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Employment Law

REDUNDANCY

A Practical Guide for Employers



Introduction

Thank you for downloading this guide. It details the common steps involved in considering and implementing a UK redundancy process, whilst addressing the key legal terms that employers should be aware of.

There is of course no 'one size fits all' approach to a redundancy process. Employment Law is complex and the impact of 'getting it wrong' can have significant ramifications in terms of management time, costs, litigation (often spanning years), compensatory awards and reputational damage to name a few. This is not therefore a substitute for legal advice, it sets out a framework for common redundancy processes, providing an outline and practical tips, ahead of the reader seeking expert advice.

About the author



Alex Kiernan is Head of Employment Law at Thomas Mansfield Solicitors. He advises employers and senior executives on all aspects of contentious and non-contentious employment law, with a particular focus on Employment Tribunal claims and redundancy. Alex qualified as a solicitor in 2012 and is a member of the Employment Lawyers Association. He is ranked as an “up and coming” employment law specialist in the latest edition of Chambers UK.

For clear and practical advice on how to reduce your legal risk when making redundancies, contact Alex on 07442 899274 or email alex.kiernan@thomasmansfield.com.

Step 1: Is this really a redundancy?

We have experienced a lot of confusion as to what a redundancy really means, with employers incorrectly labelling dismissals as redundancies (resulting in unfair dismissal claims). There are broadly three situations in which a legal redundancy can occur:

- Type 1: the **whole business/organisation closes**
- Type 2: a **workplace** closes e.g. one office **closes**
- Type 3: there is a **reduced need for employees to do their particular work**

A business or workplace closure (1 & 2) are usually clear and easy to define. Type 3 is, however, the more common form we tend to see and frequently the more legally complex.

Focusing on Type 3, your thought process should be:

1. Make sure you can clearly define the **kind of work** that is reducing and **why**
2. Now you have identified the 'work' and the 'why' - identify **the job roles this scenario is likely to affect.**

TOP TIPS:

- Focus on the role and the work done by that role, not the attributes of the individual holding that role (at this stage).
- No decisions should be made as to whether a redundancy dismissal will occur until step 4.

Step 2: Plan, plan and plan

If your circumstances mean redundancy law is likely to be applicable, the next stage is planning. This is important as the documents created at this stage could be disclosed in any later legal dispute.

Effective planning usually results in a smoother process for employer and employees alike, with less costs and stress. Careful planning is also essential to mitigate the risk of Employment Tribunal Claims. Circumstances inevitably vary, but you should consider the following:

- **Creating a business rationale** - We often work with employers to create a short-written summary of the underlying business and legal reasons why they believe redundancies may become necessary. This enables employers to flesh out and better define their strategic plans, making them more legally resilient. We considering issues such as, what changes are they making? Are they medium/long term? What effect might these plans have on job roles? Will new roles be created?
- **20 or more redundancies?** - If 20 or more redundancies are being proposed in a 90-day period at one establishment, then special legal provisions apply known as 'collective redundancy consultation' obligations. If you think there is even a chance that this may apply to you, we *strongly* encourage to you take legal advice early. When collective redundancy obligations arise, criminal sanctions can apply if specific legal procedures are not followed properly. The remainder of this key-steps guide focuses on circumstances where there are below 20 redundancies being proposed so the collective obligations do not apply.
- **Consider alternatives to compulsory redundancy** - It is a fundamental part of following a legally fair process that you genuinely consider ways to avoid your business plans resulting in job losses. You should consider:
 - Dismissing self-employed freelancers/contractors before employees
 - Offering flexible working/shorter hours for existing staff
 - Cutting overtime, short time working, or lay offs
 - Other roles in the company or alternative employment for those who may be affected
 - Voluntary redundancies

- **Any internal redundancy/relevant policies** - It sounds obvious but failing to follow your own policies is a good way to lose Employment Tribunal Claims.
- **Consider redundancy 'pools'** - A redundancy pool is essentially a method by which an employer can categorize affected employees into groups with similar job roles. This enables an employer to compare individuals in similar roles, and ultimately to determine which individual is made redundant.

For example, if there were five marketing assistants and five designers, with a business proposal to reduce both teams by one, it would be logical to divide them into a marketing assistants pool and a designers pool. In this scenario you would likely then use a selection matrix to determine who is made redundant.

- **Consider using redundancy selection matrices** - Once you have a likely 'pool' identified, you may also need to consider and plan something commonly referred to as a Redundancy Selection Matrix. In simple terms a selection matrix is a set of criteria used to score employees against one another, to enable an employer to fairly select which employees from a pool (a group) would be made redundant if redundancies occur.

If there is a truly unique job role it wouldn't be sensible to compare that role with others, so no selection matrix is required (a pool of 1). Likewise, using the above example, if there was a business proposal to make all five designers redundant then again, no selection matrix is needed (there is no need to compare them against one another).

If a selection matrix is necessary, you need to give early thought to what criteria you will use to differentiate between the employees.

The criteria you use is important. Failure to use legally compliant, relevant, and meaningful criteria can result in successful Tribunal claims. Every situation is different, but we often encourage employers to keep their criteria relevant and simple, frequently limiting them to four to seven carefully chosen attributes. Ideally at least some criteria should be objective. It is not, for example, advisable to rely solely on the subjective views of one manager.

Some examples of potentially fair selection criteria are:

- Performance and skills
- Length of service
- Disciplinary sanctions
- Attendance records
- Time keeping

- **Think practically as well as legally and strategically** - Practicalities of course vary per situation but consider aspects such as:
 - Who will conduct the redundancy consultation with employees (stage 3)?
 - Do they need training, do you need help from a legal adviser?
 - What time frames are you working to?
 - How will the redundancy consultation meetings with employees take place (in person, video call?)
 - Do you have relevant employees' key information and contracts to hand?
 - Do not forget about absent employees (those who may be on maternity or paternity leave or perhaps off sick). They should be included if their roles are likely to be affected – consider the practicalities of that.
 - Clearly it can be a very stressful and unsettling time for employees, are certain employees going to suffer with the process more than others? Consider any support that can be put in place. Do some employees have characteristics such as a disability that need to be considered and accommodated by way of adjustments?

TOP TIPS

- Plan well and you will limit confusion, errors and difficulties during the next stage of the process.
- Legal advice is highly recommended as this process is easy to get wrong.

Step 3: Start a redundancy consultation

Having an effective and meaningful consultation is a key attribute of following a legally sound process. A redundancy consultation is essentially a series of planned conversations and communications between an employer and affected employees before any final decisions are made. Throughout this communication process, an employer will consider whether to enact the redundancy proposals it has formed. While the process will inevitably depend on the exact circumstances, common stages are as follows:

- **Announcement meeting** - Often an initial meeting or communication will take place where employees will be advised, in broad terms, of a proposal for change and that future discussions will be necessary.
- **First consultation meeting** - Commonly, shortly following a broad announcement, employees likely to be affected by the business proposals will be met with individually. This is usually known as the first consultation meeting where the employer sets out what the employer's proposals are in greater detail, and why. It confirms that the employee is at risk of redundancy and explains the consultation process with anticipated timings.

The employer should explain what alternatives to redundancies have been considered (or are being considered) and why these may not be viable. The employer may have alternative roles it is able to offer and explain to employees. A selection matrix may be discussed as well as proposed pools, as appropriate. The employee should be given the opportunity to provide input and ask questions on all these issues.

- **Second and further consultation meetings** - At least two consultation meetings are recommended, although it may well be advisable to have more. The approach needs to be adapted based on the circumstances and discussions with employees. These meetings are about continuing the conversation, reminding the employees of your proposals, considering their feedback, updating them on any changes, discussing alternatives to redundancy and exploring them. You may also be discussing the outcome of any selection matrix and the reasons why scoring was as it was. You may, as another example, need to pause to interview employees for alternative job roles.

We refer to speaking with employees above for ease and simplicity, however, in some circumstances consultation will take place via employee representatives.

TOP TIPS

- Take notes at meetings and summarize discussions in writing as the process continues.
- There isn't a legal rule as to how long a consultation process should take (unless collective redundancy rules apply), but it needs to be long enough to be meaningful and effective. Think weeks, not days, in most cases.
- Enable employees to be accompanied at redundancy consultation meetings by a workplace colleague or trade union representative.

Step 4 – Make a decision

Whilst an employer may have business proposals which it thinks are very likely to result in redundancies (perhaps it even considers certain individuals highly likely to be made redundant from the outset), no decisions should be taken until step 3 has been completed and the language used should reflect this.

Pre-determining a redundancy is another common reason for a successful unfair dismissal claim by an employee.

Once an effective consultation has finished, a decision can be taken as to whether to dismiss employees by reason of redundancy.

Usually, it would be appropriate to communicate the decision to dismiss at a meeting, sometimes it will be confirmed in writing only. If holding a meeting, you should enable the employee to be accompanied at that meeting by a workplace colleague or trade union representative. In any event, an employer should follow any verbal communication in writing shortly thereafter.

TOP TIPS

A confirmation of dismissal letter should include:

- A summary of the redundancy process and reason for the redundancy situation.
- Confirmation that the reason for dismissal was redundancy.
- Confirmation of when employment ends.
- Information about final salary payments (including payments in respect of notice periods, accrued but untaken holiday, and any statutory redundancy payments).
- Usually, we recommend allowing a right of appeal.

About Thomas Mansfield Employment Law

Established in 2004, our employment team has a strong reputation for advising businesses on the strategic and operational issues they face when managing their staff. We act for major, multinational organisations through to private, owner-managed businesses and start-ups in a wide range of sectors. We are recognised by the leading independent UK legal directory, The Legal 500 and have been awarded the Law Society's Lexcel quality standards accreditation, which distinguishes practices for meeting particularly high standards in client care and business management.

Our approach is to provide straight talking practical and commercially focused legal advice for employers. We pride ourselves on high service levels, timely advice and clear fee estimates.

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