



Legal services

Right by your side

Redundancy

Unite guide for members

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Introduction

Redundancy has become an all too depressing feature of the modern economic landscape. Globalisation, increased competition, technological change, government cuts have all contributed to the continuing tide of job losses. At least 109,000 workers lost their jobs in the UK through redundancy in 2019. Redundancy affects not only individuals, but their families and local communities as well.

For this reason Unite seeks to use all means possible to safeguard jobs. Our aim is always to reach agreements which avoid the need for compulsory redundancies and mitigate the consequences for those affected. While we try to negotiate job security which avoids redundancies completely, it is not always possible.

Unite believes that compulsory redundancies should be the last resort, considered only when measures such as the following have been tried:

- Early consultation before job losses become inevitable
- Ending contracting-out and overtime working
- Moving people to alternative jobs with appropriate training and protection of pay and employment rights
- Suspending all recruitment
- Ending the use of temporary and agency workers

These steps are sometimes still not enough to prevent job losses. In this event we believe that volunteers should be sought before any compulsory redundancies are considered. There should be written agreements on the method of selection and compensatory payments. Counselling, time off for job interviews, help with retraining and assistance with travelling expenses should be made available to those affected by redundancy.

This booklet sets out basic rights and discusses the main issues likely to be raised in a redundancy situation. Unite has a network of professional full-time officials (supported by the union's solicitors where necessary) with experience in dealing with redundancy situations. As members, as soon as you become aware of potential redundancies contact your local official for advice.

What is Redundancy?

Redundancy situations occur in many forms. It is important to understand these different forms in order to establish whether a dismissal is a genuine redundancy. Entitlement to certain statutory protections, such as compensatory payments, depends upon dismissals falling within the legal definition of redundancy.

The statutory definition of redundancy is set out in the Employment Relations Act 1996 (ERA) Section 139 defines redundancy as follows: ‘for the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to the following:

- (a) The employer has ceased, or intends to cease either:
 - (i) to carry on the business for the purposes of which the employee was employed, or
 - (ii) to carry on that business in the place where the employee was so employed, or
- (b) The requirements of the business for employees to carry out work of a particular kind, or to carry it out in the place where they are employed, have ceased or diminished or are expected to cease or diminish.

This definition governs whether an employee has the right to claim a redundancy payment, and whether redundancy has been established as the reason for dismissal. The circumstances of a dismissal must fall exactly within the wording of the definition for a redundancy reason for dismissal to be established.

An employment tribunal will not look behind the fact of the closure to enquire into the reason, or justification, for such a course of action, which means that employers have considerable amount of discretion in lawfully dismissing employees for redundancy.

Although an employee will need two years’ service for a redundancy payment, dismissal due to redundancy can happen at any point - the fairness of a dismissal may be challenged if an employee has at least two years’ service (one year in Northern Ireland). However, if the redundancy dismissal was due to asserting a statutory right then the two years’ service requirement does not apply, e.g. a union representative made redundant because they had complained about not being allowed reasonable time off to carry out trade union duties would not need two years’ service.

Employers may also try to carry out ‘bumping’, which means a surplus employee is moved from one section into the job of another employee in another section. The displaced employee is then deemed to be dismissed by reason of redundancy. Any instances of this kind should be brought to the attention of the full time convenor or Unite official for investigation.

Lay-off and short-term working

Employees may also be able to claim redundancy payments if they are kept on lay-off or short-time working for four or more consecutive weeks, or for a total of six or more weeks out of thirteen (where not more than three weeks were consecutive) and earning less than half of an employee’s weekly wage. The rules are found in sections 148-154 of the ERA 96, they are complex, with a strict timetable for applying. If you are in this situation then you should ask for advice from you full time convenor or Unite official.

Consultation

Employers are required to consult collectively over redundancies, this requirement is set out in sections 188 of the Trade Union and Labour Relations Act 1992 (TULRCA). Where there are twenty or more employees at an establishment, the employer is required to consult with the recognised trade union. If there is no recognised trade union, the employer must consult with the elected employee representatives or the individual employees.

Under the Information and Consultation of Employees Regulations 2004, where at least ten per cent of employees request it, negotiations must begin for an Information and Consultation Agreement. The terms of any such agreement can be agreed between parties, but if no agreement is reached, there are standard default terms which provide for more wide ranging consultation than the regime sets out in TULRCA.

Re-structures & changes to terms and conditions

Under section 195(1) of TULRCA redundancy is defined differently as covering a 'dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related'. This wider definition, which only applies to the duty to consult, means that employers are under an obligation to inform and consult wherever collective dismissals result from, for example, proposals to reorganise or restructure undertakings, or to re-allocate job duties, even though there are no redundancies as traditionally defined.

The duty to consult also applies where an employer gives notice to terminate existing contracts and then offers new terms.

When should consultation begin?

As required by Section 188 of TULRCA, an employer proposing to make redundancies must begin consultation 'in good time' and at least 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.

Consultation must begin at least 45 days (90 days in Northern Ireland) 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.

Voluntary redundancies

All employees who volunteer to be dismissed as redundant must be included when working out whether 20 or more redundancy dismissals are proposed. Only those employees who genuinely resign their employment before the employer has made any proposals to dismiss employees as redundant are excluded.

Redeployment

If an employer plans to redeploy some of the affected employees, which would result in less than 20 employees being dismissed the employer must still consult with those who will be affected.

Monarch Airlines

Monarch Airlines staff were all made redundant on the day the company went into administration. Unite brought a claim that Monarch had failed to inform and consult with the union.

The evidence of the Unite official was that there was a system in place for Unite to have bi-monthly meetings with Monarch Airlines management to discuss issues affecting Unite members. However, the company had not given any indication, at any of these meetings, that it was in financial trouble nor that it was contemplating redundancies.

The first indication Unite was given, that there was any kind of issue, was a telephone call from the managing director on 29 September when he said that Monarch was in serious financial difficulties and, unless it could obtain financial assistance from the government, the company would go into receivership on 1 October. There was no further communication from Monarch before the company went into administration on 1 October.

The employment tribunal found that Unite had been given no opportunity to make proposals as to how the business might have been saved in whole or in part. The Judge concluded that it was, 'unlikely that the company's financial position deteriorated so immediately that consultation was not possible. It seems more likely that the Union was kept out of the loop.'

The tribunal awarded all of the affected employees 90 days' pay. Although the company was in administration, the redundant employees were able to claim up to 8 weeks of this entitlement from the Government (through the Redundancy Payments Office).

Disclosure of information

Proper consultation begins with the disclosure of specific information in writing to the appropriate representatives as required by Section 188 of TULRCA. The information to be disclosed is as follows:

- The reasons for the redundancy proposals
- The numbers and descriptions of the employees whom it is proposed to dismiss as redundant
- The total number of employees of any such descriptions employed by the employer at the establishment in question
- The proposed method of selecting the 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 redundancy payments to individual employees, if this differs from the statutory scheme

This information must be disclosed by being 'given to each of the appropriate representatives by being delivered to them' or sent by post to an address notified by them to the employer or in the case of a union representative, sent by post to the union at the address of its head or main office.

Scope of consultation

The consultation required by Section 188 must include consultation about ways of avoiding dismissals, reducing the number of employees to be dismissed and mitigating the consequences of the dismissals. Consultation must be undertaken by the employer with a view to reaching an agreement with the appropriate representatives. The consultation process can be expected to cover issues such as re-allocation of work, the re-training and re-deployment of employees, meetings with outside support agencies and information on training and re-training opportunities elsewhere.

Requirement to complete the HR1 form

An employer proposing to dismiss as redundant between 20 and 99 employees at one establishment within a 90 day period is legally obliged to send written notification to the Insolvency Service, which acts on behalf of the Secretary of State for Business, Energy and Industrial Strategy ('BEIS') at least 30 days before the first of those dismissals take place (known as the HR1 form). If the number of proposed redundancies is 100 or more employees at one establishment notification must be given to the Insolvency Service at least 45 days before the first redundancy covered by the notice takes effect, and in any event before notice is given to terminate any contracts of employment.

If consultation with appropriate representatives is required, the HR1 form must identify them and state the date on which consultation with them began. A copy of the HR1 form must be given to the appropriate representatives of employees who are the subject of the employer's proposals. The Redundancy Payments Office or BEIS may require the employer to provide further information.

Insolvency

As shown in the Monarch case study (on page 6), the duty to consult still applies in cases of insolvency. In cases where the insolvent employer did not have enough assets to fund the protective award, the government will pay up to 8 weeks' pay towards any protective award made by an employment tribunal (in addition to statutory redundancy pay, notice pay and holiday pay) through the Insolvency Service. The person dealing with the insolvency should provide employees with an RP1 fact sheet, which sets out information about how to claim monies they are owed.

More information is available at <https://www.gov.uk/your-rights-if-your-employer-is-insolvent/your-rights>

Failure to inform and consult

If an employer fails to comply with any of the requirements for information or consultation or fails to do so within the appropriate period, a complaint may be made to an employment tribunal by the trade union (where the failure relates to a breach of the duty to inform and consult with trade union representatives) for a protective award. The claim must be brought by whoever should have been consulted and it must be brought within three months less one day of the date of the last dismissal.

Protective award

A protective award is a sum of money paid in respect of every affected employee within the scope of the award and is designed to punish the employer for failing to consult. If the employer fails to pay the award once made, individual employees can make a claim to the employment tribunal for payment.

The maximum protective award a tribunal can make for failure to consult is 90 days' pay per affected employee. It is worth noting that the cut in the statutory minimum collective consultation period from 90 to 45 days, where one hundred redundancies are proposed, has had no effect on the maximum protective reward, which remains at 90 days' pay. This is because the purpose of the award is to punish the employer.

Shahan Engineering

Shahan had a contract to simultaneously construct 2 heat recovery steam generators and employed 145 people to do this work.

On 29 April 2008, the main contractor, Alstom, instructed Shahan to change their work schedule and build one generator first and the second generator later in the year, for safety reasons. Alstom instructed Shahan to do this by 1 May 2008 and said that its expectation was that this would result in an immediate reduction of labour on site.

On 1 May 2008, Shahan selected 50 people to be made redundant, before informing the union of his decision. Their employment terminated on 2 May 2008. In its defence, Shahan argued that there were special circumstances which meant that it was not reasonably practicable to comply with the requirement to consult.

The Tribunal found that there was no reason why it would not have been open to the Shahan to have carried out some consultation, even if the consultation had been for a shorter period than 30 days. Shahan appealed and the Employment Appeal Tribunal (EAT) agreed with the Tribunal that, although there was not enough time for a 30 day consultation period, there was still enough time for a shorter consultation period to take place.

Representative's Role

Time off for representatives

Reps are entitled to reasonable paid time off for consultation over collective redundancies. Union reps are also entitled to reasonable paid time off for certified training in the role. Where there is a recognised trade union, this right is found in section 168(1)(b) of TULRCA. Time off is paid 'at the appropriate hourly rate'.

There should be paid time off for:

- Pre-meetings and side-meetings of representatives to determine policy
- Meetings with affected employees to canvass opinion
- Training in the law and industrial relations practice on redundancies and information and consultation
- Meetings with the employer

Facilities for representatives

The employer is required to shall allow the representatives access to the affected employees and to afford them access to such accommodation and other facilities as may be appropriate.

Negotiated facility time for reps to undertake their duties is very important and can include the following:

- Access to means of communication, such as telephones, email, intranet and internet
- Accommodation for meetings and pre-meetings
- Dedicated office space
- Access to training

Statutory protection for representatives

Reps are protected against unfair dismissal or any detriment connected with their representative role. Protection against detrimental treatment is guaranteed under section 146 of TULRCA for trade union reps in recognised workplaces, and under section 47 of the ERA 96 for all other appropriate representatives.

Dismissal, wholly or partly for acting or standing as a rep is 'automatically' unfair. There is no qualifying service requirement.

Selection for Redundancy

The criteria used by an employer to select employees for redundancy must be both reasonable and fairly applied. In many workplaces across the union there is an agreed procedure in place for selecting for redundancy. A redundancy procedure will rarely be contractual even if it has been collectively negotiated. This means that changing it will rarely be a breach of contract. In contrast a promise to pay enhanced redundancy payments is much more likely to be contractual.

As far as possible an employer should seek to establish criteria for selection which do not depend solely upon the opinion of the person making the selection but can be objectively checked against criteria such as skills, knowledge and experience and also any technical skills that may be in short supply within the company. There are basic guidelines laid down for a fair redundancy dismissal and these include:

- Give as much warning as possible of likely redundancies
- Consult reps on the best way of causing as little hardship as possible to employees
- Draw up agreed selection criteria
- Ensure selection criteria are capable of objective verification
- Carry out the selection exercise fairly, following the agreed criteria
- Consider alternative employment
- Consult with employees on issues affecting them as individuals
- Allowing employees the opportunity to appeal against a decision to select them for redundancy

Discrimination

If the selection criteria and/or the selection process discriminates on the grounds of sex, race, disability, age, sexual orientation, transgender, religion or belief, marriage or civil partnership, pregnancy or maternity (or, in Northern Ireland, political opinion) the employer's actions can be challenged under the Equality Act 2010 (or equivalent in Northern Ireland) as well as under unfair dismissal law.

Many commonly used selection criteria carry a risk of discrimination, these can include; attendance, sickness absence (e.g. failing to exclude pregnancy or disability related absence), time-keeping, flexibility or language requirements.

Automatically unfair selection criteria

Some selection criteria are automatically unfair (section 105 ERA 96) if the reason, or, if more than one, the main reason for redundancy selection is one of the following. The employer is not allowed to argue that its decision was reasonable. No qualifying service is needed for a claim based on one of these reasons:

- A union related reason - including recognition
- Participating in official industrial action
- A reason related to a prohibited list (a blacklist) under the Employment Relations Act 1999 (Blacklists) Regulations 2010
- Selection of a woman for a reason related to pregnancy or childbirth
- Leaving or refusing to return to the place of work, in circumstances of danger, which the employee reasonably believed to be serious and imminent and could not avert
- Asserting certain statutory rights, for example rights under the Working Time Regulations
- Asserting rights under the National Minimum Wage Regulations
- Making a protected disclosure (whistle blowing)
- Asserting a right protected by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000
- Asserting a right protected by the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002
- Asserting a right to request flexible working
- Asserting a right to request time off to study and train
- Taking or requesting leave for family reasons
- Standing as a candidate for, acting as, or being elected as an employee representative for collective redundancy or TUPE purposes, or as a rep under the Information and Consultation of Employees Regulations or of a European Works Council
- Refusing to work on a Sunday if the employer is a shop or betting shop
- Asserting rights under the Agency Workers Regulations 2010
- Asserting rights under the Tax Credits Act 2002
- Being a trustee of a pension scheme
- Being absent on jury service
- A reason relating to pension auto-enrolment

Freshbake Foods Ltd

Mr Hooley was employed as an engineer. He was the shop steward. Notice of redundancies was given to the workforce in July. The employer used 3 different matrices to select who should be made redundant, giving Mr Hooley different scores on each matrix. Using 2 of the 3 matrices would have meant that Mr Hooley's score was high enough for him to survive the redundancy process. However the employer used the matrix with the lowest score for Mr Hooley. The Tribunal found that the employer's redundancy selection procedure was flawed.

The employment tribunal also took account of the fact that there was a 'dubious warning' which lowered Mr Hooley's score. The warning was not signed by Mr Hooley and the tribunal believed his evidence that no warning had actually been given. The Tribunal noted that, following Mr Hooley's dismissal, there was no longer a Unite presence at the site where he had worked.

The Tribunal was satisfied that there was a connection between Mr Hooley's trade union activities and the dismissal. Mr Hooley was awarded compensation of £33,390, the state benefits he had received were deducted from this sum so that the compensation he actually received was £21,011.00

Notice

As well as redundancy pay, employees being made redundant are entitled to full statutory notice, or their contractual entitlement to notice, whichever is the longer.

The notice period is:

- One week if their length of service is between one month and two years; or
- One week for each year if they have between two and twelve years' service, up to a maximum of 12 weeks.

An employer who does not want an employee to work their notice must make a payment in lieu of the notice entitlement often referred to as a PILON payment. Notice pay should include the value of any contractual benefits the employee would have earned had they been employed during the notice period.

To be entitled to a longer notice period, the employee must have a clearly expressed contractual right. If a promise of a longer notice period is negotiated through a collective agreement, it must be incorporated into the employee's individual contract of employment to be enforceable.

Even if an employer has announced redundancies and given an indication as to which people are likely to be on the list of dismissals, it is important that employees do not panic and leave their job too early. Employees leaving before the start of the notice period will lose their right to a redundancy payment.

Time off to look for work

Employees with at least two years' continuous employment and who are under notice of redundancy have specific rights to reasonable time off to look for a new job, attend interviews or arrange training. The time off must be agreed by the employer and employees are entitled to be paid as normal for the time taken off.

Redundancy Pay

The UK has a statutory redundancy pay scheme.

Under section 135 of the ERA 1996 an employee who is redundant and has worked continuously for the same or an associated employer for at least two years (regardless of the number of hours worked in a week) has the right to statutory redundancy pay unless:

- The employee accepts suitable alternative employment, or
- The employee unreasonably refuses suitable alternative employment, or
- The employee was dismissed for gross misconduct, or
- The employee terminates his/her contract during the notice period, or
- The employee refuses to extend the notice period as a result of strike action

The following categories of worker have no right to statutory redundancy pay:

- Employees with less than two years' continuous employment
- Self-employed workers
- Individuals without a contract of employment
- Civil servants and other public employees who are covered by their own agreement
- Foreign government employees
- Seafaring workers who are covered under different agreements
- Domestic workers employed by close relatives
- Employees married to their employer

Calculating redundancy pay

Statutory redundancy pay is calculated using a statutory formula based on the employee's age and length of employment, multiplied by a 'week's pay'. The formula for entitlement is:

- Up to the age of 21 - half a week's pay for each year
- 22 - 40 years of age - a week's pay for each year
- Aged 41 or over - one and a half week's pay for each year

The maximum number of years of employment which can be taken into account is 20.

There is an online ready reckoner for calculating redundancy pay at www.gov.uk/calculate-your-redundancy-pay

A 'week's pay'

Under the statutory scheme the level of redundancy pay depends on an employee's gross earnings at the date of dismissal, but the calculation of a 'week's pay' is subject to a statutory cap and is revised each year. From 6th April 2020 the cap is £538 per week (£560 in Northern Ireland). Anyone earning less than £538 per week receives statutory redundancy pay based on actual gross earnings.

Redundancy pay is based on earnings at the dismissal date so an employee who has previously worked full-time but is working part-time at the dismissal date will have the whole of their redundancy pay calculated at the part-time rate with no reference to their previous full-time work.

Written statement

Under section 165 of the ERA 96, the employer must give the employee a written statement explaining how redundancy pay has been calculated.

Redundancy payments and tax

Redundancy pay is tax free up to £30,000. Above this level income tax is payable at the usual rates, depending on an individual's income throughout the year. Pension lump sum payments are taxed separately under different statutory arrangements. Tax will be paid in the normal way on payment in lieu of notice, holiday pay and arrears of pay for work done.

State benefits

Employees who become unemployed through redundancy are usually entitled to Jobseeker's Allowance (JSA) and may be entitled to Universal Credit. The fact that a person has received a redundancy payment is not a bar to receiving JSA, but if the redundancy package includes pay in lieu of notice there is usually no right to JSA until the notice period expires.

Alternative Employment

Employers have a duty to consider whether employees likely to be affected by redundancy can be offered suitable alternative work. To comply with section 141 of the ERA an employer must make an offer of alternative employment after notice of termination is given but before the employee's existing contract comes to an end.

In addition, the start date for the new job must be immediately after the termination of the old job, or at least within four weeks.

If a person turns down an offer of alternative employment, their entitlement to a redundancy payment depends on whether the refusal was reasonable. The new job must be suitable alternative work, the terms and conditions of employment must be broadly comparable and the skills and experience required must be within the employee's capability. The following are some of the factors that need to be considered:

- Changes in pay
- Changes in working hours or working time
- A change in the status or grade of an employee
- Changes in the way work is carried out
- Changes in work location
- An employee's individual circumstances - such as domestic arrangements, caring responsibilities, travelling difficulties and their state of health

CJR Fryson & Sons

Unite member Mr Sennitt worked for his employer GR Fryson & Sons in Ely for more than 17 years.

The company went into receivership and Mr Sennitt was made redundant. The business was sold to another company on the same day and he was offered work on considerably less favourable terms and conditions, which he refused. After he was denied a redundancy payment from the Redundancy Payments Office, Unite took the case to employment tribunal on Mr Sennitt's behalf.

- The tribunal ruled that a suitable offer of alternative employment had been turned down and as a result there was no entitlement to a redundancy payment.
- The case was then taken to the EAT which found that Mr Sennitt was in fact entitled to a payment as there had been a transfer of undertakings and the alternative work involved a substantial and detrimental change in terms - in short it did not amount to an offer of suitable work.

Maternity leave

Women who are away from the workplace on maternity leave have additional protection when an employer is making decisions about redundancy. Regulation 10 of the Maternity and Parental Leave etc. Regulations 1999 requires the employer to offer a suitable vacancy, if it has one, to a woman on maternity leave in preference to other employees. A failure to do so will lead to a finding of automatically unfair dismissal and, possibly, unlawful discrimination.

Trial period

Employees under redundancy notice who are offered and accept alternative work are allowed a trial period of up to 4 weeks. During this time they can decide whether the new job is suitable. Entitlement to a trial period is guaranteed whether or not an employer agrees. Even if no trial period is offered, the first 4 weeks in the new job will count as a trial, entitling the employee to leave and claim a redundancy payment during or at the end of the 4 week period. If a person works beyond the 4 week period, they lose their entitlement to a statutory redundancy payment.

It is important to note that the trial period is counted in calendar weeks rather than working weeks. This means that periods of closure for company holidays will count towards the trial period. Any agreement for an extension in the trial period should be in writing and be made prior to the commencement of the new contract.

Unfair dismissal

Employees who have at least two years' service are entitled to bring a claim for unfair dismissal. There are various ways in which a dismissal on the grounds of redundancy can be deemed unfair, these include:

- If selection was for any of the automatically unfair reasons (set out on page 11)
- If redundancy was not the real reason for the dismissal but some other reason such as capability
- If the employer did not have a rational basis for deciding on the pool for selection
- If the employer acted unreasonably when choosing selection criteria or selecting a particular employee for redundancy
- If there was inadequate consultation
- If there was a failure to adequately consider suitable alternative employment,
- If there was a failure to offer a suitable vacancy to a woman on maternity leave

Time limit

The time limit for a claim of unfair dismissal on grounds of redundancy is three months less one day from the date of dismissal.

The three month less one day time limit should not be confused with the six month time limit for claiming a statutory redundancy payment. It is vital to be clear about the dismissal date and not to leave the claim until the last minute. Appeals against dismissal do not alter the three month less one day time limit. Time runs from the date of dismissal and is strictly applied.

In addition, ACAS must be contacted and Early Conciliation have taken place before any claim is commenced. This can affect the time limit for presenting a case to the Tribunal. Please contact your local official for advice

COVID 19

Corona Virus job retention scheme

On 26 March 2020 the Government published the Corona Virus Job Retention scheme (CVJRS). The purpose of the scheme is to enable private sector employers, who are unable to operate or have no work for particular employees to do because of COVID 19, to keep these employees on the payroll.

Under the scheme, the Government pays 80% of the wage costs of any employee who is 'furloughed' as a result of the pandemic, subject to a cap of £2,500 per month.

The scheme is expected to continue, in its current form, until 31 July 2020. The Government has announced that the scheme will run until the end of October 2020 but, from August 2020, employers will be asked to pay a percentage towards the salaries of their furloughed staff.

Where employers propose to make employees redundant because of COVID 19, Unite's normal policy is to oppose redundancies on the basis that all private sector employers have access to CVJRS and can furlough employees instead of making them redundant

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Administration

If a company goes into administration, the administrator is allowed to access the CVJRS. Government guidance says that it expects administrators to only do so if there is a reasonable likelihood of rehiring the workers, for example through sale of the business.

Section 188 consultation

As set out above, collective consultation requires that the employer provides the appropriate representatives with access to the affected employees as well as providing the representatives with such 'accommodation and other facilities as may be appropriate'.

WHAT IS UNITE'S POSITION on COMMENCING s.188 CONSULTATIONS

Why we say it's unlawful:-

1. Consultation must be meaningful to comply with the statutory requirements.

Meaningful consultation must be with a 'view to reaching agreement' It is more than just the employer listening to your views. We take the view that to do in an environment where management, reps and importantly members are locked down – either fully or partially – makes this impossible.

2. S188 (5A) requires the employer to allow reps 'access' to the affected employees and to provide them with 'such accommodation and other facilities as may be appropriate'

We take the view that this is also impossible in the current environment.

- Access has to be not only to our own members but all of the affected workforce – including non-members in the Bargaining Unit – we do not hold details for these individuals.
- Employer offered facilities are not subject to confidentiality or secure.
- Members (and others) may not enjoy internet access.
- Members (and others) have current caring responsibilities.
- Disabled members (and others) may need reasonable adjustments.
- Members (and others) require assistance/interpretation if English is not the 1st language.

3. The minimum period for consultation is 45 days – this is only a MINIMUM

The 45 day consultation period is set down as minimum in ordinary times ie when the workforce is working as normal and a 'normal' redundancy exercise is taking place. Employers should be aware that to simply comply with the minimum does not make it 'meaningful' and will not necessarily stop a protective award claim for all of those affected.

Employers should be aware of the possibility of an HMRC audit further down the line if they have been found to have allowed people to return to work for whatever reason including consultation.

4. Can there be a proper assessment of redundancy during a pandemic and whilst the JRS is operating?

It is the Union's position that an alternative to redundancy is readily available while the JRS continues to operate. It is further the Union's position that until such time as the full effects of the pandemic and mitigation provided by the scheme are known it is impossible to accurately consult on the number and location of redundancies.

It is the Union's position that any dismissal taking place during the period when the JRS continues to offer funding would be unfair. It is a simple, easy and cost neutral alternative to redundancy.

5. Should reps attend if an employer fails to acknowledge the points made?

This will depend on the industrial circumstances in each workplace and will be a decision taken by the officers and workplace representatives. Some representatives may wish to simply point out that the employers position on consultation is unlawful and decline to do so.

Others may take the view that they wish to attend and not engage whilst presenting the employer with their reasons as to why it is unlawful; that they are attending as a result of the instruction to do so however this does not in any way legitimise the approach being taken by the employer at this time.

And of course there will be other representatives who wish to engage and mitigate whilst making the point that the process is unlawful and they reserve their legal rights to pursue claims for unfair dismissal or failure to consult.

Whichever approach is taken we should continue to make the points outlined, ensuring that these are clearly recorded as part of any redundancy consultation exercise.

Selection for redundancy

It is likely that, if an employer were to make only those employees who had been furloughed redundant, this would not be a reasonable method of selection and the employees would probably have a claim for unfair dismissal. This is because it is very likely that any selection process for putting employees on furlough will not have been carried out to the standard required when selecting for redundancy (see page 10). There may also be discrimination issues if a disproportionate number of workers with a protected characteristic, e.g. older workers, had been placed on furlough.

Calculation of statutory notice pay for furloughed employees

Unite's position is that, if a furloughed employee is made redundant, then notice pay should normally be based on the employee's normal pay (i.e. not 80% of pay if the employee agreed to a pay reduction whilst on furlough.). This is on the basis that it was an implied term of the agreement to accept reduced pay that the agreed reduction was for the purposes of preserving employment and, therefore, the agreement to temporarily accept reduced pay does not apply to the employee's notice period.

Calculation of statutory redundancy pay for furloughed employees

Unite's position is that, if a furloughed employee is made redundant, then the calculation of redundancy pay should usually be based on the employee's normal pay (i.e. not 80% of pay if the employee agreed to a pay reduction whilst on furlough.) This is on the basis that the normal working hours of employees who are on furloughed have not changed.



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