

# Unite the Union

*Education Department*

## Dealing With Redundancy

## Resources





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**Note:** The information in this pack is current at the time of this course, but remember that if you use legislation or case law in the future to always check it is up to date.

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# 1. Employment Rights Act 1996

## **S.135 The right.**

(1) An employer shall pay a redundancy payment to any employee of his if the employee -

(a) is dismissed by the employer by reason of redundancy,

or

(b) is eligible for a redundancy payment by reason of being laid off or kept on short-time.

(2) Subsection (1) has effect subject to the following provisions of this Part (including, in particular, sections 140 to 144, 149 to 152, 155 to 161 and 164).

## **S.139 Redundancy.**

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to -

(a) the fact that his employer has ceased or intends to cease to -

(i) carry on the business for the purposes of which the employee was employed by him,

or

(ii) carry on that business in the place where the employee was so employed,

or

(b) the fact that the requirements of that business -

(i) for employees to carry out work of a particular kind,

or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(3) For the purposes of subsection (1) the activities carried on by a (local authority) with respect to the schools maintained by it, and the activities carried on by the (governing bodies) of those schools, shall be treated as one business (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(4) Where -

(a) the contract under which a person is employed is treated by section 136(5) as terminated by his employer by reason of an act or event,

and

(b) the employee's contract is not renewed and he is not re-engaged under a new contract of employment,

he shall be taken for the purposes of this Act to be dismissed by reason of redundancy if the circumstances in which his contract is not renewed, and he is not re-engaged, are wholly or mainly attributable to either of the facts stated in paragraphs (a) and (b) of subsection (1).

(5) In its application to a case within subsection (4), paragraph (a)(i) of subsection (1) has effect as if the reference in that subsection to the employer included a reference to any person to whom, in consequence of the act or event, power to dispose of the business has passed.

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

(7) In subsection (3) "local authority" has the meaning given by section 579(1) of the Education Act 1996. ]

## 2. Trade Union & Labour Relations (Consolidation) Act 1992

### **S. 181 General duty of employers to disclose information.**

(1) An employer who recognises an independent trade union shall, for the purposes of all stages of collective bargaining about matters, and in relation to descriptions of workers, in respect of which the union is recognised by him, disclose to representatives of the union, on request, the information required by this section.

In this section and sections 182 to 185 “representative”, in relation to a trade union, means an official or other person authorised by the union to carry on such collective bargaining.

(2) The information to be disclosed is all information relating to the employer’s undertaking (including information relating to use of agency workers in that undertaking) which is in his possession, or that of an associated employer, and is information -

(a) without which the trade union representatives would be to a material extent impeded in carrying on collective bargaining with him,

and

(b) which it would be in accordance with good industrial relations practice that he should disclose to them for the purposes of collective bargaining.

(3) A request by trade union representatives for information under this section shall, if the employer so requests, be in writing or be confirmed in writing.

(4) In determining what would be in accordance with good industrial relations practice, regard shall be had to the relevant provisions of any Code of Practice issued by ACAS, but not so as to exclude any other evidence of what that practice is.

(5) Information which an employer is required by virtue of this section to disclose to trade union representatives shall, if they so request, be disclosed or confirmed in writing.

## **S. 188 Duty of employer to consult . . . representatives.**

(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be (affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.)

(1A) The consultation shall begin in good time and in any event -

(a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least (45 days) ,  
and

(b) otherwise, at least 30 days,

before the first of the dismissals takes effect.

(1B) For the purposes of this section the appropriate representatives of any affected employees are -

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union,  
or

(b) in any other case, whichever of the following employee representatives the employer chooses:-

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf;

(ii) employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1).

(2) The consultation shall include consultation about ways of -

(a) avoiding the dismissals,

(b) reducing the numbers of employees to be dismissed,

and

(c) mitigating the consequences of the dismissals,

and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

(3) In determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun.

(4) For the purposes of the consultation the employer shall disclose in writing to the (appropriate) representatives -

- (a) the reasons for his proposals,
- (b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant,
- (c) the total number of employees of any such description employed by the employer at the establishment in question,
- (d) the proposed method of selecting the employees who may be dismissed, . . .
- (e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect. ...
- (f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be dismissed.
- (g) the number of agency workers working temporarily for and under the supervision and direction of the employer,
- (h) the parts of the employer's undertaking in which those agency workers are working,  
and
- (i) the type of work those agency workers are carrying out.

(5) That information shall be (given to each of the appropriate representatives by being delivered to them), or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the union at the address of its head or main office.

(5A) The employer shall allow the appropriate representatives access to (the affected employees) and shall afford to those representatives such accommodation and other facilities as may be appropriate.

(6) (now omitted). . . . .

(7) If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection (1A), (2) or (4), the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances. Where the decision leading to the proposed dismissals is that of a person controlling the employer (directly or indirectly), a failure on the part of that person to provide information to the



employer shall not constitute special circumstances rendering it not reasonably practicable for the employer to comply with such a requirement.

(7A) Where -

(a) the employer has invited any of the affected employees to elect employee representatives,

and

(b) the invitation was issued long enough before the time when the consultation is required by subsection (1A)(a) or (b) to begin to allow them to elect representatives by that time,

the employer shall be treated as complying with the requirements of this section in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.

(7B) If, after the employer has invited affected employees to elect representatives, the affected employees fail to do so within a reasonable time, he shall give to each affected employee the information set out in subsection (4).

(8) This section does not confer any rights on a trade union ,(a representative) or an employee except as provided by sections 189 to 192.

## 3. Redundancy: your rights

1. Overview
2. Being selected for redundancy
3. Redundancy pay
4. Notice periods
5. Consultation
6. Suitable alternative employment

### 1. Overview

Redundancy is a form of dismissal from your job. It happens when employers need to reduce their workforce.

If you're being made redundant, you might be eligible for certain rights, including:

- redundancy pay
- a notice period
- a consultation with your employer
- the option to move into a different job
- time off to find a new job

You must be selected for redundancy in a fair way, eg because of your level of experience or capability to do the job.

You can't be selected because of age, gender, or if you're disabled or pregnant etc. If you are, this could be classed as an unfair dismissal.

### 2. Being selected for redundancy

Your employer should use a fair and objective way of selecting you for redundancy.

Commonly used methods are:

- last in, first out (employees with the shortest length of service are selected first)
- asking for volunteers (self-selection)
- disciplinary records
- staff appraisal markings, skills, qualifications and experience

Your employer can make you redundant without having to follow a selection process if your job no longer exists.

If your employer uses 'last in, first out', make sure it's not discrimination, eg if it means only young people are made redundant.

### Reapplying for your own job

You might be asked to reapply for your own job, which could help your employer decide who to select. If you don't apply or you're unsuccessful in your application, you'll still have a job until your employer makes you redundant.

## Unfair selection

You can't be selected for the following reasons - your redundancy would be classed as an unfair dismissal:

- gender
- marital status
- sexual orientation
- race
- disability
- religion or belief
- age
- trade union membership
- health and safety activities
- working pattern (eg part-time or fixed-term employees)
- maternity leave, birth or pregnancy
- paternity leave, parental or dependants leave
- your membership or non-membership of a trade union
- you're exercising your statutory rights
- whistleblowing (eg making disclosures about your employer's wrongdoing)
- taking part in lawful industrial action lasting 12 weeks or less
- taking action on health and safety grounds
- doing jury service
- you're the trustee of a company pension scheme

## Appealing the decision

You can appeal if you feel that you've been unfairly selected. Write to your employer explaining the reasons.

You may be able to make a claim to an employment tribunal for unfair dismissal.

## Voluntary redundancy

It's up to your employer whether they actually select you if you volunteer for redundancy.

Your employer can't just offer voluntary redundancy to age groups eligible for an early retirement package - this could be unlawful age discrimination.

However, an early retirement package (for certain age groups) could be one element of a voluntary redundancy offer open to all employees.

## Apprentices

Talk to your manager and training provider if you're an apprentice and you're worried about being made redundant.

Your training provider or the National Apprenticeship Service might be able to help you find another employer to help you complete your apprenticeship.

Apprenticeships are different in Scotland, Wales and Northern Ireland.

### 3. Redundancy pay

You'll normally be entitled to statutory redundancy pay if you're an employee and you've been working for your current employer for 2 years or more.

You'll get:

- half a week's pay for each full year you were under 22
- 1 week's pay for each full year you were 22 or older, but under 41
- 1 and half week's pay for each full year you were 41 or older

Calculate your redundancy pay

Redundancy pay (including any severance pay) under £30,000 is not taxable.

#### Exceptions

You're not entitled to statutory redundancy pay if:

- your employer offers to keep you on
- your employer offers you suitable alternative work which you refuse without good reason

Being dismissed for misconduct doesn't count as redundancy, so you wouldn't get redundancy pay if this happened.

You're not entitled to statutory redundancy pay if you fall into one or more of the following categories:

- merchant seamen, former registered dock workers (covered by other arrangements) or share fishermen
- crown servants, members of the armed forces or police services
- apprentices who are not employees at the end of their training
- a domestic servant who is a member of the employer's immediate family

#### Short-term and temporary lay-offs

You can claim statutory redundancy pay if you're eligible and you've been temporarily laid off (without pay or less than half a week's pay) for either:

- more than 4 weeks in a row
- more than 6 non-consecutive weeks in a 13 week period

Write to your employer telling them you intend to claim statutory redundancy pay. This must be done within 4 weeks of your last non-working day in the 4 or 6 week period.

If your employer doesn't reject your claim within 7 days of receiving it, write to your employer again giving them your notice.

Your claim could be rejected if your normal work is likely to start within 4 weeks and continue for at least 13 weeks.

## 4. Notice periods

You must be given a notice period before your employment ends.

The statutory redundancy notice periods are:

- at least 1 week's notice if employed between 1 month and 2 years
- 1 week's notice for each year if employed between 2 and 12 years
- 12 weeks' notice if employed for 12 years or more

Check your contract. Your employer may give you more than the statutory minimum, but they can't give you less.

### Notice pay

As well as statutory redundancy pay, your employer should either:

- pay you through your notice period
- pay you in lieu of notice depending on your circumstances

### Payment in lieu of notice

Payment in lieu of notice is money paid to you by your employer as an alternative to being given your full notice.

This means that your contract can be ended without any notice.

You must get all of the basic pay you would have received during the notice period. You may get extras such as pension contributions or private health care insurance if they're in your contract.

To do this you must have a payment in lieu of notice clause in your employment contract. If it's not in your contract and you're paid in lieu you must receive full basic pay, plus compensation for any benefits you would have got during the notice period.

## 5. Consultation

You're entitled to a consultation with your employer if you're being made redundant. This involves speaking to them about:

- why you're being made redundant
- any alternatives to redundancy

You can make a claim to an employment tribunal if your employer doesn't consult properly (eg if they start late, don't consult properly or don't consult at all).

### Collective redundancies

If your employer is making 20 or more employees redundant at the same time, the consultation should take place between your employer and a representative (rep).

This will either be:

- a trade union rep (if you're represented by a trade union)
- an elected employee rep (if you're not represented by a trade union, or if your employer doesn't recognise your trade union)

Collective consultations must cover:

- ways to avoid redundancies
- the reasons for redundancies
- how to keep the number of dismissals to a minimum
- how to limit the effects for employees involved, eg by offering retraining

Your employer must also meet certain legal requirements for collective consultations.

### **Length of consultation**

There's no time limit for how long the period of consultation should be, but the minimum is:

- 20 to 99 redundancies - the consultation must start at least 30 days before any dismissals take effect
- 100 or more redundancies - the consultation must start at least 45 days before any dismissals take effect

### **Electing employee reps**

If you're an employee affected by the proposed redundancies you can:

- stand for election as an employee rep
- vote for other reps

### **Fixed term contract employees**

Your employer doesn't need to include you in collective consultation if you're employed under a fixed term contract, except if they're ending your contract early because of redundancy.

## **6. Suitable alternative employment**

Your employer might offer you 'suitable alternative employment' within your organisation or an associated company.

Whether a job is suitable depends on:

- how similar the work is to your current job
- the terms of the job being offered
- your skills, abilities and circumstances in relation to the job
- the pay (including benefits), status, hours and location

Your redundancy could be an unfair dismissal if your employer has suitable alternative employment and they don't offer it to you.

## **Refusing an offer**

You may lose your right to statutory redundancy pay if you unreasonably turn down suitable alternative employment.

You can make a claim to an employment tribunal if you think the job you've been offered isn't suitable.

## **Trial periods**

You have the right to a 4 week trial period for any alternative employment you're offered.

The 4 week period could be extended if you need training. Any extension must be agreed in writing before the trial period starts.

Tell your employer during the trial period if you decide the new job isn't suitable. This won't affect your employment rights, including your right to statutory redundancy pay.

You'll lose your right to claim statutory redundancy pay if you don't give notice within the 4 week trial period.

## **Time off for job hunting**

If you've been continuously employed for 2 years by the date your notice period ends, you're allowed a reasonable amount of time off to:

- look for another job
- arrange training to help you find another job

How long you can take will depend on your circumstances.

No matter how much time you take off each week to look for another job, your employer only has to pay you up to 40% of that week's pay for it.

## **Example**

You work 5 days a week and you take 4 days off in total during the whole notice period - your employer only has to pay you for the first 2 days.

## 4. Redundancy selection matrix/criteria - example

(a) See below for an *example* of a redundancy selection matrix to assess employees' value to the organisation when considering making redundancies from a pool of employees. The scores arrived at will form the basis of management decisions as to whom to select for redundancy.

<b>Redundancy selection matrix</b>			
Name of employee		Job title	
Department		Length of service	
Name(s) of manager(s) making assessment			
Criteria	Score (1-10)	Weighting (1-5)	Total score
Knowledge (eq of job, customers, the organisation)			
Skills			
Breadth and depth of relevant experience			
Versatility (in terms of ability/willingness to perform different functions/duties)			
Relevant qualifications/training			
Job performance			
Attendance			
Timekeeping			
Disciplinary record			
Total score			
Manager's signature		Date	
Approval of senior manager		Date	
<p><b>Notes</b></p> <p>The range of 1-10 for employees' point scores should be applied as follows:            10 = highest (eg the employee's skills are exceptionally relevant and useful to the organisation)            1 = lowest (eg the employee does not have suitable or adequate skills to do the job)</p> <p>The organisation treats personal data collected for the purposes of dealing with potential or actual redundancies in accordance with its data protection policy. Information about how your data is used and the basis for processing your data is provided in [the organisation's employee privacy notice].</p>			



**(b) Law relating to a redundancy selection matrix/criteria:**

Employment Rights Act 1996, Equality Act 2010, Data Protection Act 2018, General Data Protection Regulation (2016/679 EU)

Employers should establish the criteria for selection for redundancy with care, and ensure that they avoid any grounds that will be automatically unfair in law. Automatically unfair reasons for redundancy selection include reasons associated with an employee's trade union membership or activities, health and safety activities, pregnancy and maternity leave, making a protected disclosure (whistleblowing), assertion of a statutory right and (for shop workers and betting workers) refusal to work on a Sunday. Further, any criteria that place an individual at a disadvantage because of sex, race, disability, age, religion or belief, sexual orientation, marital or civil partnership status, pregnancy or maternity or gender reassignment will breach the Equality Act 2010.

A dismissal for redundancy may be unfair under the general test of fairness in s.98(4) of the Employment Rights Act 1996 as a result of the application of unfair redundancy selection criteria or if the criteria have not been applied fairly, objectively and consistently.

Under the Equality Act 2010, redundancy selection processes should be free of age discrimination. For example, selecting employees for redundancy on a "last in first out" (LIFO) basis is likely to be indirectly discriminatory as the practice puts younger employees at a particular disadvantage.

However, selecting employees for redundancy on a LIFO basis may be justifiable where it constitutes a proportionate means of achieving a legitimate aim. The employer may wish to reward loyalty and, used as one of several criteria or a deciding factor when other factors are not decisive, LIFO may be a proportionate means of achieving this aim. The use of LIFO may also be justified where there is a limited availability of other criteria. Generally, it is inadvisable for an employer to adopt LIFO as the only criterion, if there are other factors that can be taken into account.

If attendance is to be used as one of the criteria for selection for redundancy, absences on maternity leave and any absences due to a pregnancy-related condition should not be taken into account in allocating points. Further, absence for parental leave, paternity leave, adoption leave or acting as a trade union or employee representative should not be taken into account. The employer should not use selection criteria based on being a part-time or fixed-term employee, trade union membership or any of the protected characteristics under the Equality Act 2010.

Employers should take care when assessing an employee with a physical or mental disability. For example, consideration should be given as to whether or not it would be reasonable to exclude absences or performance problems when allocating points for "attendance" and "job performance" respectively.

The General Data Protection Regulation (GDPR), which is in force from 25 May 2018, requires employers to comply with principles for processing personal data, including being transparent by providing information to employees about personal data that they hold and how it is used. Employers must protect against unauthorised access and disclosure of personal data. There are special rules for employers to bear in mind when processing data related to an employee's health, which is one of the "special categories" of data under the GDPR.

The Data Protection Act 2018 allows an employer to process special categories of data where the processing is necessary for performing obligations or exercising rights under employment law, provided that the employer has an appropriate policy document in place.

### **(c) Relevant case law**

Wrexham Golf Club Co Ltd v Ingham EAT/0190/12. The Employment Appeal Tribunal (EAT) held that, where the employer put an employee into a redundancy "pool of one" and did not consider the possibility of putting a wider pool of employees at risk of redundancy, the employment tribunal did not properly consider whether or not restricting the pool to one fell within the "range of reasonable responses".

Capita Hartshead Ltd v Byard [2012] IRLR 814 EAT. The EAT held that the employer's decision to restrict a redundancy selection to one employee when there were other employees doing the same job who could have been put in a redundancy selection pool made his dismissal unfair.

Lancaster v TBWA Manchester EAT/0460/10. The EAT held that it was not a reasonable adjustment for the subjective redundancy selection criteria by which a disabled employee who was at risk of redundancy was judged to be removed from the process.

Eversheds Legal Services Ltd v de Belin [2011] IRLR 448 EAT. The EAT held that "special treatment" afforded to women in connection with pregnancy or childbirth under the Sex Discrimination Act 1975 must constitute a proportionate means of achieving the legitimate aim of compensating her for the disadvantages occasioned by pregnancy or maternity leave. This case involves the employer giving a preferential score in one area to an employee who was on maternity leave that proved decisive in a redundancy selection process.

First Scottish Searching Services Ltd v McDine and another EATS/0051/10. The EAT held that the employment tribunal was wrong to find that the absence of a system of moderating two sets of redundancy scores following a TUPE transfer rendered the selection process unfair.

Mayor and Burgesses of the London Borough of Tower Hamlets v Wooster EAT/0441/08. The EAT held that an employer committed direct age discrimination against an employee when it made him redundant at the age of 49 in order to avoid paying an early retirement pension that he would be entitled to if he left employment when he was aged 50 or over.

Lomond Motors Ltd v Clark EATS/0019/09. The EAT held that an employer's choice of who to include in a redundancy selection pool was within the range of reasonable responses because it was based on genuine, sound business reasons. Employers should be afforded a good deal of flexibility in the determination of the pool of selection for redundancy.

Rolls-Royce Plc v Unite the Union [2009] IRLR 576 CA. The Court of Appeal upheld a High Court decision that two collective agreements giving points for length of service in the redundancy selection process are lawful under the age discrimination legislation. This case was considered under repealed provisions in the Employment Equality (Age) Regulations 2006 (SI 2006/1031) that are now contained in the Equality Act 2010.

## 5. Individual Consultation

### 1. Time off to look for work

The maximum amount the company is *obliged* to pay you is equivalent to two fifths (40%) of a normal week's pay, even if you are absent for longer than that.

The company may ask to see the letter inviting you to attend an interview if you ask for time off for that reason. Your right to time off is not limited to attending interviews, however. You could, for example, ask for time off to arrange new training for yourself.

### 2. In the individual consultation meeting:

#### a) Ask for their reasons/validation for selection including:

- scores
- evidence
- criteria

#### *Scores/evidence/criteria*

There is no *statutory* right to see scores, but it is likely to be seen as unreasonable (of the company) if the scores are not given to the employee affected, as the company needs to validate their decision and it means it is difficult for you to make an informed challenge. Scores that are based on more subjective criteria, usually need a greater degree of evidence to demonstrate their 'reasonableness'.

- Ask for validation of how skills, knowledge and qualifications scores have been given
- Ask to check training records and question opportunity to have received training
- Ask what the requirements are of the future roles (if any are to be retained)
- Check that the absence/attendance details are correct and have been properly applied
- Ask for the details of any Safety Record/Quality/Disciplinary scoring if being used

Make sure you and the member have **prepared** all of the arguments – any relevant facts/data that the matrix scoring has not considered or you believe considered unfairly. *Just saying 'no' or you 'disagree' isn't enough!*

#### b) Clarify pool selection

#### *The pool of employees*

As with the scores there are no rights to challenge the pool an employee is put into, but a Tribunal may consider it an unfair dismissal if he opportunity to challenge the pool allocated. In essence, if the employee is in the wrong pool, the score is unlikely to be a fair reflection of their skills/knowledge etc. against their peers.

The company must also ensure that the pool of employees to whom the selection criteria apply is fairly defined. If the wrong group is selected, the dismissals may be unfair even if the selection criteria used are fair.

Tribunals usually consider the following factors:

- job description
- the extent to which employees' jobs are interchangeable
- whether other employees are doing the same work on different shifts or in other parts of the business
- whether the union (or employee representatives) agreed the selection pool
- any evidence that suggests that a pool was a sham and defined purely for the purposes of weeding out a particular individual (such as a rep) or group of individuals

The way in which the pool is defined can make a significant difference to the employees who may be selected for redundancy. For example, if the pool is restricted to one particular shift or part of the business, then only those employees will be at risk. However, this may be unfair if there are other workers on a different shift doing the same job.

It is possible that all of one pool are considered for redundancy as the role is no longer required. However, that activity may be added to other retained positions. The company are able to do this although it does not mean it shouldn't be challenged.

c) Ask what alternatives the company have offered

*Suitable alternative employment:*

- the employee's skills and experience (i.e. do they have the right skills and experience for the new role?)  
and
- the terms of the alternative job including: status, place of work, job duties, pay, hours and responsibility (i.e. how similar are these to the old role?).
- statutory right to a 4 week trial period

The trial period starts when the employee's employment under their old contract ends and lasts for four weeks. The trial period can only be extended beyond that if the employee needs to be retrained.

**If the company** gets an immediate sense that the employee is not right for the position and seeks to terminate the employee's employment during the trial period, the company can offer a different alternative post (with a new trial period) *or* can revert to the original redundancy.

In these circumstances, the employee is treated as having been dismissed on the grounds of redundancy from the date on which the original contract terminated – it is as if the trial period never happened. The same is true if it is the employee who is looking to terminate the relationship during the trial period.

**If the employee** decides during the trial period that they do not want to continue in the new job, and that they don't think it is suitable alternative employment, or that they have other sound and justifiable reasons for declining to continue in employment, then they should communicate this to the company before the end of the trial period and stop work at the end of the trial period.

The employee's entitlement to redundancy compensation will be calculated as if they had left employment before the trial period, but they will still be entitled to any wages earned during the trial period.

If the employee's reasons for terminating during that trial period are unreasonable, and if the new position was a "suitable" alternative vacancy (as opposed to just a different role) then, as with the outright rejection of the offer of "suitable" alternative employment, the employee forfeits his or her right to a statutory redundancy payment.

The test for whether the refusal by the employee was unreasonable is set high, in other words, there is a heavy emphasis on the company demonstrating it was suitable and reasonable (Readman vs Devon PCT 2013)

### *Bumping*

Bumping should also be considered by the company if there is the option e.g. allowing oversubscription from an at-risk pool or allowing a non-at-risk employee to take redundancy to create a vacancy. It is an opportunity to offer a 'suitable, alternative employment'. Failure for the company to consider this may lead to an unfair dismissal claim

- d) Make your own proposals for alternative work
- e) Details of all money due (redundancy, holidays, bonus. etc.)
- f) If applicable, state that you wish to appeal the decision
- g) Clarify support (including such as outplacement centres, time off to seek work etc.)

### **3. Ensure there is compliance with any agreements, processes and existing policies**

- Check any agreements have been complied with (e.g. service or bonus payments)
- Remember - the Redundancy Policy (and other relevant policies) are the company's documents; make sure they are complying with their processes

#### 4. How will the dismissals be handled?

There should be thought and care put into the process of how the employees will be handled through their last day at work. Aim to have the process kept as private and confidential as possible – it is the individual's prerogative if they want what is happening to them to be 'public'. Have support on hand – Occ Health, Security, Reps – whoever you feel would be helpful.

Try and avoid:

- The 'walk of shame'
  - It can be a bad experience for those being made redundant to be called through their work area to go and attend their exit interview
- The 'departure lounge'
  - Having a room that all those affected are called to sends a signal to everyone else – “we know where you're going!”

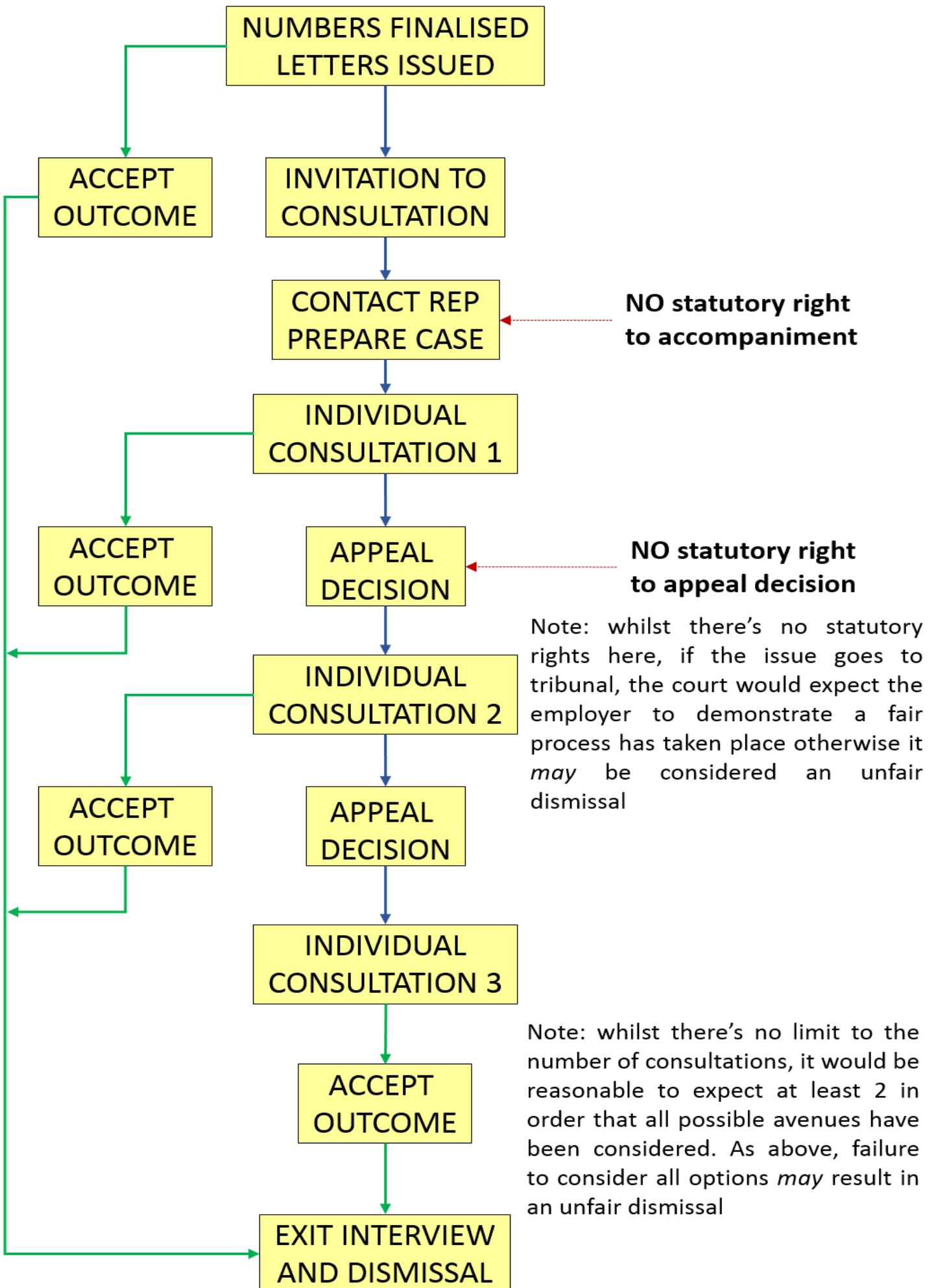
#### 5. On the day of the exit interview / dismissal, ensure:

- check when any redundancy pay, wages, holiday pay and other money due to you are paid
- job references from your company
- a letter stating the date of your redundancy
- a written statement showing how your redundancy pay has been calculated
- your P45 (to give a new company so you are taxed correctly)
- details of your pension (if applicable)
- state benefits
- remind the member that through Unite, financial advice and guidance can be offered

This will be a very difficult day for most people – some will be angry, some sad, some relieved and some still won't believe it is happening. Be prepared for responding to your members with support.

#### 6. ***Tribunal claims for unfair dismissal must be lodged within 3 months less one day (from date of dismissal)***

## Individual consultation flowchart



## 6. Scoring Disclosure – case law example

**ALEXANDER AND HATHERLEY V BRIDGEN ENTERPRISES LTD: EAT 12 APR 2006**

**References:** [2006] UKEAT 0107 – 06 – 1204, [2006] IRLR 422, UKEAT/0107/06, [2006] ICR 1277

**Coram:** The Honourable Mr Justice Elias (President)

**Ratio:** The company made selections for redundancy, but failed to give the appellants information about how the scoring system had resulted in the figures allocated. The calculations left their representative unable to challenge them on appeal. The procedure adopted did not follow the statutory rules, but the tribunal had found the dismissals to be fair. The employees now said they had been automatically unfairly dismissed in breach of the statutory dismissal procedure, that the dismissals were unfair for procedural failings, despite the tribunal finding they would have been dismissed anyway, and that the finding of 100% chance of dismissal was an unjustified finding displaying an error of law.

Held: The appeal succeeded. The procedure was intended to avoid matters going to the Employment tribunal, and the information to be provided must be at least sufficient to enable the employee to give a considered and informed response to the proposed decision to dismiss, but the bar for compliance with the procedures should not be set too high. At the first stage, the employer need only set out the broad grounds, but at the second it must inform the employee of the basis of those grounds: **‘the employee must be given sufficient detail of the case against him to enable him properly to put his side of the story. The fundamental elements of fairness must be met. ‘**

The employer having failed to meet that standard, the dismissals were automatically unfair. ‘in order to comply with the statutory provisions **an employer should provide to the employee not only the basic selection criteria which have been used, but also the employee’s own assessment.** That will give the employee an opportunity to make representations not only about whether the criteria are justified and appropriate but also, **more importantly, whether the marking given to him in respect of any particular criterion is arguably unjust, and why.’**

And ‘section 98A(2) applies to all procedures, which we take simply to mean the steps which ought to be taken by an employer before determining that he will dismiss a particular employee. Those steps will of course vary depending on the reason for the dismissal. There is no magic in the word ‘procedure’ and there is no justification for seeking to redefine some steps which would naturally be described as ‘procedural’, such as the duty to consult, as ‘substantive’ merely on the basis that they



are said to provide particularly important safeguards for the employee. All procedural requirements are important for employees. ‘

As to Polkey: ‘Polkey now has only limited application. . . . it is still relevant where the statutory procedures have been infringed so that the dismissal is automatically unfair [and] even where the statutory procedures are complied with but the dismissal is unfair under section 98(4), Polkey will still apply where on the balance of probabilities the employee would not have been dismissed even had a fair procedure been complied with, but where there is a chance that he might have been. ‘ The dismissals were automatically unfair, but the award was limited to the minimum basic award of 4 weeks pay.

**Statutes:** Employment Act 2002, Employment Relations Act 1996 98A(2), Employment Act 2002 (Dispute Resolution) Regulations 2004 3(1), 12(1). **Jurisdiction:** England and Wales

## 7. Employment Rights Act 1996

### **S. 52 Right to time off to look for work or arrange training.**

(1) An employee who is given notice of dismissal by reason of redundancy is entitled to be permitted by his employer to take reasonable time off during the employee's working hours before the end of his notice in order to:

(a) look for new employment,

or

(b) make arrangements for training for future employment.

(2) An employee is not entitled to take time off under this section unless, on whichever is the later of—

(a) the date on which the notice is due to expire,

and

(b) the date on which it would expire were it the notice required to be given by section 86(1), he will have been (or would have been) continuously employed for a period of two years or more.

(3) For the purposes of this section the working hours of an employee shall be taken to be any time when, in accordance with his contract of employment, the employee is required to be at work.

### **S. 53 Right to remuneration for time off under section 52.**

(1) An employee who is permitted to take time off under section 52 is entitled to be paid remuneration by his employer for the period of absence at the appropriate hourly rate.

(2) The appropriate hourly rate, in relation to an employee, is the amount of one week's pay divided by the number of normal working hours in a week for that employee when employed under the contract of employment in force on the day when the notice of dismissal was given.

(3) But where the number of normal working hours differs from week to week or over a longer period, the amount of one week's pay shall be divided instead by the average number of normal working hours calculated by dividing by twelve the total number of the employee's normal working hours during the period of twelve weeks ending with the last complete week before the day on which the notice was given.

(4) If an employer unreasonably refuses to permit an employee to take time off from work as required by section 52, the employee is entitled to be paid an amount equal to the remuneration to which he would have been entitled under subsection (1) if he had been permitted to take the time off.

(5) The amount of an employer's liability to pay remuneration under subsection (1) shall not exceed, in respect of the notice period of any employee, forty per cent. of a week's pay of that employee.

(6) A right to any amount under subsection (1) or (4) does not affect any right of an employee in relation to remuneration under his contract of employment ("contractual remuneration").

(7) Any contractual remuneration paid to an employee in respect of a period of time off under section 52 goes towards discharging any liability of the employer to pay remuneration under subsection (1) in respect of that period; and, conversely, any payment of remuneration under subsection (1) in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

## 8. Summary of the main statutes relating to redundancy

### The Employment Rights Act 1996

- S.52 - Right to time off to look for work or arrange training
- S.53 - Right to be paid for time off under S.52
- S.98 - Potentially fair reasons for dismissal
- S.105 - Fairness of a redundancy dismissal
- S.138 - No dismissal in cases of renewal of contract or re-engagement
- S.139 - Definition of a redundancy situation
- S.205A - Employee Shareholders are not entitled to redundancy payments

### The Trade Unions and Labour Relations (Consolidation) Act 1992

- S.188 - Duty to consult
- S.189 - Complaining to an employment tribunal and protective awards
- S.190 - Entitlement under a protective award
- S.191 - Termination of employment during protected period
- S.192 - Complaint by an employee to an employment tribunal
- S.193 - Duty of employer to notify Secretary of State of certain redundancies
- S.194 - Offence of failure to notify
- S.195 - Dismissal for these purposes means redundancies
- S.196 - Definition of employee representative
- S.197 - Power of Secretary of State to vary S188, S189 & S193
- S.198 - Power of Secretary of State to adapt provisions in case of collective agreement
- S.199 - Issues of Codes of Practice by ACAS

### The Equality Act 2010

- This act makes it unlawful to select a person for redundancy on the basis of the protected characteristics, trade union membership or the refusal of a protected shop worker to work on Sundays

### **NOTE: EU DIRECTIVES ARE LIKELY TO CHANGE ONCE BREXIT IS FINALISED**

#### European Union Directives (applicable to Member States)

- Collective Redundancies Directive 98/59/EC
- Information and Consultation Directive 2002/14/EC
- European Works Council Directive 94/45/EC

## **NOTE: THESE REGULATIONS MAY CHANGE ONCE BREXIT IS FINALISED**

### Regulations

These have been incorporated into UK law from EU Directives as Statutory Instruments

- Information and Consultation of Employees Regulations (ICE) 2004 (SI 2004/3426)
- The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 1995 (SI 1995/2587)
- The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (TUPE) (Amendment) Regulations 1999 (SI 1999/1925)
- The Collective Redundancies (Amendment) Regulations 2006 (SI 2006/2386)
- The Agency Workers Regulations 2010 (SI 2010/93)
- The Maternity & Parental Leave etc. 1999