?**

In a redundancy situation an employer should be very careful in determining the initial selection pool. Many employers fall down at this early stage by identifying employees who are under-performing. The employer then identifies those employees as constituting the selection pool - this can lead to claims for unfair dismissal.

A formal redundancy procedure may contain a process for selecting the pool or there may be a customary arrangement for choosing a pool. Obviously if such a method exists the employer must use that method or show objective grounds for not using it.

In the absence of a customary arrangement at the planning stage the employer should identify the group of employees whose work takes place at a particular location or whose work has either ceased or diminished or is expected to do so. This will be the selection pool. The pool should contain all employees who undertake a similar type of work in a particular department or at a relevant location. A key aspect is that the pool should not be discriminatory, for example focussing on part-timers who are more likely to be women, or focussing upon a certain age group.

In some circumstances employees in other departments may need to be included in a wide pool. For example if a group of employees use specific equipment which is being replaced and those employees do other work in their department as well, the pool should usually include the other employees in the department and not just those using the specific equipment - see *Hendy Banks City Print Ltd v Fairbrother and Others (unreported, EAT/0691/04/TM 21 December 2007, EAT).*

For small employers if only one employee falls within the pool then there is no requirement to go through a selection procedure within the pool. However, if the choice of selection pool is biased in the first place then the employee who is selected may have an unfair dismissal claim.

See also question above on the common selection critera for redundancy.

- **Once employees have been selected for redundancy can they appeal?**

Yes, an appeal procedure should be offered to all employees who have been selected for redundancy.

Smaller scale redundancies

The establishment of a redundancy appeals procedure is essential before 6 April 2009 in the cases where the statutory disciplinary and dismissal procedures apply, that is all redundancies affecting fewer than 20 employees, or where more than 20 redundancies will take effect but in a period longer than 90 days. If appeals are not provided for then the dismissal may be automatically unfair even if there is a genuine redundancy situation and there has been an objective selection.

Although the statutory procedures are abolished with In Great Britain with effect from 6 April 2009, an appeal stage is still highly advisable to demonstrate reasonable behaviour and to try and prevent tribunal claims.

Larger scale redundancies

The establishment of a redundancy appeals procedure is highly advisable in other cases (namely when the collective consultation provisions apply). The advantage of such a procedure is that complaints about selection for redundancy may be resolved internally and thus reduce the likelihood of complaints to employment tribunals.

(For details of the abolition of the statutory appeal procedures and the transitional provisions see our Discipline and Grievances FAQ).

- View Discipline and grievance procedures FAQ

- **What reasons must not be used as a basis for redundancy selection?**

The risks of using discriminatory factors including age as a basis for redundancy selection was explained in the above question on selection criteria. In addition, an employee dismissed for reasons of redundancy will be found to have been unfairly dismissed if the principal reason for selection is one of the following reasons:

- trade union related membership or activities
- for carrying out duties as an employee representative for consultation on redundancies or business transfers
- health and safety representative activities
- for taking part in consultation on specified health and safety matters
- for performing the duties of a occupational pension scheme trustee
- for performing or proposing to perform the duties of a workforce representative for the purposes of the Transnational Information and Consultation of Employees Regulations 1999
- for taking lawfully organised industrial action lasting eight weeks or less
- for asserting a statutory employment right
- on maternity-related grounds
- by reason of his or her refusal or proposal to refuse to do shop work or betting work on Sundays (England and Wales only)
- for a reason relating to rights under the Working Time Regulations 1998
- for a reason relating to rights under the National Minimum Wage Act 1998
- for a reason relating to rights under the Maternity and Parental Leave etc Regulations 1999
- for making a protected disclosure (whistleblowing)
- for a reason relating to the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000
- for a reason relating to the Fixed-term Workers (Prevention of Less Favourable Treatment) Regulations 2002
- for a reason relating to the Tax Credits Act 2002
- for exercising or seeking to exercise the right to be accompanied at a disciplinary or grievance hearing
- for requesting flexible working arrangements
- where the employer has failed to comply with the elements of the 'duty to consider working beyond retirement procedure - see our Age discrimination and retirement FAQ
- Go to Age discrimination and retirement FAQ

If the reason for selection for redundancy was based on any of these, a subsequent dismissal will be automatically unfair. However, it is for the dismissed employee to establish that one of the above reasons was the reason for dismissal rather than that put forward by the employer.

It is worth emphasising that in addition to an unfair dismissal claim a redundancy dismissal may also be found

to be discriminatory where selection was on grounds of age, sex, marital status, race, disability, sexual orientation, religion or belief. Particular care should be taken to ensure that selection criteria are not indirectly discriminatory. For example, selecting part-timers for redundancy may amount to indirect discrimination against women. Selection of women for redundancy on the grounds of pregnancy will also be considered unfair.

- **Can an employee who is pregnant or on maternity leave be placed in the pool for selection for redundancy in the same way as other employees?**

The basic position is that a pregnant employee or one on maternity leave can initially be treated the same as other employees in the pool for selection for redundancy. However if employees on maternity leave are selected, special provisions concerning offering alternative employment apply to protect them.

As long as a fair selection process is applied across the pool for selection, it is possible that a pregnant employee or one on maternity leave may be selected for dismissal by reason of redundancy. Obviously pregnancy (or absence on maternity leave) must not be used as a selection criterion for redundancy. However if absence is one of the criteria to be used, then any absences that relate directly to the pregnancy or to time off for dependents should be disregarded in the scoring to avoid any inference of sex discrimination.

Because an employer risks threatened claims for sex discrimination and automatically unfair dismissal if they select an employee who is pregnant or on maternity leave for redundancy many employers try to leave these employees out of the pool for selection. However employees who are pregnant or on maternity leave can be notified of the redundancy process, invited to redundancy consultation meetings, included in the pool and considered for redeployment in the usual way.

However, if employees who have actually commenced their maternity leave are selected for redundancy then special provisions apply to them. They must be given first refusal on any available suitable alternative employment. For further information go to the question on redundancy during the OML and AML in our Maternity, paternity, adoption leave and pay FAQ.

- Go to FAQ

If an employee is made redundant while on maternity leave she is entitled to her notice payment in the normal way. Rights to statutory maternity pay continue even if the employee is made redundant whilst on maternity leave. For more information on maternity pay see the question on maternity pay in our Maternity, paternity and adoption leave and pay FAQ.

- Go to FAQ

All employees who are made redundant while absent on maternity leave are entitled to written reasons for their dismissal whether this has been requested or not.

- **Should a redundant employee be offered a suitable alternative?**

Yes, for a dismissal to be fair, an employer must offer any suitable alternative job to the employee to avoid their redundancy. Whether a position is suitable depends on:

- the terms of the job being offered,
- the employee's skills, abilities and circumstances,
- the pay (including benefits), status, hours and location of the job.

The following points apply to offering a suitable alternative.

Employer's obligations

The employer should make the offer of an alternitive before the old job ends together with enough information about what the alternative position involves so the employee can understand how the two roles differ.

Special provisions apply to offering suitable alternatives to employees on maternity leave. For more information see the question on redundancy during the OML and/or AML period in our Maternity, paternity and adoption leave and pay FAQ.

- Go to FAQ

Is the alternative suitable?

The test of what is suitable alternative employment is asessed objectively. Whether it is reasonable for the employee to reject it is assessed subjectively (considering the individual's personal circumstances). Factors to be taken into consideration include pay, loss of status, loss of fringe benefits, place of work, general terms and conditions, job prospects and job content. It would also be prudent to consider opportunities within other associated companies if there is more than one within the group. The following points are relevant to alternative roles:

- An employer must give priority to potentially redundant employees for a suitable alternative role even over external candidates although an employer does not have to appoint someone to a post for which someone is not suitable.
- Loss of status will make it reasonable for an employee to reject alternative employment; however if the employee is prepared to accept a subordinate position and makes that clear to the employer, the employer may act unfairly if they fail to offer that lower alternative.

Salary of suitable alternative position

The similarity of the salary of the alternative position will be taken into account to assess its suitability. A failure by the employer to provide salary information will make it very difficult for the employee to assess the suitability of the alternative employment and will presumably make it reasonable for the employee to refuse the offer. However the employee should indicate an interest in a particular position offered to them and request salary information. If they do not, then the basic and compensatory award (for any resulting finding of unfair dismissal bassed upon selection for redundancy) may be reduced on grounds of contributory fault - see *Fisher v Hoopoe Finance Ltd (unreported, EAT/0043/05 13 April 2005, EAT*).

Unreasonable refusal

An employee who unreasonably refuses the offer of a suitable alternative may forfeit their right to a statutory redundancy payment.

For an example see *Hudson v George Harrison Ltd* (reported in the Times 15 January 2003). In this case, due to a relocation of the employer's premises, the employee in question was at risk of redundancy. She was offered the same job at the new site and the employer agreed to provide free transport for the journey to work, but she refused the offer as she would be required to commute. The employer alleged that the employee had forfeited the right to a redundancy payment by unreasonably refusing an offer of suitable alternative employment. The employee brought a claim for the payment and won. In assessing the right to refuse the test is part objective and part subjective and can therefore take into account the personal circumstances of the employee.

Statutory trial periods

Where the terms and conditions of the new contract differ wholly or in part from the original contract, the employee is entitled to a statutory trial period of four weeks. Any agreement for a longer trial period so as to facilitate retraining must be made before the employee starts work under the new or renewed contract. For more information see the question below on statutory trial periods.

Offering the original job back - withdrawal of redundancy

Employers must continue to seek work for an employee until the date their employment terminates. A suitable

alternative may arise at the last minute if economic circumstances change and the employee could have their original job back. This will need the employee's consent if the employee has already been given notice. The correct approach is for the employer to seek the employee's consent to a withdrawal of the notice of redundancy.

If the employee unreasonably refuses their original job back, then they lose the right to a statutory redundancy payment. The test of whether the refusal is reasonable is subjective. If, for example, they have already secured alternative employment elsewhere their refusal may be reasonable.

- **How do statutory trial periods operate in a redundancy situation?**

In a redundancy situation employees have the right to a four-week trial period in a new job to decide if the alternative post offered is suitable without prejudicing their eligibility for redundancy pay.

The trial period will normally be four weeks but can be longer if the employee needs retraining. If there is to be an extended trial period certain agreed conditions must be strictly observed for the employee to remain entitled to statutory redundancy pay.

After the trial period the employee can either:

- Decide the new job is suitable and remain in the position beyond the end of the trial date. If there is no express agreement to extend that trial then the employee will lose his right to a redundancy payment.
- Decide the new job isn't suitable and give notice during the trial period. This will preserve the employee's right to a statutory redundancy payment.

The employee must terminate the trial employment within the statutory four weeks to preserve any entitlement to statutory redundancy pay – see *Optical Express Limited v Williams (unreported, UKEAT/0036/07 12 July 2007, EAT)*.

If the employer offers a suitable alternative job and the employee unreasonably refuses it, the employee may lose the right to statutory redundancy pay. For further information on the suitability of alternatives see the question above on suitable alternative employment.

- **Can part-time employees be dismissed by reason of redundancy if they cannot work full-time and the employer wants a full time employee?**

In this situation, there is no reduction in the need for employees to carry out work of a particular kind: on the contrary, there is an increase in demand for work of that type. Accordingly, this does not appear to fall within the statutory definition of redundancy.
It is necessary to discuss the change with the current employee to see if they can change their hours. It may also be necessary to consider whether the work can be done by two part-time workers on a job-share basis. If the reason for the part-time working is childcare related, any dismissal could give rise to a claim of indirect sex discrimination in which case the employer would need to demonstrate objective justification for the requirement that this post be done on a full-time basis.

- **Can an employer consult about a variation of contract such as a reduction in hours and if the employees do not agree dismiss them and then re-engage on new terms instead of making redundancies?**

If there is a reduction in number of employees required to perform the work due to a reduced demand for products, this is a redundancy situation.

As part of the consultation process, measures to avoid or mitigate the numbers of redundancies should be discussed. This could include consideration of a proposed variation of contract.

However, if employees are not willing to agree to the variation, then to dismiss them (under the 'some other substantial reason' unfair dismissal category) and offer re-engagement on the new terms may result in an unfair dismissal claim and also a claim for failure to pay statutory redundancy pay.

If there is a provision in the contract entitling the employer to provide short-time working, where there is a reduction in work of the kind that the employee is employed to do, then this provision may be invoked as a temporary alternative, though not a long-term solution. See the question below on what is short-time working.

- **What is short-time working as an alternative to redundancies?**

An employer and the unions may agree to short-time working as an alternative to redundancies. This means that employees are laid off for a number of contractual days each week, or for a number of hours during a working day. The employer must have the employee's agreement to lawfully to reduce the amount of pay.

A lay off happens when the employer can't supply employees with paid work for a temporary period. Short-time working occurs where the employee's pay amounts to less than half a week's pay.

If there is no express or implied agreement to short-time working the employer will have committed a constructive unfair dismissal and an unlawful deduction of wages under Part II of the Employment Rights Act 1996.

If an employee is put on short-time working for:

- four consecutive weeks or more, or
- for six weeks in a period of thirteen weeks

then the employee can give the employer written notice that they intend to claim a redundancy payment.

- **What are the consequences if the redundancy dismissal is not carried out fairly?**

It is crucial that employers start thinking about redundancies early and implement sufficient planning to reduce the consequences. Often employers make the mistake of pushing redundancies through too rapidly. The employer is open to several claims if the redundancy dismissal is not carried out fairly including:

- a claim for a protective award (see question above on the consequences of failure to collectively consult)
- unfair dismissal for employees with one year's continuous service. There are also certain categories of automatically unfair dismissal which do not require one year's continuous service.
  - Go to Unfair dismissal FAQ
- discrimination - if the selection procedure has been tainted by discrimination, an employee may also claim discrimination on grounds of sex, marital status, race, disability, sexual orientation, or religion or belief
- breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 or the Fixed-term Workers (Prevention of Less Favourable Treatment) Regulations 2002.

- **Can an employee resign once they are served with a redundancy notice and if they do so, will they lose the right to statutory redundancy pay?**

An employee may submit their resignation during the notice period by serving written notice to their employer (counter-notice) that they intend their employment to end on a date earlier than the date on which the employer's notice expires.

To retain the right to a redundancy payment, a counter-notice must be submitted within:

- the period ending on the date the employer's notice is due to expire i.e. equal in length to the statutory period of notice under section 86 of the Employment Rights Act 1996 or
- the contractual notice period, whichever is the longer.

Employees will lose their entitlement to a redundancy payment if their counter notice expires before the end of the above period.

- **How does an employee qualify for a statutory redundancy payment and how is it calculated?**

To claim a statutory redundancy payment, an employee must have been employed for a continuous period of two years and have been dismissed by reason of redundancy.

Currently the amount of a statutory redundancy payment depends on the employee's age, length of service and gross week's pay. Only a maximum of 20 years' service may be taken into consideration. (For details of the maximum gross week's pay that an employer has to take into consideration when making the calculation and the current maximum redundancy payment - see our Unfair dismissal FAQ). These amounts are increased annually, usually in February - see our Employment law at work data.

- Go to Unfair dismissal FAQ
- Go to Employment law at work data

The formula for calculating redundancy pay is:

- half a weeks' pay for each complete year in which the employee was under 22 years old,
- one weeks' pay for each complete year in which the employee was less than 41 but not less than 22 years old,
- one and a half weeks' pay for each complete year of employment in which the employee was 41 years old or more.

The employer must give the employee a written statement showing how the redundancy payment was calculated. An employer who does not do this may be fined for committing a criminal offence (see Employment Rights Act 1996 Section 165).

The Employment Equality (Age) Regulations 2006 made changes to some aspects of eligibility for statutory redundancy payments (SRP) and the way in which statutory redundancy payments previously operated. Fom 1 October 2006 :

- the former upper and lower age limits of 18 and 65 were removed, and
- SRP is no longer tapered after an employee's 64th birthday. (It was previously the position that for an employee aged between 64 and 65, the cash amount due was tapered by one twelfth for every completed month by which the employee's age exceeded 64 - see the question on how statutory redundancy payments are affected by the advent of age discrimination legislation in our Age discrimination and retirement FAQ).
- Go to Age discrimination and retirement FAQ

Also note that from 29 November 2006, under the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006, the statutory redundancy pay rights of public sector employees, including local authority staff, are preserved if their employment is transferred from one public sector employer to another.(This is the equivalent of the associated employer rules which apply in the private sector (under Employment Rights Act 1996 s.139(2)).

Further information about statutory redundancy payments, including an up to date ready reckoner for calculating the number of weeks' pay due if made redundant on or after 1 October 2006, can be found on the Department for Business, Enterprise and Regulatory Reform website.

- Go to BERR website

The Business Link website also provides an online interactive tool which helps employers calculate redundancy pay and produce a personalised written statement.

- View online tool

- **What is the 'obligatory period' and what is its impact on entitlement to redundancy pay?**

Once an employee has been issued with written notice of redundancy they could obtain an alternative position with a new employer who wants them to start before their notice period expires. If the employee leaves early they may lose their entitlement to a redundancy payment.

To try and preserve their entitlement to a redundancy payment the employee can give what is called a counter notice that they wish to terminate their employment before the date set by the employer. The written counter notice must be given within 'the obligatory period'. (See section 136(3) of the Employment Rights Act 1996).

The obligatory period therefore is the statutory minimum notice or contractual notice period counted backwards from the termination date within which the employee can serve his counter notice.

If the employer accepts the counter notice there is no problem and the employee can leave early and receive the payment.If the employer does not accept it then the employee can apply to an employment tribunal which will determine whether it is just and equitable that the employee receive the appropriate payment.

- **How are employers own enhanced redundancy payments affected by the age discrimination legislation?**

Whether an employer's own enhanced redundancy payment scheme will be affected by the Employment Equality (Age) Regulations 2006 depends upon the nature of the scheme. The approach taken by the law depends on whether the employer's scheme is calculated in a way which mirrors the statutory scheme or not.

Enhanced redundancy schemes based on the statutory scheme

By Regulation 33 of the Regulations some enhanced redundancy payments are specifically exempt from the Regulations so employers will still be permitted to make enhanced redundancy payments based on age and length of service as contained in the statutory redundancy payment multipliers.

Enhanced redundancy payments can be made to employees who are:

- entitled to receive a statutory redundancy payment (SRP), or
  excluded from receiving an SRP by virtue of having less than two year's continuous service, or
- have agreed to the termination of their employment in circumstances where, had they been dismissed, the dismissal would have been by reason of redundancy.

Under Regulation 33 an employer may enhance the amount offered by doing any or all of the following:

- Ignoring the limit on a week's pay (£330 from 1 February 2008) applied to SRP.*
- Ignoring the amount allowed for each year of employment.
- Multiplying the total amounts of the payment.

*For changes to tribunal awards since the FAQ was updated see Employment law at work data.

- Go Employment law at work data

Such payments must be calculated using the same multipliers as are used to calculate statutory redundancy payments (as set out in s162(1) to 162(3) of the Employment Rights Act 1996). However, enhanced redundancy payments will not be subject to the maximum statutory cap.

For example if a statutory redundancy payment for employee A, would amount to £2970 and employee B £4950 a permitted enhancement would be to take both these totals and double them giving employee £5940 and the other £9900.

Enhanced redundancy schemes which are not based on the statutory scheme

Enhanced redundancy payments based on a different method of enhancement, for example those based on length of service irrespective of age, or using different age bands will not fall within the Regulation 33 exception. Therefore a contractual redundancy payment scheme which allows for a different enhancement will be discriminatory unless the employer can objectively justify it. This may be difficult, if length of service alone were used an employer would need to show that policy was objectively justified for that employment.

Although the Government has justified the age bands and length of service for the statutory redundancy scheme by showing that greater financial assistance is required for older redundant workers an employer would have to prove that applied to their employment as well.

For example an employer who operates a scheme whereby all employees regardless of age receive redundancy packages calculated on three weeks salary per year of service would have to objectively justify the schemes by arguing that it is a 'proportionate means of achieving a legitimate aim'.

Even a scheme just linked to the 'last in, first out' (LIFO) method or length of service could indirectly discriminate against younger employees who are more likely to have less service with the company than older employees and would be statistically more likely to be disadvantaged by the scheme whereas the statutory redundancy scheme increases with age. The Acas guidance on age discrimination recommends that employers avoid using LIFO although it may still be permissible in certain circumstances. For further consideration of this issue go to the question above on should LIFO be used as a criteria for redundancy selection.

Some employers will inevitably be forced into a position of having to objectively justify their schemes by arguing for example they are rewarding loyalty. However, it will be very expensive to incur the legal fees of a battle to prove this and as there is an exemption for schemes that emulate the statutory scheme it is safer to adopt such an approach until further guidance on the provisions emerges.

Some guidance can be taken from *Galt and others v National Starch and Chemical Ltd (unreported, ET/2101804/07 20 February 2008, ET)* which held that an employer had failed to justify its use of enhanced redundancy payments which were calculated on the basis of age and length of service, but did not mirror the statutory redundancy payment scheme. The employer did not therefore fall within the exemption contained in Regulation 33 and so its redundancy scheme was unlawful.

Of course from a practical point of view many employers will decide to retain their existing schemes and run the risk of any claims, most employees will be content with redundancy payments under an enhanced generous scheme and may also not appreciate there is a potential age discrimination argument at all.

(Note that the Regulation 32 exemption for benefits based on length of service does not apply in a redundancy context because this regulation does not cover benefits awarded to employees on termination of employment.)

In addition to the information above, see our Age discrimination and retirement FAQ and in particular the caselaw examples provided in the question on objectively justifying age discrimination.

- Go to Age discrimination and retirement FAQ

- **Is a redundant employee entitled to a period of notice as well as a redundancy payment and can they be placed on garden leave during any notice period?**

An employee is entitled to a period of notice as well as a redundancy payment. An employee must therefore be given either statutory minimum notice under section 86 of the Employment Rights Act 1996 or contractual notice, whichever is the greater.

Once the redundancy process has been completed and the employee has been given notice of dismissal then the employee may be asked to work the notice period, or be offered a payment in lieu of the notice period or be placed on garden leave. The fact that there is a redundancy makes no difference to the legal position. Either the employer is entitled to impose a garden leave period or they are not, depending on the the terms of the contract. Many contracts do contain a provision which expressly allows the employee to be placed on garden leave during the notice period. It is not unusual for a redundancy package to encompass a garden leave period. Obviously garden leave should not usually be used until the employee has been properly selected for redundancy and given notice. (In some circumstances, where the contract contains the express power to send the employee home at any time during the employment contract, employees may be sent home before they have been given notice. However this is high risk strategy as it suggests that the employee has already been unfairly selected for redundancy before the process has been followed).

For further information see the questions on garden leave in our Terms and conditions of employment FAQ.

  - Go to FAQ

- **Are employees entitled to time off to seek alternative employment during their notice period following a dismissal by reason of redundancy?**
  Yes an employee who is under notice of dismissal by reason of redundancy is entitled to be permitted to take reasonable paid time off during their normal working hours to seek alternative employment, or make arrangements for training necessary for future employment. To qualify for this entitlement the employee must have two years continuous employment at the date on which the notice period expires.

- **Are there any future developments expected in the area of redundancy?**

The number of redundancies is predicted to increase during 2008 due to the current economic situation.

Recently, it has been reported in the press that the Government is considering:

  - a one-off rise in the statutory cap on the amount of a week's pay which can be taken into account in calculating entitlement to redundancy pay,
  - lowering the qualifying period to statutory redundancy pay from two years' service to one year, and
  - raising the tax-free limit for compensation for loss of employment from the current £30,000 which has not been subject to tax.

Future legal issues which are likely to arise in a redundancy context may concern the interpretation of the Employment Equality (Age) Regulations 2006 which have only been in force since 1 October 2006. Cases are likely to start reaching the tribunals throughout the course of 2007, providing guidance on the way in which the legislation will operate. Some of these cases may involve selection for redundancy.

For further details of age discrimination see our Age discrimination and retirement FAQ.

  - Go to Age discrimination and retirement FAQ

For details of developments since this update see our Recent developments section.

- Go to Recent developments

While every care has been taken in compiling these notes, the CIPD cannot be held responsible for any errors or omissions; the notes are not intended to be a substitute for specific legal advice.

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