

Employment law

Briefing

MACFARLANES

Redundancies: costs and consultation

This paper considers in outline the employment issues arising in connection with a proposal of redundancies by an employer. Part I details potential costs arising on the termination of employment. Part II summarises the procedures to be followed. Part III focuses in particular on the obligation to consult with and properly select employees.

Introduction

What is redundancy?

There are three main situations in which a redundancy situation may arise, namely where:

- the employer ceases to carry on business (i.e. where the business stops trading);
- the employer ceases to carry on business in a particular place (i.e. where a site or office has closed down), or
- there is a reduced need for staff due to diminishing business.

In addition, an employee is technically redundant where he or she is dismissed to make way for another employee whose job is redundant, even though the position of the employee to be dismissed is not itself redundant. This is known as “bumping” and while employers are not always obliged to “bump” staff, the courts have said that it may be unfair not to consider it as an option.

PART I

Notice of termination

All UK employees are entitled by law to receive notice of termination of their employment. For employees with less than two years’ service, at least one week’s notice must be given. Employees with more than two years’ service are entitled to a week’s notice for each complete year of service up to a maximum of 12 weeks’ notice after 12 years’ service.

If employees have contractual notice entitlements that are more generous than the statutory minimum entitlements then these entitlements will take precedence.

Statutory redundancy payments

Employees with more than two years’ continuous service at the date of termination are entitled to receive a statutory redundancy payment if they are made redundant within the meaning of the legislation.

The amount of the statutory redundancy payment will depend upon an employee’s age, salary and length of service. The formula for calculating statutory redundancy payment is as follows:

$$A \times B \times C = \text{statutory redundancy payment}$$

Where:

A= the number of complete years of continuous service to the date of dismissal (up to a maximum of 20 years)

B= the employee’s gross weekly pay (this is capped by statute and the cap is increased each year on 1 February – on 1 February 2008 the cap was raised to £330 per week)

C= an age multiplier of $\frac{1}{2}$ (for each year of service in which the employee was below the age of 22), 1 (for each year of service between the ages of 22 and 41) or $1\frac{1}{2}$ (for each year of service in which the employee was not below the age of 41)

Accordingly, if an employee is to receive the current maximum payment he must have been employed for 20 years at age 41 or above and with a gross weekly salary at termination of more than £330 (i.e. $20 \times 330 \times 1\frac{1}{2} = £9,900$).

Unfair Dismissal

If an employee who is dismissed has more than a year’s continuous service at the date of termination, he may bring a claim of unfair dismissal against his former employer in an Employment Tribunal. Claims must be brought within three months of the date of dismissal. If there is a “statutory dispute resolution process” ongoing at the date of expiry of the three month limitation period, the time limit is extended by a further three months.

If the claim is successful, the Tribunal may make the following awards of compensation:

- a **basic award**, calculated in the same way as the statutory redundancy payment referred to above (and,

therefore, currently capped at £9,900 per employee); and

- a **compensatory award**, of up to a maximum of £63,000 per employee. The compensatory award is based on the Tribunal's assessment of the loss the employee has suffered as a result of his dismissal (for example, loss of earnings and loss of future employment).

If an employee has been unfairly dismissed, a Tribunal may, as an alternative to compensation and only if the employee so wishes, make an order that the employee should be reinstated or re-engaged. Such orders are, in practice, rare. If the employer refuses to comply with such an order, a Tribunal can award additional compensation.

The Tribunal must increase any award of compensation by between 10% and 50% where the employer has failed to comply with the statutory dispute resolution procedures.

If an employee has received a statutory redundancy payment, he is not also entitled to receive a basic award in subsequent unfair dismissal proceedings.

In order to defend a claim of unfair dismissal, the former employer would need to show:

- first, that it had a “fair” reason for dismissal (redundancy can be a “fair” reason); and
- second, that it acted fairly in all the circumstances in dismissing the employee.

A Tribunal will generally accept that an employer has acted fairly, in the context of a redundancy, if, for example:

- employees have been fairly selected for

redundancy by reference to objective criteria;

- the employer has considered whether there are alternative positions available for staff within its wider group;
- employees have been allowed time off prior to dismissal to seek alternative employment;
- employees have been consulted about the redundancies before they take effect (see further below); and
- the employer has followed the statutory dispute resolution procedures.

The Tribunal may also increase or decrease an award of compensation if it considers it “just and equitable” to do, and will take into factors such as the extent to which the employee contributed to his or her own dismissal, and the extent to which the employee should have mitigated his or her loss by finding alternative employment.

Taxation of termination payments

Statutory redundancy payments are payable free of tax by law.

Payments of salary made to an employee during his notice period are taxed in full.

Payments in lieu of notice pursuant to a contractual payment in lieu of notice clause are taxed in full. If the contracts of employment of staff do not contain such contractual payment in lieu of notice clauses then the payments may be made free of tax up to £30,000.

Payments made under terminal bonus schemes and loyalty bonus schemes will be taxed in full. “Ex gratia” payments, not falling within the above categories, made in consideration of

the termination of an office or employment can be paid tax free up to £30,000 per employee. In certain circumstances, this concession may also extend to payments made under contractual or ad hoc redundancy schemes. The £30,000 limit includes payments made in lieu of notice but not pursuant to a contractual payment in lieu of notice clause as above.

Settlement of claims

If an employer considers that there is a risk that unfair dismissal claims may be brought, it may wish to enter into binding compromise agreements with employees. Compromise agreements will only be binding if the employee has received independent legal advice in relation to his dismissal and the effect of the compromise agreement on his statutory rights.

In view of the additional time and expense of this (employers are expected – but not obliged – to make a contribution to employees’ costs of taking independent legal advice), it may not be practicable to require all staff to enter into binding compromise agreements. If it does not require signed compromise agreements, the employer should ensure that it adopts a fair procedure in relation to the proposed redundancies as a means of avoiding unfair dismissal claims. Proper consultation (see below) is essential if unfair dismissal claims are to be avoided.

PART II

General Procedure

Once the business decision on the necessity of implementing redundancies has been made, the employer should consider and undertake as necessary the following action (although not necessarily in this order):

- Decide on the number of employees to be made redundant.
- Consider whether alternative jobs are available within the organisation. If necessary, consider retraining employees for those jobs.
- Inform employees as soon as possible of their impending redundancies and consult with the employees in relation to the proposals.
- Allow employees who do not wish to move, or where applications are unsuccessful, time off to look for other employment.
- Deal with applications for new positions, if any.

PART III

Statutory dispute resolution procedure

It is currently necessary to follow a statutory “three step” procedure before dismissing an employee in all but limited circumstances. This is known as a “statutory dispute resolution procedure” or “statutory dismissal procedure” (but is commonly abbreviated to “SDP”).

It is not necessary to follow an SDP in a collective redundancy situation (the relevant procedural requirements in this context are set out below). Employers commonly decide, however, that they will follow an SDP in the interests of fairness and best practice.

See Macfarlanes’ separate practice note entitled “Statutory Disciplinary and Grievance Procedures” for further information on the statutory dispute resolution procedure requirements.

Consultation on collective redundancies

UK legislation provides that if an employer is proposing to dismiss as redundant 20 or

more employees at one establishment within 90 days, it must consult with “appropriate representatives” of the affected employees.

If 20 or more redundancies are proposed from the same establishment within a period of 90 days, it is very important that collective consultation is commenced with elected representatives of the affected employees.

The purpose of consultation

Consultation should be about ways of avoiding the dismissals or reducing the numbers to be dismissed and mitigating the effects of the dismissals. This could include any of the following:

- the cessation of recruitment of new employees;
- the transfer of potential redundant staff within the employer’s group of companies; and
- sharing workload by eliminating overtime.

The consultation process must not be a sham exercise and the employer must properly and genuinely consider the views of the employee representatives. However, the employer is not obliged to adopt any or all of the proposals made by them.

UK Courts have interpreted fair consultation to mean:

- consultation when the proposals are still at a formative stage - it is important that the employer begins consultation before giving individual notices of redundancy or before making public announcements of redundancies;
- adequate information being given to the employees’ representatives on which to respond;
- adequate time for the employees’

representatives to respond; and

- conscientious consideration by the employer of the response to consultation.
- If the appropriate representatives feel that there has been no or insufficient consultation, there is a risk that it may encourage employees to take industrial action.

Timing for consultation

By statute, consultation must begin “in good time” and, in any event:

- at least 30 days prior to the date the first dismissal takes effect where the employer is proposing to dismiss between 20 and 99 employees; and
- at least 90 days prior to the date the first dismissal takes effect where 100 or more dismissals are proposed.

Notification to the Secretary of State

An employer is obliged to notify the Secretary of State in advance of collective redundancies. This is a simple form filling exercise and the consent of the Secretary of State is not required. If more than 100 redundancies are proposed, the Form must be submitted at least 90 days in advance of the dismissals. Where between 20 and 99 redundancies are proposed, the Form must be submitted at least 30 days before the first dismissal. A copy of the form should also be sent to employees’ representatives.

It is, strictly, a criminal offence not to submit the form (although the Department for BERR (formerly the DTI) has not been vigorous in pursuing offenders).

Appropriate representatives of the affected employees

The employer is obliged to consult “appropriate representatives” of all those employees who are to be dismissed.

Appropriate representatives of these employees are either:

- trade union representatives, where a union is recognised in relation to the affected employees; or
- if no union is recognised, employee representatives elected by the affected employees specifically for the purpose and who have the authority of the relevant employees to negotiate on their behalf.

If some (but not all) of the employees are represented by a union, non-unionised employees should be invited to elect a representative.

The legislation sets out the requirements for the election of representatives. In summary, the ballot must be conducted secretly, fairly and so as to ensure that enough candidates are elected to properly represent each “interests group” identified amongst the employees. For example, “accounts staff” may count as one “interest group” and “administrative support staff” may count as another.

Where a union is not recognised by an employer there is no obligation to consult with its representatives, even if the recognition process is underway. This means that, unless the recognition process is completed before the consultation is completed, there is no requirement to consult the union.

Disclosure to the appropriate representatives

Before consultation commences, the following information must be disclosed in writing to the employee representatives:

- the reasons for its redundancy proposals;

- the number and description of employees whom are to be dismissed as redundant;
- the total number of employees of any such description employed at the establishment in question;
- the proposed method of selection for the employees to be dismissed;
- the proposed method for carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect; and
- the proposed method of calculating the amount of any redundancy payments to be made.

Ideally, all of the above information should be presented to the employee representatives in one document - they should not have to search for the information required. It is important that the representatives have a fair and proper opportunity to consider and understand fully the proposals before making proposals of their own.

Failure to consult

If there is no (or no proper) consultation, the employees or their representatives may bring claims for compensation before the Employment Tribunal. The Tribunal may make such awards (known as “protective awards”) as it considers just and equitable up to a maximum of 90 days’ pay per employee.

Selection Criteria

If only some of the employees are to be dismissed, it is very important that those employees are fairly selected. Before deciding on the selection criteria to be applied, the relevant pool from which the potentially redundant staff are to be drawn must be identified. For example, if you need to make three secretaries redundant and there are twelve secretaries in the business as a whole, you should select the three individuals from the pool of twelve. If you wish to make an IT administrator redundant,

and the business only has one IT administrator, then clearly there is no need for selection from a choice of employees.

Suitable alternative employment

Employers are obliged to consider whether employees selected for redundancy can be offered suitable alternative work. This search should extend throughout other group companies or locations (where appropriate).

Appeals

Employees should be given the opportunity to appeal against their selection for redundancy, within a limited period after notification of their selection.

Timing of dismissals

Employees should not be dismissed or given notice of dismissal until after consultation has taken place. Appeals may not be heard until after notice has been given, but with the proviso that the notice can and should be withdrawn if the appeal is successful.

If employees are dismissed immediately following the consultation period (e.g. by making a payment to them in lieu of notice), employees may still be able to recover unfair dismissal compensation. Such claims would be on the basis that they had not, for example, received sufficient notice of termination of employment to allow them to look for alternative employment.

Contact details

If you would like any further information or specific advice please contact your usual Macfarlanes contact, or **Seán Lavin**
DD 020 7849 2695
sean.lavin@macfarlanes.com

This note is intended to provide general information about some recent and anticipated developments which may be of interest. It is not intended to be comprehensive nor to provide any specific legal advice and should not be acted or relied upon as doing so. Professional advice appropriate to the specific situation should always be obtained.

Macfarlanes LLP is not authorised under the Financial Services and Markets Act 2000, but it is able in certain circumstances to offer a limited range of investment services to clients because it is regulated by the Solicitors Regulation Authority. It can provide these investment services if they are an incidental part of the professional services it has been engaged to provide.

October 2008

Macfarlanes LLP 20 Cursitor Street London EC4A 1LT
T +44 (0)20 7831 9222 F +44 (0)20 7831 9607 DX 138 Chancery Lane www.macfarlanes.com

Macfarlanes LLP is a limited liability partnership registered in England with number OC334406. It is regulated by the Solicitors Regulation Authority. Its registered office and principal place of business are at 20 Cursitor Street, London EC4A 1LT.

The word ‘partner’ is used to refer to a member of Macfarlanes LLP. A list of members is open for inspection at the above address.

© Macfarlanes LLP 2008