Redundancy

Unite guide for members

unite
the UNION

Redundancy

Unite guide for members

CONTENTS

Updated February 2016

Published by Unite the Union
General Secretary Len McCluskey

Unite House
128 Theobald's Road
Holborn, London WC1X 8TN
Tel: 020 7611 2500

This guide book is downloadable in PDF format from www.unitetheunion.org

■ INTRODUCTION

Redundancy has become an all too depressing feature of the modern economic landscape. Globalisation, increased competition, technological change and government cuts have all contributed to the continuing tide of job losses. To give an indication of this, at least 102,000 workers lost their jobs in the UK through redundancy in the period between September and November 2015.

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, to carry on the business for the purposes for which the employee was employed, or has ceased, or intends to cease 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, thus giving employers a considerable amount of discretion in fairly 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 one year of continuous service before 6 April 2012 or two years' service for employees starting employment on or after 6 April 2012. However, if the redundancy dismissal was due to asserting a statutory right, e.g. to be paid holiday pay under the Working Time Regulations 1998, then no fixed length of service is required.

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.

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 and as they are complex with a strict timetable for applying, anyone thinking of claiming should ask for advice from their full time convenor or Unite official.

Under section 195(1) of the Trade Union and Labour relations (Consolidation) Act 1992 (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'.

Employers are, therefore, 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. This would include the situation where an employer gives notice to terminate existing contracts and then offers new terms.

Rolls Royce Motor Cars

Rolls Royce Motor Cars was condemned by an employment tribunal in 1995 for its 'hasty, intimidating, inadequate and chaotic' treatment of redundant workers.

In October 1991, the company had announced 420 redundancies and over a period of no more than two and a half days managers assessed 2,100 employees.

The tribunal ruled that it was not reasonably practicable for 23 managers to properly and fairly assess a large number of employees in this short time.

The tribunal heard that having terminated consultation with Unite, the company informed those that were 'below the line' following assessment that their jobs were at risk and that they would have to show at an interview over the next two days why they should be re-assessed and re-prieved.

Many failed to do this and the tribunal found that: 'the conditions in which the individual consultations took place were… hasty, intimidating, inadequate and chaotic' and added that: 'it was impossible for applicants to contribute in any meaningful way to the consultation period.'

■ CONSULTATION

The employer's obligation to consult collectively over redundancies is set out in the 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.

From April 2005, the Information and Consultation of Employees Regulations 2004 have been in effect. Under these Regulations, 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. More details are set out in the Unite guide to Information and Consultation at Work which can be accessed via the Unite website.

▪ When should consultation begin?

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

▪ 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.

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. This process can be expected to cover matters 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.

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 Secretary of State at the Department for Business, Innovation and Skills (BIS) 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 BIS 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 notice to BIS 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. BIS may require the employer to provide further information.

▪ 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.

GBE International (Andover)

Unite members sacked by GBE International in Andover were awarded over £100,000 in compensation for the company's failure to consult the Union before dismissing them for redundancy.

Immediately after the company went into receivership the Receivers sacked 175 workers, including 74 Unite members. A Unite regional officer immediately lodged an application with the employment tribunal claiming that the company should have consulted with the Union. Even though the company was in receivership, it was still obliged to follow the consultation procedure set out in Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.

The employment tribunal accepted that it was no defence that Receivers had been appointed, and a protected period of 90 days, giving a right to 90 days' pay, was ordered by the tribunal.

Although the company was not in a position to pay anything under the award, the Government guarantees up to eight weeks of this entitlement.

The members who were sacked by the Receivers in this way were also entitled to guaranteed notice pay and statutory redundancy pay from the Government.

■ 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

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 does 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
- Ensuring selection criteria are capable of objective verification
- Carry out the selection exercise fairly, following the agreed criteria
- Offer alternative employment where possible

▪ 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) they 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, 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
- Asserting a statutory right, for example:
- Asserting a right under the Working Time Regulations
- Asserting rights under the National Minimum Wage Regulations
- Making a protected disclosure (whistle blowing)
- Asserting rights under the Tax Credits Act 2002
- Asserting a right protected by the Part-time Workers Regulations 2002
- 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
- Being a trustee of a pension scheme
- 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
- A reason related to a prohibited list (a blacklist) under the Employment Relations Act 1999(Blacklists) Regulations 2010
- Being absent on jury service
- A reason relating to pension auto-enrolment

Rolls Royce, Bristol

A total of £38,000 compensation was secured for Unite member, Andy Robertson after the union's solicitors proved that he had been unfairly selected for redundancy on the grounds of his union activities.

- Andy had worked as a fitter at Rolls Royce, Bristol for eight years. With the announcement of large scale redundancies in 1993, his union workload increased and towards the end of the year he was informed he had been selected for redundancy.
- The company operated a selection procedure which involved gradings for categories such as attendance and service where Andy scored well and for subjective criteria such as flexibility and adaptability where he scored poorly. When challenged over his low grades the company said the reason for the scoring was that he 'never took his trade union hat off'.

The tribunal ruled unanimously that Rolls Royce was guilty of discrimination on the grounds of trade union activities and said the company should only have assessed his work as a fitter.

■ 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, it must be 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 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

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. The cap is currently £475 per week (£490 in N. Ireland).

▪ 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 2015 the cap is £475. Anyone earning less than £475 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). 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 and 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 CJR Fryson & Sons in Ely for more than 17 years.

The company went into receivership in 1990 and Mr Sennitt was made redundant in September of that year. 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 an Employment Appeal Tribunal (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.

▪ 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

There are various ways in which a dismissal on the grounds of redundancy can be deemed unfair, this will entitle the employee to bring a claim for unfair dismissal. 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 acted unreasonably when choosing selection criteria or selecting a particular employee for redundancy
- If there is inadequate consultation
- If there is a failure to offer alternative employment, for example there are special rules for women made redundant when 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. The introduction of tribunal fees from 29 July 2013 has not altered the three month time limit. 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.

NOTES

Unite the Union
Unite House
128 Theobald's Road
Holborn
London WC1X 8TN
Tel: 020 7611 2500
www.unitetheunion.org

ES/3641-4/RG Redundancy/2-16

unite
theUNION