



Redundancies: managing legal risk

By **Darren Isaacs** - 6 September 2021

We highlight the key issues businesses should be aware of when considering making redundancies to help manage legal risk.

Key risks

The key risks for employers to be aware of are:

- **Unfair dismissal:** Employees with more than two years' continuous service may bring a claim for unfair dismissal on the basis that the decision or the process followed was unfair.
- **Discrimination:** Any employee, irrespective of their length of service, may bring a claim (for uncapped compensation) that their redundancy amounts to unlawful discrimination.
- **Collective redundancies:** Where an employer is proposing to make 20 or more dismissals at a particular establishment in a 90-day period for reasons that are not related to the employees' performance, there is an obligation to collectively consult with elected employee representatives. The employer must also inform the UK Government. The penalty for breach can be a compensation award of up to 90 days' actual pay for each affected employee (provided the employee has at least two years' service). There are potentially criminal sanctions for failing to notify the Government in a timely manner.

Minimising the risks

To minimise the risk of facing a claim, before making redundancies employers should:

1. Check proposed redundancies are genuine and necessary

Broadly, there is a genuine redundancy situation if the reason that the employee is being dismissed is because:

- The entire business is closing down
- The part of the business where the employee works is closing down
- The business will close down in the location where the employee works

- The business needs less employees to do a particular kind of work

2. Warn employees of the risk of redundancy and consult

Employees must be given appropriate warning of the risk of redundancy. This is to allow genuine consultation to take place before a decision is made to dismiss them. Consultation should take place with individual employees which will typically include discussing matters such as:

- Reasons for the proposed redundancy
- Selection criteria and their scores
- Ways to avoid their redundancy, including alternative vacancies, agreeing to flexible working/reduced working hours
- Redundancy payments should their redundancy be confirmed

Note that in a collective consultation situation, in addition to this individual consultation the employer will also need to consult with employee representatives.

Collective consultation (if required)

The minimum consultation period is 30 days (45 days if you propose dismissing 100 or more employees) and consultation should start without delay as soon as the proposal is made. Before consulting you will need to allow time to prepare certain statutory information and to elect representatives if you do not already have representatives in place.

Have a fair selection process

Employers should identify an appropriate 'pool' of employees who are at risk of redundancy and a fair way to select employees for redundancy. This will typically be done using selection criteria which should be appropriate, fair and objective. It is important to beware of the risk of unlawfully discriminating against certain staff. For example, this could occur by using attendance and attendance records as a criteria without making adjustments for disability or maternity leave.

4. Consider alternative employment

Employers must search for suitable alternative vacancies and discuss these with the 'at risk' employees. Where an employee is offered a role which is materially different to their original role, they may be entitled to a statutory four-week trial period. Beware that employees on maternity (and certain other types of family leave) must be given a suitable alternative role if it is vacant, in priority over others, otherwise their dismissal will be automatically unfair.

5. Redundancy payments

Aside from any contractual redundancy payments the business may offer, employees who have two years or more continuous service are entitled to receive a statutory redundancy payment. This is calculated based on a statutory formula based on age and length of service.

6. Fair process

This will include consultation meetings with the employee prior to making them redundant.

Typically, following the decision to make an employee redundant, employers will also offer a right of appeal. This is not a legal right, but ACAS (a quasi-government body that publishes best practice) considers it is good practice as it allows an opportunity for disputes to be resolved internally, gives employers a chance to address concerns or potentially unfair parts of the process and helps show a Tribunal that the employer has followed a fair process.

7. Plan to succeed

Given the issues involved, good pre-planning is essential to help minimise legal and practical risks.

This note is for information only and is not legal advice. It reflects the position as of 3 September 2021. For any questions, please get in touch with [Darren Isaacs](#) or your normal GQ|Littler contact.