

**EMPLOYMENT LAW UPDATE FOR CHARITIES SEMINAR
JULY 2007**

Restructuring and Redundancy

Presented by Chris Billington, Partner

The purpose of this paper is to highlight an often overlooked issue relating to redundancy and the restricted way in which it is defined for the purposes of both establishing a fair reason for dismissal and the entitlement to receive a redundancy payment.

The danger is that if an employer dismisses an employee on grounds of redundancy it may make little difference that they have followed all of the proper redundancy procedures. If you do not satisfy the narrow statutory definition of redundancy you will not have dismissed on grounds of redundancy and, unless you have argued that there was some other substantial reason for dismissal then you will be found to have dismissed unfairly and will be liable to pay compensation.

As part of looking at how to remove this risk, I will be highlighting the consultation obligations that exist as part of any redundancy situation and as part of a restructuring.

Definition of Redundancy

The dictionary definition of redundancy talks about a person being superfluous or surplus to requirements.

The statutory definition of redundancy is much narrower. It appears in s139 of the Employment Rights Act 1996 as occurring:

...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 purpose 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 so employed by the employer,

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

This covers three principal areas:

1. the employer is closing (business disappears);
2. the employer is closing in the place where the employee worked (possibly involving a relocation) (workplace disappears);
3. the business no longer needs the employee (work disappears).

A 'business' is widely defined and will include non-commercial activity and the work of charities, and other not for profit organisations.

Comparisons

Redundancy is defined differently for the purposes of consultation under the Trade Union and Labour Relations Act 1992 s195 which refers to '...dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related.' A reason connected with the individual would include matters such as conduct or capability.

Unfair Dismissal and Redundancy

We have dealt with the issue of what is Unfair Dismissal in more detail in other papers which are available on our website at www.wrigleys.co.uk. In particular see 'Managing a Fair Dismissal' from our June 2005 employment Update Seminar

In summary, all employees have the right not to be unfairly dismissed. There are a number of qualifications, for example the individual must be an employee and must be dismissed. This will include constructive dismissal and other circumstances set out in employment legislation where there is a deemed dismissal e.g. non renewal of a fixed term contract.

There are also a number of conditions which must be satisfied before an employee can present a claim of unfair dismissal to a Tribunal, for example the employee must have at least one year's continuous employment unless one of the ever growing exemptions to this rule applies. Most recently dismissal on grounds of age was added to the exemptions meaning that an employee can from day one of their employment claim a dismissal is unfair (as well as potential discrimination) if it is for an age related reason.

There is a two part test for tribunals in determining whether or not there is a fair dismissal:

- was there a potentially fair reason for dismissal? (e.g. conduct, capability, redundancy, contravention of statute, some other substantial reason and age); and

- was that reason sufficient in all the circumstances to justify that dismissal?

So redundancy is a potentially fair reason for dismissal provided that the above test is satisfied. However there is in fact a presumption that a dismissal is by reason of redundancy. This favours the employee but the presumption can be overcome to demonstrate that the real reason for dismissal was something else. This has the peculiar effect that an employee can be made redundant (and entitled to a redundancy payment) within the meaning of the legislation, but also for that dismissal to be unfair. However the employee does not benefit from any double recovery and any redundancy entitlement would reduce the overall compensation for unfair dismissal.

Redundancy Pay

An employee dismissed on grounds of redundancy is entitled to a redundancy payment provided that they have completed at least two years continuous employment. There are a number of issues that need to be carefully considered, such as:

- an unreasonable refusal of an offer of suitable alternative employment will mean the entitlement to redundancy pay is lost; and
- accepting alternative employment (whether or not it is suitable) will mean that as a matter of fact there is no dismissal and hence no entitlement to be paid.

The entitlement is calculated on the basis of a statutory formula, which is the same calculation used for determining the basic award for unfair dismissal. It takes account of age (although the upper and lower limits have now been removed), length of service (maximum 20 years) and wage (maximum statutory weekly pay of £310 from February 2007).

An employee dismissed for any other reason is not entitled to a redundancy payment. This is significant in terms of a dismissal for some other substantial reason, which whilst it may have all the hallmarks of a redundancy fails to satisfy the statutory definition.

Justifying Redundancies

Employers are not required to justify a declaration of redundancy, but a tribunal will be entitled to question whether:

- there has been a dismissal;
- the statutory definition of redundancy is satisfied;
- redundancy is the reason for dismissal; and
- the employer has acted reasonably in treating that as a sufficient reason

The difficulty of Disappearing Work

It will often be easier to recognise where redundancy arises because the business closes (employer closes) or because the workplace closes (employer moves). It is less easy to recognise whether the statutory definition is satisfied where the work disappears. Much of the early case law has focussed on the question of disappearing work but it is now relatively settled law that the question is not whether that particular employee is required, but rather whether the business has less need for employees. The test focuses on the work or skills required, not the individual or the job that they perform.

The statutory definition of redundancy is not intended to cover all those circumstances where an employee may reasonably consider that they have been made redundant. There are many situations, which often may be better viewed as a re-structuring, in which an employee may be dismissed but is not made redundant within that statutory definition.

A good example of the distinction between redundancy and re-structuring which appears in the text books [Harvey - E/535 [693]] is of a business that employs a dedicated driver and a dedicated warehouseman. The warehouseman cannot drive and the decision is taken to employ dual skilled workers who can cover for each other. Each are dismissed and replaced. There is no redundancy and no entitlement to a redundancy payment since there is still as much need for a driver and for a warehouseman as before.

Cases have sought to highlight that different skills may create work of a particular kind which can therefore be distinguished from other work. Qualifications may provide evidence of special skills, attributes or knowledge. The work of a senior employee may therefore be of a particular kind, different from that of a more junior employee such that downgrading a post may require significant de-skilling (reducing the need for the higher level work) whilst upgrading a post may be viewed as a reduction in the need for lower level work; hence a redundancy is created because the work of that particular kind has disappeared or diminished.

There will be a need for the employer to demonstrate that there is a sufficient difference in the new and old roles based on skills required and not just on some qualification or desired level of staffing. What a Tribunal is required to do is to analyse the facts and match those facts to the statutory wording. Often there may appear to be little difference in the before and after roles. In the example I give above, it would be possible to argue that driving requires special skills and the foreman's role was upgraded. It is easier to run this argument where there are clear specialist skills involved, although the focus remains on the needs of the business rather than the ability of the individual to respond to those needs. If the statutory definition is satisfied, then redundancy is made out.

Examples of re-structuring

Restructuring has always sat uneasily with redundancy, but it is not the case to say that all restructuring will not create a redundancy. It will all depend upon the nature of the restructuring.

Changes in the nature of the job

An employee may be reasonably required to keep up to date with modern methods or techniques, but it will be a question of fact whether it is a question of modernisation or of skills having become specialised to such an extent that the work is now of a different kind. For example a manager required to develop computer skills may be seen as modernisation, which would require a dismissal on non-redundancy grounds.

Reallocation of the job role and responsibilities

Tribunals will look at the overall requirements of the business and not at individual roles and responsibilities. Reallocating duties does not of itself diminish the need for work of a particular kind even if a particular job may disappear.

Varying terms and conditions

Where the variations do not affect the work that a person does it cannot satisfy the definition of redundancy. Also reducing cost by cutting wages will not affect the need for the same number of employees to carry out the same kind of work.

Bumping

Bumping is sometimes known as a transferred redundancy. This is where an employer having gone through the redundancy process identifies a particular individual as being redundant, within the statutory definition. In considering alternatives the employer may redeploy the selected employee, subject to that individual having the appropriate qualification or capability, into another role and make the person already in that role redundant in their stead. This last person is dismissed or bumped as a result.

There was a period during which it was thought that bumping could not be a redundancy but may fall under some other substantial reason. However it is now relatively settled law that transferred redundancy or bumping is a valid redundancy. The cases concerned (set out below) are considered to have taken too much account of the work of the individual employee bumped, rather than the overall needs of the business and the strict statutory test.

In **Church -v- West Lancashire NHS Trust [1998] IRLR 4**, the EAT held that a "bumped" employee is not redundant within the statutory definition.

Mrs C Barnes -v- Gillmartin Association [1998] LTL 24/8/98 A secretary who had already reduced her hours to part time sought to reduce them further, but following an increase in work the employer decided to replace the claimant with a full time secretary. The full time position was not offered to the employee and as the employer was a small firm, there were no alternative positions. This was not a redundancy within the statutory definition but there were sufficient facts for the dismissal to be held fair as a business reorganisation under the some other substantial reason category.

So if it isn't redundancy is it fair?

The issue is to be clear what the reason for dismissal is. In the case of a manager asked to undertake additional duties which are simply beyond them there may be an issue of capability. There is a separate issue whether changes (imposing the additional duties) where fair or could give rise to a claim of constructive dismissal. Where there is a dismissal on capability grounds the employer would still be required to demonstrate a fair procedure, including training, support and appropriate warnings.

In general terms a re-restructuring could be potentially justified under the potentially fair 'some other substantial reason'.

So what is some other substantial reason?

Although the categories are potentially open ended, most of the cases that have been decided under this heading arise where an employer has taken action to protect their legitimate business interest. Additionally, employment legislation may deem a dismissal to have been for some other substantial reason.

Protecting Business Interests

Employment law does not prevent an employer from seeking to change their terms and conditions of employment. In certain cases this might be restricted, for example following a transfer of undertaking subject to the transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

A variation of the contract of employment can, in law, amount to a dismissal with an offer of alternative employment on the amended terms. As a dismissal, it may in the circumstances be unfair. The change can be effected by agreement between the employer and the employee, in which case the issue is unlikely to come before a Tribunal, but where the employee does not agree to accept the changes the employer may be able to rely upon the 'Some Other Substantial Reason' category as a potentially fair reason.

However it is simply not enough that an employer wishes to reorganise its business in a manner which the employer considers advantageous. An employer will have to demonstrate that there are discernible advantages. This is consistent both with the burden of proof being on the employer to show that the reason for dismissal falls within this potentially fair category and that the reason is substantial in terms of having some basis other than the uninformed opinion of the employer or worse, based on some subjective prejudice.

This demand on the employer to demonstrate his claims is reflected in other areas of employment protection. For example, the rules around flexible working require that an employee's request for altered hours or other changes must be subjected to a proper consideration by an employer on matters such as cost, ability to meet customer demand and impact on quality and performance.

WRIGLEYS

— SOLICITORS —

Whilst the Tribunals will accept arguments about what is in the employer's interest, the interest of the employee cannot be ignored. Whether the employer acts properly in all the circumstances will depend at least in part on whether the employee has acted reasonably in refusing the change.

Just as the Tribunal can not impose its own view as to whether the circumstances justify redundancy, a Tribunal may not impose its own view as to what it thinks may be necessary or what steps an employer should take to deal with a redundancy. However a Tribunal does still have considerable scope to permit their own view of the reasonableness of an employer's actions to hold sway. An employer may have a good business reason for seeking to cut pay or increase over time, but in practice if this is merely to make a profitable business more profitable, Tribunals are likely to view the change with disapproval.

Where employees are adversely affected, particularly financially, a Tribunal will need to be persuaded that it is reasonable for the employer to impose the burden on employees. There is a great deal of grey area between the position where an employer claims that changes will improve its business and those where the survival of the business is threatened.

Where a proposed change does not directly affect the financial well-being of an employee, it is likely to be easier for an employer to justify the change as fair. It is also less likely that such change will find its way before a Tribunal.

One of the principal factors, although it is only one of a number of different factors that will be considered by a Tribunal, is the question whether an individual employee stands alone in their objection to the changes that the employer seeks to impose and whether the changes are in fact being introduced following a lengthy period of consultation with unions, employee representatives or the individual employees themselves.

It is not true to say that where an employee may be acting reasonably in refusing to accept a change the employer must be acting unreasonably by imposing it. Both may be acting perfectly reasonably.

Examples of cases upon this point, where the reason for dismissal was some other substantial reason, are as follows:

1. **Farr -v- Hoveringham Gravels Limited [1972] IRLR 104, IT** - The employer relocates but the employee refused to move what was considered to be a reasonable travelling distance;
2. **Moreton -v- Selby Protective Clothing Co. Ltd [1974] IRLR 269, IT** – The employee was required to work during school holidays but was unable to do so, although she had been given twelve months to make alternative arrangements.

WRIGLEYS

— SOLICITORS —

3. **Robinson -v- Flitwick Frames Limited [1975] IRLR 261, IT** – The employee refused to work overtime and was the only one to do so. This created difficulties with sharing bonus money.

A restructuring which focussed on changing terms and conditions of employment is, as stated above, unlikely to satisfy the statutory redundancy definition. However imposing changes in terms and conditions where an employee refuses to accept them can still be held to be a fair dismissal for some other substantial reason. The following cases are examples:

1. **RS Components Limited -v- Irwin [1974] 1 ALL ER 41, [1973] ICR 353** - The employer faced a serious problem from staff leaving, setting up in competition and soliciting former customers. The business was losing profits, so they sought to impose restrictive covenants on staff to prevent them operating in competition. One employee refused and was dismissed. Dismissal was held to be fair.
2. **Hollister -v- National Farmers Union [1979] IRLR 238, [1979] ICR 542** - Reorganisation was introduced at the insistence of and for the benefit of employees. Mr Hollister refused to accept the reduced contractual rights. Even though there was a failure to consult with the individual over the reorganisation, the dismissal was held to be fair.
3. **Sycamore -v- H. Myer & Co. Ltd [1976] IRLR 84** - An employee refused to accept a union negotiated agreement which would have led to a reduction in his salary. He was held to have been fairly dismissed.
4. **Skyrail Oceanic Limited trading as Goodmos Tours -v- Coleman [1980] IRLR 226 [1980], IRC 596 EAT** - A travel agency clerk was dismissed because she was about to marry an employee in a rival firm. It was held that the employee had access to confidential information and that the dismissal could be justified under the head of some other substantial reason. A claim under the Sex Discrimination Act failed, because a male member of staff in a similar situation would also have been dismissed. In this case there was a procedural defect which rendered the dismissal unfair.

In all of these cases it is important to note that a dismissal for some other substantial reason is not automatically fair. Just as with any of the six potentially fair reasons (capability, conduct, redundancy, contravention of statute and age), once the potentially fair reason has been established, consideration must be given to the second stage of the test as to whether or not the employer acted reasonably in treating that reason as sufficient to justify dismissal. This requires consideration of alternatives as well as a requirement to ensure that a fair or reasonable procedure has been followed.

The statutory dismissal procedures also need to be satisfied.

Other examples which illustrate the potentially wide scope of the category of some other substantial reason are as follows:

Personality Differences

In the case of **Treganowan -v- Robert Knee & Co. Ltd [1975] IRLR 247, [1975] ICR 405, QBD** the office working environment had become unbearable and was seriously affecting the company's business. A personality clash arose "from a difference of opinion as to the merits of the permissive society". The employee had an illegitimate child and was boasting of a relationship with a partner almost half her age.

Third party pressures

A dismissal may be fair even though an employer is reluctant to dismiss where a request comes from some third party, for example, if an employee upsets a major customer who then insist on that employee's dismissal (Scott Packing and Warehousing Co. Ltd -v- Patterson [1978] IRLR 166 EAT).

An employer seeking to suggest that there is third party pressure must still satisfy a tribunal that this is the case. In the case of **Grottcon (UK) Ltd -v- Keld [1984] IRLR 302** the employer failed to indicate how the third party instruction to dismiss had been given or what consultations there had been with the third party to avoid the dismissal.

The mere fact that a valued customer or client insist upon dismissal will not always mean that a subsequent dismissal is fair. It is still a requirement that the employer must balance their own interest against the individual interest of the employee.

Other cases have highlighted other circumstances which may justify dismissal on the grounds of some other substantial reason.

Priddle -v- Dibble [1978] 1 ALL ER 1058, [1978] ICR 149. Dismissal to make room for the employer's son.

Kelman -v- Orman [1983] IRLR 432. The dismissal of a spouse where a married couple had been employed together (e.g. living in a public house) and the other spouse had been dismissed, even if that dismissal was unfair.

Statutory substantial reasons

Statute itself also identifies two circumstances where a dismissal will fall under the category of other substantial reason. First is the dismissal of a replacement covering employees who are medically suspended or on maternity leave, provided that the replacement was informed in writing at the time of engagement that their employment is temporary and would be terminated.

This demonstrates that the dismissal of any fixed term or temporary employee at the end of the fixed term may fall under this category this is confirmed by the case of **Terry -v-**

East Sussex County Council [1997] 1 ALL ER 567, [1976] ILR 536. Again it is important to note that dismissal is not automatically fair and that the employer must still show that they have acted reasonably including consideration of alternative employment. There are however also practical implications in terms of a dismissed employee being able to establish that they have the requisite qualifying period to be eligible to present a claim as well consideration of unfair or detrimental treatment under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

The second scenario where statute provides that a dismissal is for some other substantial reason is in the context of a transfer of an undertaking. An employee who is dismissed for an economic, technical or organisational reason entailing a change in the workforce is considered to have been dismissed for some other substantial reason.

Consultation: The When, What, Who and Why

The regime in the UK

All companies, including charitable companies have a duty under Section 309 of the Companies Act 1985 to have regard for the interests of its employees as well as its members. It is difficult to determine what if any practical effect this requirement has had on employee relationships or rights.

Statutory information and consultation is only required in certain specified circumstances.

Redundancy Consultation and Notification

The redundancy consultation and notification provisions are contained in Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992. These provisions have been amended by the Trade Union Reform and Employment Rights Act 1993, the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999 and the Collective Redundancies (Amendment) Regulations 2006.

Employers are required to inform and consult appropriate representatives of employees who may be affected by proposed collective redundancy dismissals, or measures taken in connection with them. The collective redundancy situation arises where the employer proposes to dismiss as redundant at least twenty employees at one establishment within a 90 day period.

There is no specific legal obligation to inform and consult employee representatives in cases falling below the 20 redundancy at one establishment threshold.

Where there is a collective redundancy situation there is, since October 2006 an obligation to notify the Department for Trade and Industry in advance before any redundancy notice takes effect. The notice period matches the consultation period.

When should the process begin?

The 1992 Directive states that information should be given and consultation started *in good time*. The 1998 Directive sees the trigger for consultation as where an employer is *contemplating* redundancy measures.

Section 188 of TULRCA 1992 as amended states that the trigger for consultation should be where an employer is *proposing* redundancies.

There has been much discussion over the years about what these words mean. *Proposal* has been described as going beyond the mere contemplation of a possible event (*APMAC -v- Kirvin 1978 EAT*) and relating to a state of mind which is *much more certain and further along the decision making process than the word contemplate* (*R -v- British Coal Corporation and Secretary of State for Trade and Industry, ex parte VARDY 1993, CA*). It seems that the European Directive envisaged consultation at an earlier stage. Many businesses have taken the view that there is no need for action until they have produced a business plan which makes it clear that redundancies are needed. In any event, the employer must begin the process of consultation:

- at least 30 days before the first of the dismissals takes effect where 20-99 redundancy dismissals are proposed at one establishment within a 90 day period; or
- at least 90 days before the first of the dismissals takes effect where 100 or more redundancy dismissals are proposed at one establishment within a 90 day period.

There is in fact no minimum consultation period. Consultation does not need to last for the whole of the 30 or 90 day period, provided that it is started at the relevant time. Also no redundancy notice can be issued until consultation has been completed.

Who must be informed and consulted under the present regime?

If there is a trade union recognised for collective bargaining purposes then the employer must inform and consult an authorised official of that union. In this case there is no requirement to inform and consult any other employee representatives although this may be done voluntarily by the employer.

If the trade union is recognised for one group of employees but not another then the employer must inform and consult appropriate representatives of those other employees, whether this be existing representatives or new ones specially elected for the purpose. If there are existing employee representatives, they must have suitable authority from the

employees concerned to deal with redundancies (i.e. they should not have been elected for different representative purpose).

If there is a general committee of employees fairly elected for general personnel matters then it would be appropriate to inform and consult with that committee. If there are no employee representatives then the employer should give the employees a genuine opportunity to elect representative(s) and if they fail to do so then the employer must provide relevant information to the employees direct. Even those employees who are not to be dismissed may be affected by the proposed measures (e.g. through some form of restructuring) and in this case they too should be informed and consulted.

Where employee representatives are to be specially elected the employer should make reasonably practical arrangements to ensure that the election is fair and determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all the affected employees, having regard to the number and classes of those employees. The employer can determine whether the employees should be represented as a whole or whether representatives of particular classes ought to be elected and before the election the employer must determine a sufficient term of office to enable information and consultations to be completed. There is further guidance in the regulations.

What must be disclosed?

In the case of redundancies, employee representatives will need enough information about the proposals to be able to take a useful and constructive part in the process of consultation. The employer must disclose, in writing and hand to each of the appropriate representatives or send by post to an address notified to the employer, or the Union's Head Office or main address, the following:

- The reasons for the proposals;
- The numbers and descriptions of employees it is proposed to dismiss as redundant;
- The total number of employees of such description by the employer at the establishment in question;
- The proposed method of selection;
- The proposed method of carrying out the dismissals (taking into account agreed procedure);
- The period over which the dismissals are to take effect; and
- The proposed method of calculating any non-statutory redundancy payments proposed

Why consult?

TURERA 1993 states that the consultation should be "with a view to reaching agreement". There is certainly no duty to bargain, but the obligations extend further than merely telling employees about the redundancies and listening to what they have to say. The consultation should include ways of avoiding the redundancy situation or dismissals or of reducing the number of dismissals involved and mitigating the effects of the dismissals. A safer approach would be a genuine attempt to reach some form of accommodation or understanding on the issues raised. This may involve consultation before the formal information giving.

Ultimately the question 'why consult?' is answered by the fact that if you fail to consult when and in the manner required then, in addition to any compensation based upon the failure to consult, there is a great risk that the dismissal that follows would be held to be unfair.

Transfer Of Undertaking Protection of Employment Regulations 2006 (TUPE)

Again other papers available on our website provide more detail about TUPE and how it works. Please visit our website at www.wrigleys.co.uk and in particular 'Transfer of Undertakings' from our June 2006 Employment Update Seminar.

TUPE applies to 'relevant transfers' and requires that certain information must be given in writing, including the social, economic and legal implications of a transfer and any measures envisaged (e.g. redundancies or a change in terms and conditions).

There are two obligations; to inform and, separately, to consult with representatives of employees who may be affected by the transfer. It is important to note that this will include not only individuals who are to be transferred; but also

- colleagues in the transferor who will not transfer but whose jobs may be affected; and
- new colleagues in the transferee whose jobs may be affected by the transfer.
- The obligation to inform requires the following information to be provided;
- the fact that a transfer is to take place;
- approximately when it is to take place;
- the reason for the transfer;
- the legal, economic and social implications of the transfer for affected employees;

- measure that the employer envisages that it will take in relation to affected employees;
- the transferee must identify whether he intends to take any measures in relation to those transferred employees and details of the changes that are envisaged;
- there is also an obligation on the transferor to disclose whether he believes the transferee will be taking any measures and, if so, what he thinks they may be.

This information should be provided to all affected employees, i.e., not only those who are to be transferred. Taking measures is not defined but it can encompass any significant alteration to existing working conditions or practices. The obligation to inform and consult arises as soon as reasonably practical which will be long enough before the transfer to enable consultation to take place.

The Duty to Inform

Case law confirms that the duty to inform is triggered where there is proposed or planned transfer even if it does not take place - **Banking Insurance and Finance Union –v- Barclays Bank Plc [1987] ICLR 495**.

The obligation is to inform and consult with appropriate representatives. As with the rules which apply to collective redundancies on this may be a recognised trade union or where one does not exist or cover all of the affected employees, employee appointed representatives who have suitable authority to be consulted in relation to a transfer. If ultimately no representatives are available or appointed, the employer is not then obliged to inform or consult directly with the affected employees but there is nothing to prevent the employer doing so. However, the employer cannot decide to inform and consult directly without having first satisfied its obligation with regard to the election of appropriate representatives.

Employee representatives do have certain rights and protections in order to enable them to carry out their functions properly. This includes the employer allowing access to the affected employees and to such accommodation and facilities, such as use of the telephone, as may be appropriate. Employee representatives do have protection against dismissal and detriment connected to their status or activities as a representative.

The Duty to Consult

The duty to provide information applies to every transfer but the duty to consult only arises where the relevant employer envisages that there will be measures taken in relation to any affected employee. There is a greater duty placed on the employer to show that there has been a genuine attempt to inform, consult and reach agreement in relation to any measures that are proposed. However, there is no duty to consult about the mere possibility of measures and the duty will only arise once it is clear that measures will be taken.

The Information and Consultation of Employees Regulations 2004

The ICE Regulations apply to undertakings with 100 or more employees. It will apply to undertakings with 50 or more employees from 6 April 2008. There are no current proposals to extend the Regulations to those organisations with less than 50 employees.

Some organisations may already have some form of pre-existing consultation agreement with its staff. These will only be relevant to the ICE Regulations if they meet certain conditions, such as they cover the whole workforce and are in writing. If not, then the existence of such pre-existing agreements is of little significance and the ICE Regulations will (where certain conditions are satisfied) impose an additional layer of Information and Consultation.

When the ICE Regulations were first introduced in April 2005 there was a great deal of thought given to whether there was any need to upgrade existing information and consultation regulations. Since its introduction it is generally considered that the ICE Regulations have had very little if any practical impact and there have been less than a handful of cases to the Central Arbitration committee, which regulates disputes relating to ICE.

The key to the ICE Regulations is that they are triggered by an employee request for an Information and Consultation Committee to staff. If your staff are already engaged, or alternatively do not care, then the likelihood of a request is low.

The ice regulations, once triggered allow employer and employees to agree the scope of information and consultation. However where agreement is not reached, and the timetable is restrictive then Standard (default) Provisions apply.

Basic requirements - "the Standard Provisions"

The Regulations contain default provisions which will apply if an Information and Consultation Committee is not established by agreement.

These require both employer and employee to co-operate and the employer to consult and inform a range of business critical issues, including redundancy and 'decisions likely to lead to substantial changes in work organisation...!.

The Statutory Dismissal Procedure and Unfair Dismissal

The Statutory Dismissal Procedure will apply to all dismissals not just those relating to conduct or performance. It will apply to dismissals on grounds of redundancy, termination for health reasons, non-renewal of a fixed term contract and retirement. If the employer fails to follow the statutory dismissal procedure then any dismissal will be automatically unfair and the employee will be entitled to an up lift on any Tribunal award of between 10% and 50%.

The Procedure is very basic and requires:

- Step 1. The employer must provide a written statement outlining the alleged disciplinary matter and inviting the employee to a meeting.
- Step 2. Meet with the employee.
- Step 3. Write to confirm the outcome of the meeting and identify the right of appeal against any decision taken.

Exceptions to the Statutory Disciplinary Procedure

There are only limited circumstances where an employer has no need to comply with the statutory procedure and generally those are in circumstances where the individual characteristics of the employee will not play any real role in the decision to dismiss such as in -

Collective redundancies. Where an employer wishes to make 20 or more employees at the same establishment redundant within a 90 day period there is a statutory obligation to consult representatives.

For redundancies where the statutory obligation to consult does not arise (e.g. less than 20 employees being made redundant) the statutory disciplinary procedure will apply.

Where all employees are dismissed and offered re-employment in the same or a suitable alternative position. A dismissal and re-employment is often used as a mechanism for re-issuing contracts or changing terms of conditions of employment.

The employer's business ceases unexpectedly. For example the premises may burn down and it may become impractical to continue employment.

Unfair Dismissal and Consultation

As previously mentioned guidance on managing a fair dismissal is better dealt with elsewhere (see our website at www.wrigleys.co.uk). Here the issue I want to highlight relates to elements of information and consultation as part of a fair dismissal procedure, or to put it another way, the lack of information and consultation leading to an unfair dismissal.

As already noted there is no statutory obligation to consult unless there is a collective redundancy (more than 19 employees affected by redundancy in a 30 day period at a single establishment). Also the Statutory Dismissal Procedure does not apply where there is a collective redundancy.

However this does not mean that an employer has no obligations or concerns. Where there is no statutory consultation obligations first consideration should turn to whether there is a collective bargaining or any trade union agreement which may require consultation in particular circumstances. There may be existing consultation procedures in place, which may have a contractual or non-contractual effect. Regardless it must be

WRIGLEYS

— SOLICITORS —

remembered that general principles of fairness continue to apply to any dismissal and in the context of a redundancy this will include meeting with the affected employee and considering the availability of alternative employment. In practical terms meeting with the employee as part of any fair dismissal procedure will involve many of the same considerations as undertaking consultation and information.

Summary

The danger is that if an employer dismisses an employee on grounds of redundancy it may make little difference that they have followed all of the proper redundancy procedures. If you do not satisfy the narrow statutory definition of redundancy you will not have dismissed them for redundancy and, unless you have argued that there was some other substantial reason for dismissal then you will be found to have dismissed unfairly and will be liable to pay compensation.

The key is to ensure that you do not try to hide the reason for dismissal. If you are cutting costs be clear that is what you are doing. If you need to shift job functions around because this may provide operational efficiencies then do so. Employment law does not prevent you from making changes, but do not simply assume that if change involves potential dismissal that it must be due to redundancy. There is nothing to be lost by complying with the collective redundancy consultation obligations, but much to be lost by claiming you are creating a redundancy when you are not.

Chris Billington

Partner

Wrigleys Solicitors LLP

9 Cookridge Street, Leeds LS2 3AG

Tel: 0113 244 6100

Fax: 0113 244 6101

Email: chris.billington@wrigleys.co.uk

www.wrigleys.co.uk

This material does not give a full statement of the law but is intended for guidance and discussion purposes only. It is not a substitute for professional advice. No responsibility for loss occasioned as a result of any person acting or refraining from acting on the basis of the contents of this document is or can be taken by Wrigleys Solicitors.