

EMPLOYMENT LAWYERS ASSOCIATION

**REDUNDANCY AND
RESTRUCTURING**

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LITIGATION RISKS

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A. TRIBUNAL CLAIMS

Individual Claims

What Claims Arise?

1. If an individual employee has been dismissed by reason of redundancy a number of claims can potentially arise:

1.1 **Statutory redundancy pay:** maximum payment = 1.5 x weeks pay x 20. An employee will lose entitlement to a statutory redundancy payment unless one of the following events occurs before the end of a six month period:

- 1.1.1 the payment is agreed and paid (Section 164(1)(a) ERA)
- 1.1.2 the employee makes a written claim for payment to the employer (Section 164 (1)(b) ERA)
- 1.1.3 the question of an employee's right to a redundancy payment is referred to an Employment Tribunal (Section 164(1)(c) ERA)
- 1.1.4 the employee presents a complaint of unfair dismissal to an Employment Tribunal (Section 164(1)(d) ERA)

If a claim is made out of time but within a further six-month period, the Employment Tribunal has a discretion to extend time to consider the claim if it considers it just and equitable to do so. After the second six-month period, however, there is no further discretion to extend time (see ***Crawford v (1) SOS for Employment and (2) Colmore Depot*** 1995 IRLR 523 EAT).

1.2 **Contractual redundancy pay:** entitlement will depend on the terms of the contract but usually provide for enhanced sum subject to statutory conditions. Claim is brought under Employment Tribunal (Extension of Jurisdiction) Regulations 1994, as claim in contract,

subject to statutory cap of £25,000 and possibly attracting counter-claim.

1.3 Notice pay: The proper amount of notice to which the employee will be entitled will be determined by the contract or by the periods set out at Section 86 ERA (whichever is the greater). If the contract is silent then a “reasonable” period will be implied, with Section 86 ERA setting down the minimum requirement. A claim for notice pay is a contractual claim and can be pursued in the ET for up to £25,000. The employee need not pursue such a claim in the ET although it will usually be convenient to do so.

1.4 Unfair dismissal:

1.4.1 “Normal” Unfair Dismissal: see Sections 94 (the right) and 98 (the “test”) ERA. It is for the employer to prove the reason for dismissal, although redundancy is capable of being a fair reason for the purposes of Section 98(2)(c) ERA. NB The right to claim unfair dismissal for these purposes arises after one year’s continuous service.

1.4.2 “Automatic” Unfair Dismissal: see Section 105(1) ERA – an employee who is dismissed by reason of redundancy but who is selected for one of the proscribed reasons (health and safety, refusal to work Sundays, working time, role as occupational pension scheme trustee, role as employee representative or candidate for collective redundancies or TUPE purposes, protected disclosure, assertion of a statutory right, National Minimum Wage, Tax Credits, protected industrial action, pregnancy, maternity, parental leave etc, membership/non-membership of a trade union or (non)participation in trade union activities, trade union recognition or de-recognition) will have been unfairly dismissed. NB There is no qualifying period of service for this right.

1.5 Unpaid wages: outstanding monies due – see Part II ERA. Must be brought within three months of last deduction.

1.6 Other claims, e.g. unlawful discrimination etc

2. Disputed claims for statutory redundancy payments alone are not particularly common. Where a dispute does arise, it is often against the background of a possible TUPE transfer. More commonly, redundancy situations lead to other (related) claims of unfair dismissal, unlawful discrimination etc.

Defences

3. This section of the paper endeavours to look at possible “defences” to each of the potential claims identified above.

4. Statutory redundancy pay:

4.1 No dismissal

4.1.1 Generally (e.g. constructive dismissal situation): the basic definition of dismissal for the purposes of the statutory redundancy scheme is to be found in Section 136(1) ERA – it is similar (but not identical) to that provided by Section 95(1) (for unfair dismissal purposes)¹. As for unfair dismissal, it is the employee who bears the burden of proving dismissal²

4.1.2 Because an offer of re-employment is made before the old employment ends and:

4.1.2.1 the employee is re-employed after not more than four weeks (Section 138(1) ERA)

¹ NB The employment contract of a woman on maternity leave/employee on parental leave subsists while she/he is absent and she/he has the right to return to their previous job at the end of their leave. If the employer fails to permit them to return, this will amount to a dismissal. If they are made redundant during the leave period this will be a dismissal by reason of redundancy.

² And see *Morris v London Iron & Steel Co Ltd* 1987 ICR 855, CA, for an example of a case where the burden of proof was determinative.

4.1.2.2 the employee refuses the offer but it amounted to suitable alternative employment and the refusal was unreasonable (Section 141(1) ERA) – the test of suitability is objective, that of reasonableness subjective.

NB if any difference in terms etc then a statutory four-week trial period is available for the employee. If the employee leaves during the trial period then (subject to the offer having been a suitable alternative and the refusal to accept unreasonable) s/he will be taken to have been dismissed by reason of redundancy.

4.2 Does not meet definition of “redundancy” provided by Section 139 ERA. NB there is a statutory presumption that a dismissed employee claiming a redundancy payment has been dismissed by reason of redundancy.

4.3 Does not qualify for payment

4.3.1 Not an employee

4.3.2 Too old: normal retirement age/65 (Section 156(1) ERA)³

4.3.3 Too young: any service before an employee’s 18th birthday is to be disregarded (Section 211(2) ERA)

4.3.4 Insufficient service: an employee needs two years of continuous employment as at the effective date of termination in order to qualify for a redundancy payment (Section 155 ERA). Continuity of employment is broken for the purposes of the statutory redundancy payments scheme by a prior statutory redundancy payment (although this must be made in respect of a genuine redundancy situation, **Rowan v Machinery Installations (South Wales) Ltd** 1981 ICR 386, EAT)

³ And between the ages of 64 and 65, entitlement to redundancy pay is reduced by one-twelfth for each complete month of service following the employee’s 64th birthday, Section 162(4) and (5) ERA.

4.3.5 Is in receipt of a pension (see the Redundancy Payments Pensions Regulations 1965 SI 1965/1932).

4.3.6 After receiving notice of dismissal by reason of redundancy, the employee served a counter-notice seeking to terminate the contract on an earlier date and the employer served a further notice requiring the employee to work out the entire notice period but the employee refuses to do so (Section 142 ERA)

4.3.7 Whilst under notice of dismissal by reason of redundancy, the employee is dismissed for misconduct (Section 140(3) and (4) ERA).

5. Contractual redundancy pay:

5.1 Does not meet terms of contractual scheme – usually same kind of defences available as for statutory claim. Will depend on wording of contract.

5.2 Possible counter-claim

6. **Notice pay:** will depend on contractual terms and what has occurred between parties (whether dismissed with notice, pay in lieu etc). Again possibly subject to counter-claim.

7. Unfair dismissal:

7.1 Dismissal was for reason capable of being “fair” for the purposes of Section 98 – will include “redundancy”. This is for the employer to prove.

7.2 The dismissal of the employee for that reason was fair in all the circumstances of the case, taking account of the size and administrative resources of the employer. The “burden of proof” is neutral at this stage. Considerations will include:

7.2.1 Fair selection: the pool, the selection criteria etc

7.2.2 Warning

7.2.3 Consultation

7.2.4 Consideration of alternatives/alternative employment

NB The test remains the range of reasonable responses of the reasonable employer and it is not for the ET to substitute its view for that of the reasonable employer.

7.3 Even if the dismissal was prima facie by reason of redundancy, a claim of “automatic” unfair dismissal can still arise if the selection of the employee was for a prohibited reason (see above). If the employee does not have sufficient continuity of service to pursue a “normal” unfair dismissal claim, s/he will bear the burden of proving that the dismissal was for a prohibited reason so as to give the Tribunal jurisdiction to hear the complaint notwithstanding the lack of one year’s continuous service. Where the employee has more than one year’s service, however, the burden is on the employer to demonstrate the reason for his/her dismissal.

8. **Unpaid wages:** this will depend upon whether any wages are due and the reasons (if any) for non-payment.
9. Other possible claims: unlawful discrimination etc: this will depend on the facts of the case although note that if the employee can demonstrate less favourable treatment and a difference of race, sex, etc, it will be for the employer to establish the reason for the treatment in question (dismissal/selection for redundancy) and to show that it was not an unlawfully discriminatory reason.

Collective Claims

10. Others today have set out the requirements for collective consultation in redundancy situations and this paper does not seek to repeat that information. Effectively, however, the claims in question relate to the

obligations imposed by Section 188 Trade Union and Labour Relations (Consolidation) Act 1992.

Who Can Bring Them?

11. In the case of a failure relating to the election of employee representatives, any of the affected employees or any of the employees who have been made redundant. In these circumstances, it is for the employer to show that the requirements for election under Section 188A TULRCA have been met. Section 189(1)(a) and (1B) TULRCA.
12. In the case of any other failure relating to employee representatives, any of the employee representatives to whom the failure related. Section 189(1)(b) TULRCA.
13. In the case of failure relating to representatives of a trade union, by the trade union. Section 189(1)(c) TULRCA.
14. In any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant. Section 189(1)(d) TULRCA.
15. If there is a dispute as to whether or not an individual was an appropriate representative for the purposes of Section 188, it is for the employer to establish that the individual concerned had the authority to represent the affected employees, Section 189(1A) TULRCA.
16. A complaint under Section 189 TULRCA must be made either before the date on which the last of the dismissals takes effect or during the period of three months beginning with that date. Tribunals only have limited discretion to extend time thereafter, for such period as is considered reasonable if it was not reasonably practicable to present the complaint within three months (Section 189(5) TULRCA).

What For?

17. If a tribunal finds that an employer has acted in breach of Section 188 TULRCA, it must make a declaration to that effect and may make a protective award. Section 189(2) TULRCA. The effect of such an award is to entitle the employees concerned to minimum pay for a certain period called the 'protected period' (s 189(3)). The award may extend to any description of employee in respect of whom the employer has failed to consult.

Defences

18. Special circumstances: can be absolute defence (see Section 188(7) TULRCA)

19. The amount of a protective award may be reduced in certain cases, e.g:

19.1 where the breach/es in question is/are minor or technical in nature, see ***NUPE v General Cleaning Contractors Ltd*** 1976 IRLR 362, ET, ***Amalgamated Society of Boilermakers, Shipwrights, Blacksmiths and Structural Workers v George Wimpey ME & C Ltd*** 1977 IRLR 95, EAT)

19.2 where the employer makes a genuine (and not unreasonable) mistake, see ***UCATT v H Rooke & Son Ltd*** 1978 IRLR 204, EAT, although note ***Joshua Wilson & Bros Ltd v USDAW*** 1978 ICR 614, EAT.

B. REMEDIES

Statutory Redundancy Payment

20. A statutory redundancy payment will depend upon length of service and the employee's age. The entitlement will be calculated according to the following rules:

One and a half weeks' pay for each complete year of service after reaching 41.

One week's pay for each complete year of service between the ages of 22 and 40.

Half a week's pay for each complete year of service between the ages of 18 and 21.

See Section 162(2) ERA.

21. Any service before an employee's 18th birthday is to be disregarded. Between the age of 64 and 65, entitlement is tapered, reducing by one twelfth for each complete month of service after age 64. There is no entitlement to statutory redundancy pay for those aged over normal retirement age or (if none) 65.

22. The maximum number of years that can be taken into account is 20.

Unfair Dismissal

23. The primary remedies are reinstatement or re-engagement.

24. Compensation can be awarded under two heads:

24.1 A Basic Award:

This is calculated in a similar way to a statutory redundancy payment, i.e.

One and a half weeks' pay for each complete year of service after reaching 41.

One week's pay for each complete year of service between the ages of 22 and 40.

Half a week's pay for each complete year of service age 21 and under.

NB Years prior to the employee's 18th birthday count for unfair dismissal basic award purposes.

24.2 A Compensatory Award: compensatory, based on what the Tribunal considers just and equitable. As the law currently stands, this may include damages non-pecuniary losses arising out of the manner of the dismissal, see ***Dunnachie v Kingston-Upon-Hull City Council*** 2004 EWCA Civ 84, CA⁴. Subject to statutory maximum (save in automatically “unfair” cases).

Polkey Reductions

25. There is no need for an ‘all or nothing’ decision. If the Employment Tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment. See ***Polkey v AE Dayton Services Ltd*** 1988 ICR 142, HL.

Collective Claims

Protective Award

26. Where a protective award is made, remuneration must be paid to all employees who have been, or are to be, made redundant and who are of a description specified by the Employment Tribunal, Section 190(1) TULRCA.

27. The rate of remuneration is one weeks’ pay for each week of the protected period (Section 190(2) TULRCA) up to a maximum of three months.

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⁴ The decision of the House of Lords is awaited on this issue, due July 2004.