Notes for union reps on handling redundancy

Is it redundancy?

Redundancy is defined in section 139 *Employment Rights Act 1996* as a dismissal because:

- the employer has ceased or intends to cease—
    - to carry on the business for the purposes of which the employee was employed, or to carry it on in the place where they were employed.
- the requirements of that business—
    - for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where they were employed, have ceased or diminished or are expected to cease or diminish.

There are therefore three scenarios that give rise to redundancy:

- the business closes
- the business relocates
- the employer needs fewer employees to do the work that they were employed to do.

There may be issues around TUPE if a business is bought out, and there may be questions about whether an employee is required to relocate, but in terms of defining a redundancy situation, the first two are fairly straightforward.

Difficulties tend to arise when an employer decides to reorganise the way that work is carried out or restructure its organisation.

For example:

Fewer staff required to do the same work

Kingwell & ors v Elizabeth Bradley Designs [2003] UKEAT 0661/02/1902 The company suppled needlework kits by mail order and employed staff part-time to pick, pack and dispatch them. They had a downturn in business and responded by reducing the hours of all their workers down to one day a week, which the employees agreed to. The new staffing arrangements were not cost effective as there were now ten part-time staffing working one day a week each and the overheads were disproportionate. The employer reorganised the staff and replaced the ten part-timers with four members of staff job-sharing two full-time roles. They were doing the same work and the same total number of hours. For economic and commercial reasons, the requirement for employees to carry out work of a particular kind had diminished. There was a redundancy situation.

Change in job roles

Murphy v Epsom College 1985 ICR 80 (CA) Murphy was one of two plumbers employed by the school and his work consisted mainly of general plumbing. A second plumber was employed whose main task was to maintain the improved heating system. They decided to dismiss one of the two plumbers and selected Murphy. There was a redundancy situation because there was no longer a need for a general plumber as there was instead a need for a heating engineer.

Safeway Stores plc v Burrell 1997 IRLR 200 Burrell was employed as a petrol filling station manager at a Safeway store. His post was deleted in a restructure that reduced the total number of managers. It was replaced by a petrol filling station controller, who was one of the new controllers reporting to managers in the new structure. The filling station controller post was paid some 15% less than Burrell was paid as a manager and so it wasn't suitable for him as an alternative. After he was made redundant, Burrell brought an unfair dismissal claim arguing that the new job was the same as his old manager's job so it was simply a cost-cutting exercise and there was no redundancy. The EAT disagreed.

The EAT said it is a mistake to focus on the work to be done and not the employees who do it. The question is whether there is a reduction in the number of employees. Whatever the underlying cause, the only question to be asked when considering whether there was a redundancy situation is, "Was there a diminution/cessation in the employer's requirement for employees to carry out work of a particular kind, or an expectation of such cessation/diminution in the future?".

In Burrell's case, the employer had a need for fewer managers.

If jobs are combined and one person does the work previously done by two, there will be a redundancy.

This is why **bumping** is lawful: an employee can be dismissed for redundancy when their own job remains but is given to someone else because overall numbers of staff are reduced.

Full-time to part-time

Packman t/a Packman Lucas Associates v Fauchon [2012] UKEAT 0017/12 Following the introduction of new software, an employer wanted to reduce the hours of its bookkeeper. She refused and was dismissed. Her employer refused to pay her redundancy, arguing that there was no redundancy because it still needed a bookkeeper. The EAT upheld her claim for redundancy, because its need for bookkeeping had diminished by a number of hours.

Replacement of permanent employees with contractors

The replacement of an employee with an independent contractor is a redundancy because there is a requirement for fewer "employees" (***Bromby and Hoare Ltd v Evans and anor 1972 ICR 113; Noble v House of Fraser (Stores) Ltd EAT 686/84***).

More work creates new jobs

Hakki v Instinctif Partners Ltd (formerly College Hill Ltd) EAT 0112/14 The role of an HR administrator who carried out HR admin tasks as well as assistance to the CEO and finance director was removed. Two new posts were created instead: HR adviser and PA to the CEO/financial director. There was a redundancy situation because there was no longer a requirement for her old job as HR administrator.

Change of location

Sometimes employers argue that employees are required to move to a new location because of a "mobility" or "flexibility" clause in their contract. In both *High Table Ltd v Horst [1997] EWCA Civ*

2000 (CA) and *Bass Leisure v Thomas [1994] IRLR 104* (EAT) it was ruled that the employees were not required to move, and were entitled to redundancy.

Unfortunately, in *Home Office v Evans & Laidlaw [2007] EWCA Civ 1089* the Court of Appeal took a different view and said the Home Office could insist that employees move from Waterloo to Heathrow. Employees who refused to go were not entitled to redundancy payments when they were dismissed.

Changes to terms and conditions

Johnson v Nottinghamshire Combined Police Authority [1974] 170 There was no redundancy when the shift pattern was changed and two clerks working one shift pattern were replaced by two clerks working the new pattern.

Chapman and ors v Goonvean and Rostowrack China Clay Co Ltd [1973] ICR 310 (CA) The employer withdrew free transport to work because it was uneconomical. Some employees lost their jobs because they could no longer get to work. The Court of Appeal said that this was not a redundancy situation.

To what extent can you challenge redundancy?

There is little ground for challenging an employer's economic or strategic decision to reduce numbers of staff in individual redundancy situations (fewer than 20), but considering alternatives is part of the overall fairness criteria.

Collective consultation

When an employer is proposing redundancies of 20 or more employees in one workplace, then the statutory right to collective consultation under section 188 of the *Trade Union and Labour Relations (Consolidation) Act 1992* (TURLCA) applies (article 216 of *the Employment Rights (Northern Ireland) Order 1996*).

This is the case even when it comes to changes to terms and conditions that do not constitute an individual redundancy situation under the ERA. This is because of the separate definition of redundancy under TULRCA (S.195), which is "**dismissal for a reason not related to the individual concerned** ". This means that the dismissal of employees and their re-engagement on new terms and conditions (so called fire and rehire) triggers collective redundancy consultation obligations even if there is no proposed reduction in the number of employees (*GMB v Man Truck and Bus UK [2000] IRLR 636*).

The scope for challenge is wider than under s.139.

Under section 188(2), TULRCA, the employer must consult about ways of:

- avoiding dismissals;
- reducing their number; and
- mitigating the consequences of dismissals.

The consultation must:

- be sufficient and meaningful, real, in good faith and not a sham (*R v British Coal ex parte Price [1994] IRLR 72*)
- cover the business reasons for any proposed change, closure or relocation (*UK Coal Mining Limited v National Union of Mineworkers (Northumberland Area) [2008] ICR 163*); and
- be supported by adequate and accessible information demonstrating those business reasons.

Fair redundancy procedures

There are established procedures that employers should follow to make a redundancy fair, and so challenging employers on any of these grounds mean that you have case law to back you up when you are negotiating.

The basic standard for fairness in all redundancy situation is as follows (*Williams v Compair Maxim [1982] IRLR 83*).

- give as much warning as possible;
- consult reps on the best way to minimise hardship;
- draw up agreed selection criteria;
- use objective selection criteria where possible (for example, attendance records) in preference to criteria that rely on subjective line management opinion;
- carry out the selection exercise fairly, following the agreed criteria;
- consider any representations; and
- offer alternative employment where possible.

The significance of each factor will depend on the individual circumstances. For example, during coronavirus a failure to consider furlough made dismissal unfair (*Lovingangels Care Ltd v Mhindurwa [2023] EAT 65*).

Re-applying for existing job

This has become an increasingly common practice. It is not necessarily unfair but it should only be used where a restructuring creates genuinely new and different jobs (*Gwynedd Council v Shelley Barratt and Another [2020] UKEAT 0206/18* and in the CA *[2021] EWCA Civ 1322*). All the usual standards of fairness apply (*Green v London Borough of Barking & Dagenham [2016] UKEAT 0157/16*).

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