REDUNDANCY AND COLLECTIVE CONSULTATION

ELA INTRODUCTION TO EMPLOYMENT LAW

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1 REDUNDANCY AS A POTENTIALLY FAIR REASON FOR DISMISSAL

Redundancy is one of the five potentially fair reasons for dismissal (s.98(2)(c) of the Employment Rights Act 1996 ("ERA 1996")).

For unfair dismissal purposes, an employee will be treated as dismissed for redundancy if the statutory definition of redundancy set out in s.139(1) of the ERA 1996 is satisfied. The statutory definition covers three specific situations:

(a) the closure of a business;

(b) the closure of a particular place of work; and

(c) a diminishing need for employees to carry out work of a particular kind.

A dismissal will not be for redundancy unless it falls within one of these three situations.

To bring a claim of unfair dismissal, an individual must be an employee, i.e. work under a contract of employment, and must have at least two years' continuous employment at the date of termination of their contract of employment (except where the dismissal is for one of the prescribed reasons where there is no qualifying period of service – discussed in greater detail below).

The burden of proof is on the employer to establish that the reason for dismissal was redundancy. Once that has been established, the tribunal will consider whether the employer acted reasonably in treating that reason as a sufficient reason to dismiss the employee, having regard to equity and the substantial merits of the case. Carrying out a fair procedure is crucial if an employer wishes to avoid a finding of unfair dismissal.

2 DEFINITION OF 'REDUNDANCY' AND THREE REDUNDANCY SITUATIONS

Definition of redundancy

Section 139(1) provides that: 'an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:

(a) the fact that his employer has ceased or intends to cease:

(i) to carry on the business for the purposes of which the employee was employed by him; or

(ii) to carry on that business in the place where the employee was so employed; or

(b) the fact that the requirements of that business:

(i) for employees to carry out work of a particular kind; or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer;

have ceased or diminished or are expected to cease or diminish.'

2.1 **The closure of a business**

There will be a redundancy situation if an employer ceases, or intends to cease, to carry on the business for the purposes of which an employee was employed. In practice, this is one of the easiest types of redundancy situation to identify. An example would be an employer that decides to close down its entire manufacturing business because it is not economically viable and dismisses all the employees because of this.

The word 'ceased' may include a temporary cessation of a business as well as a permanent closure. Whether a temporary cessation amounts to a 'cessation' of the business for redundancy purposes will be a question of fact for a tribunal.

2.2 **The closure of a particular place of work**

If an employer closes down the place of work where an employee is employed to work, this will also amount to a redundancy situation.

Usually it is obvious where an employee is employed to work, but what if the employee's contract of employment contains a mobility clause that allows an employer to change the employee's place of work? Can an employer rely on the mere existence of such a mobility clause to avoid a redundancy situation? The short answer is no. According to the Court of Appeal in ***High Table Ltd v Horst & Ors*** [1997] IRLR 513, an employee's place of work is the place at which the employee is in fact employed to work before their dismissal and not the place or places where the employer could lawfully require the employee to work under their contract of employment. If, however, an employee's work requires them to work from different places, the terms of any mobility clause may be useful in determining the place where the employee is in fact employed.

This approach was followed by the EAT in ***EXOL Lubricants Ltd v Birch*** (UKEAT/0219/14), in which it said that in cases of mobile employees (e.g. delivery drivers) it is appropriate to consider the contract of employment and, depending on the facts of the case, any connection the employee may have with a particular depot, head office, etc.

Can an employer invoke a contractual mobility clause to avoid dismissing an employee as redundant? Potentially, yes. In ***Home Office v Evans*** [2008] IRLR 59, the Court of Appeal confirmed that an employer can invoke a mobility clause when a redundancy situation arises or might arise, e.g. because of the closure of part of a business, thus avoiding a redundancy

dismissal. In such circumstances, the employer is not proposing to dismiss the employee by reason of redundancy and accordingly no right to a statutory redundancy payment arises. An employer must, however, make it clear to employees at the outset that it is invoking the mobility clause and that it is not invoking the redundancy procedure. It cannot start with redundancy and then subsequently seek to force the employees to move under a mobility clause. It must also ensure (i) the wording of the mobility clause allows it to move the employee; and (ii) it exercises the clause reasonably to ensure it does not breach the implied term of trust and confidence.

This issue came up in ***Kellogg Brown & Root (UK) Ltd v Fitton (1)*** **and** ***Ewer*** **(2)** (UKEAT/0205/16 and UKEAT/0206/16). Here the EAT held that a tribunal had erred in concluding that the employees had been dismissed by reason of redundancy.

F and E were employed at KBR's site in Greenford, Middlesex. KBR decided to close this site and it instructed F and E to transfer to its other site in Leatherhead, Surrey, in accordance with the terms of the mobility clause in their contracts of employment. F and E refused to transfer, as this would mean they had to travel for an extra 20 to 30 miles per day. F and E were subsequently dismissed by KBR for refusing to relocate. They both brought claims for unfair dismissal and statutory redundancy payments.

The employment tribunal held that the dismissals were unfair. It held that the dismissals were by reason of redundancy, as Greenford was the employees' place of work and KBR had ceased carrying on business there. The EAT agreed that the dismissals were unfair, but said that the reason for dismissal was misconduct, namely the employees' failure to comply with the instruction to transfer and not redundancy. This meant there was no redundancy dismissal and no entitlement to a statutory redundancy payment.

2.3 Diminishing need for employees

This is often the most problematic of the three different types of redundancy situation. For many years there was a big debate about whether tribunals should look at the work that an employee actually did (the "function test") or the work that an employee could be required to do under their contract of employment (the "contract test") to determine whether there was a diminution in the need for employees to carry out work of a particular kind.

The leading case is ***Safeway Stores v Burrell*** [1997] IRLR 200, in which the EAT set out the following three-stage test for determining whether there has been a diminution in the need for employees to carry out work of a particular kind:

(a) Was the employee dismissed?

(b) If yes, had the requirements of the employer's business for employees who undertook work of a particular kind reduced, or was this likely to be so?

(c) If yes, was the dismissal as a result of the reduction?

This approach was endorsed in ***Murray & Anor v Foyle Meats Ltd*** [1999] IRLR 562, in which the House of Lords confirmed that it is not necessary for tribunals to look at what employees can or cannot be required to do under their contracts of employment. They should simply focus on whether any dismissal was attributable to a diminution in the employer's need for employees to do work of a particular kind.

Some practical examples

Example One

We propose to dismiss two of our employees because independent contractors can do their work more efficiently. Will this amount to a redundancy situation?

Potentially yes, because an employer only has to show that its requirement for employees to do work of a particular kind has ceased or diminished or is likely to cease or diminish.

Employers, however, need to be aware that the use of contractors could amount to a TUPE transfer, which would be covered by the TUPE Regulations, in which case there might not be a redundancy situation.

Example Two

We have the same amount of work in our accounting function, but we think that it could be done by employees who are less qualified (and ultimately cheaper) than our existing employees. Will this amount to a redundancy situation?

On the face of it no, because the employer's requirement for employees to do work of a particular kind i.e. in the accountancy function has not ceased or diminished. The employer simply requires a different type of employee to do the work.

In ***Pillinger v Manchester Area Health Authority*** [1979] IRLR 430, Mr Pillinger was a scientific research officer who was dismissed because a scientist of a lower grade could do his work. The EAT held this was not a redundancy situation.

Example Three

The employees in our credit control department currently deal with chasing up late payments. We would also like them to do some invoicing work in addition to their credit control duties. If we ended up dismissing the employees because they would not agree to a change in their terms and conditions, would this amount to a redundancy situation?

The question is whether the employer's requirement for employees to carry out credit control work has ceased or diminished or is likely to cease or diminish – on the face of it, no.

In ***Shawkat v Nottingham City Hospital NHS Trust*** [2001] IRLR 555, the Court of Appeal had to consider whether a doctor was redundant when his employer sought to require him to carry out cardiac work in addition to thoracic work following the merger of the thoracic and cardiac department. Dr Shawkat was dismissed following his refusal to agree to a change in his terms and conditions of employment, whereby he would be required to do cardiac work as well as thoracic work. He brought a claim in the tribunal claiming he had been unfairly dismissed and that the reason for his dismissal was redundancy. The tribunal dismissed his complaint on the basis that there was no diminution in the requirement for employees to carry out work of a particular kind.

Points to watch out for

(a) **Restructuring**

In practice, difficulties often arise when there is a business reorganisation/restructuring exercise and there is a reallocation of duties or there is the same amount of work, but an employer wishes it to be carried out on different terms and conditions or by different types of employee. A question may then arise as to whether there is a redundancy situation. If an employer is undertaking a reorganisation that falls outside the statutory definition of redundancy, it may be able to rely on 'some other substantial reason' to justify any dismissals resulting from that reorganisation. Employers should be particularly careful when dealing with the following situations:

(i) **The same work done under different terms and conditions**

The courts have confirmed that work and the requirement for employees to do it do not change simply because the work is carried out on different terms and conditions (see ***Shawkat*** above).

(ii) **The same work done by different types of employee**

As set out above, the fact that an employer simply requires a different type of employee to do the work does not mean there is a redundancy situation (see ***Pillinger*** above).

(iii) **The work changes, but remains work of the same particular kind**

There will be no redundancy situation if the new work is of the same kind as the old work. If the new work is of a different kind, there will be a redundancy situation. It should be remembered that an offer of different work may be an offer of suitable alternative employment and if the employee unreasonably refuses to take up the offer, they will not be entitled to a statutory redundancy payment.

(b) **Fixed-term contracts**

Employers should ensure they are not caught out by the expiry of fixed-term contracts. The expiry and non-renewal of a fixed-term contract may constitute a dismissal by reason of redundancy if the reason for not renewing the contract is a reduction in the need for employees to carry out work of a particular kind.

(c) **TUPE transfers**

Employers need to be careful when making redundancies in the context of a TUPE transfer as different rules apply. Where the transfer is the sole or principal reason for the dismissal, it will be automatically unfair. This will not be the case where there

is an economic, technical or organisational reason entailing changes in the workforce (an "ETO reason").

(d) **Bumping**

Sometimes, where an employee's job becomes redundant, another employee will be dismissed in order to make way for them. This is known as "bumping". It is clear from the case law that this can be a dismissal for redundancy even though there has been no diminution in the need for employees to carry out the work done by the employee who is actually dismissed. Bumping is considered in greater detail below.

3 INDIVIDUAL VS COLLECTIVE REDUNDANCY PROCESSES

In small-scale redundancy exercises (where an employer is proposing to dismiss fewer than 20 employees), an employer is required to follow a fair process when handling any redundancies. Individual consultation is required irrespective of how many employees an employer is proposing to dismiss as redundant.

The Acas Code of Practice on Disciplinary and Grievance Procedures does not apply to redundancy dismissals. An unreasonable failure to comply with the Code will not therefore result in a potential uplift in compensation. Note, however, that the Code may apply and an uplift may be awarded if a tribunal finds that the redundancy dismissal was a sham (see ***Rentplus UK Ltd v Coulson*** [2022] EAT 81).

Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, an employer is also obliged to comply with its collective consultation obligations (discussed in detail below). An employer is still obliged to follow a fair process when implementing any individual redundancies. Collective consultation is not a substitute for individual consultation.

Acas has produced a number of useful guides on redundancy, which employers should consider reading prior to commencing any redundancy exercise.

4 OVERVIEW OF AN INDIVIDUAL REDUNDANCY PROCESS

As set out above, redundancy is a potentially fair reason for dismissal, but it is critical that an employer carries out a fair process if it wants to avoid a finding of unfair dismissal.

4.1 Selection

Carrying out a proper selection process is crucial if an employer wishes to avoid an unfair dismissal.

When selecting employees for redundancy, employers should ensure that:

(a) the "pool" for selection is identified correctly;

(b) the selection criteria used are, as far as possible, objective; and

(c) the selection criteria are applied fairly.

4.2 **The pool for selection**

The first thing employers need to do is to consider the "pool" of employees from which those who will be made redundant will be selected. If employers dismiss employees without considering this issue, any subsequent dismissal will more than likely be unfair. Clearly, if an employer is closing down its business or a particular place of work, the issue of the "pool" for selection will not usually arise since all the employees will potentially be redundant, unless alternative employment can be found.

This is not always a straightforward exercise and in selecting the "pool" employers should consider the following points:

(a) Is there any agreed procedure/arrangement in place governing which employees should be included in the pool? For example, is there an agreement with the union? If so, employers should usually adopt this procedure unless they can show it was reasonable for them not to have done so. If employers recognise a union or elected employee representatives, they should in any event consider consulting with them with regard to the appropriate pool.

(b) The type of work that the employees carry out. If employees do jobs that are interchangeable or do the same or similar work, employers should consider widening the pool to include such employees.

If an employer genuinely applies its mind to the issue of the correct pool for selection and acts reasonably in deciding what the pool should be, an employment tribunal will not usually interfere with its decision (***Taymech Ltd v Ryan*** (UKEAT/663/94) and ***Samels v University of Creative Arts*** [2012] EWCA Civ 1152). A tribunal will judge an employer's choice of pool by asking whether it fell within the range of reasonable responses open to an employer in the circumstances. This means that employers have a certain amount of flexibility and a given set of circumstances may give rise to a variety of different permissible pools. A narrow pool is more likely to be challenged by an employee whereas a wider pool is likely to result in a more lengthy selection exercise.

Some case law examples

In ***Capita Hartshead Ltd v Byard*** [2012] IRLR 814, Ms Byard was one of four pension scheme actuaries, all of whom managed a number of pension funds. Ms Byard had lost a number of her clients. The company therefore decided that a pool consisting of just Ms Byard was "feasible and responsible" in the circumstances. She was made redundant and brought a claim of unfair dismissal. The EAT upheld the tribunal's decision that limiting the pool to just one was not reasonable in the circumstances and the other actuaries should have been included.

In ***Contract Bottling Ltd v Cave & anor*** (UKEAT/0525/12), the company put its entire administrative staff into the same selection pool irrespective of their different functions and the fact they worked in different departments. The EAT upheld the tribunal's decision that the two resulting dismissals were unfair. It commented that the choice of selection pool was "rather surprising".

In ***Mogane v Bradford Teaching Hospitals NHS Foundation Trust & Anor*** [2022] EAT 139, the EAT held that an employee was unfairly dismissed where the employer's sole criterion for selection, which was adopted without prior consultation, was that her fixed-term contract was due to expire before that of her colleague. It said that whilst a pool of one can be fair in appropriate circumstances, it should not be considered, without prior consultation, where there is more than one employee.

4.3 **Volunteers**

Employers are not under a statutory obligation to seek volunteers for redundancy, but it is good practice to do so and it will help in establishing reasonableness.

Employers often offer enhanced redundancy payments as an incentive for employees to volunteer for redundancy. If employers seek volunteers, it is important they reserve the right to turn down particular requests, or else it might lead to an imbalance in the workforce or a loss of employees with particular skills and experience.

If an employee volunteers for redundancy, this will still constitute a dismissal by reason of redundancy. In ***White v HC-ONE Oval Ltd*** [2022] EAT 56, the EAT held that an employment tribunal had erred when it concluded that an unfair dismissal claim had no reasonable prospect of success because the claimant had volunteered for redundancy.

4.4 **Bumping**

Is an employer under an obligation to consider "bumping"?

Whilst an employer is not under an absolute obligation to "bump", it may be unfair not to consider bumping. This issue came up in ***Mirab v Mentor Graphics (UK) Limited*** (UKEAT/0172/17). In brief, Dr Mirab held a stand-alone sales director role, which Mentor decided it no longer needed. This followed earlier discussions about Mirab's responsibilities and departmental structure in which he had kicked against any implied demotion to account manager, claiming (probably rightly) that it would entitle him to claim constructive dismissal.

When it came to the proposed redundancy, Mirab made brief reference in his consultation meeting to dismissing the account manager instead. It was not clear whether that was with a view to his taking up that role, or simply because the savings from losing the account manager would enable Mentor to retain him as sales director. Mentor read his reference as the latter. On that basis, plus Mirab's strong earlier resistance to becoming account manager and the absence of any account manager vacancy, Mentor did not consider whether the account manager should be bumped out. The employment tribunal found Mirab's dismissal fair, but the EAT was not convinced. In particular, it noted:

(a) consideration of bumping is just one ingredient to go into the pot to determine overall fairness, but is not determinative of that question by its presence or absence;

(b) there is no general rule that an employer is obliged to consider bumping on a pro-active basis, i.e. without the employee even raising it;

(c) Mirab's earlier resistance to a move to account manager was relevant to whether Mentor was reasonable not to look at bumping, but not determinative of it – much as when considering alternative vacancies in a redundancy situation, a more junior replacement role may not be something the employee would consider in the ordinary course, but they may become more flexible once confronted with the option of losing their employment altogether.

If an employee expressly raises the suggestion of bouncing out someone else in order to keep their job, the employer should be seen to consider that suggestion. However, because there is no positive obligation to bump, that consideration can literally be the work of minutes only – is there any pressing reason why it would be in our best interests to retain A or B at the expense of C?

From a practical point of view, when selecting employees for redundancy, employers should consider whether the employee in question could be offered an alternative position even if it is subordinate or if it means dismissing another employee. This issue is most likely to be relevant when dealing with small-scale redundancies.

4.5 **The selection criteria**

Having identified the "pool" for selection, employers then need to consider the selection criteria to be applied. In doing so, employers need to ensure the criteria are, as far as possible, objective and they are applied fairly. Selection criteria that involve an element of personal judgement may be appropriate if they can be applied in an objective manner.

In ***Williams & Ors v Compair Maxam Ltd*** [1982] IRLR 83, the EAT said that an employer should seek to establish selection criteria which do not depend solely upon the opinion of the person who is selecting employees for redundancy, but which can be checked objectively against such things as attendance records, efficiency at the job, experience or length of service. In this case, the EAT also suggested that where there is a recognised trade union (and presumably if there are also elected employee representatives), selection criteria should be drawn up in consultation and, if possible, by agreement with that union.

It is not possible to draw up a definitive list of selection criteria that an employer should always use and that are guaranteed to be fair, as the facts of each case will obviously differ. The selection criteria used will depend on the individual employer's needs or arrangements. It is important that managers adopt a consistent approach and have clear rules about what can and cannot be taken into consideration. We set out below some of the most commonly used criteria:

(a) **Skills and knowledge:** It is of course reasonable for an employer to take into account an employee's skills and knowledge in a selection exercise. Employers should be careful to ensure that such skills are assessed objectively and should avoid tests such as an employee's "attitude", as such subjective tests are difficult to measure.

(b) **Attendance records:** Whilst employers can use an employee's attendance record as a criterion for selection, they need to be careful about the period over which attendance is reviewed and the reasons for the absence. Employers should, for example, exclude any absences due to pregnancy-related sickness to avoid the risk of any discrimination claims. Employers should also be aware of the potential risk of a disability discrimination claim if absences are for a disability-related reason. Whilst it is clearly appropriate for an employer to use criteria that match the needs of the

business and ensure that those who are best able to do the job are retained, an employer should be aware that it might be necessary to adjust those criteria if the employees involved have a disability. In ***Dominique v Toll Global Forwarding Ltd*** (UKEAT/0308/13), for example, the EAT held that the employer should have made reasonable adjustments to its selection criteria to take account of an employee's disability even though if it had done this the employee would still have been made redundant.

(c) **Disciplinary records:** An employee's disciplinary record may be taken into account in the selection process. Again, employers should consider the period over which disciplinary records are to be assessed. It is good practice to only take into account unexpired warnings. One way of doing this is to give points on a score of 1 to 5 depending on the seriousness of the warning.

What about "last in, first out"? Historically, it was common practice to include length of service as one criterion. As its inclusion can, however, lead to claims of indirect age and sex discrimination, it now tends to only be used in a tiebreak situation, if at all. In ***Rolls Royce Plc v Unite*** [2009] IRLR 576, the Court of Appeal held that using length of service in a redundancy selection matrix was lawful. While it constituted indirect age discrimination, it was objectively justified. There were two legitimate aims: the maintenance of a stable workforce during a redundancy exercise, and the rewarding of loyalty. The means of achieving that were proportionate in that length of service was one of many criteria used, it was consistent with the overarching concept of fairness, and younger employees accepted it.

The ERA 1996 contains a lengthy list of grounds on which selection for redundancy will be automatically unfair. In such circumstances, employees do not have to have a qualifying period of service to bring an unfair dismissal claim, e.g. selection for redundancy connected to pregnancy, childbirth, asserting a statutory right, whistleblowing, etc.

If an employer's selection criteria discriminate on the grounds of race, sex, disability, etc., it will potentially face discrimination claims as well as claims for unfair dismissal. Employers also need to be careful not to discriminate against part-time or fixed-term employees. The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 provide that it is unlawful to treat a fixed-term employee less favourably than a comparable permanent employee, unless the treatment can be objectively justified. An employer should not therefore select a fixed-term employee for redundancy simply because they are on a fixed-term contract, as this will constitute less favourable treatment and would not be justifiable.

The safest way to avoid discrimination claims is to use objective and job-related selection criteria. It is also good practice for more than one person to be involved in the selection process to reduce the risk of possible bias/discrimination. It is sensible to have, say, two people carry out the assessment, both of whom have knowledge of the individual employee concerned. One way this can be done is for each person to carry out their own assessment and then discuss the outcome of their assessments before giving the individual a final mark. Those individuals carrying out the scoring should be given training/guidance on how to do this.

Best practice generally is to use a matrix, which is in effect a score sheet that attaches a certain weight and score to each criterion, giving each employee being considered for redundancy a final score on which the decision for redundancy is based. When all the scores have been worked out, those employees with the lowest scores will be the ones who are provisionally selected for redundancy.

It is not enough that an employer uses objective selection criteria if it then fails to apply them fairly. The inappropriate application of otherwise fair selection criteria is enough to make a dismissal unfair.

Many employers get nervous when carrying out redundancy exercises if the selection pool includes a woman who is pregnant or on maternity leave. The risk of her bringing a discrimination claim as well as an unfair dismissal claim if made redundant is often on their mind. Acas has published a useful guide entitled "Managing redundancy for pregnant employees or those on maternity leave", which contains practical tips and a handy checklist for employers facing this situation.

As a general rule, the safest approach when measuring the performance of an employee who is on maternity leave is to carry out an assessment based on an extrapolation from her actual performance. If, for example, one of the selection criteria is the employee's ability to hit her sales targets and, prior to going on maternity leave, the employee has always hit her sales figures then she should be treated as if she had met her sales figures during the relevant period. As a minimum, any departure from the performance assessment of the prior year will need a good explanation. A failure to act fairly could expose the employer to a claim.

Employers need to be aware that they could face claims from men if they feel they have been treated less favourably than a woman on maternity leave. In ***Eversheds Legal Services Ltd v De Belin*** [2011] IRLR 448, the EAT upheld a claim of sex discrimination brought by a male employee who was made redundant after his employer inflated the score of his colleague who was on maternity leave.

Points to consider

Picture the scene – an employer decides to restructure its business, as a result of which two roles are identified as redundant. Both employees are put at risk of redundancy and given the opportunity to apply for the one role that will be created in the new structure. Both are quite capable of carrying out the new role. Whom should the employer pick and what process is it required to follow in making that decision (bearing in mind that the unsuccessful applicant will lose their job)?

This issue was considered by the EAT in ***Morgan v The Welsh Rugby Union*** [2011] IRLR 376. The WRU decided to restructure its coaching department and create the single post of National Coach Development Manager. It put together a job description and interview plan for the new role and invited Mr Morgan and two other candidates to interview. When Mr Morgan was turned down for it and then made redundant he brought an unfair dismissal complaint, claiming that the decision-making process lacked the objectivity and fairness appropriate to a redundancy dismissal. He pointed out in particular that the successful candidate had not satisfied the criteria set out in the job description for the new role and that the interview panel had dropped the ball in not sticking to the job description or the agreed format for the interview. The WRU accepted that it had not done either of these things, but maintained that it had nonetheless followed a fair procedure. Whilst both main candidates were capable of doing the new role, Mr Morgan was simply not the better of the two.

The EAT upheld the tribunal's decision that Mr Morgan's dismissal was fair. It said the normal rules on selecting employees for redundancy do not apply when selecting potentially redundant employees for alternative employment. In its view, the latter is more

akin to a recruitment process and, as such, employers have more flexibility as to how and whom they pick. The EAT pointed out that if the WRU had been recruiting externally for the new role, it would not (absent a claim of discrimination at least) have been bound by a job description or a person specification. Further, if an outstanding candidate had emerged who did not meet some aspect of the person specification, it would still have been entitled to appoint them.

The EAT's observations give employers a clearer idea of what they are able to do when selecting employees for alternative roles. It means that employers are not bound by objective selection criteria, as they would be if selecting which of two or more employees to make redundant. This is not to say that employers can adopt an entirely subjective approach. Previous case law makes it clear that the selection process must meet some criteria of fairness, as ultimately the selection for alternative employment is determinative of who is made redundant. Any appointment process should be sufficiently objective to avoid a decision which might be seen as capricious, discriminatory or arising out of favouritism and that makes it advisable to try and stick to any job description as much as possible. To do otherwise is simply inviting any unsuccessful candidates to challenge the fairness of the decision or to argue that the decision was discriminatory.

Does this mean that if an employer wishes to reduce the number of employees carrying out a particular role from five to two, it could sidestep the normal selection process, put them all at risk and then get them to reapply for their old jobs, albeit fewer of them? No – this rule will only apply where new or different roles are being created, where the employer can legitimately argue that it is entitled to take a more forward-looking approach, focusing upon the candidate's ability to perform the new role.

Note, however, that in ***Green v London Borough of Barking and Dagenham*** (UKEAT/0157/16), the EAT said that the Morgan case does not establish a general proposition of law and that the overriding test is still whether the employer has acted reasonably within the meaning of section 98(4) of the ERA.

4.6 **Individual consultation**

Individual consultation is essential because if an employer does not carry out such consultation any subsequent dismissal will almost certainly be unfair.

In ***Warner v Adnet Ltd*** [1998] IRLR 394, the Court of Appeal said that tribunals should "*scrutinise with the greatest care*" any case in which an employer makes a dismissal without consultation, carefully examining excuses such as "*no time to consult*" or "*no point in consulting*".

Individual consultation involves an employer explaining to employees why they have been provisionally selected for redundancy, the basis on which they have been provisionally selected for redundancy and giving them the opportunity to express their views, to raise any questions they may have and to discuss and/or identify any alternatives to redundancy.

Consultation does not mean an employer has to agree with what the employee says. It simply means considering what the employee has to say and not simply dismissing it out of hand.

It is advisable to have at least two meetings with the employee concerned, so they have an opportunity to go away and consider what has been said at the first meeting and whether or not they have any questions or suggestions before a final decision is taken. The second meeting should obviously be held some time (i.e. usually at least several days) after the first meeting and any points raised by the employee should be considered by the employer. If this means going away and looking into the points raised and then arranging a further meeting to discuss these, this should be done. Employers should be seen to be as helpful as possible during the consultation period. There is no hard and fast rule about how much time there should be between the meetings - the important thing is that the process is genuine and not a sham.

Employers should ensure they do not forget about individuals who are absent from work, e.g. on maternity leave or long-term sick leave. They should be kept informed of the position, receive the same information in writing as any other employees and be actively involved in the redundancy consultation process.

Individual consultation must take place prior to an employee being given notice to terminate by way of redundancy. If an employer serves notice prior to carrying out consultation, there is a strong likelihood the dismissal will be unfair.

It is good practice in any event to keep employees informed and updated to minimise damaging rumours and to give the employer control over what, when and how information is put across. Key employees are far more likely to stay if an environment of trust and openness is fostered.

4.7 **The right to be accompanied**

Under Section 10 of the Employment Relations Act 1999, "workers" have the right to be accompanied by a trade union official or a fellow worker at any disciplinary or grievance hearing.

A "disciplinary hearing" is defined as a hearing that could result in the administration of a formal warning, the taking of some other action or the confirmation of a warning or some other action taken. A "grievance hearing" is defined as a hearing that concerns the performance of a duty by the employer in relation to a worker.

Workers must request to be accompanied at such meetings in order to trigger the statutory right. It is, however, good practice to advise a worker of their right to be accompanied at such meetings.

Is a meeting to inform an employee that they are at risk of redundancy a "disciplinary hearing" within the meaning of the Employment Relations Act 1999? No, according to the EAT in ***Heathmill Multimedia ASP Ltd v Jones & Anor*** [2003] IRLR 856 and ***Taskforce (Finishing & Handling) Ltd v Love*** (EATS/0001/05), but it is nonetheless good practice for employers to give employees the right to be accompanied at such meetings.

4.8 **A right of appeal**

As set out above, the Acas Code of Practice on Disciplinary and Grievance Procedures does not apply to redundancy dismissals.

In ***Gwynedd Council v Barratt & Anor*** [2021] EWCA Civ 1322, the Court of Appeal held that a redundancy dismissal would not be unfair solely because an employer did not offer an employee a right of appeal. A failure to offer an appeal will, however, be one of the factors to consider when deciding whether a dismissal is fair. The court said that if a redundancy selection process is carried out in accordance with a fair procedure, the absence of a right of appeal is not fatal to an employer's defence of an unfair dismissal claim.

Having said all this, the safest approach is to offer a right of appeal in redundancy situations, not least because it gives employers the opportunity to address any previous defects in the process. The Acas Guide on Managing Staff Redundancies also states that it is good practice to offer employees the chance to appeal.

4.9 Disclosure of selection criteria

It is good practice to inform employees of the selection criteria that have been used and to show them their matrix/ how their scores have been reached. This allows employees to see how the employer has come to the decision to select them provisionally for redundancy.

But what if the employee asks to see the scores given to their colleagues in the selection process? Employees do not have a general right to see the scores given to other employees. The key issue is whether the employer can show that the method of selection was fair in general terms and that the criteria have been applied reasonably.

This question was considered in ***Glacier Vanderwell Ltd v Wallace*** *(EAT/1284/99),* in which the EAT confirmed that it was not for a tribunal to rake over the scoring system that had been used in the selection process so as to reopen the question as to how it had been done. It is only in exceptional circumstances that scores given to other employees should be revealed to an employee who has been selected for redundancy.

5 SUITABLE ALTERNATIVE EMPLOYMENT AND TRIAL PERIODS

An employer must take reasonable steps to find alternative employment for employees who may otherwise be dismissed by way of redundancy. A failure to do so could make an otherwise fair dismissal unfair.

What is "reasonable" is ultimately a question that only a tribunal can decide, but it would include, for example, identifying vacancies within the company and inviting the employee to consider them.

An employer should not assume that because an alternative position would involve a reduction in salary, relocation, loss of status, etc. that an employee would not be interested in the position. Employees might be interested in such positions if the only other alternative is redundancy. The safest course of action for an employer is to provide employees with details of all vacant positions to enable them to make a decision.

One question that sometimes comes up is whether an employer is under an obligation to look for alternative employment within other companies in the group or whether the search for alternative employment is limited to positions within the company in which the employee was employed. There is case law to suggest that there may be circumstances in which employers should consider the possibility of alternative employment elsewhere in the group. In ***Vokes Ltd v Bear*** [1973] IRLR 363, the NIRC held that a tribunal had been entitled to conclude that the dismissal was unfair because no

attempt had been made to see if the employee could have been offered a position in one of the 300 other companies in the group.

Since ***Vokes*** there have been a number of decisions in which the EAT has imposed a less onerous obligation on employers. For example, in ***Barratt Construction Limited v Dalrymple*** [1984] IRLR 385, Mr Dalrymple was dismissed from his job as a site agent on the grounds of redundancy. The tribunal held that his dismissal was unfair. One of the factors it took into account when reaching its decision was the fact that since the company was part of a larger group of companies, enquiries should have been made to see whether there was a vacancy for him in any of the other companies. The company appealed against the decision. The EAT allowed the appeal and held that the tribunal had erred in holding that before dismissing the employee, the company should have canvassed the possibility of employing him in other autonomous companies within the group. The EAT held that whilst it was true that a reasonable employer will seek to see whether, instead of dismissing for redundancy, it can offer alternative employment, it is not for an employment tribunal to speculate as to what further steps should be taken and to draw an adverse inference because an employer has not taken them. In this case, the evidence before the tribunal was that efforts had been made to see if alternative employment was available within the company itself.

More recently, in ***Gwynedd Council v Barratt & Anor*** [2021] EWCA Civ 1322, the Court of Appeal referred to the well-known passage in Polkey, which said that employers should take "*such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation*" and then said that an employer's "organisation" includes, in the private sector, associated employers.

If an employee (i) accepts an offer of suitable alternative employment or (ii) unreasonably refuses an offer of suitable alternative employment an employer will not be liable to pay the employee a statutory redundancy payment. This will, however, only be the case where the statutory conditions for an offer and acceptance are met. These are briefly as follows:

(a) The offer must be made and communicated to the employee prior to the end of their current employment.

(b) The alternative job must start no later than four weeks after the end of the old contract.

(c) If the terms and conditions of the new job differ from those of the old job, the employee is entitled to a four-week statutory trial period. Four weeks means four calendar weeks.

5.1 **Statutory trial period**

An employee is entitled to a statutory trial period whenever the terms and conditions of the new contract differ wholly or in part from the terms of the old contract. The trial period may be extended for such period of time as is agreed between the parties but this is for the purposes of retraining only. The purpose of the trial period is to give an employee the chance to decide whether the new job is suitable without necessarily losing the right to a statutory redundancy payment.

If an employee terminates the contract or gives notice to terminate it during the trial period, they are treated as having been dismissed on the date on which the original contract came to an end. Similarly, if the employee is dismissed for a reason relating to the trial period, for example, because a new role is unsuitable, the employee is treated as having been dismissed with effect from the end of the original contract. If the termination is for some other reason,

for example misconduct, the employee may lose their right to a statutory redundancy payment.

There is nothing to stop employers and employees agreeing to enter into a longer trial period, but it is important to remember that if the employee is dismissed or resigns outside the statutory trial period, the employee will not be treated as having been dismissed on the termination of their old contract – and they will not be entitled to a statutory redundancy payment. This could mean you have to start all over again – in terms of a fair process – if you want to dismiss the employee. It also means that if an employee is on trial with another group company that company will have to pick up the tab for getting rid of them if things did not work out during the trial period. This is just something for employers to bear in mind when agreeing to offer longer trial periods.

5.2 **Suitable alternative employment**

It is only where an employee unreasonably refuses an offer of "suitable" alternative employment that they will lose their right to a statutory redundancy payment. The onus is on an employer to show that a job offer was "suitable" and that the employee's refusal was "unreasonable". Whilst suitability is assessed objectively by a tribunal, there is also a subjective element because a tribunal will look at whether the job offer is suitable "in relation to the employee" concerned. In deciding whether suitable alternative employment has been unreasonably refused, tribunals will take into account a number of factors including:

(a) The new terms and conditions of employment e.g. a change in hours of work may render the employment unsuitable or justify the employee in turning it down;

(b) Remuneration;

(c) Status;

(d) Personal reasons may make a refusal reasonable; and

(e) Change of workplace e.g. if the offer would involve the employee having to travel further or move house it may render the offer unsuitable or an employee's refusal reasonable.

Points to watch out for – women on maternity leave

Employees facing redundancy whilst on maternity leave are in a stronger position than their colleagues are. The law makes it quite clear that in such circumstances they are entitled to be offered (as opposed to merely having the opportunity to apply for) alternative employment if there is a "suitable available vacancy". Remember – this obligation currently only arises in connection with employees actually on maternity leave: if the woman has returned to work or not yet gone on leave an employer is not under this strict obligation to offer her any suitable available vacancy in priority to others. It will, however, still be under the normal obligation to take reasonable steps to find her alternative employment. See box below concerning changes to the law that will extend protection for women and new parents in a redundancy situation.

Regulation 10(3) of the Maternity & Parental Leave etc. Regulations 1999 provides that in order to be a suitable available vacancy the work involved in the new job must be suitable and appropriate (Regulation 10(3)(a)) and the terms and conditions, including the place of work, must not be "substantially less favourable" to the particular employee (Regulation 10(3)(b)).

According to the EAT in ***Simpson v Endsleigh Insurance Services Ltd*** (UKEAT/0544/09), whether or not a vacancy is "suitable" will be up to an employer, bearing in mind what it knows about the employee and the role.

Miss Simpson worked as an insurance consultant in London. Whilst she was on maternity leave Endsleigh closed down most of its retail outlets (including where Miss Simpson worked) and relocated the business to call centres in Cheltenham, Burnley and Northern Ireland. It sent Miss Simpson details of alternative vacancies at those other sites and invited her to apply for them if she was interested. She did not do so, but she subsequently brought a claim in the employment tribunal arguing that she should have been offered suitable alternative employment in the Cheltenham call centre and Endsleigh's failure to do so amounted to a breach of Regulation 10 of the Maternity and Parental Leave Regulations 1999, thus making her dismissal automatically unfair.

Endsleigh accepted that it had not actually offered Miss Simpson any roles in the Cheltenham call centre (as opposed to inviting her to apply for them), but argued that it was not under a legal obligation to do so because none of them were in fact "suitable" in the statutory sense. It accepted that one of the roles (insurance consultant) may have satisfied the first limb of the Reg 10(3) test (i.e. the work involved in the post was suitable and appropriate) but argued that it did not satisfy the second limb of the test because the terms and conditions were substantially less favourable to Miss Simpson, as she would have been required to relocate.

The EAT (upholding the decision of the tribunal) confirmed that in order for a job to be a suitable available vacancy under Regulation 10(2), the tests set out in Regulations 10(3)(a) and (b) must both be satisfied. It accepted that Endsleigh was not under an obligation to offer Miss Simpson the insurance consultant role because although the role was essentially the same as her old job it was "substantially less favourable" to her in terms of her place of employment. It was therefore sufficient to invite her to apply rather than offer the role outright.

The EAT said that at the end of the day "it is up to the employer, knowing what it does about the employee, to decide whether or not a vacancy is suitable". Probably easier said than done! It is not always going to be clear whether a vacancy satisfies the test outlined above and must therefore be offered to the affected employee - in this case the fact that the new role was in a different location was sufficient to render it substantially less favourable, but this may not always be the case (for example if the two locations are much closer than London and Cheltenham). Clearly, the safest approach will be to offer the affected employee any vacancies that are likely to satisfy the test. If this is not practicable, an employer should document its reasoning in case its decision is subsequently challenged. Remember – if a vacancy meets the criteria outlined above the employer is obliged to offer it to the woman in question – merely sending her a list of vacancies will not be sufficient.

Also, remember that this duty to offer a suitable available vacancy extends to employees on adoption leave or shared parental leave.

Extending Redundancy Protection for Women and New Parents: The Protection from Redundancy (Pregnancy and Family Leave) Act 2023 gives the government the power to introduce new regulations to provide additional protection from redundancy during or after pregnancy or after periods of maternity, adoption or shared parental leave. The government has said it will extend the current redundancy protection period outlined above to include pregnancy (starting from when the employee informs their employer they are pregnant) and for a period of time after the mother returns to work – expected to be six months. So, a mother returning from 12 months' maternity leave will receive six months' additional protection when she goes back to work. It will also provide the same enhanced protection for those returning from adoption leave and shared parental leave. The precise detail of the new rights will be set out in regulations, which have not yet been published.

5.3 **Other alternatives**

The purpose of any consultation process is to try and identify alternatives to redundancy. Whilst alternative employment may be the most common alternative under consideration, there are other possible options. For example, it may be possible to agree a reduction in wages with employees as an alternative to redundancy. Similarly, a reduction in hours may reduce overheads sufficiently to avoid the need for redundancies.

Some contracts of employment contain a right to lay off employees. Such a provision would allow an employer during a period when no work was available to ask an employee not to attend work and not be in breach of contract. The use of such clauses is limited to a certain extent in that the ERA 1996 provides that an employee has the right to claim a redundancy payment if laid off for a continuous period of four weeks or for six weeks in a thirteen week period. In the absence of a contractual right, an employer should not lay off employees, as this would amount to a fundamental breach of contract and the employer could be faced with a constructive dismissal claim.

5.4 Leaving during the notice period

Sometimes employees who have been given notice to terminate their employment on the grounds of redundancy wish to leave the company before the expiry of their notice period, usually to start a new job. The question then arises whether the employee is still entitled to a statutory redundancy payment. There are only two situations in which an employee who leaves early is entitled to claim a statutory redundancy payment and these are as follows:

(a) where the employee and the employer agree to vary the notice period; or

(b) where the employee complies with the (rather complicated) statutory provisions governing counter-notices.

If an employer agrees (and there must be genuine agreement) to allow the employee to leave early then there will still be a dismissal for the purposes of section 136 of the ERA 1996 and the employee will remain entitled to a statutory redundancy payment.

If, however, the employer does not agree to shorten the notice period then an employee needs to comply with the detailed provisions laid down in the ERA 1996 to maintain their right to claim a statutory redundancy payment. Essentially, this involves the employee serving what is known as a "counter-notice" on the employer within a certain period of time ending on the date of expiry of the employer's notice. This is known as the "obligatory period" of notice and is defined in section 136(4) ERA 1996 as being the period which is equal in length to the statutory notice period or to the employee's contractual notice entitlement, whichever is the longer. If, for example, an employee has six years' continuous employment they will be entitled to a minimum of six weeks' notice under the ERA 1996. If the employer gives six weeks' notice then the "obligatory period" is equivalent to the employee's notice period. If, however, the employer gives 10 weeks' notice, the "obligatory period" is the last six weeks of the ten weeks' notice. It is important that an employee gives their notice within the "obligatory period" or else they will lose their right to a statutory redundancy payment.

To complicate matters further, employers also have the right to serve a counter-notice on employees to require them to work out their full notice period. If the employee complies with the counter-notice, they will continue to work until the employer's original notice expires. If, however, the employee does not comply, they will be treated as if they were dismissed on the date specified in the employee's counter-notice. The employee then has to apply to a tribunal who will consider whether it is just and equitable for the employee to receive a statutory redundancy payment.

Employers would be well advised to seek legal advice in the event that an employee serves a counter-notice, as the provisions are far from straightforward.

6 COMPENSATION AND REDUNDANCY PAYMENTS

6.1 Statutory redundancy pay

Provided certain qualifying conditions are met and none of the exclusions apply, an employer must make a statutory redundancy payment to an employee who is dismissed by reason of redundancy. The key qualifying condition is that an employee must have two years' or more continuous employment.

The amount of any statutory redundancy payment is based on three factors: an employee's age, salary and length of service. Under s.162(2) ERA 1996, the employee is entitled to receive:

(a) half a week's pay for each year of completed employment in which the employee was under the age of 22;

(b) one week's pay for each year of completed employment in which the employee was not below the age of 22; and

(c) one and a half weeks' pay for each year of completed employment in which the employee was not below the age of 41.

One week's pay is currently subject to a maximum of £643 (for the period 6 April 2023 to 5 April 2024).

Employers are required to provide employees with a statement setting out how the amount of statutory redundancy pay has been calculated. A failure to do so is actually a criminal offence.

In order to work out the amount of the payment there is one key date to bear in mind – the "relevant date". This is generally the date on which the notice period expires (where the contract is terminated with notice).

Things become slightly more complicated if an employer makes a payment in lieu of notice. In such circumstances the "relevant date" is the date on which the statutory minimum notice period would have expired had it been given. This is probably best demonstrated by way of an example. Take an employee who has been in employment for 12 years and 10 months. If on 25 June she is dismissed for redundancy with a payment in lieu of notice, the relevant date for calculating her length of service and thus the amount of her statutory redundancy payment is the date on which her statutory notice period would have expired i.e. 12 weeks after 25 June. She will therefore have 13 years' continuous service for the purposes of calculating her statutory redundancy pay entitlement.

This could mean that employees are entitled to slightly more money than the employer first thought – which could be significant in a large-scale redundancy exercise.

6.2 Enhanced redundancy payments

As the amount of any statutory redundancy payment is small, many employers offer enhanced redundancy payments.

There have been a number of cases concerning enhanced redundancy payments, mainly arising out of situations where employers have made enhanced payments in the past and then sought not to do so. If the company has made enhanced redundancy payments in the past this does not necessarily mean it will be obliged to do so again. It depends on whether the company has led employees to believe that they will receive such payments or there is a "custom and practice" of making them. To avoid such payments becoming contractual, employers should ensure they are stated to be discretionary and that no precedent is being set, and ideally vary them from time to time. This should help to minimise the scope for a claim that an employee is entitled to a certain amount by virtue of custom and practice. Also consider making them subject to the completion of a settlement agreement.

The Court of Appeal in ***Park Cakes Ltd v Shumba & Ors*** [2013] EWCA Civ 974 gave guidance on when enhanced redundancy terms will become contractual through custom and practice. It said that the following factors should be considered when determining whether employees are entitled to an enhanced redundancy payment:

(a) On how many occasions and over how long a period, the benefits in question have been paid. Obviously, but subject to the other considerations identified below, the more often enhanced benefits have been paid, and the longer the period over which they have been paid, the more likely it is that employees will reasonably understand them to be being paid as of right.

(b) Whether the benefits are always the same. If while an employer may invariably make enhanced redundancy payments, it nevertheless varies the amounts or the terms of the payment, that is inconsistent with an acknowledgement of legal obligation; if there is a legal right it must in principle be certain. Of course, a late departure from a practice that has already become contractual cannot affect legal rights, but any inconsistency during the period relied on as establishing the custom is likely to be fatal. It is, however, possible that in a particular case the evidence may show that the employer has bound itself to a minimum level of benefit even though it has from time to time paid more on a discretionary basis.

(c) The extent to which the enhanced benefits are publicised generally. Where the availability of enhanced redundancy terms is published to the workforce generally, that will tend to convey that they are paid as a matter of obligation, though much will depend on the circumstances and on how the employer expresses itself. Employment tribunals should be able to judge whether, as a matter of industrial reality, the employer has conducted itself so as to create "widespread knowledge and understanding" on the part of the employees that they are legally entitled to the enhanced benefits.

(d) How the terms are described. If an employer clearly and consistently describes its enhanced redundancy terms in language that makes clear they are offered as a matter of discretion – e.g. by describing them as ex gratia – it is hard to see how the employees or their representatives could reasonably understand them to be contractual, however regularly they may be paid. Conversely, the language of "entitlement" points to legal obligation.

(e) What is said in the express contract. As a matter of ordinary contractual principles no term should be implied, whether by custom or otherwise, which is inconsistent with the express terms of the contract, at least unless an intention to vary can be understood.

(f) Equivocalness. The burden of establishing that a practice has become contractual is on the employee, and he will not be able to discharge it if the employer's practice is, viewed objectively, equally explicable on the basis that it is pursued as a matter of discretion rather than legal obligation.

The decision contained two other pointers for employers seeking to avoid the development of a custom and practice entitlement to enhanced severance terms.

First, the question is not what the employer intended, but what the employee might reasonably perceive it to intend. Therefore, if its choice to pay at a particular level is the

subject of a separate decision-making process each time, it is important that the employees are made aware of this "non-automaticity".

Second, if you are content to pay enhanced figures but only subject to a binding settlement agreement, make this condition clear from the outset, both through notice to the employees and through its invariable application. If you allow exceptions you may find that redundant staff have a right to the redundancy payment even if they then intend to (or do) make further claims against you on top.

When providing a written statement in respect of a contractual redundancy payment, employers should state that the payment is deemed to include the amount of any statutory redundancy payment.

7 UNFAIR/DISCRIMINATORY REDUNDANCY AND POTENTIAL CLAIMS

Employees who have been made redundant may seek to bring a number of claims on termination of their employment. The most likely claims are:

(a) **Unfair dismissal:** As set out above, in order to bring a claim of unfair dismissal an employee must generally have at least two years' continuous employment at the date of termination of their contract of employment. Redundancy is a potentially fair reason for dismissal, but even if a redundancy situation exists, an employer must follow a fair procedure when making the employee redundant if it wants to be able to defend an unfair dismissal claim successfully.

An employee may claim that the dismissal was automatically unfair for one of the automatically unfair reasons set out in ERA 1996. The ERA 1996 contains a lengthy list of grounds on which a dismissal will be automatically unfair (i.e. unfair without any consideration of reasonableness under section 98(4) ERA 1996). These include where the reason for dismissal related to health and safety, making a disclosure, asserting a statutory right, etc. Employers need to be aware that for certain automatically unfair dismissals the statutory limit on compensation for unfair dismissal does not apply and an employee generally does not have to have two years' qualifying service in order to bring a claim.

If the reason for dismissal was redundancy it will still be automatically unfair if the employee was selected for redundancy for one of the automatically unfair reasons. For example, it is automatically unfair to select an employee for redundancy for reasons connected with pregnancy, maternity leave, paternity leave, adoption leave, etc.

A claim must be brought within three months of the effective date of termination (subject to the rules on Acas early conciliation).

An award of compensation is made up of a basic award and a compensatory award. In a standard unfair dismissal case, the basic award is calculated by reference to the employee's age and length of service. Any basic award would be set off against any statutory redundancy payment already paid. The amount of the compensatory award is such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the

dismissal insofar as that loss is attributable to action taken by the employer. There is a cap on the maximum compensatory award that may be awarded, namely the lower of 52 weeks' pay of the person concerned and the overall statutory cap (currently £105,707 – from 6 April 2023 to 5 April 2024).

(b) **Discrimination:** Employees may claim that their dismissal was discriminatory, for example, because of the application of discriminatory selection criteria. In which case, the employee will need to bring a claim under the Equality Act 2010.

There is no qualifying period of service required to bring a discrimination claim. Claims must normally be brought within three months of the alleged act of discrimination (subject to the rules on Acas early conciliation). There is no statutory cap on the amount of compensation that can be awarded by a tribunal in a successful discrimination claim. The amount of compensation to be paid is such sum as would put the claimant in the position he would have been in had the discriminatory act not taken place. Normal principles of mitigation apply. A tribunal can award compensation for loss of earnings (both past and future) and injury to feelings.

8 WHEN THE DUTY TO CONSULT ON COLLECTIVE REDUNDANCIES ARISES

In certain circumstances where employers are making redundancies, they are obliged to carry out consultation with trade union or elected employee representatives **in addition** to individual consultation with the affected employees.

The obligation to consult collectively is triggered:

"where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less…"

(Section 188(1) Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A).

Let us break this definition down.

8.1 **"Where an employer is proposing to dismiss as redundant"**

Key points to flag:

(a) The employer is the legal entity that employs the employee. Group companies are, therefore, separate employers for these purposes. So, if redundancies are being made across the group, it is possible that collective consultation will be triggered at some group companies, but not others.

(b) We talk in more detail below about the meaning of "proposing to dismiss" and when the duty to consult collectively is triggered. Employees will be treated as dismissed in the usual range of circumstances set out in section 95 of the ERA 1996, the most common situation being when the employer terminates the employee's contract, with or without notice. When it comes to employees on fixed-term contracts, they are excluded from the employer's duty to consult collectively unless the dismissal will take effect before the expiry of the fixed term (section 282(2) TULRC(A)).

(c) Under TULR(C)A, the duty to consult collectively is triggered where an employer is "proposing" to dismiss 20 or more employees as redundant. Article 2(1) of the Collective Redundancies Directive, on the other hand, says that consultation is required where an employer is contemplating redundancies, which is generally accepted as being at an earlier stage of the decision-making process. So, where do employers stand? Unfortunately, there is conflicting case law on this issue, so there is no clear answer as to the point at which the duty to consult arises. In practice, employers should not get too concerned about the different terminology, as both the Directive and TULR(C)A require consultation to begin "in good time" and the focus, therefore, tends to be on whether the period of consultation is sufficient rather than the date on which the process started. The key thing is that consultation must begin before any final decisions are taken. See below for a discussion on whether an employer is required to consult on the business reasons for the proposed redundancies.

(d) The definition of redundancy for collective consultation purposes is wider than that for unfair dismissal purposes. Section 195(1) of TULR(C)A provides that, for the purposes of collective consultation, a redundancy dismissal is "*for a reason not related to the individual concerned or for a number of reasons all of which are not so related*". Collective consultation may, therefore, be triggered in a wider range of circumstances than employers first think, for example where they are seeking to make changes across the workforce to terms and conditions of employment, but they are unable to agree the changes, so they end up terminating existing contracts and offering continued employment on new terms and conditions.

8.2 **"20 or more employees"**

The duty to consult only arises in respect of "employees" as defined by section 295(1) TULR(C)A, namely individuals who have entered into, or work under, a contract of employment.

In calculating how many employees are involved in a potential redundancy situation, employers should be aware that:

(a) Voluntary redundancies can amount to dismissals for collective consultation purposes, so these will generally have to be included when you are trying to work out how many employees the employer is proposing to dismiss as redundant. In ***Scotch Premier Meat Ltd v Burns & ors*** [2002] IRLR 639, the employer argued that the employees who had accepted voluntary packages were not entitled to a protective award because they had not been dismissed in law. The EAT in Scotland held that "*where the whole background to the departure was determination by the employer to close a factory and make the employees inevitably redundant, the fact that some employees accepted a package as the means of effecting that decision does not in our opinion preclude a finding that there was a dismissal*." The EAT agreed with the tribunal that the employer had called for volunteers in an attempt to avoid the duty to consult and held the terminations had not been mutually agreed.

(b) As above, if an employee is engaged on a fixed-term contract that is coming to the end of its agreed duration, the employee will not be included in the calculation. Employers must include any fixed-term contracts if the employer proposes to terminate the contract early on the grounds of redundancy.

(c) The obligation to consult collectively will be triggered even if an employer intends to offer alternative employment to the majority of employees, thereby bringing the number of employees actually dismissed as redundant below 20. This was confirmed in ***Hardy v Tourism South East*** [2005] IRLR 242. This case made it clear that employers cannot avoid their obligations to inform and consult under TULR(C)A by arguing that they were not really proposing to dismiss 20 or more employees, as they hoped to redeploy a number of them. Whether an employer is under an obligation to inform and consult should be determined at the start of the redundancy process and not at the end when it can look back and see how many employees it actually made redundant.

(d) No account should be taken of employees in respect of whose proposed dismissals collective consultation has already begun (section 188(3) TULR(C)A). Therefore, if, for example, an employer proposes to make 30 redundancies at one particular site and kicks off collective consultation in respect of those dismissals, but then proposes to make a further 10 redundancies at the same site within the same 90-day period, it would not be required to consult collectively in respect of the second batch of 10 redundancies. If, however, the employer had not yet commenced consultation in respect of the first batch of 30 redundancies, it would be required to consult collectively in respect of all the proposed dismissals. Furthermore, if, say, an employer proposes to carry out the dismissals over a longer period of time, such that 20 dismissals do not occur within a 90-day period, the duty to consult collectively will not arise.

Note, however, the ECJ's decision in ***UQ v Marclean Technologies*** (C-300-19)) in which it said that under the Collective Redundancies Directive employers *are* required to take into account dismissals that are already underway when deciding whether the duty to consult collectively has been triggered.

Marclean is a Spanish case that was referred to the ECJ. The claimant, UQ, was dismissed by her employer in May 2018. A further 35 employees were dismissed within the next 90 days. UQ argued there had been a "hidden" collective dismissal and that her dismissal should therefore be declared void under Spanish law. The Spanish labour court sought clarification from the ECJ on how the reference period of 90 days should be calculated for collective consultation purposes, bearing in mind that the Spanish Supreme Court had previously suggested it should be calculated exclusively by reference to the period *preceding* the disputed dismissal.

The ECJ held that employers should look both backwards and forwards from an individual dismissal when deciding whether the obligation to consult collectively is triggered. It said the reference period should include any period of 30 or 90 days during which the contested individual dismissal took place and during which the greatest number of dismissals carried out by the employer occurred for one or more redundancy reasons. Needless to say, this raises a number of practical issues for employers, is in direct contrast to what is stated in s.188(3) of TULR(C)A and could mean that the duty to consult collectively is triggered in a wider range of circumstances than is currently the case.

To date, we are not aware of any UK cases in which this point has been raised, but it is something for employers to be aware of.

8.3 **"At one establishment"**

There is no definition of "establishment" in TULR(C)A and it has been down to case law to give us guidance on what is meant by this term.

In 2015, the ECJ confirmed in ***USDAW & anor v WW Realisation 1 Ltd (in liquidation), Ethel Austin Ltd & anor*** (C-80/14) (the so-called "*Woolworths* case") that the term "establishment" in a collective redundancy context means the entity to which the employees who are being made redundant are assigned to carry out their duties. In most multisite redundancy situations, therefore, the establishment will be the particular physical location where the employees carry out their duties. In the *Woolworths* case, for example, each store was a separate establishment.

This decision was consistent with the ECJ's previous decision in the *Rockfon* case, in which the ECJ held that the term "establishment" must be understood as meaning, "*depending on the circumstances, the unit to which the redundant workers were assigned to carry out their duties*." The ECJ added, "*It is not essential, in order for there to be an 'establishment', for the unit in question to be endowed with a management which can independently effect collective redundancies*."

There have been UK cases where tribunals have been prepared to include a number of different geographical sites as being one establishment. Ultimately, each case will turn on its own particular facts, but there must be doubt about whether these cases would be decided in the same way now given the ECJ's guidance on how to interpret "establishment" for these purposes. The focus should be on the "local unit" to which the employees are assigned, and this will usually be the physical location where the employees are employed.

Things have the potential to get more complicated when dealing with a mobile workforce, for example a field salesforce. The two cases that are usually cited on this issue both pre-date the *Woolworths* case. In ***Mills and Allen Ltd v Bulwich*** (UKEAT/154/99), the EAT held that the whole field salesforce constituted a single establishment for collective consultation purposes. The employer treated the salesforce as a single entity and there was no real organisational link between the sales team and the staff employed at the local offices. In ***MSF v Refuge Assurance plc*** [2002] IRLR 324, the EAT held that each member of the salesforce was assigned to a local branch office. Each branch office was a separate costs centre and the branch office manager was the manager of the sales staff assigned to that particular branch.

8.4 **"Within a period of 90 days or less"**

The duty to consult collectively is triggered if an employer proposes to dismiss 20 or more employees within a period of 90 days or less. A tribunal will, therefore, be looking at a rolling period of 90 days.

As highlighted above, no account will be taken of employees in respect of whose proposed dismissals collective consultation has already begun. Although note the ECJ's decision in ***UQ v Marclean Technologies.*** Furthermore, if, say, an employer proposes to carry out the dismissals over a longer period of time, such that 20 dismissals do not take place within a 90-day period, the duty to consult collectively will not arise.

Employers need to be careful when making redundancies in "batches", in case a tribunal finds that they had a proposal from the outset to dismiss 20 or more employees within a 90-day period.

9 INFORM AND CONSULT

9.1 **Who?**

Employers are obliged to consult with "appropriate representatives" of the affected employees. Appropriate representatives will be one of the following:

(a) Trade union representatives if the employees are of a description in respect of which an independent trade union is recognised by their employer

(b) In any other case, employee representatives

This means that if the affected employees are represented by a recognised union, the employer must consult with the representatives of that trade union. It does not have a choice about whom it should consult. It does not matter whether all of the employees are members of a particular union. What is important is the class of employees in respect of which the union is recognised.

It is important to determine early on which of the affected employees are represented by the union and which are not. Those who are not will need to be represented by employee representatives (see below for further information on electing representatives).

Section 188 (1B)(b) TULR(C)A defines "employee representatives" as either:

(a) Persons specifically elected for the purposes of redundancy consultation.

(b) Persons who are elected or appointed by the affected employees for a purpose other than redundancy consultation, but who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf. This definition could potentially include employees on an existing works council or general staff consultative committee.

If an employer proposes to consult with elected employee representatives, it needs to build in to the consultation process sufficient time to allow employee representatives to be elected. This election process could take between two and four weeks, depending on the number of employees involved. The collective consultation process cannot start until the representatives are in place, so this can add up to a month to the process. According to s.188A TULR(C)A, the requirements for the elections are as follows:

(a) The employer should make such arrangements as are reasonably practicable to ensure that the election is fair

(b) The employer should determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all the affected employees given the number and classes of those employees

(c) The employer should determine whether the affected employees should be represented by representatives of all the affected employees or by representatives of a particular class of those employees

(d) Before the election, the employer should determine the term of office of an employee representative so that it is of sufficient length to enable the information to be given and consultation to take place

(e) The candidates for election as employee representatives must be affected employees on the date of the election

(f) No affected employee must be unreasonably excluded from standing for election

(g) All affected employees on the date of the election must be entitled to vote

(h) Employees entitled to vote may vote for as many candidates as there are representatives to be elected or, if there are to be representatives for particular classes of employee, may vote for as many employees as there are representatives to be elected to represent their particular class

(i) The election must be conducted to ensure that, so far as is reasonably practicable, the voting is in secret and the votes are accurately counted

If an employer invites the affected employees to elect employee representatives and they fail to do so within a reasonable time, the employer is required to give to the affected employees the information it would have been required to give to the employee representatives (see below).

9.2 **The rights of appropriate representatives**

An employer must allow all appropriate representatives (i.e. both elected employee representatives and trade union representatives) to have access to the affected employees and to have such accommodation and other facilities as may be appropriate.

Elected employee representatives, and candidates for such elections, have certain rights under the ERA 1996, including the right not to be dismissed or to suffer a detriment for a reason connected with their status or activities as employee representatives. Trade union representatives have similar rights.

Appropriate representatives are also entitled to reasonable paid time off during working hours to perform their functions. Employers should, therefore, allow the representatives sufficient time to discuss issues amongst themselves and communicate effectively with the employees they are representing.

9.3 **The timetable for consultation**

TULR(C)A provides that consultation must begin "in good time" and must, in any event, begin:

(a) Where 100 or more redundancies are proposed at one establishment within a 90-day period, at least 45 days before the first of the dismissals takes effect

(b) Otherwise, at least 30 days before the first of the dismissals takes effect

A dismissal "takes effect" when the employment contract comes to an end, for example the date on which the notice period expires.

The obligation to consult relates to any employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals (section 188(1) TULR(C)A). The obligation, therefore, goes further than just those employees whom it is proposed to make redundant. It would include, for example, any employees whose work may be affected by the proposed redundancies.

9.4 **The duty to inform**

The employer is obliged to disclose, in writing, the following information to the appropriate representatives:

(a) The reasons for its proposals

(b) The numbers and descriptions of employees it proposes to dismiss as redundant

(c) The total number of employees of that description employed at the establishment in question

(d) The proposed method of selecting the employees who may be dismissed

(e) The proposed method of carrying out the dismissals, including the period over which the dismissals are to take effect

(f) The proposed method of calculating the amount of any redundancy payments to be made (other than statutory redundancy pay) to employees who may be dismissed

(g) The number of agency workers working temporarily for, and under the supervision and direction of, the employer

(h) The parts of the employer's undertaking in which those agency workers are working, and the type of work those agency workers are carrying out

The information needs to be given to the appropriate representatives personally or posted to an address notified by them to the employer or, in the case of trade union representatives, posted to the main or head office of the union. It will not be sufficient to give the information to the employees themselves. The only situation where an employer is allowed to provide information directly to affected employees is where, following an invitation to elect representatives, the affected employees have failed to do so within a reasonable timeframe (section 188(7B) TULR(C)A).

How much information must be given?

TULR(C)A does not set out any guidance on how much information employers need to give, but they should provide sufficient information to enable meaningful consultation to take place. In ***MSF v GEC Ferranti (Defence Systems) Ltd (No.2)*** [1994] IRLR 113, the EAT indicated that an employer does not have to provide all of the s.188 information at the outset. Collective consultation can be deemed to have started as long as the employer has provided sufficient information to enable meaningful consultation to take place. The ECJ in the *Fujitsu* case (C-44/08) also made it clear that this obligation to provide information is a continuing obligation.

9.5 **The duty to consult**

Under section 188(2) TULR(C)A, consultation must include consultation about ways of:

(a) Avoiding the dismissals, i.e. what other options has the employer thought about/considered?

(b) Reducing the number of employees to be dismissed, for example redeployment, suspending recruitment, reducing overtime, etc.

(c) Mitigating the consequences of the dismissals, for example severance payments, outplacement counselling, etc.

In addition, the consultation must be undertaken "*with a view to reaching agreement with the appropriate representatives*".

Must an employer consult about the reasons for the proposed redundancies? For example, if a company is planning to close one of its sites, which will inevitably result in large-scale redundancies, is the duty to consult collectively triggered when the employer is still thinking about closing the site, but before finally deciding to do so, or only once it has decided to close the site and is planning to proceed with the consequential redundancies?

In ***UK Coal Mining Ltd v NUM & anor*** [2008] IRLR 4, the EAT suggested that it was the former, namely when an employer is formulating the proposal to take a potential course of action that could lead to the dismissal of employees because of redundancy.

This approach was subsequently thrown into doubt by the ECJ's decision in *Fujitsu* [2009] IRLR 944, in which it held that the Directive only requires consultation once a strategic decision is taken that would compel the employer to contemplate or plan collective redundancies.

In ***USA v Nolan*** [2010] EWCA Civ 1223, a case involving the closure of a US military base in Hampshire, the US argued that UK Coal Mining should be overturned in light of *Fujitsu*. Unfortunately, when this matter came before the ECJ, it declined to make a decision on this issue because it said it did not have jurisdiction to hear the claim, as it involved employees of a public administrative body. When this matter was referred back to the UK courts, the case was ultimately dismissed with consent of the parties by the Court of Appeal, so this issue remains unresolved.

Practical issues in managing the consultation process

- It is advisable to draft a checklist/timeline showing key milestones, deadlines for achievement in accordance with legal obligations and individual responsibilities.
- Consider the number of employees the company is proposing to dismiss. It is important to consider this point at the outset, as it could have important consequences for how long the process lasts, consultation obligations, etc.
- Consider individual responsibilities, for example who is going to carry out the selection process, consultation meetings, appeal process, etc. Is it necessary to provide guidance

and training for those managers involved in the redundancy exercise? Do you want to put together a Q&A document for staff to deal with typical questions? Do you want to prepare scripts/individual consultation records for managers to use?

- If you are consulting with employee representatives, consider training the representatives on their roles and responsibilities in a collective consultation process.
- To limit the scope for adverse publicity, employers should give consideration to having a pre-prepared press release.
- Is there a redundancy procedure in place? Some employers have policies in place setting out the procedure to be followed in a collective redundancy situation.
- Recognise the emotional impact of change on all employees involved in a redundancy situation, including not just those employees at risk of redundancy, but also the managers who have to break the bad news, and other employees who are outside the scope of consultation but whose morale may also be affected.

10 PROTECTIVE AWARDS

If an employer fails to comply with its obligation to consult collectively, there is a risk that the employee representatives, the trade union representatives or individual affected employees may present a complaint to an employment tribunal.

The complaint must be made no later than three months after the date on which the last of the dismissals took effect, unless the tribunal finds it was not reasonably practicable to bring the complaint within this period (and subject to the Acas early conciliation provisions).

If the complaint is well-founded, the tribunal must make a declaration to that effect and may make an award of compensation (a protective award) to be paid to those employees who have been dismissed as redundant or whom it is proposed to dismiss as redundant and in respect of whom the employer has failed to comply with its obligation to consult collectively.

Appropriate compensation for each relevant employee is such sum, not exceeding 90 days' actual pay, which the tribunal considers just and equitable having regard to the seriousness of the employer's failure to comply with its duties. It is fair to say, therefore, that a failure to comply with the collective consultation obligations could prove a costly mistake. In ***Susie Radin Limited v GMB & Ors*** [2004] IRLR 400, the Court of Appeal gave guidance on the factors to be taken into consideration when deciding whether to make a protective award. In giving its judgment, the Court of Appeal started by referring to the relevant features of the statutory provisions, including:

(a) The fact that there is an absolute obligation on an employer to consult the appropriate representatives of employees who may be affected by the proposed dismissals, with such consultation to be in good time and to be conducted with representatives who are fully informed by reason of the required disclosure specified in s.188(4).

(b) The topics for consultation must include the matters specified in s.188(2). The employer must undertake the consultation not as an end in itself, but with a view to actually reaching agreement.

(c) The consequences of a finding by the employment tribunal that the complaint is well founded are the mandatory declaration to that effect and, if the employment tribunal chooses to exercise its discretion, the making of the protective award. No other sanction is provided.

(d) The protective award is a collective award: it is expressed to be in respect of one or more descriptions of employees affected, rather than in respect of individual employees.

(e) The particular circumstances of the individual employees should not be the focus of attention: this is highlighted by the fact that the protected period begins with the date on which the first of the dismissals to which the complaint relates takes effect and that the limitation period for bringing a complaint under s.189 is defined by reference to the date on which the last of the dismissals to which the complaint relates takes effect, regardless of the dates on which the dismissals of others to whom the complaint refers takes effect.

(f) There is no reference whatever to compensation or loss in the provisions relating to the protective award.

(g) The only guidance given as to the length of the protected period is that, subject to a maximum of 90 days, it is to be what the employment tribunal determines to be "just and equitable in all the circumstances having regard to the employer's default in complying with any requirement of section 188".

Lord Justice Peter Gibson said that it was "tolerably plain" that the purpose of the protective award was to ensure that consultation in accordance with the requirements of s.188 takes place by providing a sanction against failure to comply with the obligations imposed on the employer. He pointed out that there is nothing in the statutory provisions that requires employment tribunals to take into account any loss suffered by all or any of the employees. He said that tribunals should not focus on compensating employees, but on the seriousness of the employer's default. It is that seriousness which governs what is just and equitable in all the circumstances.

He went on to give the following guidance to employment tribunals when exercising their discretion whether to make a protective award and, if so, how much:

(a) The purpose of the award is to provide a sanction for breach by the employer of the obligations under s.188: it is not to compensate the employees for any loss that they have suffered in consequence of the breach

(b) Employment tribunals have a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employer's default

(c) The default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult

(d) The deliberateness of this failure may be relevant, as may the availability to the employer of legal advice about its obligations under s.188

(e) How an employment tribunal assesses the length of the protected period is a matter for the employment tribunal, but the proper approach in a case where there has been no consultation is to start with the maximum period and reduce it only if there are mitigating circumstances justifying a reduction

In ***London Borough of Barnet v Unison & anor*** (UKEAT/0191/13), the EAT held that an employment tribunal had erred in identifying the "starting point" for calculating the award as the maximum 90-day period. It said that the starting point should not be applied mechanically where there has been some information given or some consultation carried out. The EAT set aside awards of 60, 50 and 40 days for different groups of affected employees and remitted the issue for further consideration.

An employer can seek to defend a complaint by showing:

(a) That there were special circumstances, which meant that it was not reasonably practicable for it to perform the duty

(b) That it took all such steps towards its performance as were reasonably practicable in those circumstances

The onus is on the employer. There is no statutory definition of "special circumstances". The statute does, however, provide an example, stating that if the affected employees have not elected representatives – once they have been invited to do so – within a reasonable time, there is no duty to consult.

In ***Clarks of Hove Ltd v Bakers' Union*** 1978 ICR 1076, the Court of Appeal held that "special circumstances" means an event must be "out of the ordinary" or "uncommon". This approach was followed by the EAT in ***Carillion Services Ltd (In compulsory liquidation) & ors v Benson & ors,*** in which it held that the liquidation of the Carillion group of companies precipitated by a lack of support from lenders and the government did not amount to "special circumstances" capable of absolving it of the duty to consult collectively.

It is important to remember that it is not possible for an employer to use a settlement agreement to settle a complaint under s.189. Such a complaint can only be settled via Acas (s.288(2) TULR(C)A 1992). It is possible, though, for an employer to settle a claim that it has failed to pay the amount due under a protective award and so appropriate wording to this effect should be included in a settlement agreement.

Points to watch out for – Form HR1

Under section 193 TULR(C)A, an employer proposing to dismiss as redundant 100 or more employees at one establishment within a period of 90 days or less is obliged to notify the Secretary of State, in writing, of its proposal before giving notice to terminate an employee's contract of employment and at least 45 days before the first of the dismissals takes effect. In the case of 20-99 employees, the notice period is reduced to 30 days. A copy of the "Advance Notification of Redundancies" form (known as "HR1") can be obtained here.

A failure to comply with this requirement is a criminal offence punishable by a fine. Therefore, it is imperative it is not overlooked. Until fairly recently, we were not aware of any situations where the Secretary of State had taken action for failing to comply with these provisions, but criminal proceedings were commenced against David Forsey and Robert Palmar (a former director and administrator of an insolvent company) for failing to comply with the obligations under section 193 TULR(C)A.

An employer is also required to give a copy of this notice to the appropriate representatives. This is something that is often overlooked in practice, but is required under the legislation. There is, however, no penalty for a failure to send a copy of the notification to the appropriate representatives.

11 ACAS GUIDANCE

Acas has produced some non-statutory guidance for employers when making collective redundancies, and this can be found here.

Redundancy dismissals are expressly excluded from the Acas Code of Practice on Disciplinary and Grievance Procedures, but an employer is still expected to follow a fair process.

12 INTERACTION WITH THE ICE REGULATIONS

The Information and Consultation of Employees Regulations 2004 (the "ICE Regulations") were introduced with the aim of establishing a right to minimum standards for staff communication and involvement in larger businesses.

Employers do not have to set up information and consultation arrangements unless they receive a valid request from employees or they wish to do so of their own volition.

Where employers are subject to the standard information and consultation provisions, they are required to inform and consult the information and consultation representatives about a number of matters, including "the situation, structure and probable development of employment within the undertaking (including suitable information relating to the use of agency workers) and on any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking". This would clearly cover collective redundancies.

Where employers are subject to the standard information and consultation provisions, and also come under an obligation under TULR(C)A and/or the TUPE Regulations to inform and consult, they may be relieved of their obligation to inform and consult under the ICE Regulations, provided they inform the information and consultation representatives in writing that they will be consulting under TULR(C)A and/or the TUPE Regulations. This avoids having to consult under both pieces of legislation.

These regulations have had very little impact in the UK.

These notes have been prepared for the purpose of a presentation. They should not be regarded as a substitute for taking legal advice.

October 2023