Webinar series: managing redundancies

Here we answer all the questions our viewers asked before and during our webinars on 28th, 30th July and 4th August

All you need to know about restructuring your business and making redundancies

We draw together here a wealth of expertise from our series of three webinars, tackling the challenging subject of making redundancies; how to do this fairly and safely so that unfair dismissal claims don't follow.

Our employment experts answered questions on setting new terms and conditions, alternatives to redundancy, collective consultation, communicating with employees, and the involvement of unions – they can be watched again here:

- Restructuring your workforce post lockdown
- Redundancies – the basics
- Managing a complex or large scale redundancy process

The following Q and A draws together all the questions and answers from the series.

Q: What factors would a tribunal consider in an unfair dismissal claim, if you had to dismiss staff and offer immediate re-engagement on new terms and conditions?

Guy Hollebon:

The starting point is that a tribunal will look at whether you are a good guy or a bad guy – have you had a discussion with staff, have you chatted to them and have you explained the position? Is there a genuine business need to make those changes?

If you are doing it so you can enjoy a more profitable business, so that the directors can enjoy some holidays in Spain, the tribunal is unlikely to have a lot of sympathy with you. If the business is trying to survive and making these changes is one way to achieve that, it is far more likely that the tribunal will say it is OK.

It is also important that the employer has had a dialogue with staff and has tried to overcome concerns they may have. You are not just saying 'do you agree – yes, or no – and we don't care if you say no because we are going to go ahead anyway.' If you genuinely try to engage with whatever the blocks to agreement are, and if you have gone some way to resolving them, that will be acknowledged.

Rowena Kay:

Also, look at your numbers carefully because if you have 20 or more people potentially at risk of being dismissed in connection to a refusal to agree changes to terms and conditions, you will have triggered the collective consultation requirement and even if you fully expect almost all of them to agree the changes, you do still have to consider those changes.

Q: Do I need to consult my staff in writing over any changes, or is it OK to do it verbally?

Rowena Kay:

Your consultation should be verbal – it does need to be a two-way process, giving your employees a chance to give their feedback and the best way to do that is by sitting down and talking to them.

You should document everything in writing, including minutes of meetings, outcomes and then a signed agreement by them. I have helped quite a few clients who have manual workforces without work email addresses, but they also need to get signed agreement to, for example, go on furlough. A text to confirm agreement, or taking a photo of the agreement and messaging it to the employer also works – it doesn't have to be a nicely scanned document.

Q: Are the alternatives to redundancy issues that you have to consider in every case before you can move to redundancies?

Rowena Kay:

In the UK the law does not dig into your reason for redundancies to decide whether it is good enough. You are obliged to consult about your proposals and consider all the ideas that employees come up with to avoid them. If you are thinking of redundancies as a way forward, you can move forward in discussion with your employees. However, if your employees say during that consultation 'how about we cut overtime if it would save jobs?' you are obliged to genuinely consider that and see if it is an answer.

What the tribunal will not do is impose their decision. If you look at that opportunity and consider it and if there are genuine reasons why it won't work, the tribunal won't say they think it could have worked; they will simply see that you looked at it.

Practically, I would always advise people to go through those ideas before redundancies because, not least when your business does hopefully recover, you are going to need as many people as possible. If you have a skilled workforce, news does travel about who tried their hardest for their people, and those who were a little quick to move to redundancies. From a workforce relations viewpoint, work through any of those other options first, such as part-time working, sabbaticals etc

Q: Short service dismissals – how do we go about it?

Guy Hollebon:

It is certainly something that is a useful way to approach restructuring your business, to look at who has less than two years' service. From a legal perspective, they are lower risk people to get rid of, but it may be that they are the most engaged or new recruits who offer a skill set that you need, so think about the impact on your business if you decide to go down that road.

It is quick and simple – they can't bring an unfair dismissal claims so there is no mechanism through which they can get a tribunal to look at the process. You can bring them into a meeting, sit them down and say that it hasn't worked out and give them notice; it is really is as short and sweet as that.

It does seem somewhat brutal and they will push back sometimes, asking why you are doing this and why them. Quite often employers want to give an explanation but there is no legal requirement to so, so you can say you're very sorry, you're in a difficult financial position and you're letting them go. It does achieve the desired objective of reducing headcount quickly.

Q: Does holiday accrue when staff are on sabbaticals?

Guy Hollebon:

One of my clients had agreed to a sabbatical with an employee, for a year. Everything seemed fine and it suited the employer rather nicely. They had a return date in mind for the employee and the work was piling up ahead of that date. The date came round and the employee said, 'well I've got six weeks holiday to take so I will see you in six weeks' time.' The employer queried this and the employee said that they had been employed during that time and so had continued to accrue holiday.

Under the Working Time Regulations, you continue to accrue holiday because the regulations base the entitlement to holiday on being a worker, not on working. So if you are on sabbatical but remain notionally an employee, although you are not doing any work, you accrue holiday.

It is something that you need to be careful about. There are ways to structure it so that the employment ends but there is a cast iron agreement to re-engage the employee at the end of that time. Clearly you need to think very carefully about a sabbatical generally. What commitment is there to take the person back on? What happens if their role has disappeared when they're on sabbatical? It's often worth managing people's expectations beforehand so that they understand the potential risks.

Rowena Kay:

The issues tend to be most significant if you are talking about long sabbaticals – a couple of months carries less holiday entitlement and that will come out in the wash, whereas if you are looking at long sabbaticals like 6 or 12 months, it is an important consideration.

Q: If you have 15 employees at risk of redundancy and you redeploy 12, so you only make three redundant, but a month later you need to put another 10 people at risk of redundancy - do you need to do collective consultation?

Rowena Kay:

In that situation you have never had a contemplation of dismissing 20 or more employees within a 90-day period. You had 15 at risk of redundancy which crystallised into only three and later, after you knew it was three people, you added 10 so that it reached 13. Be incredibly careful when the second set of redundancies were first formulated – one set of emails saying we might need to do some more redundancies during the first process would trigger the collective consultation requirement.

Bear in mind that if you have discussed it on email or in a recorded Zoom meeting, those can be called as evidence, unless you are talking to one of us, in which case you are legally privileged. The penalties for a failure to consult are quite severe – it can be up to three months' pay per person affected. If in doubt, consult collectively.

Guy Hollebon:

It would also depend on the situation when you started the process – if when you started, you were pretty confident that there were 12 roles that people would slot into, it's very unlikely that the collective consultation requirement would come up.

But if those 12 redeployments came up at the last minute for some reason, or came up as part of the consultation, then you might be in slightly trickier territory, because when you kicked off redundancy process one, you were looking at 15 dismissals and very quickly afterwards you added another 10 into the mix, so it is something you need to take detailed legal advice on and tread carefully.

Q: Can there be a claim for unfair dismissal if made redundant while the furlough scheme is running?

Chris Mayers:

The important thing to bear in mind is that an employer is, within reason, allowed to organise their business to suit the commercial and financial circumstances in which they are operating. They have to demonstrate that there is a genuine need for redundancy. However employers are not permitted to make sham redundancies because they just want to move certain people out of the business.

So, has there been a diminution of work, has the business closed, have there been closures of workplaces? Is there a genuine need for redundancy? If there is, you have to consider how to fairly work that out and work out a proper path to follow. Best practice is that, if you have more than a few employees at risk, you try to agree a matrix with them; being the criteria you will be adopting to select who is being considered for redundancy.

You should ensure that it is not discriminatory or unfair and that you genuinely engage with employees. They can say that it is unfair and not genuine, and there could be a claim for unfair dismissal while the furlough scheme is running. It is a very tricky situation for the employer to decide when to begin consultation. This is the job retention scheme after all – it is designed to retain jobs and stave off redundancy. If some businesses had decided very early on to make people redundant, there may be an argument that they jumped the gun and that was unfair. However, in most cases the availability of the furlough scheme will not in itself make redundancies unfair, particularly as we are now nearing the end of the scheme.

Ultimately the employment tribunal will take a view without inquiring too closely into the employer's motives as long as they appear bona fide. It is not for the tribunal to say how a particular business should be run, within reason. However, there may be lots of argument about when decision should have been made, about consultation and why people are being made redundant.

Q: When working out if there are 20 or more redundancies for collective consultation, do you include just the number of job losses or the number of employees at risk? Also, what if you come to a settlement agreement with some people; do you have to include those people?

Andrea Thomas:

It is not just the actual number of redundancies, but it is not everyone at risk either. You have to include the number of redundancies *proposed* within a 90 day period, so if you are not entirely sure of the numbers, work on the basis of the worst case scenario.

Commonly, you will have more people at risk of redundancy than the number you actually make redundant. You may, for example, have several people in a pool for each actual redundancy you make, so you would not include all the people in that pool as you do not intend to make them all redundant. But you do need to be careful to collectively consult where this may be required – for example, you may be close to the 20 mark and in the course of the process more may be added, and then you are over the number of 20 within that 90-day period. I would advise caution, particularly with regard to notifying the Secretary of State because it is a criminal offence if you don't do so.

Chris Mayers:

Yes I agree. After all, you can't be criticised for having too much consultation or spending too long on it!

Q: Please can you clarify if a small business, who inherited one member of staff when the business was purchased (TUPE) with 11 years' service, does not need to undertake the consultation period at all? This is the only member of staff.

Chris Mayers:

It doesn't matter if you have one employee or thousands of employees, they all have the same position as far as unfair dismissal and redundancy is concerned. I'm not clear about when the business was purchased but the person who came with the business has 11 years' service; if you have more than two years' service, you are protected against unfair redundancy.

So you will need, as the employer, to consult with that employee; it should be a fairly short consultation. Explain that they are at risk of redundancy, make sure they understand why their position is being made redundant – the global pandemic, the fall off in business, financial difficulties, the furlough scheme ending etc – make sure you take a note of that meeting and ask them to sign a copy of those notes so that it is all clear and they understand the position.

Q: Do pregnant employees have to be given priority when offering alternative employment or is it just employees who are already on maternity?

Andrea Thomas:

It is just those on maternity leave currently but a change is proposed in the law which has not yet come into effect. It will extend the protection to pregnant employees from the time they inform their employer of their pregnancy to six month after they come back from maternity leave; it will also extend protection to those taking other forms of statutory parental leave.

Q: Can the furlough scheme be used to pay notice for employees who are being made redundant and if so, do you have to make up the salary to 100%?

Chris Mayers:

We have just been thrown a curve ball on this as new legislation has just been announced, but we suspect the answer is yes but we don't entirely know yet.

The government is likely to ensure that redundancy payments will be made up to 100% of salary, rather than being at the furlough rate.

Andrea Thomas:

Yes, you can use furlough to pay notice. You should make the payment up to 100% for the statutory notice period for furloughed employees working their notice; if they have notice periods longer than the statutory period, I suspect you will not have to do that for the whole period but we are awaiting confirmation of this.

Q: If more than one employee might be suitable for an alternative role, can I carry out a competitive interview process to decide the best candidate?

Andrea Thomas:

Yes, I think you can, but you ought to be very careful to distinguish between the process of selection for redundancy and then the selection of employees for alternative employment where you have more than one person suitable for a role.

You should not normally use a competitive process for redundancy selection because, with limited exceptions, this is likely to be unfair. However, you can do so when selecting for an alternative role when there is more than one potentially redundant person who may be suitable for the role.

Q: Do I have to allow my employees to be accompanied to a redundancy consultative meeting?

Chris Mayers:

No – there is no ACAS guidance which requires this. People sometimes confuse this with the fact that there is a statutory right for an employee to be accompanied by a trades union rep or a willing work colleague at an internal disciplinary hearing. There is no equivalent right for redundancy consultations. If you are a large organisation, the unions may be involved in the consultation process anyway at a collective level, but being accompanied to an individual consultation meeting is not a

right. However, if people want it and you allow it, it demonstrates that you are taking a reasonable and helpful attitude to the consultation.

Q: Is it possible to withhold redundancy pay if an employee declines an alternative job role?

Helen Cairns-Terry:

The question is what is a suitable alternative role? When you are considering whether a role is suitable or not, you need to consider the employee's skills and experience. Do they have the right skills and experience for the new role? And are the terms of the alternative role similar in terms of place of work, duties, status, pay, hours, and responsibilities? Assess how similar it is to their old job role.

Bear in mind that maintaining status and pay is not necessarily sufficient to make an alternative role suitable, because if there are clear differences, for example, if they would not use the same skills or their working hours would be significantly different, it is unlikely to be suitable. So if an employee refuses a role and they have good reason for it, then you would still have to pay them statutory redundancy.

If they unreasonably refuse, then you don't have to pay them that redundancy but it's just worth bearing in mind that, if you are wrong about whether it is suitable or not, you could be facing claims for the redundancy and for unfair dismissal. So keep that in mind when making a decision because you could get involved in more trouble and have to pay a lot more than statutory redundancy.

Q: We have 86 employees and there is the possibility that 36 will be facing redundancy. There is no agreement between the company and employees with regard to a trades union, but I am aware that some of the employees belong to a union. Does this mean that a union might try to involve itself, and in that situation, what involvement can they have?

Michael Stokes:

If there is no union recognition, there isn't a duty on the part of the employer to consult with the union, but if you are going to have to arrange employee elections for representatives to consult about collective redundancies, the union members might group together and campaign for a particular person to be elected. So you may end up with a senior union person or quasi representative on the site being elected as representative for consultation purposes.

You are still only dealing with them as an employee, not as a union, though it means that you have got to be on your game and ready to face some difficult questions, because they may well be armed with more legal backup than employees who are not in a union. That does not follow automatically, but in this situation there are materials available to union members that employers will recognise – but it still won't be negotiating with a union.

It is possible for an employer in this situation – and there may not be many cases like this – to actively involve a trades union where they know they have got union members, even if there is no union recognition, but I think many employers would shy away from that if they had the choice.

Q: What are the best selection criteria to use in making redundancies?

Michael Stokes:

This is important when it is tested in the context of an unfair dismissal case – the assessment will be about whether the method used was fair. Was it one of the fair methods that a reasonable employer could use? There are lots of them – there is no perfect set of criteria; my generic advice would be to make sure that you have a matrix of criteria and try to make them objective and based on records.

If you are including skills in your selection, for example, make sure you look in the filing cabinet at what the qualifications are; similarly with disciplinary record, attendance, time-keeping etc. With length of service, that can be used as one of a number of criteria, but you cannot do 'last in, first out', because that is likely to be discriminatory. Make it evidence-based; if you want to assess for attitude, you need to have some comments on your matrix form as to why you gave them two marks rather than five marks.

Q: Is it OK to just use an interview process?

Michael Stokes:

I have come across this often and I have colleagues who have worked in local government where they used competitive interviews in departmental restructuring quite happily and assumed that it was an entirely respectable thing to do.

There is a recent case in the Employment Appeal Tribunal where an interview process was used to reduce the number of employees doing a particular job; this involved all of the relevant employees being interviewed for the same jobs they were already doing. This was found to be unfair.

I would not say that was the case in every instance of an interview process being used, but watch out because it is not necessarily fair. What you are looking for as an employer is to find something that is safe.

You can use interviews as long as the job roles you are interviewing for are new. If you are restructuring the department and job roles are being changed in a big way, so that no-one is being asked to interview for an identical job, an interview process is fine. Just watch out how you use them.

Answered by:

Michael Stokes, Head of Employment and Immigration
M: +44 7807 747 455
E: mstokes@hcrlaw.com

Chris Mayers, Partner, Head of Employment in Wales
M: +44 7552 606 001
E: cmayers@hcrlaw.com

Andrea Thomas, Partner, Employment and Immigration
M: +44 7725 240 233
E: athomas@hcrlaw.com

Guy Hollebon, Legal Director, Employment and Immigration
M: +44 7860 924 361
E: ghollebon@hcrlaw.com

Rowena Kay, Associate, Employment and Immigration
M: +44 7815 160 175
E: rkay@hcrlaw.com

Helen Cairns-Terry, Associate, Employment and Immigration
M: +44 7525 594 650
E: hcterry@hcrlaw.com