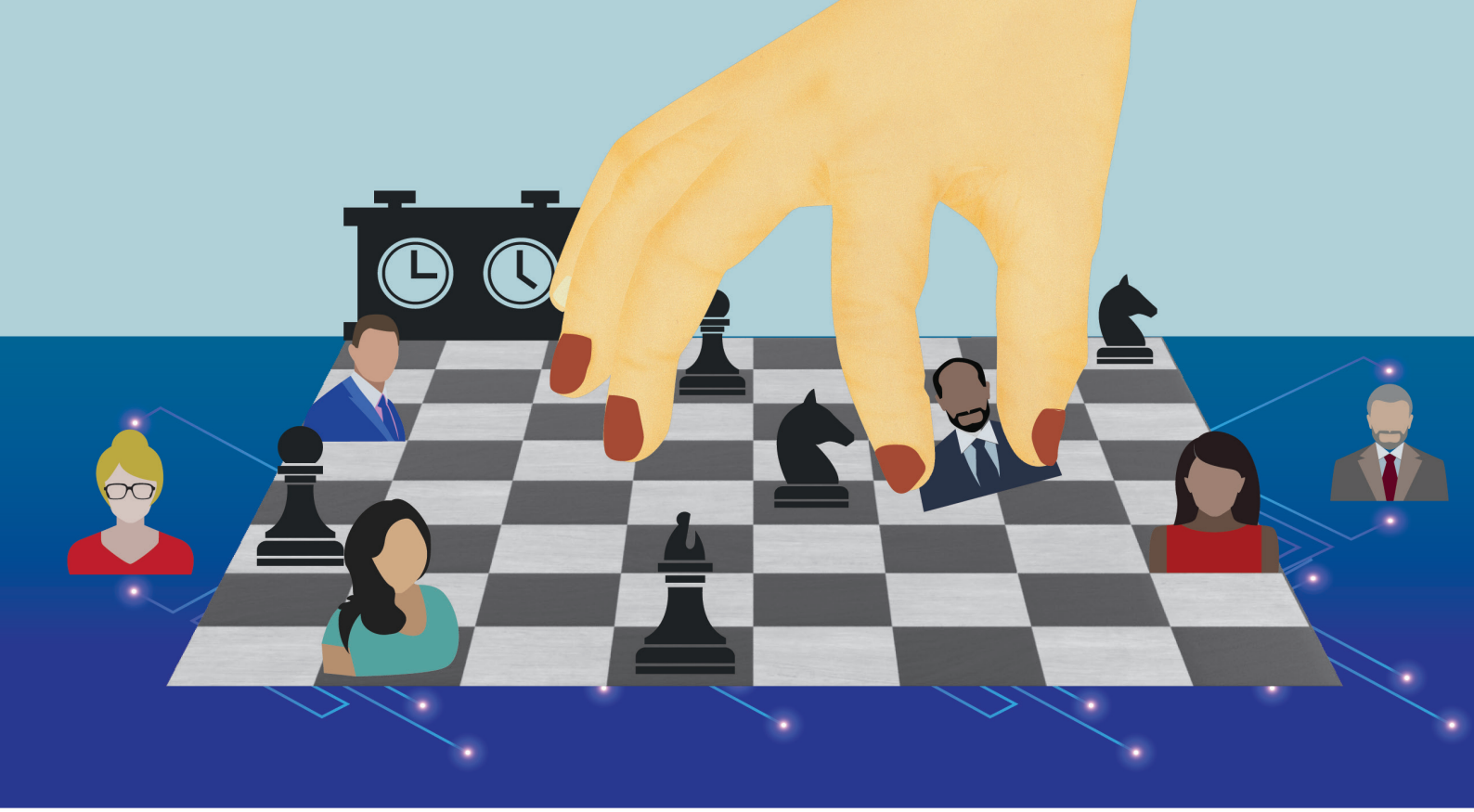

REDUNDANCY
THE NEW NORMAL?

Jane Fielding, Connie Cliff and Rebecca Jones of Gowling WLG (UK) LLP examine some of the key employment issues that employers face when conducting a redundancy exercise.

Many employers are currently faced with potential redundancy situations due to workplace closures or reorganisations resulting from the impact of the 2019 novel coronavirus disease (COVID-19) pandemic. On 8 September 2020, the BBC reported that a freedom of information request revealed that over 300,000 redundancies had been planned in June and July 2020, with a growing number of redundancies expected in the coming months as government support for employers winds down (*www.bbc.co.uk/news/business-54058559*). On 26 September 2020, The Times reported on forecasts anticipating widespread job losses (*www.thetimes.co.uk/edition/business/chancellors-new-support-scheme-will-see-one-million-lose-jobs-hgldqq87l*).

Dealing with redundancy can be daunting for both employers and employees. With many employees working remotely, laid off, sick or caring for others, employers face a whole set of new challenges in implementing their proposals.

Careful planning for potential issues before starting a redundancy exercise is key to complying with legal obligations, particularly in the current times.

This feature article examines some of the key employment issues, both old and new, that employers face when conducting a redundancy exercise, including:

- Some preliminary considerations, such as avoiding common pitfalls, establishing the business case for the redundancies and ensuring effective communications.
- Deciding the number of proposed redundancies, the selection pools and the selection criteria.
- Considering whether alternative employment is available.
- Dealing fairly with employees who are absent on maternity leave.
- Redundancy pay.
- Consultation requirements.
- Carrying out the dismissals.

PRELIMINARY CONSIDERATIONS

Careful redundancy planning and consultation is essential to address the risk of employment tribunal claims, poor morale and negative publicity that may result from redundancy situations. This involves planning a full and fair procedure, from formulating redundancy proposals, through to selecting employees for redundancy and effecting dismissals.

Emotional impact

Redundancy is an emotive matter. From the time of the initial announcement, emotions will be running high. This will affect the whole workforce, not just the employees who are at risk of redundancy. Keeping this in mind can help to achieve the business's objectives with the least damage to employees and employee relations.

This will also help those who keep their jobs, reducing the potential for them to be affected by "survivor syndrome". For example, employers should include all employees in preliminary briefings about what is happening in the workforce and, subsequently, those who are not directly affected can be given regular but high-level updates about the progress of the consultation. They will want to know that the organisation deals with redundancy situations fairly but will also want whatever reassurance can be given that the employer anticipates that the current measures will secure viability for the business going forward (*see box "Joint statement from Acas, CBI and TUC"*).

Joint statement from Acas, CBI and TUC

Acas, the Confederation of British Industry and the Trades Union Congress delivered a joint statement on handling redundancies on 24 September 2020 (*www.acas.org.uk/joint-statement-acas-cbi-tuc*). They set out five principles when considering redundancies during the 2019 novel coronavirus disease pandemic:

- Do it openly. There are rules for collective redundancies (those involving 20 or more staff) but whatever the scale, the sooner people understand the situation, the better for everyone.
- Do it thoroughly. To understand what is happening, people need information and guidance. Have you trained your staff representatives in how it all works?
- Do it genuinely. Consultation means hearing people's views before you make a decision; so be open to alternatives from individuals and/or unions; and always feed back.
- Do it fairly. All aspects of your redundancy procedure should be conducted fairly and without any form of discrimination.
- Do it with dignity. Losing your job has a human, as a well as a business, cost. The way you let people go says a lot about your organisation's values. Think about how you will handle the conversation, whether it is face-to-face or remote. And remember, you may want to rehire the same person in the future.

Potential pitfalls

It is always a good idea to understand where the potential risks lie when embarking on any HR process. As a starting point, a good process will account for the employee's contractual and statutory rights against the employer (*see box "Employee statutory redundancy rights"*).

Establish the business case

Employers should develop the business case for the redundancies with a clear rationale, supported by relevant information. It is key to achieving a fair process that employees have an opportunity to influence the outcome. To do that, employees and their representatives must understand what is being proposed and why.

During the process, it is important to give employees an opportunity to ask questions and put forward suggestions and proposals. It is also important to ensure that any responses to those questions, comments or proposals are consistent with what the organisation is seeking to achieve. If they are not, this will create distrust.

The development of the business case will involve considering how the organisation proposes to achieve its business objective. For example, the organisation needs to decide whether: the business or a site is closing completely or whether certain roles are simply being removed from the structure altogether; the number of employees carrying out a particular role is being reduced; or, at the most complex level, roles are being restructured so as to eliminate some roles while creating a reduced number of new roles. When it comes to judging the reasonableness of the approach to selection for redundancy, there is a difference depending on the scenario involved (*see "Role reductions" below*).

Communications

Employers should prepare an overall communication process. Key communications will include a letter to be sent directly to all affected employees advising them of the proposals and the arrangements for consultation.

A Q&A document, which is regularly updated, is a good way of addressing the questions that employees are likely to have. It enables employers to retain control over messaging, which can be particularly helpful in a collective process (*see "Collective consultation" below*).

Employers need to ensure that they send a consistent message. Scripts or bullet point briefings for those making the announcements or holding meetings will help with this, usually produced as a joint effort between HR, the legal department and the internal communications team (*see box "Communications during the COVID-19 pandemic"*).

The employer may also need to develop appropriate communications to customers and suppliers, as well as stock exchange announcements, where relevant, and press releases.

ESTABLISH NUMBERS AND TIMESCALE

In large-scale redundancy situations, where there are 20 or more proposed dismissals over a period of 90 days or less at one establishment, an employer has a duty to inform and consult appropriate employee representatives of affected employees (*section 188, Trade Union and Labour Relations (Consolidation) Act 1992*) (TULRCA).

Establishing the number and timescale for the proposed redundancies will determine whether collective consultation is required and, if so, whether the minimum timescale is 30 or 45 days (*see feature article "Redundancy: managing an effective programme", www.practicallaw.com/7-384-9402*).

Identifying who is included

When deciding whether the collective consultation obligation is triggered,

employers should take care to ensure that all relevant "redundancy dismissals" in the 90-day period are identified (*see "Collective consultation" below*). There is no minimum service requirement for collective consultation rights so employees with less than two years' service must be counted.

Volunteers. Voluntary redundancy will count as a dismissal where it occurs in response to a proposal by the employer to make redundancies, even if only voluntary redundancies are proposed.

Fixed-term employees. Employees on fixed-term contracts who have reached their agreed end date or end point are specifically excluded from collective consultation (*section 282, TULRCA*). However, those whose contracts are not due to end will still need to be included in the collective consultation.

Employers should note that, while employees whose fixed-term contracts are about to end are excluded for collective consultation triggers, if the reason for non-renewal is redundancy they remain protected under the Employment Rights Act 1996 (ERA) and, if they have two years' service, they will remain entitled to a statutory redundancy payment.

Employee statutory redundancy rights

There is no requirement for any length of service for the following rights:

- Not to be selected for redundancy on certain prescribed grounds, notably pregnancy and whistleblowing (*section 105, Employment Rights Act 1996*) (ERA).
- To be given statutory notice or contractual notice if more favourable (*section 86, ERA*).
- To be included in collective consultation where triggered (*section 188, Trade Union and Labour Relations (Consolidation) Act 1992*).

The following rights are subject to a two-year service requirement:

- Not to be unfairly dismissed (*section 94, ERA*).
- To receive a statutory redundancy payment (*section 135, ERA*).
- To be allowed time off to look for work or arrange training (*section 52, ERA*).

Series of redundancies

No account is taken of dismissals in respect of which collective consultation has already begun (*section 188(3), TULRCA*). For example, an employer has proposed 30 redundancies and begins collective consultation. It then proposes another ten redundancies within the same overall period of 90 days. As consultation has already started on the original 30 redundancies, the subsequent ten redundancies can be viewed in isolation and there will be no obligation to consult collectively in respect of the further ten. On the other hand, if an employer originally proposed to make ten redundancies and then proposes to make a further ten in the same period of 90 days, it will become obliged to consult collectively about all 20 redundancies. This can be problematic depending on how far down the line the employer is in implementing the original ten redundancies.

One establishment

The duty to consult collectively applies only where 20 or more dismissals are proposed at one establishment (*section 188(1), TULRCA*). One establishment is not necessarily the same as the entire workforce. In *USDAW and another v WW Realisation 1 Ltd (in liquidation)*, known as the *Woolworths* litigation, the European Court of Justice confirmed that aggregating proposed dismissals across the whole workforce is not required (*C-80/14; see News brief "Collective redundancy: a definitive return to normality", www.practicallaw.com/1-614-4191*).

In many cases, a specific geographical location will count as one establishment. Where a business has several branches, each branch is likely to be a separate establishment (*MSF v Refuge Assurance Plc EAT/1371/99;* the *Woolworths* litigation). However, just because two subsidiaries operate out of a single geographic location, it does not necessarily follow that they are one establishment (*Rockfon A/S v Specialarbejderforbundet i Danmark, acting for Nielsen and others C-449/93; www.practicallaw.com/3-100-0253*).

There is no single test to determine what constitutes one establishment and each case will turn on its own facts. However, the following may be relevant:

- Whether there is a distinct business unit or entity.
- Whether there is a separate geographical location.
- To what extent the potential establishment has its own management.
- Whether it shares any central functions, resources or management.
- Whether it has financial, administrative or technological autonomy.

SELECTION POOLS

Where there is not a complete site closure, the employer will need to identify the groups of staff from which the redundancy dismissals will be made. These are the pools of staff at risk of redundancy from which those to be made redundant will be selected. It is for the employer to determine the pool or pools from which selection will be made in the first instance, although there should be consultation on this. The choice must be reasonable having regard to all of the circumstances.

Pool of one

In some cases, there may be a pool of only one employee or the number of employees in the pool may equal the number of roles being eliminated. In these scenarios, selection criteria will not be necessary but consultation obligations still apply (*see "Selection criteria" below*).

Variety of pools

Unless there is a collectively agreed or customary approach to pooling, the selected pool simply needs to be within the range of reasonable responses (*Hendy Banks City Print Limited v Fairbrother and others UKEAT/0691/04/TM*). Accordingly, a given

set of circumstances may give rise to a variety of permissible pools.

While it is for the employer to determine the selection pool or pools, an employment tribunal will want to see that the employer genuinely applied its mind to that process (*Taymech Ltd v Ryan UKEAT/663/94*). If that was not the case, the whole redundancy process may be unfair (*Capita Hartshead Ltd v Byard UKEAT/0445/11; www.practicallaw.com/5-518-6316*).

The starting point is to consider which particular kind of work is ceasing and which employees perform that kind of work. For example, all senior managers in one department might be placed in a pool together, junior managers in a different pool and perhaps a third pool for shop floor staff.

It is useful to consider:

- What particular kind of work is disappearing.
- Which employees do the particular kind of work that is disappearing.
- What other roles involve skills that might be interchangeable with those identified.

Out of sight should not mean out of mind. The pool should include employees who are on secondment, maternity or other family leave, sick leave, have been laid off or who are away from work for any other reason.

Interchangeable skills

It is important to look at what employees actually do or have the skills to do, as well as what their contracts require them to do. If skills are interchangeable or contracts of employment are flexible, the pool may need to be widened to include the employees in all interchangeable roles. For example, administrative assistants across different departments may be included in a single pool due to the interchangeable nature of their skills.

Employers should consider whether:

- Equivalent roles exist in other areas of the business. In many instances, it will not be necessary to pool across business departments but it is important to consider it.
- An employee has previously done other work using different skills from those used in their current role.
- "Bumping" is appropriate. This is where a senior employee whose job is at risk is placed in a pool with more junior colleagues. Bumping is not commonly used but it is important to think about it before ruling it out (*Lionel Leventhal Ltd v North UKEAT/0265/04, www.practicallaw.com/7-200-3847; Fulcrum Pharma (Europe) Ltd v Bonassera and another UKEAT/0198/10, www.practicallaw.com/0-504-0449*).

Communications during the COVID-19 pandemic

It has always been the case that employers need to ensure that employees who are not at the workplace, such as those on long-term sick leave, maternity and paternity leave, secondment and holiday, are included in the communication process. Those working remotely from home, in some cases temporarily abroad, during the 2019 novel coronavirus disease (COVID-19) pandemic now also need to be included (*see feature article "Homeworking in the wake of COVID-19: issues for employers", this issue*). In some cases, this group may now be the majority of the employer's workforce.

Employers whose workforce is generally back in the workplace as normal will need to be mindful of COVID-19 compliance rules in their face-to-face meetings and of the impact of the quarantining and self-isolation rules in force from time to time. For employers with significant numbers of people still working from home, establishing from the outset how to communicate with a dispersed workforce effectively and reliably, possibly necessitating new digital communication platforms and equipment to be made available, will be key. Communication to all affected employees, including those not at risk of redundancy, will be critical in maintaining trust and morale at a time when employees are potentially feeling isolated and vulnerable.

Where collective consultation is triggered, employers should ensure that all participants in virtual meetings have access to suitable equipment, such as laptops, which they are trained to use (*see "Consultation" in the main text*). Employers should prepare and agree with the union or employee representatives protocols for conducting virtual meetings that cover:

- The provision of information in advance.
- The security of that information, including privacy and confidentiality obligations.
- The conduct of the meetings, such as how to manage break-out conversations.

Employers should also consider arrangements to enable the union or employee representatives to liaise effectively and confidentially with their members or colleagues so that they can canvass views when responding to the employer's proposals. Employers may need to involve IT support early in this regard.

SELECTION CRITERIA

It is for the employer to determine the selection criteria in the first instance, although there should be consultation on this.

Reasonable criteria

The criteria chosen should be capable of objective assessment. However, just because selection criteria involve a degree of judgment does not mean that they cannot be assessed in a dispassionate or objective way (*Mitchells of Lancaster (Brewers) Ltd v Tattersall UKEAT/0605/11*). Essentially, the employer must be able to demonstrate that any criterion adopted is reasonable and it has been applied rationally and objectively.

In order to be reasonable, the redundancy selection criteria should, as far as possible, be capable of independent verification. This means that the criteria should be measurable rather than just based on personal opinion. The criteria should also be discussed with the union, if one is recognised, at the start of the exercise.

Potential criteria

Care should be taken in setting the selection criteria to be used. This is a good opportunity

to look at what direction the business wishes to go in the future and ensure that a focused workforce is retained in the future.

Skill, knowledge and experience. The criteria to assess skills and knowledge should be clearly defined. Vague and ambiguous criteria, such as "attitude to work", should not be used as they can be challenged for subjectivity. Using experience as a selection criterion also carries a risk of unlawful indirect age, sex or disability discrimination, unless it is objectively justified; that is, it is a proportionate way of meeting a business need (*see feature article "Disability discrimination: challenges for employers", www.practicallaw.com/w-026-0356*).

Performance records. Performance records can potentially be relied on but employers should consider whether any appraisal or personal development review process that the employer operates reflects the proposed scoring criteria and has been implemented robustly enough to be relied on.

It is likely to be unfair to use a poor performance issue that the employer has not previously addressed with the employee. Any performance issues that are related to a disability should be assessed in accordance with any reasonable adjustments that have been made. If the duty to make reasonable adjustments has not been complied with, the performance issues will most likely need to be discounted.

Disciplinary record. Employers must be careful that the employee is aware of any disciplinary matters relied on and, preferably, that these are matters where the employer has taken disciplinary action. Any warnings that have expired should generally be disregarded.

Length of service. Although length of service was commonly used historically, particularly in unionised workforces, great care should be taken if using this in light of potential indirect age, sex and race discrimination claims. Length of service does not necessarily correlate with the employee's ability to do the job.

Attendance record. Where attendance is used, it is important that the reasons for poor attendance are examined. For example, if an employee has been absent because of:

- A disability, the employer will need to make reasonable adjustments and, in many cases, this will involve discounting disability-related absences. This is a complicated area where specific legal advice may need to be sought.
- A reason relating to her pregnancy or maternity, this must not form part of the selection criteria otherwise this could give rise to sex discrimination claims.

Weighting

In addition to determining the selection criteria, the employer also needs to assess the weight to be attributed to each criterion depending on its relative importance to the role. For example, the skills and performance criteria might carry greater weight than other criteria. Weighting should reflect the relative importance to the business of each criterion.

Volunteers

An employer may wish to consider asking for volunteers for redundancy. There is no obligation on the employer to do this but it can be helpful to minimise the effect on morale of compulsory redundancies. There are potential downsides:

- It is likely that the employer will have to offer an enhanced redundancy payment to encourage volunteers to come forward.
- It is important for the employer to make clear that simply because an employee applies for voluntary redundancy, they will not necessarily be accepted for it. Employers should retain the discretion to decline applications to avoid a situation where the employees that they most wish to retain apply or too many come forward (*HM Land Registry v Benson and others UKEAT/0197/11; www.practicallaw.com/1-518-6304*). This may mean that some employees are kept on against their wishes.

ALTERNATIVE EMPLOYMENT

As part of a fair redundancy process, the employer must consider whether alternative employment is available that potentially redundant staff could do to avoid being made redundant. Employers are not obliged to create alternative employment for redundant employees where none already exists. However, they should make sure that they undertake a sufficiently thorough search for alternative employment, including in any associated companies, as well as the employing company.

Employers should also provide employees with enough information about any vacancies so that they are able to take an informed view as to whether they want to be considered for the role.

Employee rejection of role

If the capacity and place in which the employee is employed, and the other terms and conditions of employment, differ, whether wholly or in part, from the corresponding terms of the employee's previous employment, the alternative employment will be subject to a statutory four-week trial period (*section 138, ERA*).

An employee who unreasonably refuses an offer of suitable alternative employment made before termination or within four weeks thereafter will lose their entitlement to a statutory redundancy payment (*section 141(2), ERA*). An employee can refuse a suitable alternative job provided that they are not acting unreasonably.

Selection for alternative roles

The principle that redundancy selection should be based on objective criteria does not extend to deciding which potentially redundant employee should be appointed to an alternative vacancy (*Morgan v Welsh Rugby Union UKEAT/0314/10; www.practicallaw.com/2-505-3134*). The employer is entitled to undertake a competitive interview process and appoint the candidate that it considers to be the best for the job, even if this is based on its subjective view. It simply needs to act fairly and reasonably.

Role reductions

If a redundancy arises in the context of a restructuring that sees old jobs disappear and new jobs created, the selection process that the employer will carry out may be hard to characterise. There is a subtle difference between allocating staff to newly created roles and selecting staff to remain in a dwindling number of roles. For the former, the employer has a greater degree of flexibility in how it makes its selection. In the latter situation, the employer must follow a more objective selection process scoring the at-risk pool against the same criteria (*Canning v National Institute for Health and Care Excellence UKEAT/0241/18*). However, in both cases employers should always remember the touchstone of the reasonable responses test (*Gwynedd Council v Shelley Barrett and other UKEAT/0206/18; Green v London Borough of Barking & Dagenham UKEAT/0157/16*).

MATERNITY LEAVE

It is essential to involve employees who are absent on maternity leave in any redundancy process. They are entitled to the same level of information and consultation as if they were at work. They should be counted in an appropriate selection pool as if they were at work and care should be taken when the employer applies selection criteria.

In applying the selection criteria, the employer should consider whether any of them could be discriminatory, for example, in applying an attendance record criterion, absence that is related to maternity leave should be discounted. However, employers should not assume that giving the benefit of the doubt to the employee on maternity leave will be the safest option in assessing all criteria. Employers should assess the possible ways in which the unfairness of a maternity absence can be mitigated, rather than automatically favouring the female employees on maternity leave above others. Pregnant employees and those on maternity leave should be treated more favourably than male colleagues only to the extent that this is reasonably necessary to remove the disadvantages related to their condition (*Eversheds Legal Services Ltd v De Belin UKEAT/0352/10; www.practicallaw.com/9-506-1791*).

Maternity special protection

When considering alternative employment, at-risk employees who are on maternity leave have an automatic right to be offered a suitable alternative vacancy before it is offered to any other employee. Her right effectively takes priority over any other employee whose role is redundant at the same time (*regulation 10, Maternity and Parental Leave etc Regulations 1999 (SI 1999/3312)*). Equivalent provisions also apply to those on adoption leave or shared parental leave.

An employer is not obliged to offer every suitable vacancy or, indeed, any particular vacancy if more than one suitable vacancy exists (*Sefton BC v Wainwright UKEAT/0168/14*).

Where no suitable alternative vacancy exists, the employer can dismiss the employee on the ground of redundancy. Employers do not need to extend the period for considering alternative positions until the end of the maternity leave period (*Calor Gas Ltd v Bray UKEAT/0633/04*). However, care should be taken that the employee is properly consulted and given correct notice. Once the dismissal takes effect, the maternity leave period automatically comes to an end. However, employers should be aware that the right to receive statutory maternity pay survives termination of the contract. Once the right has accrued, the payments will have to be made even after the employee has left.

Statutory redundancy pay

Statutory redundancy pay is calculated according to a formula set out in section 162 of the Employment Rights Act 1996, based on age, length of service (up to 20 years) and pay:

- Half a week's pay for each year worked before the employee's 22nd birthday.
- One week's pay for each year worked between the employee's 22nd and 40th birthday.
- Two weeks' pay for each year worked after the employee's 41st birthday.

A week's pay is subject to the statutory cap for the purpose of this calculation, which is currently £538 and is revised annually on 6 April. The most recent 20 years of service only are taken into account, working backwards from the termination date.

ESTABLISH TERMS

Under section 135 of ERA, employees with at least two years' continuous employment at the relevant date are entitled to a statutory redundancy payment (*see box "Statutory redundancy pay"*).

Some employers offer enhanced contractual redundancy payments over the statutory basic entitlement. Employers need to check any express contractual redundancy terms or terms that could apply by custom and practice. If there are none, they should consider whether enhanced redundancy terms are to be offered in relation to the redundancy exercise. Employers should also:

- Consider whether employees will be required to sign settlement agreements in return for the enhanced terms.
- Consider the effect of the Employment Equality (Age) Regulations 2006 (*SI 2006/1031*) on proposed terms.
- Ensure that the proposed terms do not acquire contractual force through custom and practice. For example, it is useful to state that the terms have been adopted by the board for the purposes of the specific redundancy exercise and that there is no obligation to apply the terms in any future redundancy exercise.

Pensions

Although outside the scope of this article, where an occupational pension scheme is in operation, specialist legal advice should be taken before the redundancy process starts, as material liabilities could be triggered depending on the circumstances.

CONSULTATION

Employers may be under a duty to collectively consult depending on the number of proposed redundancies (*see feature article "Redundancies and transfers: overlapping duties to inform and consult", www.practicallaw.com/9-516-7434*). In addition, regardless of whether collective consultation is required, employers will also need to carry out individual consultation as this remains necessary to show a fair dismissal process.

Employers face a maximum potential penalty of 90 days' uncapped pay per employee if the statutory process for collective consultation is not followed correctly.

The process should be documented throughout, with minutes taken of all meetings and records made of considerations at each stage, from determining the business case behind the proposals, the rationale for selection pools through to the evidence to support individual scoring.

Progressing consultation

Before announcing a redundancy process, it is useful for employers to prepare a timetable

and consultation plan. The timetable should be viewed as a working document that is regularly reviewed and updated to take account of any issues that arise or any agreement that is reached as the consultation progresses.

An appropriate structure is likely to include:

- Holding an employee briefing to announce the proposals in outline and explain the proposed process.
- Where there is a collective process and employees are not covered by a trade union recognition agreement, making a request for employees to volunteer as representatives and providing details of any election process.
- Holding any necessary election process and confirming the identity of representatives.
- Informing employees or, in a collective process, the appropriate representatives of when the first consultation meeting will take place and any future communications, such as a Q&A, will be published. In a collective process, the prescribed information can be provided to representatives at this stage. A series of consultation meetings can then take place.
- At the first consultation meeting, communicating the proposals and the business reasons for the proposals, seeking agreement on the timetable for consultation, arranging the necessary meetings and trying to seek agreement on the use of voluntary redundancies. It is likely that employees will be keen to hear details of the proposed redundancy terms at this stage. Redeployment may also be considered.
- At subsequent consultation meetings, allowing the employees or the appropriate representatives to respond to the proposals and for detailed consultation to take place on: whether the redundancies can be avoided or reduced; alternatives to redundancy; and the appropriateness of the proposed selection pools. This may involve several meetings.
- At later consultations thereafter, continuing to consult on the process of implementation, including: how the selection criteria will be applied; the timescale; and alternative employment and other forms of support for those selected for redundancy.
- In a collective process, beginning individual consultation with the employees who have been provisionally selected for redundancy. The collective process should remain open, with further meetings held to update representatives on the progress of individual consultation as needed. At the appropriate stage, collective consultation can be concluded.
- Once the selection process and consultation are complete, holding a final meeting with those who remain selected to review and, where appropriate, confirm the redundancy decision.

The requirements of any existing company redundancy policy or procedure should be factored into the process, although many smaller or non-unionised employers may not have these.

Collective consultation

Where the collective consultation obligation applies, consultation must begin in "good time" and, in any event:

- At least 30 days before the first dismissal takes effect if between 20 and 99 employees are to be made redundant over 90 days or less.
- At least 45 days before the first dismissal takes effect if 100 or more employees are to be made redundant over a period of 90 days or less.

The obligation is triggered when the employer first proposes the redundancies.

Proposing to dismiss. "Proposing" means more than a mere contemplation of the possibility of redundancies but is still generally found to occur at an earlier stage than an actual decision by the employer to make redundancies. Employers should not begin consultation with a closed mind since there will not be a proper consultation if the decision has already been made. Before the duty to consult arises, the employer's consideration must be sufficiently well advanced to have identified the fact that 20 or more employees may be made redundant within a period of 90 days or less but no firm decision should have been reached.

In the context of a site closure, redundancies are proposed at the point when the closure is proposed (*UK Coal Mining Ltd v National Union of Mineworkers and another EAT/0397/06/RN*). It will not be when the closure is mooted as a possibility but only when it is fixed as a clear, albeit provisional, intention. *UK Coal Mining* has been called into question, although not resolved, in subsequent case law. Unfortunately, this remains a grey area.

Notifying BEIS. An employer proposing to make collective redundancies must give formal advance notification of this intention to the Secretary of State for Business, Energy & Industrial Strategy (*section 193, TULRCA*). This is done by completing form HR1 and sending it to the Redundancy Payments Office, usually when consultation begins. Failure to do so is a criminal offence.

As clarified by the Collective Redundancies (Amendment) Regulations 2006 (*SI 2006/2387*) notification must be provided:

- Before giving notice to terminate an employee's contract of employment in respect of any of those dismissals.
- At least 30 or 45 days, as appropriate, before the first dismissal takes effect.

Length of consultation. The minimum time periods set out in section 188(1A) of TULRCA relate to the period that must elapse between the start of consultation and the first dismissal, not to the duration of the consultation. The process of consultation should continue for as long as is appropriate in order to either reach an agreement or exhaust the possibility of agreement. The process is not open-ended and, whatever the response from the appropriate representatives, it is clear that the employer will need to end the consultation at some point and begin to implement its redundancy proposals. In most cases, consultation will last at least the 30 or 45 days period, as appropriate, and ending it earlier than this will carry a risk of claims (*see below*).

Affected employees. Employers must consult with appropriate representatives of those who may be affected by the proposed dismissals or who may be affected by measures taken in connection with those dismissals (*section*

188(1), TULRCA). The duty extends beyond those immediately at risk of dismissal to include those affected by measures associated with the redundancies.

The term "measures" is not expressly defined but is likely to include any organisational step taken in connection with, or as a result of, the proposed redundancies. This could include new systems of work, new working hours or arrangements, proposed variations to contracts of employment, new reporting lines or organisational requirements.

However, the collective consultation requirements are triggered by the number of employees it is proposed to dismiss, not the number who might be affected.

Appropriate representatives. Where affected employees are all represented by a trade union recognised for collective bargaining purposes, the employer must inform and consult an authorised official of that union. The employer is not required to inform and consult any other employee representatives in these circumstances but may do so voluntarily. In other words, if one or more of the affected employees falls within the scope of the union recognition agreement, the union must be consulted. Where this is the case, typically recognition will be extended to the whole relevant category of employees, even though not everyone in that group will be a union member.

Where affected employees are not represented by a trade union, the employer's duty is to consult with employee representatives. These may be individuals who have been:

- Previously elected or appointed by the affected employees, and whose remit covers redundancy consultations; for example, works council or staff consultative committee representatives.
- Elected by the affected employees specifically for the purpose of the current redundancy consultation.

In practice, most employers will choose to consult with representatives who have been specifically elected by the affected employees, so that their remit is absolutely clear, even though it involves a little more time in the timetable. It is for the employer to determine the number of representatives but the number should be sufficient to represent all affected employees properly and should be drawn from the various components of the business. An election may not always be needed; for example, where the number of candidates does not exceed the number of representatives sought. Where an election is needed, the employer should make suitable arrangements for it. Section 188A(1) of TULRCA sets out specific statutory rules governing the election of employee representatives for the purposes of collective consultation.

In the event that affected employees fail to elect representatives within a reasonable time where the employer has invited them to do so, the employer is released from the obligation to collectively consult. In these circumstances, the employer is only obliged to give each affected employee the information required under section 188(4) of TULRCA (*section 188(4)*).

The duty to inform. The employer is under an obligation to provide the appropriate representatives with sufficient information to enable constructive consultation. Under section 188(4), certain minimum required information must be provided in writing (*see box "Required written information"*). This is to ensure that the appropriate representatives have enough information about the employer's proposals to be able to take a useful and constructive role in the consultation process. A copy of the HR1 form must also be provided (*section 192(6), TULRCA*).

This information must be in writing and either: handed to each of the appropriate representatives; or delivered by post to an address notified to the employer or, in the case of a trade union, to the union's head or main office (*section 188(5), TULRCA*).

It is not necessary for the employer to provide all of the statutory information at the outset of consultation. Consultation can be deemed to have commenced as long as the employer has provided sufficient information to enable meaningful consultation to take place (*MSF v GEC Ferranti (Defence Systems) Ltd (No 2) [1994] IRLR 113*).

The duty to consult. Consultation must be undertaken with a view to reaching agreement with the appropriate representatives regarding ways to:

- Avoid the dismissals.
- Reduce the numbers of employees to be dismissed.
- Mitigate the consequences of the dismissals.

Required written information

Under section 188(4) of the Trade Union and Labour Relations (Consolidation) Act 1992, employees' representatives must be given the following written information:

- The reasons for the proposed dismissals.
- The numbers and descriptions of employees that the employer is proposing to dismiss as redundant.
- The total number of employees of any description employed by the employer at the establishment in question.
- The proposed method of selecting employees who may be dismissed.
- The proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect.
- The proposed method of calculating the amount of any redundancy payments to be made, over and above the statutory redundancy payment.
- The number of agency workers working temporarily for, and under the supervision and direction of, the employer, the parts of the employer's undertaking in which those agency workers are working, and the type of work those agency workers are carrying out.

Possible ways of avoiding and reducing the number of dismissals might include redeployment within associated companies or use of the government's Job Support Scheme (*see News brief "Job Support Scheme: new COVID-19 support for employers and employees", this issue*). The impact of the dismissals might be reduced by offering severance payments, career guidance or a contribution towards the cost of retraining. The representatives have no right of veto and, ultimately, the employer makes the decisions on the way forward.

Special circumstances defence. If there are special circumstances which render it not reasonably practicable for the employer to comply with specified obligations, the employer must take all the steps towards compliance with that requirement as are reasonably practicable in those circumstances (*section 188(7), TULRCA*).

The specified obligations are to:

- Consult in good time.
- Consult about ways of avoiding dismissals, reducing the numbers of employees to be dismissed and mitigating the consequences of the dismissals.
- Provide the statutory information under section 188(4).

Establishing a special circumstance is extremely difficult, even in an insolvency situation. For example, special circumstances do not include:

- A decision taken by a controlling body of the employer that had not supplied the necessary information in time (*GMB and Amicus v Beloit Walmsley Ltd (in administration) EAT/1094/02 and EAT/1095/02*).
- The need for confidentiality. The Financial Conduct Authority rules do not preclude appropriate representatives being informed and consulted in advance. They can be subject to confidentiality constraints for a specified period.
- Insolvency (*Smith and another v Cherry Lewis Ltd (in receivership) EAT/0456/04*). Although insolvency is not a special circumstance, in *AEI Cables Ltd v GMB and others*, the Employment Appeal Tribunal held that tribunals should take into account the impact of insolvency on a company's ability to consult for the prescribed minimum period (*UKEAT/0375/12*).

It is highly unlikely that the COVID-19 pandemic would be seen as a special circumstance. Despite being in unprecedented times, employers will still need to demonstrate that they undertook a fair procedure and that the steps they took were reasonably practicable in the circumstances.

Protective awards. If an employer acts in breach of its duty to carry out collective consultation, for example, where the consultation was inadequate or in bad faith or there was a failure to comply with the rules on electing representatives, a protective award may be made against the employer up to a maximum of 90 days' actual gross pay per employee. The potential compensation is therefore equivalent to a quarter of the annual wage bill for the affected employees. The size of the award depends on the level of default.

Redundancy and unfair dismissal

Even if a dismissal is genuinely on grounds of redundancy, whether it is fair to dismiss for that reason normally depends on the application of the general test of fairness in section 98(4) of the Employment Rights Act 1996; that is, whether the employer acted reasonably in all the circumstances in dismissing the employee. A redundancy dismissal is likely to be unfair unless the employer:

- Identifies an appropriate pool for selection.
- Consults with the individuals in the pool.
- Applies objectively assessed selection criteria to those in the pool.
- Considers suitable alternative employment where appropriate, subject to a trial period.

In certain circumstances, the selection of an employee for dismissal on grounds of genuine redundancy will be automatically unfair; for example, selecting an employee for a reason connected to pregnancy or whistleblowing, or because the employee has refused to sign a working time opt-out agreement. In these cases, there is no qualifying service requirement.

In *Polkey v AE Dayton Services Ltd*, the House of Lords held that an employer will normally not act reasonably and a dismissal will therefore be unfair unless it:

- Warns and consults employees, or their representative(s), about the proposed redundancy.
- Adopts a fair basis on which to select for redundancy.
- Considers suitable alternative employment (*[1987] IRLR 503*).

Individual consultation

Consultation with individual employees is fundamental to the fairness of any dismissal for redundancy. Matters that should be discussed usually include giving the employee the opportunity to:

- Comment on the selection pool and criteria.
- Challenge their selection assessment.
- Put forward any suggestions for ways to avoid their redundancy.
- Consider any alternative employment.
- Address any other matters or concerns that they may have.

In a collective process, some of these matters will be consulted about through the

representatives but the principle that the employee must be able to influence decision making through the consultation process remains.

The requirement to consult does not mean that the employer has to agree with what the employee says. Rather, it means considering what the employee has to say and not dismissing it out of hand. Genuine engagement with employees is required.

There are no prescribed timescales within which individual consultation should take place. If the employer serves notice to dismiss before carrying out a consultation, a tribunal is highly likely to consider the consultation process to be a sham and the dismissal unfair.

While not a legal requirement, as a matter of best practice it is recommended that employees are given the right to be accompanied by a colleague or a trade union representative at consultation meetings.

Interaction with collective consultation. The fact that an employer that is required to collectively consult has consulted with employee representatives does not absolve it from consulting with individual employees. This remains necessary to limit the risk of successful unfair dismissal claims.

It is generally acceptable, however, for individual consultation to begin at a later stage in the process than would normally be the case where collective consultation is not required. This enables the employer to collectively consult and reach agreement regarding selection pools and criteria before instigating individual consultation only with those employees who are provisionally selected to be made redundant, rather than consulting individually with everyone in the pool.

DISMISSALS

Once the decision has been taken as to an employee's selection for redundancy, it is best practice to invite that employee to a final meeting to review the decision with them before confirming their selection and the redundancy package.

The employer should inform the employee that they will receive written confirmation and notify them that they will have an opportunity to appeal the decision (*see "Appeal meetings" below*).

Related information

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While not a legal requirement, as a matter of best practice it is recommended that employees are given the right to be accompanied by a colleague or a trade union representative at this meeting.

Dismissal notices

The employer should confirm in writing the decision to dismiss for redundancy and specify the termination date. The termination date may be at the end of the employee's relevant notice period or may be with immediate effect if a payment in lieu of notice is to be paid.

Notice period. Employees are entitled to statutory or contractual notice, whichever is the greater. Under statutory notice, an employee is entitled to one week's notice for each year of continuous employment up to a maximum of 12 weeks.

Timing of notices. Where collective consultation has been required, provided that the employer has genuinely sought to consult with a view to reaching agreement and has either reached agreement or exhausted the possibility of agreement, the only restrictions that prohibit the employer from issuing the dismissal notices are that:

- The HR1 must have been served before giving notice to terminate.
- The first of the dismissals cannot take effect within the 30 or 45 day period, as appropriate.

Appeal meetings

Although this is not a statutory requirement, as a matter of good practice, employees should be allowed the opportunity to appeal

against their selection for redundancy. Where possible, any appeal should be heard by a person who is more senior than the person who made the decision to dismiss by reason of redundancy (*see box "Redundancy and unfair dismissal"*).

It is common for appeals to take place at the conclusion of a dismissal process where the reason is conduct or capability. However, in a redundancy scenario, this may not give the employee an effective appeal. An alternative approach is that employees are given the opportunity to appeal against their scoring and provisional selection once initial individual consultation on those matters has been concluded. This will provide an opportunity for the employees to appeal while there is still a good possibility, in practical terms, that their scoring or selection could change. This will help employees to feel that they have a genuine ability to influence their position and will avoid the need for an appeal process following notices of dismissal, at which point it could be difficult for the business to accommodate a successful appeal finding.

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