

Redundancy FAQs – An Employer’s Guide

Navigating redundancy situations can be a stressful and challenging time for both employers and employees. The importance of implementing a fair selection process and following a full and thorough procedure cannot be understated as this will be key when deciding if a redundancy dismissal is both fair and free from discrimination.

This Factsheet answers some frequently asked questions that our clients have in relation to carrying out a redundancy exercise and gives key information in relation to the rights employees have in a redundancy situation.

When does a redundancy situation occur?

There are three types of situations where redundancy can arise. These are:

- Business closure;
- Office or workplace closure; or
- Headcount reductions.

What may trigger a redundancy situation?

A redundancy situation can occur for a number of reasons such as:

- Recession or other economic pressures;
- Changes in the nature of the products or services provided by a business;
- Internal re-organisations;
- Relocation of a business; and
- Technical developments or other changes which impact roles carried out by the employees.

Which employees are covered by redundancy provisions?

All employees are potentially covered by the provisions, however, employees need at least two years’ continuous employment to claim a redundancy payment and/or to bring an unfair dismissal claim. This is with a few exceptions including those situations where the employee claims whistle blowing or discrimination played a part in their dismissal.

Due to the potential for claims from a large number of individuals, it is prudent that businesses undertake a risk analysis as one of the initial stages of any redundancy exercise. This analysis can help with identifying a redundancy process which meets both the employer’s objectives and falls within its risk tolerance.

How do I identify who is at risk of redundancy and what is a “selection pool”?

Another initial key step is identifying which employees in the business or “pool” will be “at risk” of redundancy – this is known as the “selection pool” or “pool”.

There are no fixed rules about how a pool should be constructed, and a particular set of circumstances could give rise to a variety of permissible pools. There is also no legal requirement that a pool should be limited to employees doing the same or similar work, in practice though, this may frequently be the case. In addition, larger businesses carrying out business wide redundancies are likely to have multiple pools for selection.

Often, employers will wish to keep the pool for selection as narrow as possible, whereas, employees (and their representatives) generally argue for a wider selection pool in the hope it lowers the risk of them being selected for redundancy. For this reason, getting the right pool requires a careful balancing exercise for the employer – whilst there are some instances where there is a genuine stand-alone role, an overly narrow pool will increase the risk of an unfair dismissal finding.

In deciding the selection pool, there are a number of tried and tested indicators which can be utilised to help a business with this stage of the process.

Once the pool has been identified, all employees within it should be notified they have been placed “at risk”. This notification must be sent to any pool employees on maternity leave or absent due to sickness. Please note that these categories of employees do pose a number of additional risk issues which need considering.

When should we first notify employees of a redundancy situation?

Employers should give notice to employees who may be affected by the redundancy process when it is first reasonably practicable to do so. Whilst, unhelpfully, there is no set definition for when this is and it is largely dependent on individual cases, any delay in notification can increase the risk of any subsequent dismissal being unfair. Notification should be contained in an “at risk” letter and issued to those in the pool.

At the very least, the “at risk” letter should identify the business rational behind the need for redundancies and preferably set out a time line and target schedule for consultation.

Do we have a choice as to what selection process is followed in a redundancy exercise?

In situations when the business is intending to dismiss as redundant some and not all in the pool, unless there is a contractual process which sets out the selection process to be followed (and this can be implied by previous redundancy processes), generally speaking the answer to this questions is “yes”. However, as this element of the process is prime for challenge, it should be approached carefully.

Some employees opt to implement a scoring system which is designed to identify those to be dismissed for redundancy examples of potentially fair scoring criteria will include:

- Performance and ability;
- Attendance records; and
- Disciplinary records.

Examples of scoring criteria that should be approached with extreme caution and on advice as they can underpin unfair dismissal findings include:

- Employees who in the opinion of the management team would keep the Company viable;
- Employees “best suited” for the needs of the business;
- Cost saving exercises (i.e. terminating employment of those on higher salaries);
- The attitude of the individual employees which can be considered suggestive, ambiguous and vague.
- Length of service

Other employers will, instead, require the “at risk” employees to apply for any remaining/available positions in the business if there is a reduction in head count or vacancies in other departments.

It is imperative that an employer chooses either option one or option two at the outset of the process, as a decision to change course halfway through will nearly always be considered unfair.

How long should a redundancy consultation be and when is collective consultation required?

Except where there is a collective consultation situation, there are no prescribed timescales for a redundancy consultation. For this reason it may be possible to conclude the consultation exercise in the space of a week. This is very much fact dependent. Ultimately, the employer must:

- allow the individual a fair and proper opportunity to understand fully the matters about which it is being consulted; and
- give them an opportunity to express their own views and put forward alternative options.

Accordingly, although it may be fair to conclude these consultation exercises within a week, as a general rule, the shorter the consultation exercise, the greater the chance of an unfair dismissal finding. For this reason these exercises can run to a number of weeks and ordinarily include at least two individual consultation meetings.

Where there is a proposal to dismiss as redundant 20 or more employees within the period of 90 days, then employers will have an obligation to engage in collective consultation with either a trade union representative (if recognised) or an elected employee representative. Collective consultation will not eliminate the need for an employer to carry out individual consultation meetings as well. The law prescribes a process (which includes a minimum period) for collective consultation.

What steps should a consultation process include?

Matters to be discussed during an individual consultation meeting depend on the business rationale and specific set of circumstances in any redundancy exercise. As a minimum the consultation process should allow:

- where appropriate, an opportunity for employees to comment on and/or challenge the selection pool and selection method;
- an opportunity for an employee to put forward any alternative proposals to those being consulted about; and
- consideration of any alternative vacancies including any suitable alternative employment.

In the event of a collective consultation, the law prescribes matters about which the representatives must be consulted about.

What are our obligations in respect of alternative employment and what is “suitable alternative employment”?

Employers should give consideration to whether any suitable alternative employment exists within the business.

The obligation on employers is not to create or actively find alternative roles for that individual, but to provide them with information allowing them to consider whether any alternative vacancies within the business which might be suitable. These vacancies may either exist at the time or the consultation meetings or become available at any time whilst the employee is serving a notice period (if applicable).

In assessing whether the role is ‘suitable alternative employment’, the employer will need to make an objective assessment of the role. This includes considering the employee’s skills, attitude and experience as well as the terms of the alternative job (including status, pay, hours and responsibility). Employees are legally entitled to a trial period in the alternative role before concluding it is suitable.

Is “bumping” permissible in redundancy situations?

Bumping in a redundancy exercise is where an employee, whose own position is redundant, is transferred to another position that is not vacant, making the holder of the second position redundant. Redundancy “bumping” is legally permissible as long as the correct procedure is followed in respect to the employee that is “bumped” out of their role.

If the reason for redundancy/dismissal is a diminution in work resulting in the need for less employees, although the reduction in work does not relate to the employee that is ultimately made redundant, it can be linked as a result of the “bumping”.

What are employees entitled to if they are made redundant?

In order to be entitled to a statutory redundancy payment an employee needs to have two years continuous employment with the business.

There are other payments that may need to be made to the employee upon termination including payment of any outstanding notice pay and any accrued but untaken annual leave.

Employers must offer enhanced redundancy payments where they are contractually obliged to. There may be other situations where the employer exercises their discretion to offer enhanced payment terms. In these cases, consideration should be given to the use of a settlement agreement which is designed to protect the employer against any employment related claims.

Do we have an obligation to offer voluntary redundancy schemes?

Unless there is a contractual obligation to do so, the answer is “no”. However, employers will often use this option to both protect against claims and maintain staff morale at what is a difficult time for all – employers and employees alike.

Subject to how this is handled, the employer will be under no obligation to accept applications for voluntary redundancy.

Are we obliged to allow redundant individuals time off to seek alternative employment?

Yes, if the employee has more than 2 year's service.

In this instance, an employee who is given notice of their dismissal by reason of redundancy has a statutory right to take a "reasonable amount" of paid time off with pay during working hours to seek alternative employment or to arrange training for future employment. There is a wages cap in these circumstances.

What are the key risks?

The main claims that employees may bring upon termination following a redundancy exercise are unfair dismissal or discrimination claims. Other claims can include failure to collectively consult and/or make a payment.

For these reasons, it is imperative to ensure that every effort is made to follow a fair process and that dismissals by way of redundancy are only made where there is a genuine redundancy situation. Further, due to the additional obligations imposed by law in instances where an employee in the pool is on maternity leave¹ or long-term sick leave, the process will need adapting to ensure the process is legally compliant and meets the employer's risk tolerances.

This employment law factsheet just provides an overview of the law in this area.

For a complete understanding of your obligations and options in a redundancy situation please do not hesitate to contact the Employment Team at Wilson Browne Solicitors.

¹ The Pregnancy and Maternity (Redundancy Protection) Bill proposes an extension of a woman's rights in a redundancy situation where that woman is pregnant or has returned to work after maternity leave within 6 months of the redundancy exercise.