HAVE YOU BEEN UNFAIRLY DISMISSED BY REASON OF REDUNDANCY?

The following notes are for guidance only and are not intended to replace formal legal advice.

Redundancy
Definition

"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 -
(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to 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."

(Section 139(1), ERA 1996.)

Before consulting with employees or dismissing for redundancy, the employer must be satisfied that the statutory definition of redundancy.

Where the employer is undertaking a re-organisation falling outside the definition of redundancy, it may be able to rely on "some other substantial reason" as a reason for any dismissals resulting from that re-organisation. (See note on unfair dismissal)

Redundancy pay and notice

An employee with at least two years' service is entitled to a statutory redundancy payment in addition to any contractual redundancy payment or other benefits that their employer may provide. The amount of the statutory redundancy payment is increased in February each year.

There may be a contractual right to enhanced redundancy pay set out in the employment contract or in a collective agreement or redundancy policy that has been incorporated into the contract.

Employees who are dismissed without being given full notice in accordance with their contracts will also be entitled to payment in lieu of notice.
Unfair dismissal

Definition
An employee has the right not to be unfairly dismissed by their employer (section 94, ERA 1996). Generally, this right only applies after a qualifying period of service. The qualifying period applicable since 6 April 2012 is two years, but it remains at one year for all employees who started employment before that date. Dismissal or selection for redundancy on certain prescribed grounds is deemed automatically unfair and employees do not need a qualifying period of employment. These include redundancy selection connected to pregnancy or childbirth, whistleblowing or asserting a statutory right.

For a dismissal to be fair, the employer must have:
• A potentially fair reason for dismissing the employee. There are five potentially fair reasons for dismissal set out in section 98 of the ERA 1996, one of which is redundancy.
• Acted reasonably in treating that reason as sufficient to justify dismissing the employee. This is explored further below.

Remedy for unfair dismissal in redundancy cases
If a redundancy dismissal is unfair, an employee will normally be entitled to (in addition to the redundancy pay and notice entitlements):

• An unfair dismissal basic award (however, this will be cancelled out by the amount of any statutory redundancy payment received).
• An unfair dismissal compensatory award, to compensate for financial loss arising from the unfair loss of their job (although this may be reduced in some cases by any ex gratia or contractual redundancy payment in excess of the statutory redundancy payment).
• Occasionally, a tribunal will make an order for an employee's reinstatement or re-engagement, instead of monetary compensation (although in that case compensation will be ordered to cover the intervening period between dismissal and reinstatement or re-engagement).

An employee can bring a claim for compensation for unfair dismissal even after they have accepted their statutory or contractual redundancy payment, unless they have entered into a compromise agreement.

Dismissing fairly for redundancy
In order to ensure that a dismissal for redundancy is fair, an employer must establish that:
• Redundancy is the real reason for the dismissal.
• The employer acted reasonably, in all the circumstances of the case, in treating redundancy as the reason for dismissing the employee.

The test of reasonableness

A tribunal must consider whether the decision to dismiss an employee was within the range of conduct that a reasonable employer could have adopted ("the band of reasonable responses test"), having regard to section 98(4) of the ERA 1996 and the principles of fairness established by case law.

Reasonableness: Polkey guidelines

The leading case on reasonableness in relation to redundancy is Polkey v A E Dayton Services Ltd [1987] IRLR 503 in which the House of Lords held that an employer will normally not act reasonably (and a dismissal will therefore be unfair) unless it:

• **Warns and consults** employees, or their representative(s), about the proposed redundancy.

• **Adopts a fair basis on which to select for redundancy.** An employer must identify an appropriate pool from which to select potentially redundant employees and must select against proper criteria.

• **Considers suitable alternative employment.** An employer must search for and, if it is available, offer suitable alternative employment within its organisation.

Consultation

The importance of individual consultation

Consultation with individual employees is fundamental to the fairness of any dismissal for redundancy. Employers have largely failed in their attempts to persuade tribunals that a redundancy dismissal was fair despite the lack of consultation although compensation can be reduced by as much as 100% if the employer can show that the redundancy would still have taken place even if a fair consultation had taken place.

The meaning of consultation

In order for an employer to consult properly, it must have an open mind and still be capable of influence about the matters which form the subject matter of consultation. This suggests that consultation will only be meaningful if it happens at a formative stage rather than when there is a *fait accompli*.

Relationship between collective and individual consultation

Where there is a proposal to dismiss as redundant 20 or more employees at one establishment within a 90-day period, the employer will have to engage in collective consultation with a trade union or (if no union is recognised) elected
employee representatives. The requirements of collective consultation are set out in statute (section 188, TULRCA) and there are a number of prescribed matters which must be covered in consultation.

Where there is a recognised trade union, consultation with the union will also be a key element in assessing the fairness of dismissals. Individual consultation, on the other hand, is all about fairness based on the guidelines derived from case law. Collective consultation does not eliminate the need to consult with individual employees but it may, depending on the circumstances, make the employer’s obligations in this regard less onerous. Since an employer is obliged to act reasonably in all the circumstances, the extent to which it is required to consult both collectively and at individual level will depend on the facts.

Subject matter of consultation
The matters that should be discussed during the individual consultation process will depend on the specific circumstances but should usually include the following:

- An opportunity for the employee to comment on the basis for selection, both in terms of the pool and the selection criteria.
- An opportunity for the employee to challenge their redundancy selection assessment and to explain any factors that might have led to their selection and of which their employer might not have been aware.
- An opportunity for the employee to put forward any suggestions for ways to avoid their redundancy.
- Consideration of any alternative employment positions that may exist

Selection
Fair selection involves the fair application of objective selection criteria to a pool of employees. An employer should begin by identifying the pool, the group of employees from which it will select those who are to be made redundant.

Pools
Identifying an appropriate pool
Before selecting an employee or employees for dismissal on grounds of redundancy, an employer must consider what the appropriate pool of employees for redundancy selection should be. Otherwise the dismissal is likely to be unfair.

Where the employer recognises a union, it will usually be expected to discuss the choice of pool with the union.
Employer's discretion over pool
There are no fixed rules about how the pool should be defined and, unless there is a collectively agreed or customary selection pool, an employer has a wide measure of flexibility in this regard. However, the following principles have emerged from case law:

- In deciding whether a redundancy selection was unfair, a tribunal must decide whether the employer's choice of pool was within the range of reasonable responses, it should not substitute its own view as to what the pool should have been.
- The question of how the pool should be defined is primarily a matter for the employer to determine and, provided an employer genuinely applies its mind to the choice of a pool, it will be difficult for an employee (or a tribunal) to challenge its choice of pool. However, it is not impossible to do this.
- A given set of circumstances may give rise to a variety of permissible pools and there is no legal requirement that a pool should be limited to employees doing the same or similar work.

Narrow pools
Usually an employer will wish to keep the pool for selection fairly narrow, but employees within the pool may want to argue that the pool should be wider, as this will usually lower the risk of being selected.

Tribunals may also be prepared to characterise a narrow choice of pool as unreasonable.

Pools of one
It is possible to have a pool of one where there is only one individual doing the particular job which is being made redundant.

Considerations for identifying pool
Employers must think carefully when considering the choice of pool. The starting point is usually to consider which particular kind of work is ceasing or diminishing.

Factors that are likely to be relevant to identifying a pool are:
- What type of work is ceasing or diminishing.
- The extent to which employees are doing similar work (possibly even those at other locations).
- The extent to which employees' jobs are interchangeable.
- Whether the employer "genuinely applied" its mind to the composition of the pool.
- Whether the selection pool was agreed with the union or employee representatives.
Look at what employee actually does
A sensible starting point for drawing up the pool is what the employee actually does, having regard to their day-to-day activities and the terms of their contract. However, the reality of the situation should be looked, rather than what the contract says in theory about what the employee may be required to do. Having said that, an employer may also need to consider the issue of interchangeable skills.

Interchangeable skills may need to be considered
Identifying a pool is more complicated when employees are multi-skilled and do different types of work, or can be required to do so under their contracts of employment. In such cases, employees are more likely to object to being labelled as redundant, particularly if they can point to other employees, not in the pool, with whom their skills are interchangeable. Depending on the circumstances, it might not be reasonable for an employer to identify one employee as being in the pool, simply because he is doing the particular kind of work disappearing, and ignore another employee doing different work, where the first employee could just as easily do that other work. The following considerations should be borne in mind:

• Where the employee has previously done other work (other than the kind of work disappearing), this should alert the employer to the fact that his skills may be interchangeable with other employees and so a wider pool may be called for.
• Where the work is "low-skilled", the skills are more likely to be regarded as interchangeable.
• Where the employee can point to another employee with interchangeable skills who also has less service than them, this may strengthen the argument that the other person should be included in the pool.

Notwithstanding the above, it may be perfectly reasonable for an employer to confine the pool to those doing the same or similar work to one another.

Different sites may need to be considered
Where an employer carries out similar work at more than one site, it may be unfair for an employer to only include employees at one site within the pool, even if that site is closing completely.

Selection criteria
As well as considering the reasonableness of the selection pool, the tribunal will consider whether the selection criteria used by the employer are reasonable.

Objective not subjective
In order to be reasonable, the redundancy selection criteria should, as far as possible, be both objective and capable of independent verification. This means that the criteria should be measurable, rather than just being based on
someone's personal opinion. They should also be discussed with the union (if one is recognised) at the start of the exercise.

Potentially fair selection criteria include:

- Performance and ability.
- Length of service.
- Attendance records.
- Disciplinary records.

**Particular criteria**

**Last In First Out**

"Last in first out" (LIFO) used to be seen as a common and popular method of redundancy selection. However, it is a "blunt instrument" and in recent decades length of service has fallen from favour as a dominant criterion. It is more likely to be viewed as acceptable if used as part of a balanced set of criteria or as a "tie break" where all other factors are equal.

Moreover, its use as a sole or dominant criterion is likely to result in claims for unfair dismissal and indirect discrimination on grounds of age and sex.

**Performance and ability**

It is important that an employer chooses clearly-defined criteria and a system of weighting that relates to skill and knowledge required for its current and future needs. In assessing the performance of each employee, the employer should refer to written records, such as performance appraisals. It will be difficult for the employee to challenge the employer's reliance on appraisals, particularly where they have agreed with comments made in the appraisal. Common problems that arise in relation to assessment of performance based on appraisals are:

- Appraisals may not have been carried out regularly, or at all, for some or all of the staff in the pool.
- Appraisals may have been carried out by different managers, not necessarily with the same approach.

In such cases, some form of assessment independent of the appraisals ought to take place. Scoring should be undertaken by more than one individual to minimise subjectivity.

**Attendance records**

When an employer wishes to refer to attendance records, it should check the accuracy of the information and consider the reasons behind absence. Consideration should be given to whether any particular periods of absence should be discounted. For example:
• Absence for pregnancy-related illness, maternity or other family-friendly leave should be discounted.
• Where an employee's absence is connected with a disability, selection for redundancy on grounds of attendance record may amount to disability discrimination on the basis that the employer should make a reasonable adjustment in this regard (see note on disability discrimination).

The period over which attendance is assessed may also be significant. While this is a question for the tribunal to decide, the period should be substantial, particularly where long-serving employees are concerned. The employer should be satisfied that the period in question provides a snapshot which puts those in the pool on a reasonably level playing field.

**Discriminatory selection criteria**
Selection criteria may discriminate against employees either directly and/or indirectly (see note on discrimination in employment).

Any redundancy selection criteria that discriminate directly on grounds of sex (including pregnancy), fixed-term or part-time status, race, disability, sexual orientation, religion or belief will generally result in a finding that a dismissal is unfair (in addition to a finding of unlawful discrimination). Criteria that have an indirectly discriminatory effect are also likely to render dismissals unfair if the employer is unable to demonstrate an objective justification for the adoption of such criteria.

**Employer discretion over selection criteria**
A tribunal may not substitute the selection criteria it would have chosen for those used by the employer. It can interfere with the employer's choice only when the criteria used are those which no reasonable employer would have used in the way that the particular employer did.

**Employees should be consulted about scores**
The employer should disclose individual scores to the employee, explaining how they were arrived at, and give the employee a chance to challenge his individual markings as part of individual consultation.

**The duty to look for alternative employment**
A dismissal is likely to be unfair if, at the time of dismissal, the employer gave no consideration to whether suitable alternative employment existed within its organisation.

**Extent and duration of the search**
The employer is not obliged to create alternative employment for redundant employees where none already exists. However, they should make sure that they undertake a sufficiently thorough search for alternative employment and that their search is documented (to show the steps that they have taken should it become necessary to produce evidence in defence of an unfair
dismissal claim). Since the fairness of a redundancy dismissal is judged not only at the date on which notice of termination is given to an employee but also when an employee's employment actually terminates, an employer should ensure that it continues to search for possible alternative employment until the date on which an employee's dismissal takes effect.

Providing employees with sufficient information
Employers should also provide employees with sufficient information about any vacancies so that they are able to take an informed view as to whether the position is suitable for them. An employer should not assume, perhaps because a vacant role would involve reduced status or salary, that an employee would not be interested.

Matching vacant roles with potentially redundant employees
Where an employer is dealing with more than one potentially redundant employee, it should ensure that all potentially redundant employees are made aware of any vacancies and consider how it will choose which employees to make any offer of alternative employment to.