Conquering UK Employment Law – Redundancy

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CONTENTS

INTRODUCTION

Not only must business owners be experts in sales and management, finance and computing and tax and marketing; if they employ staff they also need to be familiar with the increasingly complex world of employment law.

It is entirely right and proper that employees are afforded protections at work, and that we have moved on from the 'master and slave' origins of the employment relationship, however even with the best of intentions, falling foul of the law is surprisingly easy nowadays for the unsuspecting employer given its complexity and the rate at which it changes. The addition of European originated input to our employment legislation in recent years has further increased the potential pitfalls for the unsuspecting small (or large!) employer.

This series of 'Conquering Employment Law' books is designed to aid small businesses in particular who may not have the luxury of their own in house HR team, or access to high street lawyers. They can be rather expensive when you only want to find out what the minimum wage is or what to do if an employee announces that she is pregnant!

It is true that there is a wealth of information available now online, and it is an extremely useful starting point, but it can still be difficult digging down through the enormous amount of information out there to the exact advice that you need for your situation *right now*.

The author has spent over thirty years working in the field of employment law, and has advised and represented both companies and individuals over a huge range of employment law issues during this time. She qualified as a lawyer in 2013 and in addition to writing on the subject, runs an employment law consultancy advising both SMEs and individuals across a wide range of industries.

The first book in the series is on Redundancy, which, while a relatively straightforward concept which the man in the street could probably explain without difficulty, can be difficult to get right from a legal perspective as an employer, without at least a knowledge of the basics.

1 REDUNDANCY AND DISMISSAL – THE LEGAL BACKGROUND

Let's get started then. Before considering the nature of redundancy itself, we need a little background first. The law underpinning redundancy is part of a much wider set of rights and obligations which we need to place into the larger context of employment and dismissal in general.

Briefly, when engaging an individual under a contract of employment in the UK, whilst enjoying a plethora of rights from day one, (such as the right to the minimum wage, the right not to be discriminated against, and to equal pay to name but a few), your employee will, after two years' service attain the right not to be unfairly dismissed.

(This period used to be one year prior to April 2012 and it has gone up and down with successive governments according to their persuasions over the years, and it currently stands at two years' service.)

Before going on, it might be useful to understand how we derive our legal rules in this country. A country's legal systems are either 'codified' or 'uncodified' systems, which means that the legal rules and principles setting out how the country is to be governed are either set out in one document or they are not. In a codified system, the law is set out in a document such as the constitution in the US. In an uncodified system, the rules and laws are not set out in one document but are derived from a variety of sources such as statute and case law. Here in the UK we are unusual in that we have an 'uncodified' legal system in common with only a few other countries (such as Israel and New Zealand for example), the majority having written constitutions to which one can turn to find out what the laws of the land are.

So if we have an uncodified system, how do we find out what our laws and rules are? Our law in this country is derived from three primary sources; statutes, (or laws enacted by parliament), European law (at least as things stand at present!) and case law, the judgments of hearings in the higher courts which set precedents to be followed, also known as the common law. We'll see later on that while statute often sets out the law from a macro perspective if you like, it is the courts whose role it is to actually interpret what that statute means at a micro level. We'll also see that in order to understand your obligations as an employer and know how to behave in order to comply, you need to be familiar not just with the statutes, but with common law principles as well.

Back to dismissal then. The right not to be dismissed unfairly is enshrined in the Employment Rights Act 1996 (the Act) and it has remained pretty much unchanged since that date, with only a few notable amendments over the years (such as retirement being removed as a fair reason for dismissal following the abolition of the default retirement age in 2011).

Other claims – in addition to being able to bring a claim for having been unfairly dismissed under the Act which we will look at in a little more detail below, an employee may also claim that they have been wrongfully dismissed if they have been dismissed without being paid or given the notice to which they are entitled under their contract or by statute. If they have been dismissed for a discriminatory reason they may bring a discrimination claim.

The Acts sets out a two stage test to determine whether a dismissal is fair or not.

1. Firstly, the employer must show what the reason for dismissal is. Many employers are not aware of this but there are in fact only five reasons under UK law which pass the test of being 'potentially fair' and if your reason does not fall within one of these then you may have a problem!

   The potentially 'fair' reasons for dismissal which are as follows;

   - Conduct (for example where an employee is dismissed for theft)
   - Capability (for example where an employee is unable to perform to the standard required)
   - Redundancy (which we will come on to later but which generally means being surplus to requirements for want of a better colloquial description)
   - Contravention of a statute – this arises where continued employment of a person would be breaking the law (such as where to continue to employ them would breach immigration rules, or where they lose their licence and are employed to drive and there is no suitable alternative work)
   - SOSR – this stands for Some Other Substantial Reason. While at first it may seem to be something of a 'catch all' reason, covering areas which do not fall neatly into one of the four above, it has tended to be quite narrowly applied by the courts and in *relatively* limited circumstances. It can include reasons such as where there is a conflict of interest or where a client refuses to work with an employee and there is no alternative work.

   So back to our two stage test for fairness – to pass the first part the reason must be one of the five potentially fair reasons above. You will notice that I use the word potentially repeatedly here in conjunction with fairness – just because a reason is given and it is one of the fair reasons listed unfortunately does not mean that a dismissal is fair and will stand!

2. This is where the second stage of the test comes in. Once a potentially fair reason is established, the question of whether the actual dismissal itself is *fair* or *unfair* must be considered.

   So how to determine whether it is or not is also set out in the Act which states that fairness;

   a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
   b) *shall be determined in accordance with equity and the substantial merits of the case.*

   This is rather wordy and long winded so what does it mean in practice?

   In practice, while the Act doesn't actually mention procedure or substance at all, only reasonableness, the courts have interpreted this part of the test as meaning that dismissals must be a. procedurally fair and b. substantively fair.

   Procedurally fair has a specific meaning and will be considered a little later on as the procedure for a redundancy dismissal is different to a dismissal procedure for say conduct or capability.

   Substantive fairness looks largely at the reason given, was it fair for the employer to treat that reason as the reason for dismissal. So, for example if the employee is dismissed for conduct because they were late twice by 5 minutes over a six month period would the employer have acted reasonably in treating that as a fair reason for dismissal? More than likely not. And indeed, was the reason given the true reason for dismissal, often it isn't. Employers have been known to take the 'easier' option of making someone redundant when in fact they were poor performers but the employer couldn't face the difficulty and awkwardness involved in a capability or conduct dismissal.

   And, looking at the second part of the extract from the Act above, when judging reasonableness, the courts will also take into account the size of the employer and the type of resources it has available to it when considering how reasonably it behaved. A small employer with maybe 5 staff and a part timer in the office doing HR along with all their other admin duties will be judged less rigorously than a multinational corporation with lawyers and a large Human Resources department to advise.

   So all parts must be present for the dismissal to be fair; the reason must be one of the five potentially fair ones, and the dismissal must be both procedurally and substantively fair.

To illustrate how we would apply this, let's take a scenario. An employee is seen taking money out of the till at the shop where they work. They are dismissed on the spot and sent home.

Objectively the reason appears to be one of the fair ones, conduct (theft) and the substantive reason appears to be sound, dismissal because they appeared to steal from their employer. So far so good but the dismissal is likely to be declared unfair on procedural grounds because there was no fair procedure – the employee was dismissed on the spot when there should have been a hearing and a chance for the employee to state their case and have the right of appeal as per Acas guidelines (we'll come on to those later). There may be many reasons why the employee took the money and without giving them the chance to put their side of the story, the employer cannot be said to have carried out a fair dismissal. The employee's compensation might be limited if theft was found to have taken place but win they most likely would.

Summing Up

Is the reason one of the 5 fair reasons?
Was the dismissal fair substantively?
Was the dismissal fair procedurally?

So we can see that statute in the form of the Employment Rights Act sets out the law and the test which employers must pass when determining the fairness of their dismissal. There is no further guidance given within the body of the statute on what 'fairness' actually means, and so we have to turn to case law and other authorities (such as the Acas Codes) to find further detail in terms of what makes a dismissal procedurally or substantively fair. We will look at that in the following chapters. You can see now why it can be such a headache for employers to do the right thing when it is often so difficult to find out what the right thing is!

The Acas Codes of Practice also provide guidance for employers and employees when interpreting statutes and as Acas states, while failure to follow a Code doesn't make a person or organisation liable to proceedings, an employment tribunal will take them into account when considering relevant cases and it may affect compensation.

2 BEFORE REDUNDANCY, WHAT SHOULD EMPLOYERS DO FIRST?

We will shortly consider the substantive and procedural tests but there is an earlier step which employers should take before they embark on any redundancy process.

When it becomes likely that cutbacks are potentially going to be necessary, an employer would be prudent (and indeed expected by the courts) to consider some preliminary steps in order to avoid having to make compulsory redundancies. As anyone who has been through the process will attest, it is arduous and can be as damaging to the morale of remaining staff as it is distressing for those losing their jobs. If it can be avoided it should.

We mentioned Acas earlier and this is a good point to consider their role as they provide invaluable guidance to employers in terms of good practice. Acas, which stands for the Advisory, Conciliation and Arbitration Service, is a publicly funded independent organisation set up to promote good employment relations and assist with workplace disputes.

Acas have written various guides on all aspects of employment including redundancy. One, entitled 'Handling Large Scale Redundancies' is a 64 page booklet advising employers on what to do when they are considering making 20 or more employees redundant within a 90 day period. The second 20 page guide is entitled 'Handling Small Scale Redundancies' aimed at smaller employers considering letting go of up to 20 staff. There is also a 44 page guide entitled Redundancy Handling which covers all aspects.

Although the Acas guides on redundancy have no legal effect as such and are not binding on an employer, they contain heaps of practical good advice, give examples of good practice and the courts will be keen to see that an employer has acted in accordance with such guidance when assessing fairness. You will be in a much better position (if facing a challenge) if you have acted in accordance with the Acas guides than not.

We will look at the role of Acas and Early Conciliation later on when we look at unfair dismissal and redundancy and what happens when a tribunal application is made.

So what are the possible alternatives to redundancy?

Before considering dismissing staff, an employer might want to consider some or all of the following as alternatives in an attempt to save jobs and costs and in accordance with best practice;

i. Deploy a recruitment freeze and consider withdrawing job offers which have not yet been accepted. This enables you to spread out the work which would have been carried out by new recruits amongst existing staff if possible.

> ***However, be aware that if you decide to withdraw offers which have already been accepted, you may be liable to pay notice, but this is still likely to be cheaper than employing another person unnecessarily.***

ii. Reduce or cut out overtime (where contractually possible, do check contracts for guaranteed overtime etc.) so that the work is spread more cost effectively amongst all staff.
iii. Let go of temporary, casual and agency staff where possible – again check contracts to be sure of your contractual obligations.
iv. Consider lay off or short time working. This is where staff are either temporarily laid off altogether without pay, or placed on what is known as 'short time working' where they work less days/hours than usual with a corresponding reduction in pay for a temporary period of time. Do note that you need an express contractual right to lay off staff or put them on short time working, and you will be in breach of contract if you do so without unless your employees agree to it. So, first check your contracts of employment and consult employees with a view to seeking their agreement if there is no express contractual permission. Employees may agree to this when the alternative could be job losses. There are (as we might expect) rules regarding layoffs. If employees are laid off they may, (depending on eligibility) be eligible for a Statutory Guarantee Payment at an amount set by the government and currently at the time of writing £26 per day. It is true to say that it isn't much but it is better than nothing.

> **Useful tip; when drafting your contracts of employment, include a clause providing the express right to lay staff off and put them on short time working.**

Payment is limited to a maximum of 5 days in any period of 3 months. You need to be aware that this is only a short term measure as if an employee is either laid off or put on short time working (that is, receives less than half a week's pay) for four consecutive weeks – or for six weeks in a period of 13 weeks – because of a shortage of work, the employee can give the employer written notice that he or she intends to claim a redundancy payment.

iv. Volunteers for redundancy (and offering early retirement).

If you are at the stage of offering redundancy to volunteers, then you have probably exhausted the earlier alternatives to no avail. Offering voluntary redundancy is a way of letting go of those staff who, for age or financial reasons, might be tempted to leave anyway and if you're lucky and the numbers and relative skills work, you may be able to do away with the need for compulsory redundancies. We will see where this comes in the process a little later on. Note that volunteers for redundancy are dismissed, they are not resigning. In effect, in volunteering, they are putting themselves forward to be dismissed (as opposed to electing to leave – sounds like splitting hairs but it is important for a number of reasons) and therefore count in the numbers of dismissals for collective consultation and notification purposes which we will come on to later. You also need to be aware that just because an employee volunteers for redundancy does not mean that the employer must allow them to go. There may be too many volunteers for the number of redundancies, or there may be job specific or financial reasons why you need to keep certain staff and the decision is the employer's alone. Obviously good communication at the outset in explaining to staff when asking for volunteers that they may not be successful is important. Also reassure staff that if they volunteer and are not selected, this will not be held against them in the future.

Procedures, collective agreements and contract terms.

Before embarking on any programme of redundancy, you need to know whether there are any existing procedures or agreements in place for your workforce, and if so ensure that you adhere to them. It may sound obvious but it is highly embarrassing giving evidence before a tribunal and being asked to confirm whether this is your procedure and then asked why you didn't follow it! Many firms have redundancy policies in their handbooks and they usually cover how the company will carry out redundancy programmes, how redundancy pay is calculated, how they will select employees etc. Employers aren't obliged to have such policies but if they do, then they need to follow them.

Similarly, with collective agreements. If you recognise a trade union and have a collective agreement with them, then you need to be familiar with its terms relating to redundancy and ensure that you adhere to them.

Finally, before you begin, even if there is no redundancy policy as such, do check your contracts of employment to determine whether there is a clause on redundancy and if so be familiar with its terms. Some contracts offer enhanced pay on redundancy and you need to be aware if this is the case. You might think it odd that I refer you to your own contracts to see what they say but many employers don't revisit their contracts for years, or have had them drafted by someone else and are often entirely unfamiliar with their contents.

3 THE SUBSTANTIVE TEST – SO WHAT IS A DISMISSAL FOR REDUNDANCY?

So, you know that you need to make changes or cutbacks and have been through all of the applicable steps and techniques in Chapter 2 in an attempt to avoid formal redundancies. But that may still not be enough and at this point redundancy may be inevitable. What are the next steps?

We know that our reason for dismissal has to be one of the five potentially fair ones, and we now know that our decision to dismiss must be both substantively and procedurally fair in order for us to be able to demonstrate that we have acted reasonably.

We have already considered the fair reasons for dismissal and we know that redundancy is one of them.

So now we need to move on to the substantive reason. What constitutes a redundancy?

We probably all know a friend or family member who has been faced with redundancy and are fairly certain that we know what it means. Being laid off? Let go? Surplus to requirements? And we'd probably be roughly right. But redundancy has a specific and well defined meaning in employment law, and this is the meaning that an employer has to consider.

The legal definition of a redundancy can be found in the Employment Rights Act. It tells us that there are basically only three scenarios which will result in a redundancy situation;

Dismissal for redundancy essentially arises where the dismissal is 'wholly or mainly attributable' to;

1. *The business closing altogether, or*
2. *The workplace in which the employee is employed closes even where the business itself carries on elsewhere, or*
3. *The requirement for an employee to do the kind of work which they were employed to do has ceased or diminished*

By the way the phrase 'redundancy situation' has no meaning in law and in fact the courts aren't keen on its use but we will use it for our purposes here as it is a handy definition.

As we have seen from the definition, it arises where the business either shuts down altogether, the factory or office or location where the employee works closes but not the whole business, or where the employer just needs less staff following for example a reorganisation, loss of a contract, changes in technology etc.

Any other scenario may be a dismissal for some other substantial reason but won't qualify as a redundancy.

There are a number of reasons why a company might need to declare a redundancy, it might reorganise and find that it needs less staff under the new set up, technological changes might mean that it needs less staff (and maybe more computers) to carry out the same work. It might be responding to commercial pressures, less sales, more competition, or it might be relocating to cheaper, different premises for a variety of reasons.

So why does it matter whether a dismissal is categorised as redundancy or not? It matters because compared with a dismissal for other reasons, in addition to any period of notice, a redundant employee, (assuming that they have the qualifying period of 2 years' service) will also qualify for a statutory redundancy payment (in addition to any contractual redundancy payment they may be entitled to) and this could represent a significant sum of money if they have worked for the company for a long time and in particular if they are older.

Let's look at the three scenarios in more detail before going on to consider fairness and how an employer should approach the whole business.

1. **Business closure.**
   This is straightforward and rarely causes disputes. If a business closes down for whatever reason and there is no longer a job for the employee as a result, then there is usually little to argue against. (I am assuming here that the business or part of the business hasn't been sold to a third party as that would be an entirely different situation known as a 'TUPE' situation (details in another book!) which would not result in redundancy).

   Here we are looking at a scenario where the market for the product has collapsed, or the owner no longer wants to be involved in the business and closes it rather than sells it, or it is no longer viable to continue trading for whatever reason. The closure can in fact be permanent *or* temporary according to the Act. Whilst seemingly straightforward, there are situations which cause confusion such as where a business stops trading in one way and starts trading in another and whether or not that constitutes a redundancy situation. One such case involved a restaurant which closed and later reopened under the same management as a brasserie. The employees were all dismissed as redundant and claimed unfair dismissal on the basis that there had been no closure. The tribunal agreed with them that the two sorts of restaurant were similar enough not to constitute a closure of one business, and that it had continued to trade.

2. **Workplace Closure.**
   This is also *relatively* straightforward – it applies where a unit of a business closes down even though the business itself continues to trade. For example, when a factory closes, or a shop closes but the business itself continue trading elsewhere. Again, this seems fairly logical and straightforward however issues can arise. For example, if the employee's contract says that they work in one place, but in fact they have always worked in another, which takes precedence? The contract, or where they last actually worked? The courts have established that it is the place where the employee habitually worked which must first be taken into account.

Mobility Clauses

Mobility clauses, ones which say something *like 'your place of work is x but we reserve the right to ask you to work temporarily or permanently at any other reasonable location should the needs of the business make it necessary'* are of relevance in redundancy situations but the employer needs to be clear how he is using them. One approach is to argue that where there is a mobility clause and a suitable alternative vacancy at another reasonable location, there is in fact no redundancy and cases have been argued on this basis. However the courts interpret such clauses strictly in favour of the employee and it needs to be both well drafted and the alternative employment both suitable and nearby as there is no definition of what is a reasonable location geographically. It is also important that the employer decides which approach he is taking and sticks to it. In a recent case the employer was criticised for 'dodging' between mobility clauses and redundancy. By the time that consultation starts, the employer needs to be clear whether he is invoking the clause and there is no redundancy at all, or whether the job is potentially redundant. If he is invoking the mobility clause he still needs to consult on the change in any event.

3. **Ceased or diminished requirement for an employee to do work of a particular kind.**
   This is potentially the most problematic area and the most common one. It arises where a business simply needs less employees for a variety of reasons and often needs to choose between staff.

   'Ceased or diminished' requirements can arise because the company is becoming more efficient and making better use of its resources doing the same amount of work, or because there has been a downturn and there is less work.

   This part of the statutory test can be subdivided into its 3 constituent parts;

i. **Is there a reduced requirement?**

In determining whether there is a redundancy under this heading, the first place to look is whether the business has a reduced need for a certain type of work to be carried out. Case law has established that as long as an employer is able to satisfy the tribunal that the redundancy is genuine, and that a fair procedure has been followed, the tribunals tend not to look too closely into the reasons behind the need for a redundancy, taking the view that businesses need to be able to take decisions to manage their business without too much interference. Unless the reason for dismissal turns out to be a glaring unfairness masquerading as a redundancy then it will not be scrutinised closely. This came from a case heard in 1976 and is still good law today. However you should always keep good records of meetings and documents where the business reasons and financial scenarios behind the need for redundancy were outlined, in order to be able to provide evidence of what drove the need for cutbacks if necessary.

Having made the case for the redundancy itself, who do you chose to let go? It is easier if a whole department is no longer needed as all the staff (potentially) in that department are likely to be made redundant. But what if you just need less? How do you choose between people?

Prior to 1997 the tribunals became increasingly caught up with pools of employees and considering individual employees' contract terms and what they could be asked to do or not under that contract and therefore which ones could be made redundant. It became rather complicated and a nightmare for managers trying to do the right thing.

Two leadings cases on redundancy dismissals were decided in 1997 and 1999 and remain good law today. The first involved the supermarket Safeway and a reorganisation which saw petrol station managers being made redundant and replaced with petrol station 'controllers'. It seemed that the managers could, under their old job definitions, be required to do more work than the new 'controller' roles even though the general work under both titles was in reality pretty similar. The case was appealed to the Employment Appeal Tribunal (EAT) who concluded that whether or not a redundancy existed could be simply answered by asking 3 questions as set out below. The EAT insisted that the terms of the dismissed employees' contracts were irrelevant and that the "work of a particular kind" did not have to be work undertaken by the redundant employee. It heralded a 'reigning in' if you like of judicially led decisions and a return to a simpler and broader test more closely aligned to the statute.

The Safeway 3 Stage Test

a. *Was the employee dismissed?*
b. *Had the requirements of the business for employees to carry out work of a particular kind ceased or diminished?*
c. *Was the employee's dismissal caused wholly or mainly by the answer to (b)?*

The second case in 1999 was *Murray v Foyle Meats.* The company operated a slaughterhouse with various internal departments such as a slaughter hall, loading bay, boning bay etc. Employees all had similar flexible contracts which didn't stipulate in which part of the factory they worked, but in fact Mr Murray and one other employee largely worked in the slaughter hall. The company decided that it needed less slaughter hall employees and Mr Murray and his colleague were declared redundant. They complained to the tribunal of unfair dismissal on the basis that everyone's contract was flexible and that they should have been put into a pool with **all** factory employees. The case went all the way to the House of Lords to determine the matter and the House of Lords agreed with the company. Their conclusion was, (referring to the first instance tribunal who had ruled in favour of the employer), 'The tribunal found, as a matter of fact, that the requirements of the business for employees to work in the slaughter hall had diminished. Second, they found that that state of affairs had led to the appellants being dismissed. That, in my opinion is the end of the matter." Brusque but clear. The emphasis arising from this case is that the business must show that its requirements for employees to do less work of a particular kind is what is important, not the contractual requirements in relation to any particular employee, and that this reduced requirement led to dismissal.

ii. **What is work of a particular kind?**

Interpreting this can be problematic and entirely fact dependant; for example the courts have held that changing the time of day that employees are required to work does not constitute a redundancy situation as the same work and same numbers are required.

Similarly, it is the exact nature of the work with reference to the skills and experience required which is important. For example a finance manager dealing with disposals would be different to a finance manager dealing with acquisitions as the skills and experience required for the job would be entirely different.

A reallocation of duties or introduction of new methods will not amount to redundancy unless it is so significant that the new job is entirely different from the old, and the employer can genuinely conclude that there is no longer a requirement for work of the old particular kind to be done.

Changes to terms and conditions have been held not to constitute a redundancy, it is the work itself and not the benefits associated with it which is relevant. For example the withdrawal of free transport to work, or the dismissal of an employee for refusing to accept a new contract may be an unfair dismissal (depending on the reason and procedure) but they do not create a redundancy.

Changing from full time to part time and vice versa. Certainly, changing from a part time requirement to a full time requirement does not create a redundancy as there is no cessation or diminution in the work, in fact the opposite. There has been case law on a shift from a full-time role to a part time role creating a redundancy however where full timers are replaced with part timers with no corresponding reduction in workload this may be different.

iii. **Is there an issue defining ceased or diminished?**

Cessation is easy to define; if the requirement for work to be carried out has ceased then there is a redundancy. But what about diminution? And how much of a diminution must there be to create a redundancy? This is somewhat similar to the question of full time to part time hours above. Two cases in 2012 considered the issue – in the first where a significant reduction in hours was proposed, it was held that there was a redundancy because there was a genuine reduction in the requirement for the work the employee did. In fact if you looked at it in terms of FTE hours (full time equivalent) as many companies do when determining headcount, then the number would have reduced from 1 to 0.5.

In a case heard one month later however the tribunal held that a reduction from 36 hours to 28 did not create a redundancy situation. There were other factors in this case however (such as the fact that the employer still needed the work doing but was reducing hours to cut costs) which made it arguably unreliable in terms of creating a precedent. As ever cases are fact specific, but if the reduction in hours arises as a result of a reduced requirement for the work to be carried out, there is likely to be a redundancy.

4. **Does a reorganisation count?**
   The answer is (as so often is the case with employment law) it depends! This area can be a minefield for the unsuspecting employer. If the reorganisation calls for different skills and a particular employee's work is no longer required, then a redundancy is created. If a reorganisation results in efficiencies and less employees needed, then that too is a redundancy.

   However if a reorganisation entails the overall requirement for work to be the same but involves changes to terms and conditions which employees do not accept, or which entails a redistribution of responsibilities but no headcount reduction, then this will not usually constitute redundancy. Determining what created the reorganisation and the corresponding effect on the workforce is crucial.

5. **What is bumping and is it a redundancy?**
   Bumping, or a 'transferred redundancy' arises when an employee's role is redundant but that employee, usually because he is more senior to another, is retained in another employee's role which he has the skills to carry out, and that unfortunate other employee (happily minding his own business!) is made redundant as a result! It does seem rather unfair but the prevailing view is that it is permissible and legally correct.

4 THE PROCEDURAL TEST – IT'S ALL ABOUT FAIRNESS

So to recap, we know that a dismissal will be fair if the dismissal is for one of the potentially fair reasons, and we know that redundancy is one. We know that the dismissal has to be both substantively (i.e. that it stacks up and redundancy genuinely is the reason) and procedurally fair. We have looked at the definition of a redundancy in its various guises and what makes for a substantively acceptable definition of redundancy.

So, on to the final test, that of procedural fairness'.

As we know that the concept of fairness has been derived from case law, we should not be surprised that it is now to a case that we turn for guidance on procedural fairness when considering a redundancy dismissal.

That case was *Polkey v AE Dayton Services* and while it was heard in 1987, it remains a leading employment law today case for a number of reasons.

Mr Polkey was employed as a van driver. The employer decided to replace its three male and one female van drivers with two van salespersons and a rep. The company concluded that the existing male drivers would not be suitable for the new positions but that the lady would and they also appointed another salesperson from outside the company. The male drivers were therefore called into the office, told that they were to be made redundant, given letters on the spot informing them of their redundancy and they were then driven

Industrial Tribunals were renamed Employment Tribunals in 1998 under The Employment Rights (Dispute Resolution) Act 1998

immediately home by a fellow employee. The dismissals came out of the blue with no prior consultation.

Mr Polkey made a claim to the industrial tribunal (as it was then called) on the basis that he had not been consulted. The case went all the way to the House of Lords who concluded that the dismissal was unfair. They stated that "an employer will not normally act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation".

So there we have it, a 3 step process for procedural fairness when making employees redundant.

So let's look in a little more detail at the three requirements.

Polkey stage 1 – warn and consult employees

Consultation covers both large and small scale redundancies and the law differentiates between the two. We will consider larger scale redundancies briefly first and then go on to consider smaller scale programmes.

1. **Collective consultation.**
   I do not propose to consider this topic in detail, as this book is primarily aimed at assisting the smaller employer, and if you are large enough to be considering 20 or more redundancies, or to recognise a trade union, then you probably have specialist or in house advice anyway. But to ensure that we have covered the basics just in case, you need to be aware of the following, (if only to seek specialist advice) if you find yourself in this situation.

   There is a statutory duty on employers who propose to dismiss as redundant 20 or more employees at one establishment over a 90-day period or less, to consult with representatives of any independent trade union, or elected employee representatives. Consultation must begin 'in good time' and where 100 or more redundancies are proposed, consultation must begin at least 45 days before the first dismissal takes effect.

'Polkey' Test of Reasonableness

1. Warn and consult employees
2. Adopt a fair basis for selection
3. Consider suitable alternative employment

For between 20 and 100 redundancies, the consultation period is 30 days. Employers must also notify the Secretary of State for Business Innovation and Skills at least 45 days before the first dismissal where the employer proposes to dismiss 100 or more employees within a 90-day period.

Where there are between 20 and 100 redundancies proposed, the notification period is 30 days. If there is no independent union then the employer **must** consult with elected representatives of the employees. The elected representatives could be representatives already set up for other purposes (such as elected works councils). Consultation with the representatives must be undertaken with a view to reaching agreement and must not simply be a matter of form. If there are no elected representatives then an election amongst the workforce affected must take place and this can be a complex process.

It is most important that employers involved in large scale redundancies follow the procedure and the timescales as set down as the penalties can be severe. A tribunal can award up to 90 days' pay (what is known as a Protective Award) in respect of *each* employee where there has been a breach of the information and consultation duty. This can run into thousands. The only possible defence to the strict duty is where consultation would have been 'utterly futile' and these situations are rare. An employer can also be fined if it fails to notify the Secretary of State.

The formal consultation procedure begins with the provision of information by the employer to the elected representatives which must include the following;

a) Reasons for the proposed redundancies, including numbers and descriptions of employees it is proposing to dismiss.
b) The total number of employees at the establishment in question.
c) Methods of selection for dismissal.
d) Methods of carrying out dismissals, (with regard to any agreed procedure, including the period over which the dismissals are to take effect).
e) How redundancy payments in excess of statutory redundancy pay will be calculated.
f) "Suitable information" about its use of agency workers. Once this information has been provided then consultation must begin.

Consultation

1. Consultation must begin when proposals are still at a 'formative stage'.
2. Consultation must include provision of adequate information on which to respond.
3. Consultation must include provision of adequate time in which to respond.
4. Conscientious consideration of the response to consultation must be given by the employer.
5. Consultation must be entered into with an open mind and with a willingness to be persuaded.
6. The employer must give the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted and to express its views on those subjects, with the consultor thereafter considering those views properly and generally.

How redundancy consultation should be conducted was set out by the court in a case involving British Coal in 1994 as follows;

In terms of what must be consulted about, the subject matter is set out in statute (the Trade Union and Labour Relations (Consolidation) Act 1992) which states that employers must consult over;

a) avoiding the dismissals.
b) reducing the number of employees to be dismissed.
c) mitigating the consequences of the dismissals.

There is no prescription regarding how long consultation can last bar that it must begin 'in good time' and at least 45 days before the first dismissal takes effect if 100 or more employees are being dismissed, or 30 days if between 20 and 100.

Notices of termination can be issued during the consultation period as long as the termination date (i.e. the dismissal taking effect) is outside of it. And of course the employer must be satisfied that consultation has lasted long enough to either have reached agreement with the representatives, or exhausted the likelihood of any agreement.

2. **Smaller scale redundancies.**
So how does the situation regarding consultation differ if you are proposing just one redundancy, or in any event less than 20. There is nothing laid down in statute regarding individual consultation in cases involving less than 20, and so again we have to turn to case law. *Polkey* itself as we have seen above suggests that employees must be warned and consulted, and that the employer will not normally have acted reasonably unless he has done so.

With regard to how long consultation should last, unlike with larger scale redundancies, there is again nothing prescribed in statute, and therefore employers should leave enough time for a process of consultation to take place. In a case called *Chronos Richardson v Watson*, the EAT stated "in our judgment it falls short of an adequate and reasonable standard of consultation for an employee to be told on a Monday that he is selected for redundancy dismissal intended to take place on Friday"!

So we can deduce that a week is too short and that the statutory minimum for 20 staff is 30 days. So an educated guess is somewhere between 2 weeks and a month! I always recommend to clients one or two group meetings followed by 2 individual meetings at least a week apart, and then the giving of notice which usually takes 3–4 weeks plus depending on notice periods.

The consultation must be meaningful and not simply a matter of form. This matters. Which means that you have to enter into it with an open mind and a willingness to listen to what the employee has to say and change your plan if they bring up a viable alternative. One of the few cases I ever lost at tribunal was acting for a client who had, on my advice, carried out a model redundancy exercise. The employee had been consulted over a period of at least a month, and alternatives were considered. At the end of the period he was declared redundant following which he subsequently (to our amazement) put in a claim of unfair dismissal on the basis of procedural unfairness due to a lack of consultation. The tribunal held that the dismissal was unfair because despite the model procedure, the Judge believed that my client had simply made his mind up at the outset that this employee was being made redundant regardless, and that the consultation process, whilst lengthy, could have made no difference to the eventual outcome. However (luckily) all was not lost as the tribunal also concluded that the position was in fact redundant, and even if my client had been more open minded, the employee would have been made redundant anyway as there were no alternatives and no suggestions put forward by the employee. So on this occasion whilst a finding of unfair dismissal was made there was no compensation awarded.

It is not a defence to claim that consultation would have made no difference where consultation does not take place – you never know what other skills an employee may possess or which other vacancies you may have that an employee might be suitable for unless you ask them. And as you have a duty to try and avoid the redundancy, it would be difficult to argue that you couldn't see any point in consulting.

In terms of the subject matter of individual consultation, while again there are no details set out, it would be wise to follow the statutory guide set out in TULCRA above.

You need to consult with all 'affected' staff, not just those being made redundant, so include those who may have knock on affects as a result of the changes.

Even though there is no statutory formula for consulting less than 20 staff, do check your contracts of employment and any collective agreements with unions, to ensure that you are not contractually bound in any way to any form of laid down process as that will take precedence.

IF IN DOUBT,
CONSULT!

Polkey Stage 2 – adopt a fair process for selection

This is most important and many employers have fallen foul (to their cost) of the requirement to select fairly. A fair selection process, whilst obviously benefiting employees as they are treated in an open and transparent way, also benefits you as the employer – it is much easier to defend your decisions if you have an objective process than if you don't.

The law on redundancy only applies to employees and not other categories of staff such as 'workers' or self-employed workers. It is important therefore to include only employees in your pool.

Selecting fairly can be subdivided into firstly creating a pool of staff and secondly choosing between them in that pool.

a. The Pool.
It might seem obvious if you have one driver and you no longer need a driver, that you simply consult with that person alone.

But what to do if you have three drivers and need to lose one? Or two drivers? Do you decide which one has to go and just choose that one to consult with? Or do you put them both in a pool and consult with them both? The answer is that generally you consult with them both.

So what makes a pool fair?

We turn again to case law to assist and there are a number of principles which have been derived from decisions in the courts and I will list the most relevant here;

(Hopefully you are now getting the hang of the fact that it is statute ably assisted by case law which is the way that employment law works.)

Principles on selection pools from case law

- Failure to consider employees doing similar work from more than one department can be unreasonable
- Failure to include all employees in a department even if some are more skilled than others can be unreasonable
- If employer can provide a sensible explanation for the pool then tribunal is unlikely to challenge it
- There are no fixed rules about how a pool should be determined but too narrow can be unreasonable

If you recognise a union you will be expected to agree the pool and selection criteria with the union.

So (and assuming that there is no union recognition and you are free to determine your own pool) when considering how to create your pool answering the following questions may help;

1. What sort of work is ceasing or diminishing?
2. How many employees regularly do that work or are capable of doing that work?
3. Are employees' jobs interchangeable and do they interchange often?
4. Are there other departments in the same place doing similar work who should be included in this pool or is it discrete?
5. Can you widen the pool to include lesser skilled employees?
6. If called upon to so do can you demonstrate that you have 'genuinely applied your mind' to the creation of your pool?
7. Are there any employees who you feel may be upset by your choice of pool? Examine why that might be in advance and consider whether you should change your pool as a result.

b. The Selection Criteria.
Having chosen the pool, you now need to find a method of choosing between the people in the pool on the basis that you have more people in the pool than you need to declare as redundant. It might seem obvious to you and you probably know who you want to keep, most employers do, but unless your criteria are objective and demonstrable, you may be in trouble. Just because Sarah regularly comes in early and always makes the tea, or Fred is your cousin's son doesn't mean that you can automatically select them over others.

It is commonplace now to have a 'matrix' of factors which staff can be scored against and factors can even be weighted if you want to be really thorough. For example it might be more important to your company that a person regularly delivers on their sales targets than that they have the right qualifications, or the odd day off sick. You can determine that yourself and as long as you can justify it, it should be acceptable. Obviously don't skew the weighting wildly just to keep a certain member of staff! It happens!

So which factors to choose? When I first started advising on redundancy selection back in the early 80s, it really was most straightforward. Last in first out (LIFO) was the generally accepted criteria and while others were used in conjunction, as a fall back where all else was equal, we used length of service perfectly legitimately and it was rarely challenged.

However, times have changed since the introduction of age discrimination in 2006 and using length of service alone, or even as a strongly weighted factor can now be seen to be discriminatory. There is no reason why it can't be used as part of a bundle of other factors but I would caution against putting too much emphasis on it now. It may also have discriminatory undertones for other reasons, such as women who may have less service than men due to breaking service as a result of child rearing.

So what other factors can we use?

Acas suggests the following;

- Absence and attendance
- Disciplinary records
- Performance
- Skills, experience and qualifications

It is important that whatever you choose can be 'objectively justified'. Under performance for example use appraisal results or the achievement of targets or goals or measures which are already in place which can be shown to staff. Subjective views on a person which have not been communicated and are not measurable are likely to fail as fair reasons.

Under skills, experience and qualifications, only use ones which are relevant to this job and be careful with experience as it may be discriminatory to younger workers if too much emphasis is placed on it.

Under disciplinary only use existing warnings, not expired ones and with absence and attendance, be very careful to exclude any disability related absence, or absence to do with maternity or paternity or leave to care for dependants.

Note that part timers and those on fixed term contracts are protected under the law and it would be automatically unfair to select someone for redundancy on the basis of their part time or fixed term status alone unless it can be objectively justified (and I can't think of many good examples of this!).

It should hopefully go without saying that selecting someone because they are pregnant or on maternity leave or over retirement age (there is no longer any such thing as 'retirement age) is directly discriminatory! You may think that that is obvious (and if not then you're reading the right book!) but one client facing a redundancy exercise only a few years ago cheerfully told me that we could lose x and y first because one was on maternity leave and the other was 68!

Scores and matrix results should be discussed individually with employees in consultation so that they can see how you have arrived at your decision.

There are conflicting case law authorities on whether you should show everyone all scores – in *British Aerospace v Green* in 1995 it was held that there was no obligation on employers to make all scores available, however *in John Brown Engineering v Brown* heard in 1997 it was held that not to show all scores was inherently unfair and made 'a sham' of the process. I would recommend as a compromise that you show each employee their own individual scores and then perhaps compile an anonymous list of all scores so that they can see where they figure in the overall picture but can't compare exactly with individuals. In my experience staff tell each other anyway so it gets out regardless of what you do but best to err on the side of caution and don't show everyone's scores to everyone else.

Employees should also be given a chance to challenge their scores as part of the consultation process and some understanding of how they were arrived at in order to do so! In *Alstom Traction Ltd v Stephen Birkenhead* and others it was held to be unfair just to give an employee their total score without showing them how it had been made up across the factors.

Polkey Stage 3 – consider suitable alternative employment

The third part of the Polkey test on procedural fairness involves offering potentially redundant employees any suitable alternative employment which may exist in your organisation.

At this point you have likely been through the consultative exercise so far and determined that the individual role is to be made redundant. Before declaring the position finally redundant, you must consider if there are any suitable vacancies for which they may be considered. A failure to do so is likely to render the dismissal unfair.

Remember that under TULCRA employers are required to consult over avoiding dismissals, reducing the number of employees to be dismissed and mitigating the consequences of the dismissals. Considering any vacancies is therefore imperative otherwise you are acting unreasonably – let's face it why wouldn't you look for alternative vacancies for your soon to be made redundant employee? The answer is often that it suits you to let this person go as they haven't been performing particularly well but I'm afraid if that is the case it should have been dealt with before now under the disciplinary procedure. Like it or not, if there are suitable alternative vacancies then they must be offered.

Note that an employer isn't required to *create* vacancies if none exist, but case law tells us that the employer must make 'reasonable efforts' to determine whether there are suitable alternatives – this is easy if you are a small company but if you are part of a big group then you need to work a bit harder to determine whether there are any other jobs going.

If the employee accepts the suitable alternative employment offered, or unreasonably refuses it, then they will lose their right to a redundancy payment.

Point to Note

An offer must physically be made before an employer can conclude that it has been unreasonably turned down. Sounds obvious but if you tell the employee about an alternative role and they don't like the sound of it and don't wish to pursue it, that doesn't count as a refusal (and they will still be entitled to their redundancy pay) as no offer has been made which has then been refused

Sounds straightforward. Unfortunately, not always so. Whose definition of whether it is suitable do we take and what even constitutes suitable? Ultimately, as ever, it comes down to a question of fact and degree. And unfortunately for the employer, it is for the employer to prove that the employment is suitable and that the employee's rejection in unreasonable and not the other way round.

There are number of factors which can be taken into account when considering suitability. These include objective and relatively easily measurable criteria such as you might expect including location. salary, status, job content, job title and other terms such as cars, holidays and sick pay. However there is also a subjective element to the question of suitability, and the employee's personal and family circumstances can also be taken into account. And so the reasonableness is not judged against a hypothetical reasonable employee but against this employee, taking into account their personal circumstances. Did they have *sound and justifiable reasons on the basis of the facts as they appeared, or ought reasonably to have appeared* to the employee at the time their decision had to be made in turning down the offer? A dismissal was found to be unfair where a lady refused an alternative offer even though the job was in a new location just a couple of miles from her home. It was held that because she walked to work and shopped locally and went to the gym at lunchtime at the old location and as this was not possible in the new location, even though it was only a couple of miles away, this was not a suitable offer. Someone who drove to work and did not use the local amenities might have found that this offer was held to be suitable thus highlighting the subjective element of reasonableness here.

The employer must of course make any vacancy available to all potentially redundant employees and this may involve another selection process if more than one apply. Luckily the employer does not have to be so rigorous in its selection here as with the redundancy selection process (no matrices needed!). He can simply interview as with any position and choose the best candidate.

Preferential Treatment

Certain employees receive preferential treatment when part of a redundancy programme. For example parents on maternity or adoption leave must be offered suitable alternative employment ahead of everyone else in the queue even if they are not the best candidate. And similarly, all employees facing redundancy must be offered internal vacancies in preference to external candidates, even where the external candidate is the better candidate as long as the internal candidate is suitable for the role.

Trial Periods

Employees are permitted a statutory trial period of four weeks to determine whether the alternative offer is suitable. It can be extended but only for the purposes of retraining the employee. At the end of this the employee must decide whether they are to accept the alternative employment in which case they continue in the new role, or whether they consider that the new role is not suitable and reject the offer. The employer at that stage has to decide whether their rejection was reasonable or not as discussed above.

5 THE MECHANICS – HOW TO CARRY OUT THE PROCESS

One of the issues clients have needed help with most over the years when facing redundancies, apart from understanding the basics of redundancy itself, is how to actually carry it out. What do they do first, then what and then what. Sometimes just starting the process is the hardest part.

So what follows is a step by step approach to ensure that you get it right.

1. **Alternatives.**
   Start by considering all alternatives to redundancy listed in Chapter 2 such as reducing overtime, effecting a recruitment freeze, letting go of temporary and casual staff, and considering whether lay offs or short time working (if contractually possible) might avoid redundancies.

2. **Work out your commitments.**
   If you recognise a union you will need to talk to the union about your proposals. Check your contracts of employment and handbook also to determine whether there is a redundancy policy or agreement which needs to be followed.

3. **Work out the numbers.**
   There are three potential decisions here on numbers.

a. Statutory Redundancy Pay. Redundant employees are entitled to a statutory redundancy payment if they have 2 years' service at the date of dismissal. This is calculated according at a formula based on age and length of service, set out in the box below. It sounds complicated but there is a handy little chart you can use to work this out much more easily which is readily available online, and the government website (www.gov.uk, incidentally an awesome website with literally heaps of excellent advice and information) will calculate it for you. A maximum of 20 years' service can be taken into account for redundancy pay purposes. A week's pay is subject to an upper limit set out by the government each year (currently £479 per week) and you receive this unless your pay is less than the limit in which case your payment is based on your actual weekly gross pay.

Your first decision is therefore whether you calculate a week's pay based on actual earnings or the statutory figure. Statutorily you are only required to use the maximum figure set. My clients tend to be smaller employers in the main and they always use the statutory figure. Larger companies or those with redundancy policies often use actual pay as a benefit for staff but this can increase the cost considerably. Let's take for example an employee aged 49 earning £30,000 per annum who has 12 years' service, with a gross weekly pay of £576.92. They are entitled, according to the statutory formula below, to 16 weeks' pay. If we use the statutory figure of £479 they would receive £7664. If we use their actual pay they would receive £9230.72, a substantial difference to them and obviously an increased cost to you.

Statutory Redundancy Pay

a. 0.5 week's pay for each full year worked aged under 22
b. 1 week's pay for each full year worked aged 22 or older, but under 41
c. 1.5 week's pay for each full year worked aged 41 or older

b. Enhanced Redundancy pay. The next decision is whether to offer enhanced pay over and above the statutory entitlement. This may be as part of an arrangement agreed with the unions or via the contract. Some employers do it by way of basing statutory redundancy pay on average pay rather than the statutory maximum as seen above. Some do this by adding a multiplier, for example an additional week's pay for each year of service based on actual pay. However employers need to exercise caution here.

If it occurred to you that the statutory redundancy formula for calculating redundancy pay is discriminatory as it is based on age and length of service (which of course favours the older employee), then you would be absolutely right. However, there is an exemption in the Equality Act 2010 which permits this. There is also an exemption for employers to offer their own enhanced redundancy pay schemes *as long as* the scheme is a more favourable version of the statutory scheme. The scheme must only be offered to employees who are entitled to statutory redundancy pay, (including those who take voluntary redundancy where they would have been entitled to statutory redundancy pay) and those who would fall into either of those categories but for the two-year qualifying period.

The exemption permits the following types of scheme;

a. Removing or raising the cap on a week's pay as we saw above, basing statutory redundancy on actual pay; or
b. Increasing the amount allowed for each year of employment by multiplying it by a figure of more than one; or
c. Increasing the overall figure produced by the calculation by multiplying it by a figure of more than one.

It is most important that any employer scheme uses the same age bands as the statutory scheme under 22, 22–40, and 41 or above, and the respective multipliers for those age bands are the same as or in proportion to the statutory multipliers of ½, 1 and 1½.

If you do decide to offer enhanced pay which is not part of any agreement, as well as ensuring that you comply with the exemption set out above, also be careful of setting a precedent for any future redundancies and make it clear to staff that this is a one off at this particular time as a result of current financial conditions. If you always make enhancements when making staff redundant, even if not written down, it may become an implied term of the contract by way of custom and practice and you may find that you face claims for the same if you make staff redundant without the additional pay at any future point. Redundancy pay is currently tax free, (although the government are consulting on this as we speak) up to a maximum of £30,000. If you are offering any ex gratia payment over and above statutory and any contractual payments, you might want to consider asking your employee(s) to sign a Settlement Agreement so that they are not able to bring any claims against you post termination. This is a specialist area and you need to be aware that for a Settlement Agreement to be binding the employee must take legal advice before signing it.

c. Notice Pay. Employees are statutorily entitled to a minimum of a week's notice per year of service (assuming that they have worked for at least one month – there is no entitlement to notice under a month) to a maximum of 12 weeks. Do check employment contracts as often staff have higher contractual entitlements to notice than that provided under statute. You need to decide whether you want staff to work their notice or whether you will let them go and make a payment in lieu of notice. Clearly it is more beneficial for the employee to be let go with a payment in lieu of notice however do check the contract to ensure that there is a payment in lieu provision. If you are not contractually entitled to make a payment in lieu of notice you may be in breach of contract. In practice, most employees wouldn't argue but technically it would be a breach which would mean that you couldn't rely on the terms of the contract if you are in breach. This could have the non-desired effect of releasing the employees from any post termination clauses such as restrictive covenants and confidentiality clauses.

Useful tip; when drafting your contracts of employment, include an express right to make a payment in lieu of notice, entirely at your discretion.

4. **Decide upon your pool and selection criteria.**
   As above, if there is a recognised union you will need to agree criteria with them, and abide by any redundancy agreement in place. Absent that, decide on your pool of affected employees and then the criteria you will use to select and what weighting if any you will give to each one. If they would normally have been in this group, then remember to include absent employees, those on long term sick or on maternity or paternity leave, as they will need to be consulted with in the same way although you may need to be flexible and offer to see them at home if necessary.

5. **Talk to staff.**
   If the alternatives haven't achieved the required result, identify all affected staff and in a group meeting outline the potential changes required and inform them that redundancies may be necessary. Explain the reasons. If you think that it is possible to make the required cutbacks by a small number of dismissals, ask for volunteers first before considering any formal meetings. Remember to explain to staff that volunteers may not be accepted due to the needs of the business and retaining certain skills. Reassure staff that there will be no detriment suffered if they volunteer and are not accepted. Discuss potential available alternatives. Redundancies are all provisional at this stage. If there is a pool and selection criteria explain how this works and that employees in the pool will next be scored against the criteria. I always recommend writing to staff individually after these sorts of meetings setting out what was discussed. It provides transparency and certainty and gives you a paper trail should you need it. If volunteers come forward after the meeting you will need to advise them of their potential redundancy package. Numbers and details ('will I have to work my notice?') are hugely important to volunteers so have this ready.

   You then need to carry out the scoring exercise. It is prudent (if there are enough managers available who know the staff) to use more than one manager to score the staff involved so that there is as much objectivity as possible and to avoid personal bias.

6. **Consult.**
   If volunteers aren't sufficient, then you will need to write to all staff inviting them to a group meeting to be followed immediately by individual meetings. In the letter advise that they have been provisionally selected for redundancy based on the scores and enclose scoring details so that each employee has time to consider the score before the meeting. Give at least 24 hours' notice of this meeting. Start with the group meeting setting the scene, explain if any volunteers have come forward and how this has impacted on the overall number. Discuss timescales and then hold an individual consultative meeting with each member of staff. Employees don't have a statutory right to be accompanied at these meetings but it is good practice to allow them to bring a colleague if they want to.

The redundancy should still only be provisional at this stage as nothing will yet have been decided until you have consulted fully. Explain to each one again the reason for the redundancy, discuss the possibility of alternatives, explain what their package might be, if there is a pool you need to discuss the selection criteria and how they have scored against it, listen to any comments or questions they may have and then set a date for the next meeting when they have had time to think about it and bring any further comments to you. I would then suggest at least a week before the next meeting.

At the next meeting listen to whatever they may raise, and give genuine consideration to any suggestions or points they make. You may need to schedule a final meeting if any points they make merit more detailed consideration.

7. **Termination.**
   If at the final meeting there are no suggestions which alter the position, then you declare their position redundant and issue a notice of dismissal. Notice takes effect from the day after it is given.

   At that point if there is any alternative employment, you can schedule a trial 4-week period and the dismissal notice is subject to the alternative employment. If at the end of that 4 week trial the position is suitable then a formal offer should be made within the notice period, there is no redundancy and notice is withdrawn. If it is not suitable the notice persists. A letter should be written confirming all details, redundancy pay, whether statutory or enhanced, how much notice, whether they are required to work it or not, and the termination date.

   Employees should be given the right of appeal (and this should be confirmed in the letter) against their redundancy as a matter of good form. There is no statutory right as such but it is good practice to do so.

   Employees with two years' service as at their termination date also have the right during their notice period to reasonable time off (some of which can be with pay) during working hours to seek alternative employment or to arrange training for future employment. There is no statutory definition of what is 'reasonable' so the employer will have to treat requests with common sense. The right to be paid is capped at 40% of a week's pay (equivalent to two full days' pay for an employee who works a five-day week) during the whole of the notice period.

Sometimes issues arise when an employee under notice of redundancy secures another job and wants to leave before their notice period expires. Employers are faced with a dilemma regarding whether to pay redundancy pay or not. If they resign before notice is given then there is no obligation on the employer to pay redundancy pay. If they resign after notice has been given and the employer doesn't object to paying the redundancy then they may still pay it. If they do object however, they may write to the employee asking them to remain until the expiry of the notice period (this is called a section 142 notice and governed by the Employment Rights Act). If the employee leaves anyway the employer may withhold the statutory redundancy pay. The employee however has the right in this situation to apply to a tribunal to determine whether it was 'just and equitable' for the employer to withhold the payment. Much will turn on whether the employee could have delayed the start of the new job or not.

Once the employee has left, in the unlikely event that you need to recruit again once staff have left there is no statutory obligation to offer the job to redundant employees although from a skills and knowledge point of view it might make sense to do so!

6 WHAT COULD POSSIBLY GO WRONG?

If you have followed the guidelines above then it is unlikely that anything *should* go wrong with your redundancy process but employees do make claims and sometimes they can be arbitrary and sometimes tribunals will find flaws in a procedure even if you have done your best. It is also easy to inadvertently say the wrong thing which can land you in hot water.

So what claims can an employee make?

An employee who feels that their redundancy dismissal was unfair will still make a claim for unfair dismissal, there is no special terminology relating to redundancy.

There are automatically unfair dismissals under the law and selection for redundancy on certain prescribed grounds (such as connected to pregnancy or childbirth, for whistleblowing or asserting a statutory right, for health and safety related reasons, for being on jury service, related to applying for flexible working, etc. etc., the list is much longer but this gives you an idea) is deemed automatically unfair and employees in those situations do not need a qualifying period of employment. You can see that these reasons do not fit our definition of redundancy above and redundancy is being used as a cover for the real reason.

As we have seen above, the employee may make a claim if they feel that the reason for dismissal was not for redundancy but some other reason; or that the redundancy was not necessary, i.e. the reason behind it did not stack up; if they were not warned or consulted; if there was no fair basis for selection, or if alternative employment was not offered if available. They can also make a claim if they feel that any enhanced redundancy pay scheme is discriminatory and falls outside of the permitted exceptions.

If an employee wins a tribunal claim they can be awarded a Basic Award which is equivalent to redundancy pay and which is cancelled out if redundancy pay has already been given. In addition, the tribunal can also award a Compensatory Award, which is based on the employee's financial loss as a result of the unfair dismissal. Compensatory awards are subject to a maximum of a year's pay, or a figure set by the government each year (currently £78,962) whichever is the lower.

Awards for unfair dismissal are typically at the lower end of the scale (current median award circa £7500) but can be higher if the employee is not far from retirement or if there is a particular difficulty in securing another role.

If there is discrimination or whistleblowing involved, then the cap of a year's pay is removed and awards can be much higher.

Employees seeking to bring a tribunal claim must now first contact Acas and obtain what is known as an Early Conciliation Certificate. Acas will try and resolve the dispute if at all possible, and if the parties are willing. Acas will only issue a certificate if either party does not want to conciliate, or if they do but are unable to reach agreement within the timescale. Even if a certificate is issued and a claim is brought Acas can conciliate right the way up to a hearing. If they are successful in obtaining an agreement, it is recorded on what is known as a COT3 agreement which is binding on both parties.

Conclusion

Carrying out a redundancy programme can be daunting and there are many pitfalls as we have seen.

However, if an employer genuinely applies his mind to the criteria, is sure that there is no longer a need for the employee to carry out this type of work, if he consults with him while there is still time to make a difference, selects him fairly and offers any reasonable alternatives then he won't have gone far wrong.