

Collective redundancies: new ECJ ruling on how to calculate numbers of redundancies

If employers are proposing to make more than 20 people from a single establishment redundant within a 90-day period, they have to go through onerous collective consultation procedures. But when does the 90-day reference period start and end?

Can an employer require a potentially redundant employee to go through a competitive interview process for an alternative role?

In the wake of the coronavirus pandemic, some employers will be facing the prospect of reorganising their businesses and making redundancies.

Is the spectre of redundancy looming? If so, what should you do?

Follow our tips for dealing with a potential redundancy to ensure you get the best chance of keeping your role, and the best compensation if you do not.

Top tips for surviving redundancy

Follow our top tips for redundancy to ensure you get the best chance of keeping your role, and the best compensation if you do not.

Redundancy Guide For Employers

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Whether you are looking to reorganise your business to change

the structure or skills mix or just reduce headcount, we can support your business if a redundancy situation arises.

We understand that redundancy can be a daunting process and have extensive experience of supporting our clients through what is often a difficult time. Our practical and pragmatic advice will ensure that you are able to achieve the reduction in workforce or restructure that you envisage by following the correct legal procedures to avoid any potential claims.

We set out below our top tips for dealing with redundancy.

Before instigating any kind of redundancy dismissal process, you should be aware that if tested, you would need to satisfy a Tribunal that you have a genuine redundancy situation. Broadly speaking this means that you must either closing a place of work or reducing the number of employees doing work of a particular type. If you are replacing the employee in question, or it is a restructuring which will not result in fewer employees doing work of a particular type, then it is unlikely to be considered a genuine redundancy situation. Employees may have a valid claim against your company if they believe that there was another reason for their dismissal which amounted to discrimination (e.g. pregnancy), or was a result of whistleblowing. With our guidance throughout the redundancy process, we will show you how to avoid this eventuality.

If you are proposing to make 20 or more employees redundant in one establishment in a 90-day period, then you will have additional collective consultation obligations. Employee representatives will need to be appointed if not in post already, and minimum time periods for consultation apply. If you fail to comply with these obligations, your employees may have an additional claim for up to 180 days' gross pay. Our team are highly experienced in the rules of collective consultation, and will follow best practice to ensure the best possible outcome for your firm.

If employees have more than two years' service, from the point of view of the Employment Tribunal, they must be consulted with, in order to ensure fairness. You have a duty to warn employees of the possibility of redundancy and consult with them during the process. In the interests of fairness, it is recommended that you enter the consultation period with an open mind, ensuring that no final decision is made until the period has ended.

Where work of a particular kind is ceasing or reducing, you will need to consider carefully which employees to 'pool' together as potentially redundant. This will normally involve grouping those who do the same or similar work, but may also include employees who, despite doing different work, have interchangeable skills.

When deciding which employees to select for redundancy, you must ensure that you undertake a comparison of all those in the pool. Your selection criteria should be, as far as possible, objective and capable of verification. You should be very careful to avoid using criteria which puts certain protected groups at a particular disadvantage; for example, a policy of 'last in, first out' can (if used on its own) put younger employees at a disadvantage, as they are less likely to have longer periods of service. This could amount to age discrimination.

Bumping is a process whereby you move a potentially redundant employee into a different post and instead dismiss the employee currently performing that role. This can still constitute a fair dismissal and can give your business greater control over which employees are dismissed if used correctly.

Once you have identified the employees who will be made redundant, you should then make efforts to look for alternative employment for them within the company, or associated companies. Failure to do so is likely to give rise to an unfair dismissal claim. You should inform 'at risk'

employees of all existing job vacancies (including roles that are more junior/senior to the role they are in), and give them a fair opportunity to apply.

If an employee is on maternity leave during your redundancy consultation process, she will have the right of first refusal of any suitable alternative roles. If you fail to offer such roles to her before all others, it may mean her redundancy dismissal amounts to an automatically unfair dismissal claim and sex/maternity discrimination.

As part of the redundancy process, there are advantages to giving your employees a right of appeal. You must ensure that you listen to the employee's issues and respond to each point they raise.

Your Brexit strategy – How to deal with redundancy

Rolleen McDonnell considers the strategy employees should have when dealing with a potential redundancy in the wake of Brexit.

Who counts as 'redundant' for the purposes of collective

consultation?

Where an employer in the UK proposes to dismiss more than 20 employees at one establishment in a period of 90 days, they must consult on a collective basis. If an employee resigns in response to a substantial change to their working conditions, they can be counted towards the 20-person threshold.

Ignorance of need to consult collectively no bar to protective awards

An employer's claim that it failed to consult collectively because it was not aware that it was obliged to do so is no excuse, and protective awards (of up to three months pay per employee) remain payable in such circumstances.

ECJ rules that "establishment" for collective redundancy consultation purposes means a

local employment unit, not the whole company

An employer making 20 or more people redundant in a 90 day period in a single establishment must consult on a collective basis. What is meant by 'establishment'?

EAT held employer's discretion over pool for selection was very wide but dismissal was unlawful because the employer did not follow its own processes

Mr Badmos was a regional development manager for Family Mosaic Housing Association. This employer employed five regional development managers, three of which were new business managers and two were delivery managers. Mr Badmos was a delivery manager. In 2009, the Housing Association decided to reduce the number of regional development managers from five to four, eliminating one new business manager. Both sets of managers were treated as having interchangeable skills and so Mr Badmos' role could be made redundant, despite the fact that his role as delivery manager was not being cut.

An employer cannot pay lower redundancy payments to older staff because they are getting a pension as well

The Employment Appeal Tribunal found that a council could not rely on a statutory defence to justify an age discrimination claim. Sefton Council paid redundancy payments in accordance with the Civil Service Scheme. This scheme reduced redundancy payments if employees were eligible to draw a pension as it was thought unnecessary to compensate people drawing a pension for loss of a job to the same extent as if they were still in work.

When can an employee refuse suitable alternative employment?

In *Devon PCT v Readman*, Mrs Readman was a community matron at Devon Primary Care Trust. Her role was focused on managing community and district nursing in a small community hospital which had only 12 beds.