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Getting Redundancy Right

How to Reduce the Risk of Unfair Dismissal Claims

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Getting Redundancy Right How to Reduce the Risk of Unfair Dismissal Claims
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Preface

This topic will help you to manage the redundancy process effectively and lawfully. It sets out the legal requirements, best practice and some useful hints and tips.

Getting it wrong can mean that you end up in court. Many employers don't realize that redundancy is a dismissal and subject to the same rules as any other dismissal. This means that you must ensure you follow a fair and proper process when carrying out a redundancy programme.

Last year I had a call from an employer, Ed, who had received an ET1 (tribunal claim form) from a former employee, claiming unfair dismissal. Ed didn't understand that redundancy is a dismissal and said, "But I didn't dismiss him. I made him redundant."

It was the usual story. The employee had been unsatisfactory, but had never been disciplined or managed. When things got tighter financially, Ed called him in and told the employee that he was making him redundant. There was no selection process, no consultation, no formal meeting and no right of appeal. Ed found the concept that redundancy is a dismissal a bewildering idea. He just couldn't accept that he had unfairly dismissed the employee because he had failed to go through **any** sort of process, never mind a fair one. Many employers still think that redundancy is a sort of 'get out of jail free' card. It's not. Ed had unfairly dismissed the employee, so he had to settle and it cost him a fair sum of money.

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About the author

Kate Russell, BA, barrister, MA is the Managing Director of Russell HR Consulting and the author of this publication. As Metro's HR columnist, she became known to thousands, with her brand of down-to-earth, tactical HR. Kate is a regular guest on Five Live and her articles and opinions have been sought by publications as diverse as The Sunday Times, Real Business and The Washington Post, as well as every major British HR magazine and her HR blog has been rated third best in the UK. She is the author of several practical employment handbooks and e-books, the highly acclaimed audio update service Law on the Move, as well as a monthly e-newsletter, the latter document neatly combining the useful, topical and the frivolous.

Russell HR Consulting Ltd delivers HR solutions and practical employment law training to a wide variety of industries and occupations across the UK. Our team of skilled and experienced HR professionals has developed a reputation for being knowledgeable, robust and commercially aware. We are especially well versed in the tackling and resolving of tough discipline and grievance matters.

We also specialise in delivering employment law training to line managers, business owners and HR professionals, both as in-house, tailor made workshops or open courses. We provide a wide range of practical employment training, enabling new and experienced managers to ensure that they work in a compliant and ethical fashion, and gain optimum employee output.

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Miscellaneous notes

Statutory limits

Today's statutory limits have not been specified in this book as they go out of date so quickly. You can email pm@russellhrconsulting.co.uk for an up-to-date copy of statutory limits.

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Disclaimer

Whilst every effort has been made to ensure that the contents of the book are accurate and up to date, no responsibility will be accepted for any inaccuracies found.

This book should not be taken as a definitive guide or as a stand-alone document on all aspects of employment law. You should therefore seek legal advice where appropriate.

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Gender description

For convenience and brevity I have referred to 'he' and 'him' throughout the book. It is intended to refer to both male and female employees.

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1 Overview of the Ebook

1.1 Introduction

A redundancy is a dismissal, so you need to carry out fair and appropriate selection processes, follow the correct procedure and include an appeal in the dismissal process. A failure to do so may well result in a finding of unfair dismissal if the redundancy is challenged.

1.2 What is redundancy?

Redundancy occurs because you have ceased to carry out your business or intend to cease to carry out your business either for the purposes for which the employee is employed or in the place where the employee was employed; or because the requirements of your business for employees to carry out work of a particular kind have ceased or diminished or are expected to do so, or the requirements in that place have ceased or diminished or are expected to do so.

You must take such steps as you reasonably can to reduce the need for redundancy. This might include:

- seeking applicants for voluntary redundancy and/or early retirement;
- seeking applications from existing staff to work flexibly;
- terminating contracts with self-employed workers;
- laying off casual or sub-contracted staff;
- imposing recruitment restrictions;
- reducing or banning overtime;
- filling vacancies with existing employees;
- retraining employees and then moving them to other parts of the business;
- implementing temporary lay-offs or short-time working;
- agreeing a reduction in hours and/ or wages.

1.3 Selection for redundancy

Employers are required to use a procedure which is fair, objective and non-discriminatory. This may incorporate a range of objective criteria, such as attendance, disciplinary record, appraisal rating, skills or qualifications and giving the employees affected the chance to comment on their scoring against your criteria.

You may dismiss a woman on maternity leave, so long as you can very clearly and objectively show that the selection is not in any way related to her pregnancy. She must be offered suitable alternative employment, if available, without having to apply for the post or be interviewed.

There are also special protections for part time employees. While you can apply the matrix and select part-time employees for redundancy, you should not select a person for a reason connected with his part-time status, even if the part-time status is not the only reason for the selection.

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1.4 Redundancy notification procedure

Before making redundancies, you must carry out reasonable consultations with affected employees, advising individuals of the risk of redundancy and taking such steps as are possible to reduce or remove the need for redundancy.

There may be several meetings. The final meeting with the employee will be formal and include the right to be accompanied. It's at this stage that the redundancy dismissal is confirmed. Arrange for a more senior manager to hold an appeal meeting, if the employee wants to appeal against your decision to dismiss.

If there is only one person in the selection pool or everyone in a department is being made redundant (and the number of employees affected is below 20), you only need an informal meeting, to discuss the situation, a consultation meeting and a formal one, which is set up by letter. However, to ensure procedural correctness you must still offer the right to be accompanied and a right to appeal against the decision to dismiss.

1.5 Voluntary redundancy

Voluntary redundancy is a recognised category of dismissal for redundancy. There is no legal requirement to ask for volunteers for redundancy, but it is generally considered to be good practice.

Voluntary redundancy is still a dismissal and this means that the usual procedures must be followed if the employer is to avoid a claim of unfair dismissal.

1.6 Redundancy payment

To qualify for a redundancy payment, an individual must be an employee, must have been dismissed, and either have at least two years' continuous service on the date on which his notice expires or, if termination is without notice, the date on which termination takes effect. Where there is a practice of paying enhanced redundancy payments, this may become a contractual right.

1.7 Consultation

Redundancy is a dismissal and that means that employers must ensure that they have taken all reasonable measures before implementing the final step. While there is no minimum statutory consultation period when making fewer than 20 employees redundant, you should still consult on an individual basis, otherwise the dismissal procedure may be considered to be unfair.

1.8 Collective redundancies

Where an employer proposes to make a large number of employees redundant, statutory consultation requirements will come into force. These impose procedural requirements and minimum consultation periods before employees can be served notice of redundancy. A failure to adhere to them can lead to protective orders being issued against the company.

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1.9 Garden leave and time off

It is usual for companies to put employees who are at risk of redundancy on garden leave. Employees are often very upset by the news and need time to compose themselves. It can be awkward for employees who know that they're not at risk if their 'at risk' colleagues are working alongside them. There is also the possibility that a disgruntled employee may cause damage to the business. It is wise to include a garden leave provision in the employment contract as there is no automatic right for an employer to do so.

An employee who is given notice of dismissal because of redundancy is entitled to reasonable time off with pay during working hours to look for another job, or to make arrangements for training for future employment.

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2 What is redundancy?

2.1 Introduction

A redundancy occurs where a dismissal is wholly or mainly because you have ceased to carry out your business or intend to cease to carry out your business:

- either for the purposes for which the employee is employed;
- or in the place where the employee was employed.

Situations where employees can be made redundant include:

- your business, or part of the business, has stopped operating or has become insolvent;
- your business is failing;
- you are moving into a new line of business which no longer needs certain employees' skills;
- a new system or technology is being introduced which means some jobs are no longer necessary;
- some jobs no longer exist because the work is being done by other people, following a reorganisation of the workplace;
- your business, or some of the work done, is moving to another area;
- your business is taken over.

2.2 Alternatives to redundancy

Making employees redundant is the act of last resort. If you can avoid the need for redundancy, you may keep necessary skills and good people in the business. Consultation, effective planning and creative thinking at an early stage can lead to better job security for employees and it can avoid short-term solutions, which may not be best suited to the long-term needs of your business.

You also need to do what you can to remove or reduce the need for redundancy, including looking for alternative work opportunities in the organisation.

Fully explore all alternatives to find alternative employment, within the organisation or with an associated employer, for any employee selected for redundancy. It should fully explore all alternatives with employees as part of the consultation process and confirm the details of available work in writing. These details should confirm the job title, duties and terms and conditions that attach to the alternative role, so as to enable the employee to take a decision on a fully informed basis. Redundancy can be unfair if you don't provide enough information on other jobs.

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Example

Mr Fisher was a New Business Manager employed by Hoopoe. When it ceased trading, he faced redundancy. There was a sales account manager vacancy within Hoopoe's new organisation, but no further details were provided as Mr Fisher had expressed no interest in that role.

A few weeks after his dismissal for redundancy, the role was advertised. The financial package was comparable to Mr Fisher's previous position. He claimed unfair dismissal. A key element of his claim was that Hoopoe's failure to provide him with any financial information about the new role meant he was denied the opportunity to give the role any realistic consideration.

The Employment Appeal Tribunal rejected Hoopoe's argument that its only obligation in law was to enquire about job opportunities within the business, and to make any such vacancies known to an employee. Providing such detail as the financial prospects of a particular role should be the norm unless it was not practicable because, for example, the financial prospects had not yet been determined.

However, Mr Fisher's own conduct and lack of interest in the new role indicated that failure by an employee to express an interest in a position or to request further information (including financial information) is a factor that the tribunal may wish to take into account in reducing an award on the grounds of contributory fault.

Fisher v Hoopoe Finance Ltd [2005]

Employees who are made redundant during a period of maternity leave, adoption leave or additional paternity leave, have special rights. In these cases, you must offer the employee any suitable alternative vacancy that exists, either within the organisation or with an associated employer. If there is such a vacancy, the employee is entitled to be offered that new job on contractual terms that are not substantially less favourable than those enjoyed under the previous contract. An employer's failure to offer a suitable available vacancy that exists on no less favourable terms will make the dismissal automatically unfair.

However, what is a suitable vacancy is a question for the employer to determine, having due regard for the employee's circumstances.

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Example

Ms Simpson worked for EIS as an insurance consultant at one of its London branches. During her period of maternity leave the company shut several branches including the one where she worked. It relocated its business to various call centres round the UK. As part of its redundancy consultation process, EIS sent details of various alternative vacancies to her, including one at the new Cheltenham call centre, and invited her to apply for them if she was interested. Ms Simpson did not apply for any vacancies. She was later made redundant. She complained that the dismissal was automatically unfair, arguing that the company should have offered her one of the alternative positions, rather than simply sending information and inviting her to apply. EIS took the view that it was not required to offer the Cheltenham position to Ms Simpson. It agreed that the role was suitable and appropriate in the circumstances, but its terms and conditions were substantially less favourable to her, as she would have had to both relocate and change her work pattern from weekdays only to working a seven-day shift.

The EAT agreed. It found that in order to be a suitable alternative vacancy, the vacancy had to be both suitable and appropriate in the circumstances **and** its terms and conditions must not be substantially less favourable. Therefore the company had not been obliged to offer the Cheltenham role to Ms Simpson.

Simpson v Endsleigh Insurance Services Ltd [2010]

In the last few years, many companies have sought to avoid the need for redundancies by cutting hours and/or wages. While the intention – to avoid redundancies – is admirable, such a change would be a contractual variation and therefore must not be unilaterally imposed. If it is imposed, there would be a significant risk that the cut would constitute a fundamental breach of contract by you, in response to which an employee may resign and complain of constructive unfair dismissal. All such changes must be agreed and evidenced in writing. If you do agree such a change, it's good practice to make a change in the short term (for example, three to six months) and review periodically. It's also reassuring for employees to know that if the reduction in wages doesn't work and redundancies are necessary, then any redundancy calculations will be made on their original pay rather than the reduced pay.

Take all reasonable steps to avoid compulsory redundancies by considering alternatives, for example:

- seeking applicants for voluntary redundancy and/or early retirement;
- seeking applications from existing staff to work flexibly;
- laying off casual or contract staff – provided that they are not fixed-term or part-time employees;
- recruitment restrictions;
- reducing or banning overtime;
- reduction or suspension of benefits;
- filling vacancies with existing employees;
- retraining employees and then moving them to other parts of the business;
- temporary lay-offs.

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2.3 Layoffs, short time working and guaranteed pay

Lay-offs and short time working can be a useful way of handling temporary work shortages. A lay-off is where employees are not provided with work by their employer because there is a reduction in the requirements of the employer's business for work of the kind which the employee is employed to do and the situation is expected to be temporary. During a period of lay-off an employee remains in employment and continues to accrue service, but is not paid for the lay-off period.

Short time working applies where the employee works for some of the week, but is laid off for the rest of the week. In this case he will be paid for the hours he actually worked.

Whether you are entitled to lay off employees or put them on short time working will depend on the employment contract. If the contract contains an express right for the employer to impose a lay-off or short-time working, the employee will be bound by the term. If there is no such contractual right, you will have to obtain the consent of the employee. If there is a contractual right to impose a lay-off, the rights must be exercised fairly and reasonably. The process to select those employees to be laid off must be fair.

If there is no contractual right to impose a lay-off, you should consult affected employees with a view to obtaining their informed agreement to the lay-off. Written consent should be obtained from each individual in writing, making it clear how long the lay-off is expected to last.

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An employee with a year's service who is wrongfully laid off or put on short-time working may resign and claim constructive dismissal. Alternatively, he may complain that there has been an unauthorised deduction from his wages, regardless of his length of service. If the employees do not consent to be laid off or put on short time, you may have to consider redundancy as an alternative.

2.4 Claims for redundancy due to a lay-off or short time working

Employees may be entitled to claim redundancy payments if they are laid off without pay or put on short time for four consecutive weeks, or for six weeks within a block of thirteen weeks. To do so, an employee must give written notice of his intention to claim a redundancy payment, submit the claim within four weeks of either the end of four consecutive weeks of lay-off or short time working or the end of the six weeks within the thirteen-week block and terminate his contract of employment by giving the contractual period of notice or one week's notice, whichever is the greater.

The employer may either agree to the claim, or refuse to do so and serve a counter-notice contesting liability to make a redundancy payment. This must be within seven days after service of the notice of intention to claim, on the ground that he reasonably expects to be able to provide at least thirteen weeks' continuous employment, without further resort to lay-offs or short time working, within four weeks of the date of service of the employee's notice of intention to claim.

Most employees are entitled to a statutory guarantee payment for any complete day of lay-off or short-time working (a 'workless day').

Guarantee payments are paid for up to five days of lay-off or short time in any three month period. The amount per day is based on the employee's normal daily rate of pay up to a statutory maximum. Any remuneration which the employee is paid in respect of a workless day because of a contractual agreement can be off-set against any liability to make a guarantee payment. If the employee is normally required to work less than five days a week, the entitlement cannot be greater than the number of days the employee is required to work per week under his contract. For example, if the employee works three days a week, he will be entitled to a maximum of three days' payment in any three-month period.

The following employees are not entitled to a guarantee payment:

- Employees who have worked for their employer for less than a month ending with the day before the workless day.
- Employees who unreasonably refuse an offer of suitable alternative employment for the workless day or days, whether or not it is work which the employee is employed to perform under his contract of employment.

2.5 Redeployment

You are under a duty to tell employees who are at risk of redundancy about suitable alternative work. These employees will have the first opportunity to express interest in alternative roles and to be interviewed for them, where appropriate. The alternative work shouldn't be advertised more broadly until the employees who are at risk have had a chance to be considered. It doesn't mean that they automatically get the role. If they are interviewed and are unsuccessful, then you will continue to look for alternatives to redundancy for them and make them redundant if you don't have any success.

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An employee who does accept an offer of alternative work is allowed a trial period to see if the work is really suitable. For the purposes of calculating continuity of employment, this trial period is regarded as starting from when the employee's old job ends, even where there is in fact a gap between jobs. The trial period will normally continue for four weeks after the employee starts work, but may be extended by agreement between employer and employee in order to retrain the employee for the new work.

If an employee leaves his work with good reason or is dismissed (for example, because he is unable to carry out the duties of the new work or the training) during the trial period, he will retain his rights to redundancy payment under the protective award. If, however, he gives up the work or training without adequate reason or you dismiss him fairly for reasons unconnected with the changed terms of employment – misconduct, for example – he will lose his right to payment for the rest of the protected period.

The trial period may be extended to retrain the employee for the new work, by agreement between two parties. Such agreements must be made before the employee starts the new work, must be in writing and must specify the date that the trial period ends and the terms and conditions of employment that will apply after that date.

Employees also have a right to a trial period if they start a different job at any time during the protected period and it makes no difference whether you offer them work before or after the end of the old job.

2.6 Employees who are at risk enjoy priority treatment

Where an alternative job is available, employers should not advertise it (even internally) until the employees at risk have been given the option to apply for it. An employee in this situation will still have to satisfy the employer that he is a good candidate for the role, and if he is not, he will be unsuccessful. However, he should be given the right to enter the selection process, if he wishes, as a priority candidate.

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Example

Because of a significant decline in orders, the company, Ralph Martindale, had to take out some costs, reorganising and removing a layer of management. Two senior roles were to be merged into one, which was to be known as Director and General Manager.

Mr Harris, the Group Development Executive, and Mr Ensor, the Managing Director, were both informed that their roles were at risk. Both applied for the new alternative role of Director and General Manager. The vacancy was advertised and a third internal candidate applied.

The new role was awarded to Mr Ensor on the basis that he had a 'less insular management style'. Mr Harris claimed his redundancy was unfair as the selection process for the alternative role was not objective.

The tribunal upheld Mr Harris' complaint. Although there is no requirement to consult with employees on the criteria for the alternative role, the selection process should be reasonable. The decision to appoint Mr Ensor was based on an entirely subjective view, and there was no job description for the new role.

The tribunal also held that the role should not have been opened to other applicants before the company had established that the redundant applicants were not suitable.

Agreeing with the tribunal, the EAT said that entirely subjective criteria are not appropriate when selecting for alternative employment. It confirmed that the tribunal was entitled to form its own view of the overall fairness. The tribunal is the 'industrial jury' and is entitled to make up its own mind about what constitutes 'good industrial practice' based on its own experience.

Ralph Martindale & Co Ltd v Harris [2007]

This case highlights the importance of ensuring that the selection process for alternative roles in a redundancy is not an afterthought.

2.7 The legal risks

Redundancy dismissals in certain circumstances can be unfair and/or discriminatory. The key risks and situations leading to them are set out below.

2.7.1 The redundancy is not genuine

For example, a direct replacement is appointed immediately after the employee has been made redundant.

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2.7.2 Procedural errors

Even where fewer than 20 employees are likely to be made redundant, an employer who is considering reducing staff levels must consult with those affected and make his decision following a fair procedure. In a collective redundancy situation involving 20 or more employees, the employer must follow a fair procedure and must adhere to special rules requiring collective consultation with trade union or employee representatives. Failure to comply with the latter entitles each affected employee to a 'protective award' of up to 90 days' pay and is one factor in assessing the reasonableness of the dismissals. Furthermore, even in a collective redundancy situation where consultation has taken place with a union or employee representatives, individual consultation is important, as individual employees usually like to make representations on their own behalf.

2.7.3 Unfair selection

If you select employees for redundancy using an inappropriate mechanism, or discriminatory criteria, you may face claims of unfair dismissal and discrimination.

2.7.4 Failure to offer suitable alternative employment

Employers are under an obligation to determine whether there is any suitable alternative employment within the company available to employees being considered for redundancy. Full details should be provided by the employer to the employee of any alternative positions they offer and the employee should be allowed a trial period in instances where the position differs significantly from the old job.

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3 Selection for redundancy

3.1 Introduction

In a redundancy situation, you must follow a fair and transparent procedure when selecting and dismissing an employee who is to be made redundant.

Some employers will have a recognised redundancy procedure, which will be part of the contract with workers, and has been agreed with the trade union at the workplace or with representatives of the workers. In other cases, there may be a procedure which has been consistently used previously and which has not been objected to by the workforce. This will therefore be the procedure that should be followed through custom and practice, unless it is not a fair and/or objective procedure.

3.2 Selection

Unfair selection for redundancy can make the dismissal unfair. Where you have to select some individuals from a group of people doing the same job, the approved way is to put together a matrix based on a range of objective criteria. You are entitled to keep the necessary skills in the workplace. Selection criteria must be fair, objective and non-discriminatory. For example, don't use last in first out, as it tends to discriminate against younger people. You can include things such as attendance, formal disciplinary record and appraisal rating. Be careful when dealing with employees who are on maternity leave. The law affords them additional protection, but you are still required to take a balanced approach and consider the rights of all employees.

When you put together the selection matrix, make sure that you incorporate a range of relevant, objective criteria. As well as the skills, qualifications, special aptitudes or attributes, you can also include criteria such as attendance, disciplinary record and appraisal rating. In putting a matrix together, try to be as precise as possible. A criterion such as 'good team member' is a bit too vague and is quite likely to be criticised by a tribunal if put to the test.

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Example

Mr Page had worked as an estimator in a printing business for 23 years. Following the loss of a major contract his employer embarked upon a round of redundancies. It agreed with its trade union that employees would be selected for redundancy following scoring under a matrix with the headings: attendance, quality, productivity, abilities, skills, experience, disciplinary record and flexibility. He was placed in a pool with two other employees. They each received a copy of the scoring matrix together with the potential range of marking and the standards and qualities that each level represented. Although the scoring was close, Mr Page scored lowest and was informed that he had been provisionally selected for redundancy.

He was invited to attend a consultation meeting, prior to which he had not been given his actual scores, but he did prepare a list of questions for the meeting, which included: "Why was I chosen from a pool of three?" and "Can I see the scoring sheets for the selected criteria?" He was provided with his actual scores at the meeting. He took particular issue with his scoring. A further meeting was arranged and he prepared a list of nine questions and statements raising queries in relation to his own marking, in particular, in relation to the category of abilities, skills and experience. Mr Page was given a letter purporting to respond to his earlier questions, which stated: "The points you made are noted. We believe that the scores given by the assessors are reasonable and appropriate"

The employer did not explain how the scores had been arrived at and no comments had been made on any of the scoring sheets under the column providing for 'justification/comment/example of performance'.

Mr Page complained that the selection process was unfair. The case eventually reached the EAT which agreed with him, stressing that fair consultation during a redundancy process (absence of which will result in a finding of unfair dismissal) involves giving an employee an explanation for why he has been marked down in a scoring exercise. Mr Page had not been able to challenge his scoring, but if he had been given the opportunity to do so and the markers had considered those comments, then it was unlikely that a tribunal would have been able to interfere with their decision.

Pinewood Repro Ltd T/A County Print v Page [2010]

The employer found itself on the back foot in this case because it was not able to justify its selection of Mr Page for redundancy by showing its marking of him was accurate: no one had ever raised any issues with him about his work and there was no regular appraisal system.

Equally, it could not show its marks in respect of the other two candidates in the pool were accurate due to the lack of appraisal system.

Where an employer uses a more subjective criterion such as 'flexibility', it needs to be very sure it can back up its scoring with evidence, and this evidence should be provided if challenged by the employee.

Some criteria may be more important in the job role than others, so you may want to weight different criteria according to their importance. For example, in the case of a data entry clerk, accuracy and speed are the top two criteria and both are weighted 5. Dealing with phone calls is somewhat less important in this role and might merit a weighting of 3.

Give the employees affected the chance to comment on the unscored scales and the weighting.

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If you have this situation, don't start the redundancy process until the matrix is absolutely right.

Once you have done this, you usually have a good idea of who is likely to stay. Tempting though it is, you must not say anything to the people who are likely to survive the process.

When you score the criteria, make sure that you can justify what you're saying and are able to provide specific examples to back up your assessment in the case of a challenge.

3.3 Bumping

Bumping occurs when an employee loses his position in the company and is moved to another worker's job, thus displacing the second employee and causing his dismissal. In these circumstances, the dismissal is by way of redundancy. There is still a duty on you to behave fairly and reasonably. Whether it is unfair or not to dismiss for redundancy without considering alternative and subordinate employment is a matter of fact for the tribunal.

Example

Mr North was employed by Lionel Leventhal Ltd as a senior editor. In 2003, the company encountered serious financial difficulties. At that time, it employed 12 full-time staff and two part-time secretaries.

The company decided that the best way to save money was to make a staff member redundant, and the prime candidate was Mr North, because he was the most expensive employee, in a role the company could easily manage without.

At a meeting, Mr North was advised that the company did not consider it needed a senior editor. They asked Mr North for his views and reconvened another meeting. Mr North brought a list of 11 suggestions for cost cutting to that meeting. These were discussed, but subsequently the company concluded that they were not capable of producing the required savings quickly enough. They did not consider making any other member of staff redundant.

Mr North attended a second meeting the following day and was told that his employment would be terminated, and he would be given his two months' contractual notice, together with statutory redundancy pay.

At no time did Mr North suggest, or the company consider, making a subordinate editor redundant, and offering the claimant that job, with less pay. He subsequently complained that his employer had failed to consider bumping and, that as a result, he had been unfairly dismissed

The court agreed that the redundancy dismissal was unfair, because the employer had failed to consider 'bumping' (even though the other job was a subordinate role with less pay, and the redundant employee had not suggested he would have considered this option). In this case, the tribunal concluded that Mr North was not given the opportunity to say whether he would have accepted the subordinate position, and the subordinate employee was not approached to see whether he was interested in voluntary redundancy.

Mr North v Lionel Leventhal Limited [2005]

Always assess whether it is appropriate to consider bumping in a particular case. The Leventhal case suggests that the duty placed on an employer to act reasonably does not impose an absolute obligation to consider bumping as an option but that, in particular circumstances, the failure to do so may make a dismissal unfair.

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Relevant factors include the existence of other vacancies, the extent to which the two jobs are different, the difference in pay, the relative length of service of the two employees and the qualifications of the original employee at risk. Another factor could be the willingness of the other employee to accept voluntary redundancy or another vacancy.

In most circumstances, it would be appropriate to ask employees at risk of redundancy whether they wished to be considered for bumping. If the answer is yes, and there is more than one person in the new pool, you can add them to the pool and consider their suitability against the agreed criteria.

3.4 Selection of part time employees

While you can apply the matrix and select part-time employees for redundancy, you should not select a person for a reason connected with his part-time status, even if the part-time status is not the only reason.

Example

Ms Sharma and her colleagues all worked part-time as lecturers for Manchester City Council. Their contracts entitled the Council to vary the number of hours they worked, subject to their being guaranteed one-third of the hours they had worked the previous year. This contractual provision did not appear in the contracts of full-time and some other part-time lecturers.

The Council suffered some funding difficulties. To make savings, it adopted a policy of reducing the contractual hours of many part-time lecturers, including the employees. The Council argued that the reason for the less favourable treatment (that is, the reduced hours) was not exclusively because of their part-time status, but rather the fact that their employment contracts made it possible for the Council to reduce hours without being in breach of contract.

The tribunal rejected the claim, as the reason for the detrimental treatment was not solely on the ground of the workers being part-time. The employees appealed.

On appeal, the EAT found in favour of the part-time employees. The Part Time Workers Regulations 2000 are engaged whenever (i) a part-time employee has been treated less favourably than a comparable full-time employee; and (ii) being part-time was one of the material reasons for that less favourable treatment.

In deciding the case, the EAT departed from the earlier Scottish EAT ruling of Gibson v Scottish Ambulance Service. In the Gibson case, the court held that the part-time nature of the worker's status had to be the **sole** reason for the unfavourable treatment. The later EAT in Sharma held that this approach was wrong.

Sharma and others v Manchester City Council [2008]

This decision extends protection in relation to part-time workers in line with other types of discrimination law, where the discriminatory factor need not be the sole, or even the main, factor influencing the employer. It just needs to be a material factor.

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3.5 Pregnant employees or employees on maternity leave

The pregnant or recently pregnant employee has the greatest protection in UK employment law. As with part-time employees, you can select a pregnant employee for redundancy, so long as you can very clearly and objectively show that the selection is not in any way related to her pregnancy. The Sex Discrimination Act 1975 (now subsumed into the Equality Act) provides that no account shall be taken of 'special treatment' afforded to women in relation to pregnancy or childbirth, where a claim of sex discrimination is brought by a man. These provisions are to be interpreted as meaning treatment accorded to a woman so far as it constitutes a proportionate means of achieving the legitimate aim of compensating her for the disadvantages occasioned by her pregnancy or her maternity leave.

Employees will not usually be made redundant during maternity leave. It would be more usual to advise them of what is happening in the workplace, but to allow them to complete their maternity leave. However, if there is really no alternative but to consider making a woman on maternity leave redundant, she is offered special protection.

She must be offered any suitable alternative vacancies. She does not have to apply or be interviewed for any suitable alternative vacancy, but should be offered it in priority to her colleagues. If a suitable alternative vacancy exists and she is not offered it, she may have an automatic claim for unfair dismissal. It is for the employer to determine what constitutes a suitable alternative vacancy, taking into consideration the employee's circumstances. This special protection is only available to women on maternity leave. As soon as the employee returns to work that particular protection ends.

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Suitability is looked at from the employee's point of view, so if the job offered is on less favourable terms and conditions, including the location and hours of work, or is very different from what the person was doing before, it is not likely to be regarded as suitable. If you offer the employee a suitable alternative vacancy and she turns it down unreasonably, she will lose her right to a redundancy payment.

Failure to consult with an employee because she is on maternity leave may be sex discrimination.

The selection of a woman for reasons related to her pregnancy or maternity leave, even if they are not the sole reason for the selection, will be both an automatic unfair dismissal and direct sex discrimination.

Employers faced with a situation where a female employee will suffer an apparent disadvantage for pregnancy related reasons should consider whether the 'special treatment' that it might adopt to redress the balance goes no further than what is reasonable and proportionate in the circumstances. This will involve an assessment not only of the positive impact on the female employee of such treatment, but also the corresponding negative effect on her colleagues in order to, as the EAT put it, strike 'the right balance'. If the employer goes too far in favour of the woman, this may result in a male employee suffering discrimination.

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Example

Mr De Belin was one of two associates working in Eversheds' Leeds office as part of their Real Estate Investor Team. The other associate was Ms Reinholz. In September 2008, it was decided that one of the two associates in the team would have to be made redundant. Mr De Belin and Ms Reinholz were scored against various performance criteria. One of those criteria measured the length of time between the completion of a piece of work and the receipt of payment from the client. The measurement was performed as at 31 July 2008. Mr De Belin's figure was 238, giving him a score of 0.5.

Ms Reinholz was absent on maternity leave at the measurement date: she had in fact been away since 10 February 2008. This meant that the measure could not be taken for her as at that date, since she had no client files. In accordance with what was said to be the Company's general policy for redundancy candidates who were absent on maternity leave or sabbatical, Ms Reinholz was given the maximum score for this criterion, which was 2. Mr De Belin was selected for redundancy; but the closeness of the result meant that if Ms Reinholz had not been given the maximum score on the measurement, there would either have been a tie or she would have scored less than Mr De Belin and would have been the one selected for redundancy.

Mr De Belin raised a grievance complaining that the measurement process was unfair. He suggested alternative approaches, including measuring Ms Reinholz based on the actual figures available before she went on maternity leave. The Company accepted that the result might appear unfair, but rejected Mr De Belin's proposals, stating that their approach was required by law in order to ensure that Ms Reinholz did not lose out by her maternity absence, and thus to avoid the risk of a sex discrimination claim from her.

The EAT did not accept that it was reasonable for Eversheds to take the view that it had no alternative to maintaining a maximum score, unrelated to any actual merit, for an at risk employee who was absent for pregnancy related reasons. When it became clear that the score would be decisive in the choice between her and Mr De Belin, the alternative scoring process which Mr De Belin had suggested was more proportionate and would therefore have been lawful.

De Belin v Eversheds Legal Services Ltd [2010]

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4 Redundancy notification procedure

4.1 Introduction

Following the repeal of the statutory dispute resolution regulations in 2009, redundancy is not covered by the ACAS Code of Practice, but it is still a dismissal and the process followed must be fair.

The courts make it very clear that employers are under a duty to consult, so you should still have a number of informal meetings with individual employees to advise those affected of the risk of redundancy. During this meeting you should discuss what can be done to reduce or remove that risk before any final decision is taken or notice served on the employee.

You must allow reasonable time for the consultation process to take place. If there are fewer than 20 employees affected, there is no time laid down by the law for the consultation process, but it must be reasonable. You would usually allow about three or four weeks, but it does depend on circumstances. It is important to demonstrate fairness, transparency and clarity and not to act with what the courts might consider to be improper haste. In management terms, this can be very challenging, especially when you know that there's no real prospect of avoiding redundancies. To avoid complaints of unfair dismissal you have to demonstrate absolute compliance.

4.2 Planning the process

Normally, you will start the process by having an informal face-to-face meeting with the employee(s) whose job is at risk of redundancy, after which you will have individual meetings.

Where you have to make redundancies, plan how, when and where you will make the announcement. Plan who will do it and make sure you think about how you will break the news to those who are not directly affected and whether you need to talk to clients or business partners. Try to do this simultaneously with the announcement to those at risk. You need to break the news in ways that are best for the business, so planning your approach can limit damage and distress.

4.3 Selecting from a pool

4.3.1 Basis for selection

Where you have to select one or two people from a bigger group, you will use a matrix showing a variety of scales to make the selection. This was discussed in Chapter 3 (3.2) above. In this case, there would be a number of meetings, as described below.

4.3.2 Announcing the news

Meet with the employee or employees whose jobs are at risk. If you propose to select an employee or several employees from a larger group ('the selection pool'), meet with the whole group. At this meeting you are announcing that an employee (or employees) is at risk of redundancy. Explain the reasons and how you intend to approach the selection process. Say that you will be meeting in the next few days to discuss the selection process with them on an individual basis.

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In the second meeting, meet with the employees individually. Explain that because there are a number of people in the pool you have to look at a range of criteria in order to be as fair as possible in the selection. Show the employee the unscored matrix and explain it. Give the employee a copy so he can go away and consider the scales and weightings. Arrange for a further meeting (or vehicle by which he can provide feedback) so you can make any adjustments before any scoring takes place.

At the next meeting take feedback upon the criteria and the weighting attached to each criterion. Consider any comments and make adjustments to the matrix if appropriate. Agree the next meeting date at which the scored matrices will be fed back.

4.3.3 Starting the consultation process

At the fourth meeting, present the scored criteria for each of those employees in the 'at risk' group. Again you will be meeting on a one-to-one basis. You need to be able to provide evidence as to why you have awarded the scores you have. This proves that you have been fair and objective in your scoring. At this meeting, you can advise individuals who is and who is not at risk.

For those who are not at risk, explain that they need to exercise discretion and take an empathetic approach with regard to their colleagues who are at risk.

Advise the employees who are at risk that you are now starting to consult with them about how to reduce or remove the risk of redundancy. Explain what that means. If there are any suitable alternative jobs, tell the employees who are at risk and provide details if they are interested. They have the first chance to apply for any such jobs (but they'll still need to satisfy the selection criteria).

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As a general rule, send the employees who are at risk home after this meeting, because even where they know that redundancies are likely, the announcement still tends to come as an unpleasant shock. You also have to decide if you want the employee to work through this period. It can be difficult and upsetting for the employee at risk, but it can also upset other staff members who are not at risk. If your contract allows it, you can put the employee on paid garden leave during this time if you wish.

Again, notes are taken and the next letter sets up the formal meeting and confirms that if you cannot find any suitable alternatives you will contemplate dismissal. This meeting won't be held unless there are no suitable alternatives to redundancy. If there's any way you can avoid the redundancy and it is agreed by the employee, take that route and confirm the variation of the contract in writing.

4.4 Where there is no pool

Where there is no selection pool because an individual has a truly unique role or all the people in a work group are likely to be made redundant, there is no need to draw up a selection matrix.

You should meet with the affected employees as a group to tell them that they are at risk, then follow up with two or three consultation meetings to see what can be done to avoid the need for redundancy.

As with the process set out in 4.3, the meetings and discussions should be documented. After each meeting, send a letter to each employee confirming the discussion and the next steps.

4.5 Conclusion of the consultation process

Whether employees have been in a pool or not, if there are no steps that can be taken to avoid the need for redundancy the time will come when you have to meet formally with the employee to conclude the process.

As this is a formal meeting, the employees who are at risk are entitled to be accompanied by a work colleague or trade union representative. Meet with each employee in turn, with his companion if he wishes. Review the options. If no suitable alternatives to redundancy have been found, confirm this and advise that the employee is redundant. You would usually dismiss with effect from that day and pay notice in lieu. The employee is offered the right of appeal. All of this is confirmed in writing.

However, some employers require the employee to work their notice. Please note that if this is the case, the employee is entitled to reasonable paid time off during the notice period to look for work or undergo training. This is considered to be 2-3 days per week.

4.6 Right of appeal

As a matter of good practice you should give an employee who is dismissed for redundancy a right of appeal. Advise the employee of this at the final meeting and confirm it in writing.

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If the employee chooses to appeal, he must inform you and you must invite him to a further meeting. The employee has the right to be accompanied and both parties must take all reasonable steps to attend this meeting.

The appeal meeting need not take place before any dismissal or sanction takes effect. Where possible, the appeal should be dealt with by a more senior manager than the person who attended the first meeting (unless the most senior manager attended the first meeting).

After the appeal meeting, you must inform the employee of the final outcome.

If you fail to offer an appeal, or if you don't follow the procedure properly, the dismissal is likely to be unfair.

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5 Voluntary redundancy

5.1 Introduction

Voluntary redundancy is a recognised category of dismissal for redundancy. There is no legal requirement to ask for volunteers for redundancy, but it is generally considered to be good practice.

Offering a voluntary redundancy package and then seeking willing redundancy volunteers may avoid the need for compulsory redundancies altogether. You will want to keep the right skills and knowledge in the business, so if you do ask for volunteers, make sure you reserve the right to refuse to allow voluntary redundancy. Just because you offer voluntary redundancy as a way of facilitating matters, you are not under any obligation to make volunteers redundant. You keep the right to make the final selection.

5.2 Voluntary redundancies are still dismissals

Note that the fact that an employee volunteers for redundancy does not mean that the contract is terminated by mutual consent. Voluntary redundancy is still a dismissal and this means that the usual procedures must be followed if the employer is to avoid a claim of unfair dismissal.

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Example

In March 2006, OG Ltd informed its union that it was proposing to make 19 redundancies at its Leeds site. Consultation and assessment took place in accordance with agreed procedures. This included asking for volunteers to be considered for redundancy. Three individuals volunteered and the employer accepted their requests. It decided that a further 17 employees were at risk of compulsory redundancy. The TGWU informed the employer that, as 20 redundancies were proposed, the statutory obligation to consult was triggered. The employer's response was that it was proposing to dismiss only 17 employees by reason of redundancy. It therefore refused to engage in formal consultation. The TGWU complained that the employer had failed in its statutory duty to consult.

The court agreed. Voluntary redundancies count towards the total number of proposed redundancy dismissals at an establishment, which in this case was sufficient to trigger the statutory collective consultation requirements

Optare Group Ltd v Transport and General Workers Union [2007]

Employees who volunteer and are accepted for redundancy are then in the same legal position as employees selected compulsorily, for example in relation to their right to receive a statutory redundancy payment.

5.3 Setting up a voluntary redundancy process

A redundancy may be unfair if you do not consult with the affected employees (on either an individual or a collective basis). If collective consultation is appropriate, employee representatives will need to be elected (where no existing representatives are in place). A voluntary redundancy programme does not remove these obligations. It is, therefore, important that the scheme is planned carefully and that the employer follows a workable timetable.

Before inviting volunteers for redundancy, you should consider the impact that voluntary redundancies might have on the structure of the remaining workforce and, in particular, whether or not the programme will result in an imbalance in skills and experience. There is a risk that the volunteers may include key employees who might otherwise have been expected to contribute most to the future success of the business. You may wish to restrict applications to selected categories of employees and to reserve the right to decline applications. Where appropriate, try and get the formal agreement of any employee representatives to such an approach.

5.4 The voluntary redundancy process

Once the scope of the programme has been established and agreed, the employer should write to the relevant employees and invite them to apply for voluntary redundancy. The letter should explain:

- the background to the redundancy situation (for example, a business reorganisation), what voluntary redundancy entails, the reasons for inviting employees to volunteer (i.e. to avoid compulsory redundancies) and the proposed redundancy date;
- the process to be followed by those wishing to volunteer, including the deadline for applications (for example, within 14 days) and what form the applications must take (for example, in writing, on a pre-printed application form);

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- that expressing an interest in or volunteering for redundancy will not amount to a resignation and will not be held against the employee concerned if his application is refused or withdrawn;
- the redundancy terms that will be available if the employee's application is successful (the employer should try to provide as much information as possible about the redundancy terms at this stage as this is likely to encourage greater take-up of the programme); and
- the process to be followed by the company in respect of those employees who do not volunteer for redundancy, warning them that they may be selected for compulsory redundancy regardless of whether or not they apply for voluntary redundancy (the employer may wish to set out the objective criteria that will be used if compulsory redundancies are necessary).

Provide employees with details of someone that they can contact if they have any questions or issues that they would like to discuss before making an application. Employees should understand the impact that taking voluntary redundancy could have on their pension.

Once the deadline for the receipt of voluntary redundancy applications has passed, if you have received enough applications that you can accept, it may be helpful, for the purposes of clarity, to remind all affected employees, in writing, that applications for voluntary redundancy are no longer being accepted.

If you do not receive enough suitable applications for voluntary redundancy, consider whether or not it would be worth extending the period for applications to be made. It may be that more employees would be prepared to volunteer if they had more time to consider it, or there may be more information that they require before making a decision. If you think that no further applications are likely to be forthcoming, start the procedure for making compulsory redundancies.

5.5 Selecting employees for voluntary redundancy

Identify the employees who will be offered voluntary redundancy. During the selection process, it is important that you do not discriminate on the grounds of a protected characteristic (i.e. age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation). You must also be careful not to discriminate against part-time or fixed-term employees.

If the number of volunteers exceeds the number of possible redundancies be aware of the potential reaction of employees who have applied and not been selected, and prepare a general written response to them in advance. This should explain why their applications have not been accepted, for example that you cannot accept applications from people in particular key roles. Thank employees for their cooperation in seeking to avoid compulsory redundancies and confirm that their future with the organisation will be unaffected by their decision to apply for voluntary redundancy.

Once the employees who will be offered voluntary redundancy have been established, you can prepare the terms of individual redundancy notices. Think about whether or not it would be appropriate to ask the employees to sign a compromise agreement, under which they would agree not to bring certain claims against the employer, for example for discrimination or unfair dismissal. It is usual for the company to pay the cost of the legal advice, either in part or in full.

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Inform applicants to the voluntary programme in writing of the outcome of their application and invite the "successful" candidates to a meeting for further discussion and explanation of the terms of their voluntary redundancy.

Hold individual termination meetings with the relevant employees, noting that termination should not take place before the end of the consultation period. This should start at least 90 days before the first dismissal takes effect when you are proposing to dismiss 100 or more employees, and at least 30 days before the first dismissal takes effect when you are planning to dismiss fewer than 100 but at least 20 employees. Consider whether or not those employees who have been offered voluntary redundancy will be required to work their notice periods and if any handover periods are required.

If enough employees agree to voluntary redundancy and there is no need for compulsory redundancies, inform the affected employees, their representatives and the wider workforce of this as soon as possible, to allay concerns that other employees may have about the security of their jobs.

5.6 No contractual right to voluntary redundancy

While voluntary redundancy can be a useful way of making a selection and limiting the upset and disruption that comes as an inevitable part of redundancy, employees do not have a contractual right requiring employers to engage in the process.

Example

In a pre-existing document, the company had reached an agreement with its union. One of the clauses stated that: "There will be no compulsory redundancy". 100 employees of MG Rover, including Ms Kaur, faced the threat of compulsory redundancy. Ms Kaur argued that, in line with the terms of collective agreements which were expressly incorporated into her contract of employment, her employer was not entitled to declare employees of her category and grade compulsorily redundant.

The court found that the provision in the agreement relating to job-security was no more than an expression of an aim or expectation and so was not incorporated into the individual employee contracts.

Kaur v MG Rover Group [2004]

Even where a document (such as a collective agreement) is expressly incorporated into a contract of employment by general words it is still necessary to consider whether any particular part of that document should actually be a term of the contract. This is especially so in the case of collective agreements made between employers and trade unions, as there may well be certain provisions in the agreements which are clearly not intended to give rise to legally enforceable contractual rights between the employer and the employee.

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6 Redundancy payment

6.1 Introduction

To qualify for a redundancy payment, an individual must meet certain criteria. He must be an employee, must have been dismissed, and either have at least two years' continuous service on the date on which his notice expires or, if termination is without notice, the date on which termination takes effect.

6.2 Redundancy calculation

The upper age limit for entitlement to a statutory redundancy payment was removed from 1st October 2006. Years of service below the age of 18 count towards entitlement.

While the provisions for tapering the award between the ages of 64 and 65 have been removed, 20 years' service will continue to be the maximum to count in calculating the award.

An employee has to have two years' continuous service to qualify for redundancy pay.

Under the age discrimination legislation, the calculation of redundancy payments, which is based on age, length of service and weekly pay, continues to be lawful if the statutory table under the Employments Rights Act 1996 is used.

Redundancy pay is calculated as follows:

- Up to the age of 21 – 0.5 week's pay for each completed year of service
- 22-40 years of age – 1 week's pay for each completed year of service
- 41+ years of age – 1.5 weeks' pay for each completed year of service.

The statutory level for redundancy pay is set annually.

6.3 Enhanced redundancy pay

Where there is a practice of paying enhanced redundancy payments, this may become a contractual right.

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Example

Mr Walker was one of 22 employees made redundant by Albion Automotive in January 1999. He did not have a written contract of employment and there was nothing written down about redundancy terms. From 1990 to 1994 there had been six voluntary or compulsory redundancy exercises. In each of these exercises, the employer made enhanced redundancy payments whereby redundant employees received £1,000 for each completed year of service and £90 for each further completed month.

When Mr Walker was made redundant, he did not receive the enhanced redundancy payment. He brought a claim for breach of contract to the tribunal. He argued that enhanced redundancy payments had become an entitlement by reason of an implied term in his contract of employment.

The company argued that there was no express agreement to pay enhanced terms.

The court found that an established custom of enhanced redundancy payments was sufficient to establish an intention by the employer to be contractually bound to such payments.

Albion Automotive v Walker & Others [2002]

Employers often want to enhance redundancy pay and it is open to you to do so. However, take care how you approach this, as enhanced redundancy schemes may be discriminatory on grounds of age. Schemes where the payment is based on age differentiate on age grounds and are therefore unlawful. Schemes that pay out based on length of service are likely to be indirectly discriminatory and therefore unlawful because younger employees are likely to have less service than their older colleagues.

Enhanced redundancy pay made on this basis can be defended if the scheme falls within a statutory exception or if it can be objectively justified. The age discrimination legislation provides an exemption for enhanced redundancy schemes that mirror the statutory redundancy payment framework.

The essence of the special conditions is that the enhanced redundancy pay must be calculated in the same way as statutory redundancy pay, except that there is no limit on the amount of week's pay which can be taken into account and the amount may be increased (but not reduced) by applying a multiplier, either to the amount of a week's pay used in the calculation or to the result of the calculation.

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Example

National Starch and Chemical Ltd provided paid three weeks' gross pay for each year's service under 40 years of age and four weeks' gross pay for each year above it. The tribunal found that the scheme discriminated against younger staff, did not comply with the statutory exception and was not objectively justified.

Galt v National Starch and Chemical Ltd [2008]

In another case, Mr Loxley was excluded from a voluntary redundancy scheme because he had reached the age of 60. Further, there were tapering provisions in place between the ages of 57 and 60. Mr Loxley claimed that the scheme discriminated against him on grounds of age discrimination. Agreeing with him, the EAT remitted the case back to a tribunal for a rehearing.

Loxley v BAE Systems Land Systems (Munitions and Ordnance) [2008]

The EAT has set out some general guidelines to help determine whether the age discrimination in any particular redundancy pay scheme can be objectively justified. These can be distilled as meaning that the following matters can generally be taken into account in considering justification, although none will be determinative on its own.

- The creation of job opportunities for younger people.
- The amount of pension to which the employee will be entitled.
- Whether a trade union approved the scheme.
- The prevention of a cash windfall shortly before retirement.
- Provision of extra help for older workers because they may find it more difficult to get other jobs.

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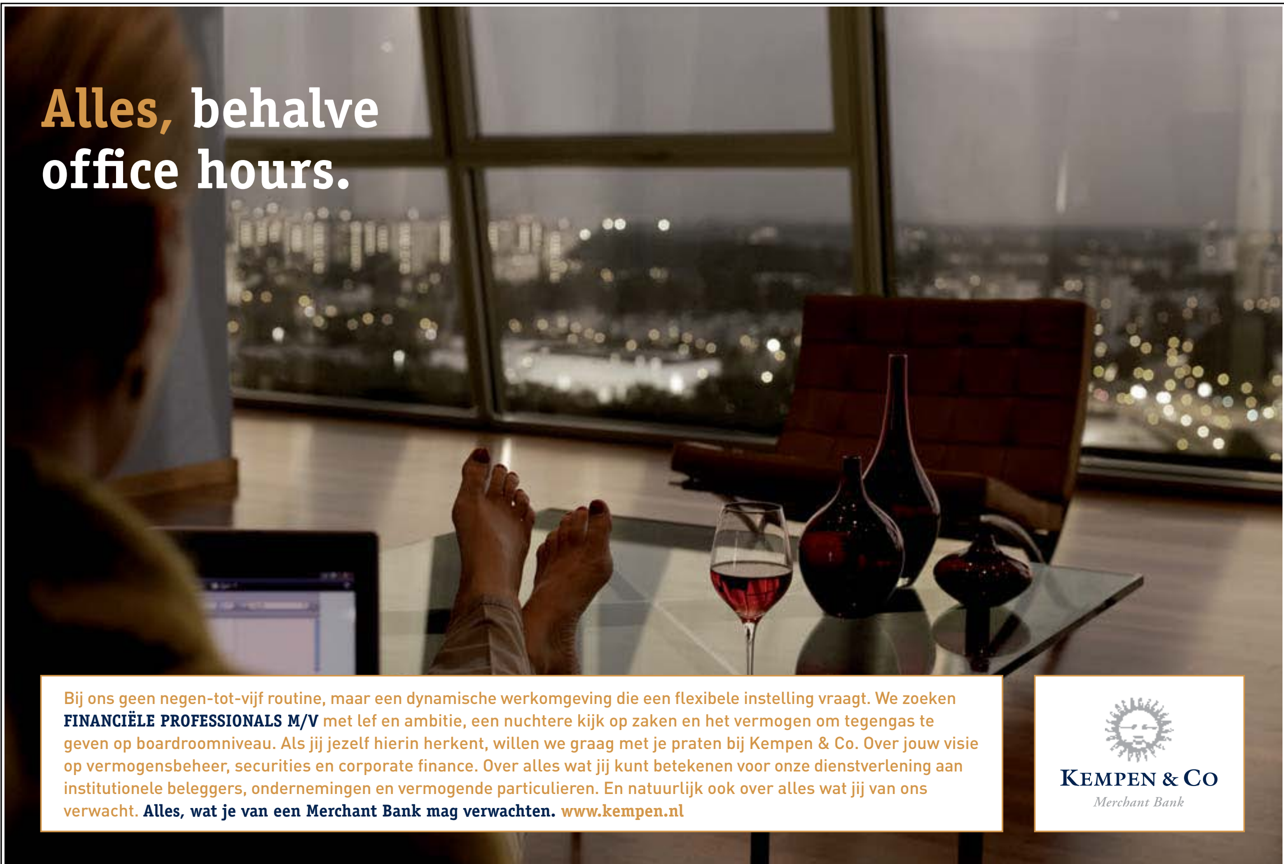

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6.4 Notice pay

Employees are also entitled to receive their notice pay. This is based on their contract or, in the absence of that, statutory entitlement. Statutory entitlement accrues as follows:

Years' service	Weeks' notice
0-2 years	1 week
2-3 years	2 weeks
3-4 years	3 weeks

Thereafter notice increases at the rate of an extra week for each completed year of service to a maximum of 12 weeks at 12 years' service. Where the contract of employment expressly entitles the employer to make a payment in lieu of notice (a PILON clause), any such payment is an emolument of the employment and treated as remuneration. In these circumstances, the employer is not in breach of contract and the question of wrongful dismissal does not arise. The whole sum will be subject to income tax under Schedule E in the normal way and the rules concerning the tax-free amount of £30,000 are not applicable. Authority for the proposition is found in the Court of Appeal's decision in EMI Group Electronics Ltd v Coldicott (HM Inspector of Taxes) 1999.

Where there is no contractual term providing for pay in lieu of notice, the payment should be seen as compensation for breach of contract and therefore not taxable as an emolument, but will be dealt with under the rules set out under Section 148 and Schedule 11 Income and Corporation Taxes Act 1988. Recent experience suggests that where there is no PILON clause, but the company has a practice of making what are effectively PILON payments, these will be treated as remuneration and are taxable in the usual way.

Trying to pay notice pay as an ex gratia payment could land you in trouble. If you make a payment and describe it as an 'ex gratia' payment, HMRC will treat it as remuneration and require that tax is paid.

Example

Publicis Consultants UK L td made Ms O'Farrell redundant. Her contact entitled her to three months' notice. However, the company only paid her four days' notice, though they also made a payment equivalent to three month's gross salary as an "ex-gratia" payment. Although she was paid the ex-gratia monies, a statutory redundancy payment and her holiday monies, she sued for breach of contract. The company tried to say that they had effectively paid the notice monies by way of the ex-gratia payment.

The EAT agreed with Ms O'Farrell and found that the letter from the employer setting out the payments made no mention of a notice payment and thus the company was in breach of contract. It cost the company around £20,000.

Publicis Consultants UK Ltd v O'Farrell [2011]

Employees are also entitled to holiday accrued but not taken to the date of termination and any contractual benefits which will accrue to the end of the notice period (whether worked or not).

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7 Consultation

7.1 Introduction

There is no minimum statutory consultation period when making fewer than 20 employees redundant, but you should still consult on an individual basis, otherwise the dismissal procedure may be considered to be unfair.

7.2 What is covered by consultation?

At the individual consultation meetings, the employer and employee should discuss a number of areas.

- The grounds for the employee's selection, including the criteria adopted and his scores against those criteria.
- Any suggestions that the employee makes in relation to avoiding redundancies.
- The possibility of alternative employment.
- Details of the redundancy payment that the employee will receive if the redundancy is confirmed.
- The notice period that will apply if the redundancy is confirmed, and arrangements such as whether or not the employee will be required to work the notice period.
- Any support that will be available, for example outplacement or time off to look for new work.
- And any outstanding related issues or questions that the employee raises.

The purpose of the consultation is to consider ways of avoiding the redundancy situation or dismissals, of reducing the number of dismissals involved and mitigating the effects of the dismissals. At the meetings, you should give the employee the opportunity to express his views and should give them genuine consideration.

You should hold further meetings with affected employees as necessary. This will depend on whether or not there are issues outstanding from the earlier meetings, for example, if further discussion is required relating to possible alternative employment.

Document the consultation process, including minutes of all meetings.

The consultation procedure is likely to last several weeks, though it could be significantly longer, depending on how it progresses. If you cannot avoid redundancies, notify the selected employees in writing, confirming that the reason for dismissal is redundancy, giving the appropriate notice period, the date on which their employment will terminate, the total redundancy payment and how this has been calculated.

While there is no statutory right of appeal against redundancy, you would be wise to allow an appeal process, as a means of addressing any outstanding issues. It may help to reduce the risk of claims from employees who feel that they have been treated unfairly.

7.3 Consulting with absent employees

Employees who are absent from work, for example on sick leave or maternity leave, must be consulted properly if their

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roles are potentially redundant. A failure to do so may make any subsequent dismissal unfair. In some cases, it could be an act of unlawful discrimination. As with other staff, give absent employees early warning of potential redundancy and include them at each stage of the redundancy consultation process.

Ask the employee to confirm how he would like to be consulted, for example by way of meetings at the employee's home, by telephone or in writing. Try to accommodate the employee's requests where reasonable.

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8 Collective redundancies

8.1 Introduction

There are three situations where statutory consultation is required.

- If between 20 and 99 employees are to be made redundant in one establishment within a 90-day period, the employer must consult with those employees' representative(s) at least 30 days before a decision is made.
- If 100 or more employees are to be made redundant, the employer must consult with them at least 90 days before a decision is made.
- An employer intending to make 150 or more employees in one establishment redundant must adhere to the provisions of the Information and Consultation of Employees Regulations 2004 and inform and consult employee representatives where there is a threat to employment in an undertaking with a view to reaching an agreement on decisions likely to lead to substantial changes in work organisation or in contractual relations.

8.2 Collective redundancies

If you are proposing to make a large number of redundancies, you must consult in advance with representatives of the affected employees, and notify the projected redundancies to the Department for Business, Innovation and Skills.

A collective redundancy situation arises where 20 or more employees are to be made redundant at one establishment within a period of 90 days or less. Consultation must be completed before any notices of dismissal are issued to employees. A complaint of failure to consult may be made to an employment tribunal, and must normally be brought within three months of the last of the dismissals. Where a complaint is upheld, the tribunal may make a protective award to employees of up to 90 days' pay.

The obligation to consult applies to both compulsory and voluntary redundancies, even when you intend to offer alternative employment on different terms and conditions to some or all of the employees, with the result that the number actually dismissed will be fewer than 20.

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Example

Tourism South East is an organisation formed to promote tourism. The company decided that it was necessary to restructure the business and in January 2004 they announced details of the restructuring as it affected the Tunbridge Wells office. The Tunbridge Wells office was to be closed as part of the reorganisation. Some 26 employees worked at that office, including Ms Hardy. All would need to be dismissed as redundant or redeployed. Ms Hardy complained that TSE had not carried out the statutory consultation. TSE accepted this but said that it was not proposing to dismiss as redundant 20 or more employees at the same establishment.

The tribunal found that, although there were 26 employees at the Tunbridge Wells office which was to be closed as part of the restructuring, TSE then only expected 12 redundancies, with the rest being redeployed. It concluded that the numbers TSE was proposing to dismiss did not reach the requisite number of 20.

Ms Hardy appealed. She claimed that the proposal to close the Tunbridge Wells office was necessarily a proposal to dismiss more than 20 employees as redundant. It was inherent in the proposal that existing contracts of employment would terminate on closure and there would therefore be dismissals. The reason for those dismissals would be redundancy. The fact that it was hoped that some of the displaced employees would apply for, and be offered, different jobs in different parts of the organisation, and in different locations, did not alter this conclusion.

The EAT agreed. Where an employer proposes to dismiss an employee, the mere fact that the employer proposes to redeploy is not decisive. If the employer only proposes to keep the employee in his employment on what is in reality a different contract of employment, he will be proposing to terminate the existing one. Some employees may have been re-deployed but, if so, it would be to jobs for which they would have to apply, in one or two different locations, with fresh job descriptions. The EAT therefore held that TSE should have followed the guidelines as this was a case where collective consultation should have taken place, even though only 12 employees were actually likely to be made redundant.

Hardy v Tourism South East [2004]

8.3 Employee representatives

Where you are putting a large number of employees at risk, consult their representatives. Where those affected are represented by a trade union recognised for collective bargaining purposes, you are required to inform and consult with an authorised official of that union. You are not required to inform and consult any other employee representatives in such circumstances, but may do so voluntarily.

You must inform and consult affected employees who are not represented by a trade union and it's your responsibility to ensure that consultation is offered to appropriate representatives. In non-union cases, where affected employees have had a genuine opportunity to elect representatives, but fail to do so, you can discharge your obligations by providing relevant information to those employees directly.

Where employee representatives are to be specially elected, you must:

- make such arrangements as are reasonably practical to ensure that the election is fair;
- determine the number of representatives to be elected so that there are sufficient numbers to reflect the interests of all the affected employees, taking into account the number and types of those employees;

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- determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees;
- determine that the term of office of employee representatives is of sufficient length to enable relevant information to be given and consultations to be completed.

In addition, the following rules apply:

1. The candidates for election as employee representatives are affected employees on the date of the election.
2. No affected employee is unreasonably excluded from standing for election.
3. All affected employees on the date of the election are entitled to vote for employee representatives.
4. The employees entitled to vote may vote for as many candidates as there are representatives to be elected to represent them; or, if there are to be representatives for particular classes of employees, for as many candidates as there are representatives to be elected to represent their particular class of employee.
5. The election is conducted so as to secure that so far as is reasonably practicable, those voting do so in secret and the votes given at the election are accurately counted.

Where an employee representative is elected in accordance with these rules, but subsequently ceases to act as such and, in consequence, certain employees are no longer represented, you should arrange to hold another election.

In a situation where employee representatives are to be specially elected, you must ensure that the election is completed and the representatives are in place (having had an opportunity for appropriate training, if necessary) in time to allow the consultation process to be completed before any redundancy notices are issued.

8.4 Timing

The law requires that you must begin the process of consultation in good time and complete the process before any redundancy notices are issued. 'In good time' means that consultation must begin at the time you are proposing the redundancies and at least 30 days before the first of the dismissals takes effect.

In a case where 100 or more redundancy dismissals are proposed at one establishment within a period of 90 days or less, the consultation must be 90 days before the first of the dismissals takes effect.

Individual notices of dismissal can't normally be issued to employees in a collective redundancy situation until the consultation process has been completed in accordance with these statutory requirements. The required notice period will depend on what an individual's contract of employment provides for.

8.5 The collective consultation process

The representatives will need enough information about the redundancy proposals to be able to take a useful and constructive role in the process of consultation, so you must disclose certain information in writing. The information must be handed to each of the appropriate representatives, or sent by post to an address notified to the employer, or, in the case of a trade union, to the address of the union's head or main office.

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You have to disclose certain specified information.

- The reasons for the proposals.
- The numbers and descriptions of employees you propose to dismiss as redundant.
- The total number of employees of any such description employed at the site in question.
- The proposed method of selecting the employees who may be dismissed.
- The proposed method of carrying out the dismissals, taking account of any agreed procedure, including the period over which the dismissals are to take effect.
- The proposed method of calculating any redundancy payments, other than those required by statute, that you propose to make.

There may be special circumstances in which it is not reasonably practicable for you to meet fully the requirements for minimum consultation periods or disclosure of information. In such circumstances, you must do all that you reasonably can toward meeting the requirements.

The Information and Consultation of Employees (ICE) Regulations 2004 give employees in larger firms rights to be informed and consulted on an on-going basis about issues in their place of work. This includes decisions on collective redundancies.

Statute does not specify a time-limit within which consultations must be completed. This will always depend on the circumstances of each case. While consultation must start at least 30 or 90 days before the redundancy notices take effect, it is not necessary that consultation should last for all of that time.

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That said, it is not necessary for the parties to have reached agreement for the consultation to be complete, although you should have undertaken genuine consultation with a view to reaching agreement. Consultation would normally be expected to cover ways of reducing the redundancies or of mitigating their effects, such as alternative work patterns or job share proposals. The consultative process should continue until the issues have been aired and parties have had a reasonable amount of time to comment on information provided and the proposals or counter-proposals which have been made. It is important for the parties to show that they have acted reasonably throughout their dealings. Keep signed copies of any meeting minutes.

8.6 Redundancy notices

You can only issue redundancy notices when the consultation has been completed. If consultation has been completed within the 30- or 90-day period, you may issue the notices at that point. You should consult beyond the 30- or 90-day minimum where the consultations are not yet complete.

Redundancy notices take effect at the end of the employee's contractual or statutory notice period (whichever is the greater).

The redundancy notices **do not** take effect at the time that they are served upon the employee. The date from the beginning of the consultation to when the employee is actually made redundant (if appropriate) must be at least 30 or 90 days, but in some cases it could be longer, where the combination of the consultation and the notice exceeds the period.

This timetable can be shortened where an employee might have decided to leave early or take voluntary redundancy. For example, employment can be terminated before the end of the statutory or contractual notice period where an employee has agreed to take a payment in lieu of notice.

8.7 Complaints

If you don't comply with the consultation requirements, an employee may make a complaint to an employment tribunal. Complaints about a failure relating to the election of employee representatives may be made by any of the affected employees or by any of the employees who have been dismissed as redundant. A complaint about any other failure relating to employee representatives may be made by any of the representatives to whom the failure related. A complaint about a failure relating to trade union representatives may be made by the trade union. In any other case, a complaint may be made by any of the affected employees or by any of the employees who have been dismissed as redundant.

Where the tribunal finds a complaint justified, it may take steps to safeguard the employees' remuneration by making a protective award.

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9 Garden leave and time off

9.1 Introduction

During the period that employees have been given notice of impending termination of employment by reason of redundancy, employers may wish to remove the employee from the day-to-day activity of the business. Alternatively, if the employee is working his notice, he has the right to paid time off during this period to attend interviews or undertake training to help him get a new job.

In this chapter we consider the rights.

9.2 Garden leave

'Garden leave' is the term given to a situation whereby an employee is required to serve out a period of notice at home (or 'in the garden'). During this period the employee continues to receive all salary and benefits but is prohibited from commencing employment with new employers until the gardening leave period has expired.

It is usual for companies to put employees who are at risk of redundancy on garden leave. There are good reasons for doing so.

Firstly, employees are often very upset by the news and need time to compose themselves. Secondly, it can be awkward for employees who know that they're not at risk if their 'at risk' colleagues are working alongside them. There is also the possibility that a disgruntled employee may cause damage to the business.

There is no right, however, to put an employee on garden leave unless it is expressed in the employment contract or agreed by the employee.

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Example

When Mr Boudrais and Ms Smith, senior employees of a consulting and advisory company specialising in the hotel sector, resigned from their employment with SG&R Valuation Service Co each gave three months' notice, as required by their employment contracts. Both were leaving to join a competitor. Almost immediately, the company uncovered evidence suggesting that they were intending to go to work for a competitor, taking confidential material with them.

They were initially put on garden leave, then suspended and told to stay at home on full pay. Mr Boudrais and Ms Smith responded by saying that there was nothing in their employment contracts allowing SG&R to suspend them or to place them on garden leave. They argued that by requiring them to remain at home the employer had fundamentally breached their contracts, entitling them to resign with immediate effect.

The employer asked the court to place the employees on garden leave for the duration of their notice periods, even though there was no express contractual garden leave clause.

The court held that Mr Boudrais and Ms Smith had a right to work, but their behaviour (in particular the specific hostility shown towards the company) had demonstrated that they were not ready and willing to work in accordance with their employment contracts. As such, the company was entitled to place them on garden leave and the court granted an injunction under which the employees remained subject to their contractual and other duties for the three-month notice period.

SG&R Valuation Service Co v Boudrais and others [2008]

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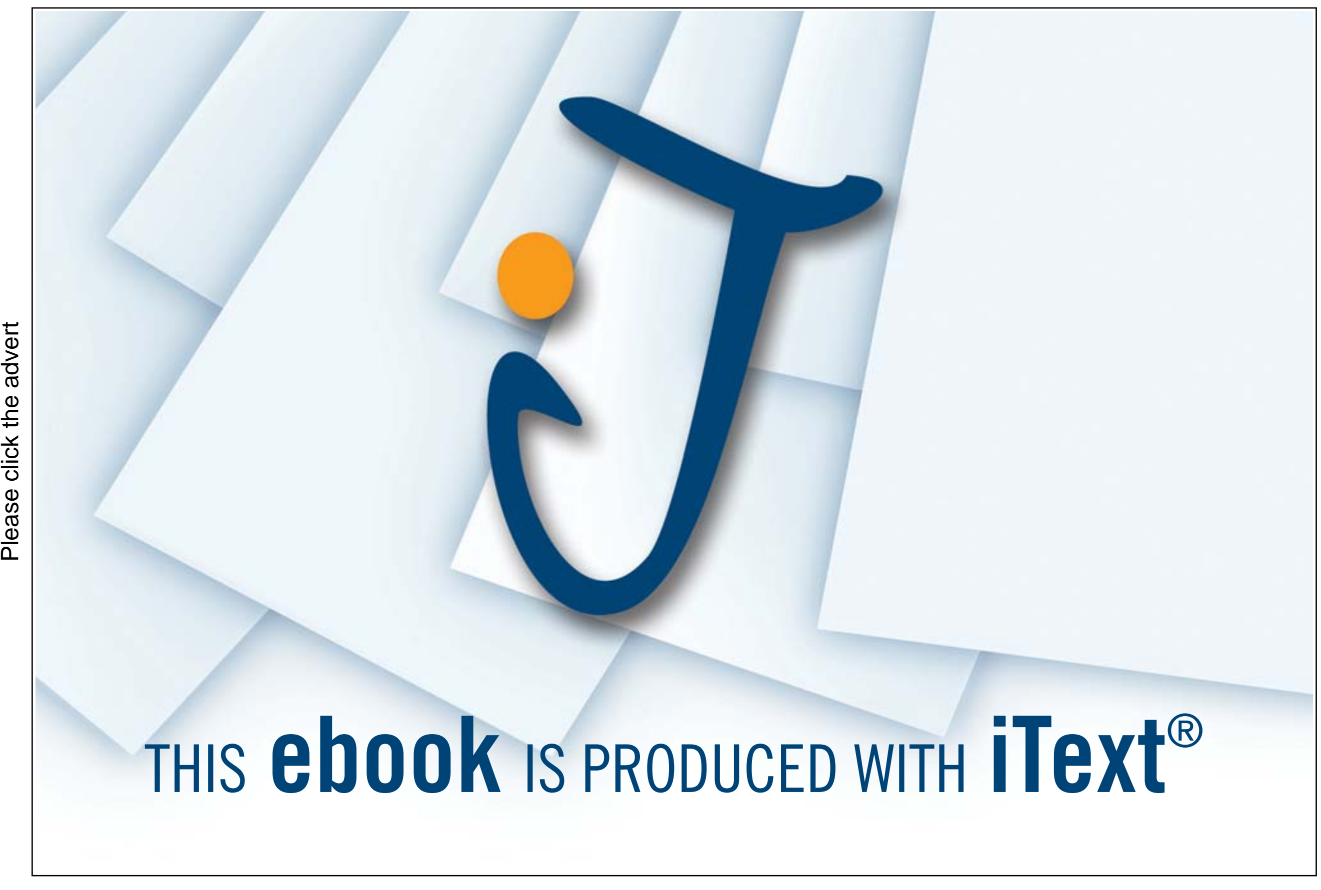

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This case serves to remind us that we should include a garden leave provision in the employment contract. Without it, it can be difficult to keep an employee away from work during the notice period. Garden leave may be possible where there is clear proof of wrongdoing which amounts to a breach of contract or of duty, but this can be difficult to establish.

9.3 Time off when at risk of redundancy

An employee who is given notice of dismissal because of redundancy is entitled to reasonable time off with pay during working hours to look for another job, or to make arrangements for training for future employment. You must allow the time off before the employee's notice period expires.

Employees are entitled to time off in this way if, on a specified date, they have had two years' continuous employment.

The date referred to is either the date when the employee's notice expires or the date when the statutory minimum period of notice due under the legislation expires, whichever is the later.

The employee is allowed 'reasonable' time off. The legislation does not specify what is reasonable. The amount of time off will vary with the differing circumstances of employers and employees. The courts have indicated that this might be two or three days per week, but it depends on the circumstances. Some employees may need only to attend one interview or make one visit. Others may have to make a number of visits, which may involve travelling some distance.

9.4 Payment for time off

Employees should be paid the appropriate hourly rate for the period of absence from work. This is arrived at by dividing the amount of a week's pay by the number of the employee's normal working hours in the week. A week's pay is calculated by reference to a date known as 'the calculation date'. In calculating pay for time off to look for work or arrange training, this date is the date on which you gave him notice.

You don't have to pay more than once for the same period. Any payment already made under an employee's contract of employment for a period of time off to look for work will be offset against your liability as an employer under the provisions.

The entitlement to paid time off is limited to 40 per cent of a week's pay for the whole notice period.

9.5 Redeployment

As discussed in Chapter 2, you are under a duty to tell employees who are at risk of redundancy about suitable alternative work. These employees will have the first opportunity to express interest in alternative roles and to be interviewed for them, where appropriate. The alternative work shouldn't be advertised more broadly until the employees who are at risk have had a chance to be considered. It doesn't mean that they automatically get the role. If they are interviewed and are unsuccessful, then you will continue to look for alternatives to redundancy for them and make them redundant if you don't have any success.

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An employee who does accept an offer of alternative work is allowed a trial period to see if the work is really suitable. For the purposes of calculating continuity of employment, this trial period is regarded as starting from when the employee's old job ends, even where there is in fact a gap between jobs. The trial period will normally continue for four weeks after the employee starts work, but may be extended by agreement between employer and employee in order to retrain the employee for the new work.

If an employee leaves his work with good reason or is dismissed (for example, because he is unable to carry out the duties of the new work or the training) during the trial period, he will retain his rights to payment under the protective award. If, however, he gives up the work or training without adequate reason or you dismiss him fairly for reasons unconnected with the changed terms of employment – misconduct, for example – he will lose his right to payment for the rest of the protected period.

The trial period may be extended to retrain the employee for the new work, by agreement between two parties. Such agreements must be made before the employee starts the new work, must be in writing and must specify the date that the trial period ends and the terms and conditions of employment that will apply after that date.

Employees have a right to a trial period if they start a different job at any time during the protected period and it makes no difference whether you offer them work before or after the end of the old job.