

Minimum Redundancy Process – factsheet

A redundancy situation arises if:

- the job has disappeared or is about to disappear, or
- the job has moved to a different location (by more than a reasonable distance), or
- the requirement for the particular work is ceasing or diminishing, e.g. because of unsuccessful tenders, lack of funding, the introduction of new technology, lower level of orders etc.

For a redundancy to be genuine, you must demonstrate that at least one of the above criteria has been met. However, note that there may not have to be a reduction in headcount in order for there to be a redundancy.

Outlined below is the minimum process that should be followed to achieve fair dismissals in redundancy cases affecting less than 20 people in a 90 day period in small organisations. Failing to follow this, e.g. failing to establish a sound business case, or consult meaningfully, may render any dismissal automatically unfair and lead to awards of 90 days' pay for each employee, and the Employment Appeals Tribunal has confirmed that the maximum should be awarded in each case unless there is good reason to award less.

- Create a written business reasons for the change (end of funding is an acceptable business reason).
- Consider who should be in the pool for redundancy - who is affected? Who is carrying out the same or similar work in an establishment?
- Give sufficient advance warning to employees. Brief those people on the situation and give them a letter placing their role at risk of redundancy.
- Hold “meaningful” consultation with them (this would usually involve two meetings minimum – one could be a group meeting, the other an individual one if requested. Involve trade union representatives if a collective agreement exists with provisions relating to redundancies of this size). Consultation would include discussing, e.g., reasonable suitable and alternative work, re-training and the redundancy package. Allow them to make suggestions about how the redundancy might be avoided. Whilst not a legal requirement, it is considered good practice to allow employees to be accompanied at individual consultation meetings by a work colleague or trade union representative.
- Where necessary, identify reasonable selection criteria and apply fairly to all employees at risk of redundancy.

- Consider suitable alternative employment possibilities. Redeploy where possible elsewhere within the organisation (cease any other recruitment activity going on while this process is happening).
- If unable to redeploy, after consultation has ended give notice of dismissal on the grounds of redundancy.
- Employee will work their notice or, if their contract of employment allows, either be placed on 'garden leave' for some/all of their notice period, or leave and be paid in lieu of notice.
- Once notice has been issued, employees with 2 or more years' service are entitled to (reasonable) paid time off to look for alternative work.
- Give the employee an opportunity to appeal against the redundancy dismissal.

Minimising compulsory redundancies

It may be possible to avoid compulsory redundancies completely or at least to reduce the number by a variety of means. The options available could include:

- natural wastage
- suspending recruitment activity
- reducing overtime
- reviewing the use of temporary or agency workers
- short-term working
- redeployment and retraining
- voluntary redundancy
- modified hours /job sharing
- considering the transfer of employees to alternative positions
- pay freezes (or cuts with the employees' agreement).

All of these should be carefully considered, as tribunals will expect you to aim to minimise the number of compulsory redundancies. Keeping a record of your considerations and decisions in relation to these options is recommended.

Consultation

Where any employee is potentially to be made redundant you must consult with them at the earliest opportunity and for a minimum period in line with the table below.

The obligation to consult is triggered when you "first propose" that redundancies may be made. The minimum information which must be given to the representatives before consultation can begin is as follows:

- the reason for the proposals

- the number and descriptions of employees whom it is proposed to dismiss as redundant
- the total number of employees of any such description employed at the establishment in question
- the proposed method of selecting the employees who may be dismissed by reason of redundancy
- the proposed method of carrying out the dismissals with due regard to any agreed procedures, including the period over which the dismissals are to take effect
- the proposed method of calculating the amount of any redundancy payments.

This notice must be in writing and the consultation must cover ways of avoiding the dismissals, reducing the number of employees to be dismissed and mitigating the consequences of the dismissals.

If there are less than 20 people affected, there is no requirement to consult collectively, however individual consultation must take place before any final decision is taken and any notices of redundancy are issued. There is no minimum period for individual consultation but this should be a reasonable amount of time, sufficient to consider the employee's representations and to search for alternative positions or ways of avoiding the redundancy.

The collective consultation procedures (and the requirement to notify the Redundancy Payments Service (RPS), acting on behalf of the Department of Business, Energy and Industrial Strategy (BEIS)) apply even if you are intending to offer alternative work to some of your employees and therefore the resulting number of actual dismissals is expected to be less than twenty. If there is doubt, and twenty or more employees may lose their existing roles, it is advisable to minimise any risk by ensuring you follow the collective consultation procedures. This applies therefore to restructuring exercises and also attempts to amend contracts by dismissing and offering re-engagement on different terms.

You can be fined an unlimited amount if you fail to notify BEIS.

Potential numbers (being made redundant in 1 establishment within a period of < 90 days)	Action required	Timings	Comments
Less than 20	Individual consultation	Consultation to begin in good time	Required to follow a fair dismissal procedure.
20 - 99	Election of representatives. Consultation with representatives. RPS informed	Consultation to begin at least 30 days before notice of the first dismissal is served	Union consultation required where there is recognition

100+	Election of representatives. Consultation with representatives. RPS informed	Consultation to begin at least 45 days before <u>notice</u> of the first dismissal is served	Union consultation required where there is recognition
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A few points to note:

- the definition of redundancy is "dismissals for a reason not related to the individual concerned" - not the narrower definition in the Employment Rights Act relating to a diminished requirement for an employee to carry out work of a particular kind
- the legal obligation to begin consultation "in good time" to allow meaningful consultation to take place still remains - irrespective of any set timescale
- the maximum protective award for a failure to consult collectively is 90 days.

If you are proposing to make 20 or more employees redundant at one establishment within a 90 day period (or less) you must notify the RPS as follows:

- where 20-99 people are being made redundant within a period of 90 days: at least 30 days **before** notice to terminate an employee's contract is issued
- where 100 or more people are being made redundant within a period of 90 days: at least 45 days **before** notice to terminate an employee's contract is issued.

Employers may notify by letter or by form HR1. The information required is similar to that which you must disclose to employee representatives for consultation purposes. In addition the notification must state when and with whom such consultation began. The notification should either be sent by post to the office indicated on form HR1 or emailed to HR1@insolvency.gsi.gov.uk

If your proposals change significantly after the notification has been given (for example, if the numbers to be dismissed increase by twenty or more or if the dismissal dates are to be brought forward or delayed) the RPS should be informed. Employers must give or send a copy of the notification to the representatives with whom they are required to consult about the proposed redundancies. When notification has been received in the form required, a formal acknowledgement will be sent to you.

It is important to be certain of the final number of employees affected. If there is any doubt that the number will exceed 20 it is advisable to submit a HR1, as it is more difficult to rectify this at a later date.

Selection pools and criteria

Where there is a 'pool' of employees from whom a number will need to be selected, it will be necessary to determine the selection criteria. Before embarking on this, it is also important to first check that the appropriate pool for selection has been correctly identified. This could vary according to the circumstances and might apply to just one team/department or the whole workforce. Pools will include employees undertaking similar work in the same department or location; but staff who are "interchangeable" or

who transfer between departments may need to be included as well as those already working in a department earmarked for closure or restructuring. The contracts of employment should be checked to see how tightly these are worded in terms of job title and location.

Having decided on the "pools" for selection, selection criteria should be drawn up, against which each individual in the pool will be assessed. The criteria must be fair, and not applied in a way which could be discriminatory. They should be objective, relevant to the business, justifiable and preferably measurable and evidence based, rather than depending largely on the view of the person doing the assessment.

Criteria may include length of service (see note below), absence records, performance information, disciplinary records, timekeeping, productivity, technical expertise, qualifications, product knowledge, staff management etc. They must be relevant to the remaining jobs and can be weighted. They also need to be free from discrimination, including indirect discrimination (so be careful using absence or driving skills etc as these may discriminate against disabled workers). Also subjective criteria such as "drive", "motivation", "adaptability", "flexibility" and "team fit" are risky as these may constitute age discrimination.

The selection of anyone for redundancy will be **automatically unfair** for any reason relating to any of the following:

- discrimination on the grounds of age, gender reassignment, marriage and civil partnership, sex, race, disability, sexual orientation or religion/belief
- pregnancy or maternity, attending ante-natal or adoption appointments, recent childbirth, adoption leave, paternity leave, shared parental leave, parental leave or time off for dependants
- performance of health and safety duties
- the assertion of part time rights by the employee
- the assertion of fixed term rights by the employee
- being the trustee of an occupational pension scheme
- membership (or not) of a trade union
- refusing to carry out certain activities that breach the Working Time Regulations 1998
- making a protected disclosure under the Public Interest Disclosure Act 1998
- the National Minimum Wage Act 1998
- refusal of the employee as a protected shop/ betting worker to work on a Sunday
- requesting a companion, or accompanying a fellow worker, at a disciplinary or grievance hearing (including appeals)
- being an employee representative for collective redundancy or TUPE-related consultation
- being a trade union representative
- trying to obtain (or prevent) trade union recognition
- requesting flexible working
- undertaking jury service
- the assertion of a statutory right by the employee.

Note re using length of service as criteria: care needs to be taken if you choose to use length of service as criteria, that it is not the only factor and that, if it discriminates on grounds of age, you can justify this.

Make sure you fully document your selection criteria, scores and any reasoning applied, in case they need to be defended.

Voluntary Redundancy

Accepting those who volunteer for redundancy is still regarded as a dismissal in law, rather than a resignation. The merit of accepting volunteers is that you lose those staff who prefer to go, and they are unlikely to claim that they were unfairly selected.

Statutory Redundancy Payments

Employees who have at least 2 years' continuous service (including those on fixed term contracts) and who are dismissed on grounds of redundancy are entitled to a statutory redundancy payment.

Statutory redundancy pay is based upon the employee's age and length of service as at the date the notice period will expire, and his/her gross average wage up to a statutory maximum weekly amount.

An employee who is under formal notice of redundancy (i.e. not simply under consultation) and who asks to be released early will only be entitled to be paid up to the last working day. If they have the requisite length of service, they will however still be entitled to a statutory redundancy payment. If you offer contractual payments in excess of the statutory amounts, you may set your own rules on this which may include a requirement to serve the full period of notice. Where formal notice has not been served, the employee would not be entitled to the redundancy payment.

Notice periods

Notice of redundancy is confirmation of the intention to dismiss and therefore must only be issued once the consultation period has been concluded.

Often in redundancy situations, there is no requirement for the employee to work out his/her full notice period as there is no work to do, although suitable alternative tasks may be agreed instead for this period. Payment in lieu must be made for any of the notice period not required to be worked, plus any redundancy pay.

If the contract of employment allows for it, employees could be placed on 'gardening leave'. This is where staff remain in your employment during their notice period but are not required to attend work and are not permitted to work for another employer. During this time you are able to call the employee back in to work should you wish.

During the notice period (whether worked or not) the employee is also entitled to the protection of his/her other benefits e.g. private healthcare cover, company car, pension.

Suitable Alternative Employment

Employees who have been either offered employment on the same terms and conditions as their original employment or offered suitable alternative employment, and in either case have unreasonably refused the offer, lose their right to a statutory redundancy payment.

Alternative Employment

If alternative work is available, which is different, the employee is entitled to a statutory trial period of four weeks. If during this time either employer or employee decides that the post is not suitable for any reason, the employee will be dismissed on the grounds of redundancy from the previous post (and still be entitled to any redundancy payment in line with the original calculation, which was based on the redundant role). If substantial training is required, the statutory trial period can be extended by the agreement of both parties: this should be confirmed in writing and an end date specified. Be aware that this is the only permitted reason for being able to extend the statutory 4 week trial period.

If the employee works beyond the trial period, he/she will be considered to have accepted the new employment and loses the right to a redundancy payment.

Time off to look for other work

An employee who is under notice of redundancy and who has at least two years' service is entitled to reasonable (paid) time off work to attend interviews or other meetings regarding future employment, e.g. at the Job Centre. As a minimum, you must pay the employee up to 40% of a week's pay to cover their time off (so, for example, if the employee usually works five days a week, and they take 3 days off during the notice period to attend interviews, you are only obliged to pay them for the first 2 days). The employee can take unpaid leave, TOIL or annual leave to cover any other time off, or there may be a contractual agreement in place which specifies more generous payments, or you may apply discretion to allow further paid time off.

For employees with shorter service, it would be considered reasonable, although not a legal requirement, to offer some limited time off if necessary, either paid or unpaid.

Appeals

There is no legal requirement to give the right of appeal against a dismissal on grounds of redundancy; however it is best practice to offer this. The non-statutory guidance issued by ACAS on redundancies advises an appeals procedure to deal with any complaints about selection criteria or their application. This, combined with the added value of an appeal in terms of giving one last chance to resolve any issues internally prior to an employment tribunal claim, means that to offer an appeal does make sense - even if it does prolong the process.

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