CHAPTER 8

Redundancy

continued

Chapter 8: Key points

- Redundant employees have a right to reasonable time off to look for work during the notice period.
- An employee who is dismissed for redundancy may be entitled to statutory redundancy pay.
- An employee who is put on short-time working or laid off without pay may resign and claim statutory redundancy pay if s/he follows the correct procedure.
- Even where there is a genuine redundancy situation the employee may have been unfairly dismissed.
- A redundancy dismissal may be unfair if there has been inadequate consultation by the employer or unfair selection for dismissal. Larger employers will be expected to have more sophisticated selection criteria than small enterprises. Criteria should be possible to measure objectively.
- Length of service is a fairly common selection criterion but can be discriminatory.
- The employer is expected to offer any available alternative employment which the employee is capable of doing.
- Where old jobs are replaced by newly designed jobs, particularly at a higher level, the selection process can be more forward-looking and assess whether the employee can do the new job.
- Watch out for direct and indirect discrimination against black and minority ethnic workers, women and pregnant women, or discrimination related to any of the protected characteristics under the Equality Act 2010, eg disability, sexual orientation, religion or age.
- See interview checklist in appendix A at A4.

General guide to useful evidence

- Get copies of all minutes, notes and memoranda of meetings at which the redundancy dismissal was discussed.
- Get a list of all workers who could have been selected for redundancy; ascertain who was retained; in a discrimination claim, try to discover when they started their employment, why they have been kept on, and how they met the selection criteria.
- Find out all vacancies available shortly before and after the dismissal (including the whole of the notice period) to see whether the worker could have done any of them.

continued

- Find out from those workers who are still employed, what happened to the worker's job after the dismissal. Was the worker simply replaced? If so, find out who the new worker is, and get a copy of the job advert and the letter of appointment.

Introduction

8.1 An employee who is made redundant may claim statutory redundancy pay. Some employees have a greater contractual entitlement and much of the public sector has its own schemes. An employee may be able to get additional compensation if s/he has a claim for unfair dismissal and/or discrimination because of one of the protected characteristics under the Equality Act (EqA) 2010, ie race, religion or belief, sex, pregnancy or maternity, sexual orientation, gender reassignment, marital or civil partnership status disability or age. An adviser must be careful because the time limits are different for each of these claims. The time limit to claim redundancy pay from the employment tribunal (ET) is fairly relaxed. Within six months of the termination date, the employee must either claim the pay in the ET or make a written claim to the employer or lodge an unfair dismissal claim.[1] But if the employee wants to claim unfair dismissal or discrimination at the same time, s/he must meet the three-month time limit for these latter claims. The Advisory, Conciliation and Arbitration Service (ACAS) Early Conciliation (EC) procedure (see para 20.16) applies to all these claims. See appendix A at A4 for an interview checklist applicable to a redundant employee.

The definition of 'redundancy'

8.2 In broad terms, there are three main redundancy situations:

1) closure of the business as a whole;
2) closure of the particular workplace where the employee was employed; and
3) reduction in the size of the workforce.

The statutory definitions are a little more complex.[2]

1 Employment Rights Act (ERA) 1996 ss164 and 145.
2 Note there is a different definition of redundancy for the purposes of collective consultation, see para 2.20.

Closure of the business

8.3 Employment Rights Act (ERA) 1996 s139(1) states:

> . . . 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 . . .

The closure may be permanent or temporary,[3] eg, closure of a restaurant for refurbishment.

Closure of the workplace

8.4 A dismissal is deemed to be for redundancy if it is attributable wholly or mainly to the fact that the employer 'has ceased or intends to cease . . . to carry on that business in the place where the employee was so employed'.[4] The employee is dismissed for redundancy if dismissed when his/her own workplace closes, even if under the contract s/he could be required to work elsewhere.[5] For example, an employee working in one branch of a restaurant or retail chain is dismissed when his/her branch closes, even though there is a mobility clause in his/her contract.

8.5 The employee needs to be careful if, instead of being made redundant, s/he is instructed to work at a different location or branch. If the employee refuses, s/he may lose his/her redundancy pay because s/he has refused an offer of suitable alternative employment (below). Also, if the employee refuses a move when there is a mobility clause, s/he may be dismissed for misconduct rather than redundancy. There is nothing to stop an employer invoking a mobility clause to avoid redundancy payments.[6] A mobility clause is one which means the worker can be contractually required to move workplace, eg: 'Your place of work is at (*address*). However, you may also be required to work at any other company premises within reasonable travelling distance of your home.'

3 ERA 1996 s139(6).
4 ERA 1996 s139(1)(a).
5 *Bass Leisure Ltd v Thomas* [1994] IRLR 104, EAT; *High Table Ltd v Horst and others* [1997] IRLR 513, CA.
6 *Home Office v Evans* [2008] IRLR 59, CA.

Reduction of the workforce

8.6 It is a dismissal for redundancy where it is:

> . . . wholly or mainly attributable to . . .
> (b) the fact that the requirements of that business –
> (i) for employees to carry out work of a particular kind, or
> (ii) . . . 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.[7]

This is where, for whatever reason, the employer wants fewer employees doing a particular kind of work. There need not necessarily be less work to be done.[8] The employer may just have decided to cut costs by reducing staff and making those remaining do more work. As long as the employee is dismissed as a result of the employer's diminished requirements, s/he is dismissed for redundancy, regardless of what kind of work s/he actually did or could be required to do under his/her contract.[9]

8.7 It is obviously a redundancy situation where the employer wants fewer employees overall. It is less clear where the employer retains the same number of employees, but on different work from before. It is redundancy if a particular type of job has disappeared altogether, but if it has simply been altered or modernised, eg, by technology, this may not be the case. The test is whether the changed job requires different aptitudes, skill or knowledge.[10] It can also be a redundancy dismissal if the employer dismisses an employee because there is less work to do and the employee won't accept a cut in his/her hours, for example if a full-time worker is dismissed and replaced by a part-time worker because there is only half as much work to do.[11]

8.8 Finally, an employer may offer a redundant employee another employee's job. The other employee is then treated as dismissed for redundancy.[12] This process is known as 'bumping' and usually

7 ERA 1996 s139(1)(b).

8 *McRea v Cullen & Davison Ltd* [1988] IRLR 30, NICA.

9 *Safeway Stores plc v Burrell* [1997] IRLR 200, EAT; *Murray and another v Foyle Meats Ltd* [1999] IRLR 562, HL.

10 *Amos and others v Max-Arc Ltd* [1973] IRLR 285, NIRC.

11 *Packman t/a Packman Lucas Associates v Fauchon* UKEAT/0017/12.

12 *Gimber and Sons v Spurrett* [1967] ITR 308, QBD.

occurs in recognition of long service, though it occurs only rarely now.[13]

Redundancy payments

8.9 An employee dismissed on the ground of redundancy is entitled to statutory redundancy pay if s/he meets the necessary eligibility requirements, ie: s/he is an employee; s/he has at least two years' continuous service; and s/he has been dismissed for redundancy. There is a presumption for these purposes that a dismissal is for redundancy unless the employer proves otherwise.[14] The employee risks losing his/her redundancy pay if s/he is given notice and leaves before the notice period expires. In such a case, s/he may need to follow the special procedure set out in ERA 1996 s136(3)–(4). The calculation of statutory redundancy pay is set out at para 18.20. There is also a lesser known right whereby a tribunal can order an employer to pay an employee an appropriate amount as compensation if the employee suffers any financial loss as a result of non-payment of his/her redundancy entitlement.[15] Workers who have the status of employee shareholders are unable to claim statutory redundancy pay.[16] The government plans to bring in regulations to impose an upper limit on the amount public sector employees can be paid in exit payments including redundancy pay, notice pay and ex gratia payments.[17]

Suitable alternative employment

8.10 The employee will lose his/her statutory redundancy pay if s/he unreasonably refused an offer of suitable alternative employment.[18]

What constitutes a valid offer?

8.11 The offer of alternative employment must be made before the old job ends and the new job must start immediately or within four weeks of

13 Whether the 'bumped' employee has been unfairly dismissed (see para 8.27) or discriminated against is a separate question.

14 ERA 1996 s163(2).

15 ERA 1996 s163(5).

16 See paras 6.103–6.105 above.

17 Small Business, Enterprise and Employment Act 2015 s153A.

18 ERA 1996 s141.

the end of the previous employment. The offer need not be in writing, but it will be for the employer to prove that a suitable offer was made.[19] If the employee says s/he is not interested in receiving any alternative offer and the employer therefore does not make one, the employee will not be taken to have unreasonably refused a suitable offer and will be entitled to a redundancy payment.[20] The offer must set out the main terms of the new job in enough detail to show how it differs from the old one[21] and the starting date should be clear.

8.12 If the employee accepts the offer, s/he is treated for redundancy purposes as never having been dismissed.[22] However, s/he can still claim unfair dismissal from the original job.[23] S/he may want to do this if, eg, his/her pay in the new job is lower.

The statutory trial period

8.13 Where the employee is offered an alternative job as above, s/he can try out the new job, where it differs from the old one, for a trial period of up to four weeks.[24] If s/he leaves or gives notice to leave within this period, the original redundancy dismissal stands and s/he can still claim redundancy pay.[25] The trial period starts on the date the employee begins the new job and ends four calendar weeks later, by which time the employee must have decided whether to accept the new job permanently. If the employee works beyond the four-week period, s/he will lose the right to claim redundancy pay. It is irrelevant whether the employee is unable to work the four weeks, eg, because s/he is off sick or the workplace is closed for Christmas.[26] However, an offer of a different alternative job will attract another four-week trial period. The four-week trial period is a strict time limit and can be extended only by agreement for the purpose of retraining the employee; such agreement must be in writing and specify a new date when the trial period will end.[27]

19 *Kitching v Ward* [1967] ITR 464; (1967) 3 KIR 322, DC.

20 *Simpson v Dickinson* [1972] ICR 474, NIRC. Although different rules may apply to collectively agreed and other contractual redundancy schemes, eg in the NHS.

21 *Havenhand v Thomas Black Ltd* [1968] 2 All ER 1037; [1968] ITR 271, DC.

22 ERA 1996 s138(1).

23 *Hempell v W H Smith & Sons Ltd* [1986] IRLR 95, EAT; *Jones v Governing Body of Burdett Coutts School* [1998] IRLR 521, CA.

24 ERA 1996 s138.

25 ERA 1996 s138(2)(b).

26 *Benton v Sanderson Kayser Ltd* [1989] IRLR 19, CA.

27 ERA 1996 s138(3).

Unreasonable refusal of a suitable offer

8.14 The employer must prove both that the offer was suitable and that the employee's refusal was unreasonable. 'Suitability' tends to mean objective job-related factors such as pay, status, hours and location. The reasonableness of a refusal depends more on the employee's individual circumstances, eg, domestic factors and health. A very common form of alternative offer is of the same job but in a different location. Whether this is a suitable offer which the employee cannot reasonably refuse depends on a combination of factors such as extra travelling time and expense, childcare responsibilities, health and status of the job (the higher the status, the more an ET would expect an employee to travel). If an employee is going to refuse a job because of travel difficulties, it is important that s/he knows precisely what the travel would entail. It may also be helpful at least to try it out. It is not for the tribunal to impose its own view on whether the refusal of the offer was reasonable. Nor is the test whether a reasonable employee would have accepted the offer. It must be looked at from the viewpoint of the particular employee concerned. Did s/he have good reasons for refusing the offer given his/her particular circumstances, even if his/her view might not be shared by others.[28] Moreover, an employee's desire to take advantage of his/her redundancy rights does not necessarily defeat a claim if s/he has given proper consideration to the job on offer.

Lay-off and short-time

8.15 Normally an employee can claim statutory redundancy pay only if s/he is dismissed for redundancy. This includes constructive dismissal, for example if s/he resigns due to a fundamental breach of contract, such as being sent home without pay, when under his/her contract this is not permitted. But there is a problem if an employee has a contract which allows him/her to be temporarily laid off without pay or put on short-time working (ie fewer hours), with a consequent cut in pay. This situation could carry on indefinitely, without the employee being able to sue for his/her lost wages or resign and claim redundancy pay. There are therefore special statutory rules which cover this situation once the employee has been laid off or put on short-time for at least four consecutive weeks or six weeks in a

28 *Bird v Stoke-on-Trent Primary Care Trust* UKEAT/0074/11; *Devon Primary Care Trust v Readman* [2013] IRLR 878, CA.

13-week period. There is a specified procedure involving notices and counter-notices which enables the employee to resign and claim redundancy pay.[29] If the employer has no money to pay the redundancy pay, this can be recovered from the National Insurance Fund.[30]

Guarantee pay

8.16 Where an employee is not provided with work on any day when s/he would normally be required to work under his/her contract because of lesser requirements of the employer's business for the employee's type of work, s/he may be entitled to a small guarantee payment from his/her employer. The rules are set out in ERA 1996 ss28–35. This sum is a minimum and is set off against any contractual wages to which the employee is entitled.[31] The maximum amount of guarantee pay in the year starting 6 April 2017 is £27 per day for five days in any three-month period.[32]

Unfair redundancy dismissal

8.17 A dismissal for redundancy may be automatically unfair on one of the specified grounds, eg selecting a woman for redundancy because she is pregnant.[33] Alternatively, it may be unfair on general principles for one or more of the following reasons:

a) there was no genuine redundancy situation;
b) the employer failed to consult;
c) the employee was unfairly selected; or
d) the employer failed to offer alternative employment.

The Employment Appeal Tribunal (EAT) in *Williams v Compair Maxam Ltd*[34] set out guidelines for the fair handling of redundancy dismissals. It is not necessarily unfair to fail to follow the guidelines in every case, but they do provide a useful standard. For general

29 ERA 1996 ss147–150. For a recent case, see *Craig v Bob Lindfield & Son Ltd* UKEAT/0220/15.

30 See para 18.69.

31 ERA 1996 s32.

32 For guidance and latest rates, see GOV.UK website at www.gov.uk/lay-offs-short-timeworking/guarantee-pay.

33 See para 6.63 onwards.

34 [1982] IRLR 83, EAT; approved by *Robinson v Carrickfergus BC* [1983] IRLR 122, NICA.

principles on unfair dismissal, including unfair dismissal on grounds of redundancy, see chapter 6.

No genuine redundancy situation

8.18 An employee cannot challenge whether the employer acted reasonably in creating the redundancy situation. The ET cannot investigate the commercial and economic reasons which prompted a closure or look into the rights and wrongs of the employer's decision.[35] However, an ET is entitled to investigate whether the redundancy situation is in fact genuine.

Failure to consult

8.19 The employer should give as much warning as possible of impending redundancies to enable the union and affected employees to consider possible alternative solutions and if necessary, find alternative employment.[36]

8.20 The statutory right to collective consultation for redundancies of 20 or more is set out at para 8.43 below. This section is concerned with the right not to be unfairly dismissed and is referring to the significance of consultation in the context of an individual unfair dismissal claim. Consultation is very important in redundancy situations and can take many forms. At one end of the spectrum it involves collective discussions and meetings with the union; at the other end it will entail discussions with individual employees who are likely to be made redundant. Failure to consult individually may well make a dismissal unfair, although compensation may be limited if consultation would not have made any difference to the outcome.[37]

8.21 Consultation requires the employer to consider options which would not involve making the employee redundant, including early retirement, seeking volunteers, alternative employment, lay-off and short-time working. The employees and their representatives should be involved in this process. Consultation means more than communicating a decision already made. The Industrial Relations Code of Practice,[38] which has been repealed, provided a good definition of

35 *James W Cook & Co (Wivenhoe) Ltd v Tipper and others* [1990] IRLR 386, CA; *Moon v Homeworthy Furniture (Northern) Ltd* [1976] IRLR 298, EAT.

36 *Williams v Compair Maxam Ltd* [1982] IRLR 83, EAT.

37 See para 18.54.

38 1972 para 46.

consultation. It defined consultation as jointly examining and discussing problems of concern to both management and employees. It involves seeking mutually acceptable solutions through a genuine exchange of views and information.[39] Furthermore, the courts have held that fair consultation involves consultation when the proposals are still at a formative stage, there is adequate information on which to respond, adequate time in which to respond, and conscientious consideration by an authority of the response to consultation.[40]

8.22 Although failure to follow the statutory rules on collective consultation will not in itself make the dismissal of an individual employee unfair, the failure to consult collectively is one factor which can be taken into account in assessing the reasonableness of the dismissal.[41] On the other hand, even if there has been union consultation, it is normally important that the employer has also consulted the individual employees. Collective consultation tends to concentrate on matters such as choice of selection criteria and how the process will take effect, whereas individuals want the opportunity to make representations on their own position,[42] eg how they should be assessed against the criteria and suggestions for alternative employment. An employee does not necessarily have to be given his/her particular scores, but it depends on the circumstances. What is important is that s/he is given sufficient information to challenge, correct and supplement the information which the employer may have wrongly taken into account or not known about when making the assessment.[43] Where there is no union or collective consultation, individuals should also get the chance to comment on the process and choice of selection criteria.

Unfair selection

8.23 As a first stage, the employer must choose a fair pool from which to select the redundant employees. Employers have a lot of flexibility in deciding on a pool, provided they apply their mind to it and act from

39 *Heron v City Link-Nottingham* [1993] IRLR 372, EAT.

40 *R v British Coal Corporation ex p Price* [1994] IRLR 72, DC; *Rowell v Hubbard Group Services Ltd* [1995] IRLR 195, EAT.

41 *Williams v Compair Maxam Ltd* [1982] IRLR 83, EAT.

42 *Mugford v Midland Bank plc* [1997] IRLR 208, EAT.

43 *Davies v Farnborough College of Technology* [2008] IRLR 14, EAT; *Alexander v Brigden Enterprises Ltd* [2006] IRLR 422, EAT.

genuine motives.[44] However, it could be unreasonable to restrict the pool artificially, eg, by not including all those doing similar work. It should not be automatically assumed that if a particular post is deleted, the post-holder is the one to go,[45] but in some situations that is the only obvious candidate. Whether a subordinate employee whose post is to be retained should be included in the pool will depend on factors such as whether the post-holder is willing to accept the more junior role at a reduced salary; the difference in salary between the two posts; the difference in the jobs; the relative length of service of the two employees and the qualifications of the employee in danger of redundancy.[46]

8.24 Once a reasonable pool is chosen, the employer can choose any reasonable selection criteria, provided these can be objectively measured and are not discriminatory. Ideally the employer should try to agree the criteria with the union, if there is one.[47] It is common these days to use multiple selection criteria, which often include length of service,[48] productivity (if it can be objectively assessed), timekeeping, the employee's adaptability and the employer's future needs. Length of service is less popular nowadays, especially if it has discriminatory effect. If attendance is one of the criteria, it should be judged over a substantial period, particularly for long-standing employees. It may in some circumstances be unreasonable not to look at the reasons behind each employee's absence,[49] but this would be unusual. Vague criteria such as 'attitude to work' could be unreasonable.[50] Certain criteria may also be discriminatory.[51]

8.25 Having chosen fair selection criteria, the employer must apply these fairly and objectively. A reasonable criterion such as 'merit' can be challenged if it is not judged in an objective manner. Unfortunately it is hard to challenge the employer's assessment of the employees against the various criteria.[52] An ET is not going to embark on its own exercise of re-marking all the candidates. Rather than checking

44 *Thomas & Betts Manufacturing Ltd v Harding* [1980] IRLR 255, CA.

45 *Fulcrum Pharma (Europe) Ltd v Bonassera and another* UKEAT/0198/10.

46 *Fulcrum Pharma (Europe) Ltd v Bonassera and another* UKEAT/0198/10. See also para 8.29 on bumping.

47 *Williams v Compair Maxam Ltd* [1982] IRLR 83, EAT.

48 *Bessenden Properties v Corness* [1974] IRLR 338 [1977] ICR 142, HL. See also para 8.37.

49 *Paine and Moore v Grundy (Teddington) Ltd* [1981] IRLR 267, EAT.

50 *Graham v ABF Ltd* [1986] IRLR 90, EAT.

51 See para 8.34.

52 See para 21.2.

whether marks were valid, an ET will be looking at the process and how marks were arrived at, ie whether there was a structured scoring process, carried out with an open mind and assessment done by informed managers who relied on solid evidence, eg appraisals, statistics or views of other managers. To challenge an assessment score, the claimant needs strong evidence that it does not make sense, eg giving an extremely low mark for product knowledge to a long-standing salesperson when there has been little change in the design of goods sold.[53] The ET will not order disclosure of the assessment forms of all employees in the selection pool unless it is clear from the tribunal claim why these are relevant and why the redundancy is unfair.[54] Nevertheless, the ET does not simply have to accept the employer's assertion that it has applied its selection criteria fairly.[55] An ET does need to know how the claimant's markings compare with those of the retained employees in deciding whether the employer acted reasonably. Disclosure or additional information regarding all the employees in the redundancy selection pool can therefore be relevant.[56] In discrimination cases, an employee should be able to get more detailed comparable information, eg, through disclosure or the non-statutory questionnaire procedure.

8.26 The lengths to which the ET expects an employer to go in drawing up and applying criteria will depend on the employer's size and administrative resources.[57] Usually the ET expects a medium or large employer to have adopted a methodical approach, awarding each potentially redundant employee with points against various criteria and dismissing those who score least.[58] This selection process, provided it is consistent and measured objectively, will in most cases justify the dismissal. However, even small employers must show that they used a fair selection method. Although a more forward-looking recruitment-style process may be appropriate where new jobs have been created on a reorganisation,[59] this is unlikely to be appropriate

53 For examples of unfairness, see *Grant v BSS Group plc* UKEAT/0832/02; *E-Zec Medical Transport Service Ltd v Gregory* UKEAT/0192/08.

54 *British Aerospace plc v Green and others* [1995] IRLR 433, CA. See para 20.112 onwards for principles for disclosure.

55 *FDR Ltd v Holloway* [1995] IRLR 400, EAT.

56 *FDR Ltd v Holloway* [1995] IRLR 400, EAT, stating *British Aerospace plc v Green and others* [1995] IRLR 433, CA should not be taken too literally.

57 ERA 1996 s98(4).

58 *Williams v Compair Maxam* [1982] IRLR 83, EAT.

59 See para 8.32.

in a traditional redundancy selection process for existing jobs where emphasis is more on assessment of past performance.[60]

8.27 In some circumstances, a tribunal may expect an employer to consider dismissing an employee who works in a non-redundant post to make way for an employee of greater suitability who works in a redundant post.[61] This is called 'bumping'. Whether it is unfair to fail even to consider bumping very much depends on the facts,[62] and the claimant would have to show, not only that there were powerful reasons to prefer him/her over the bumped employee, but that s/he could easily slot in and undertake the bumped employee's work. See para 8.23 where a senior post is deleted and a more junior employee might be dismissed to make way for the senior post-holder. Bumping may be expected if it has happened regularly in the past.[63] Moreover, the bumped employee may be able to claim that s/he has him/herself been unfairly dismissed, again depending on the facts.[64]

Failure to offer alternative employment

8.28 The employer must at least look for alternative employment and should offer any suitable available vacancies. The employer's duty is not limited to offering similar positions or positions in the same workplace and s/he should consider the availability of any vacancies with associated employers.[65]

8.29 When offering alternative employment, the employer must give sufficient detail of the vacancy and, unless the job functions are obvious, allow a trial period. Failure to do so is likely to make the dismissal unfair.[66] It is up to the employee whether to accept the alternative employment, which might even involve demotion or a reduction in pay.[67] Employers should consult about possibilities and not make assumptions about what jobs an employee would find acceptable.

60 *Mental Health Care (UK) Ltd v (1) Biluan (2) Makati* UKEAT/0248/12.
61 *Thomas & Betts Manufacturing Co v Harding* [1980] IRLR 255, CA.
62 *Green v A & I Fraser (Wholesale Fish Merchants) Ltd* [1985] IRLR 55, EAT.
63 *Thomas & Betts Manufacturing Co v Harding* [1980] IRLR 255, CA; and para 8.8.
64 *Barbar Indian Restaurant v Rawat* [1985] IRLR 57, EAT.
65 *Vokes Ltd v Bear* [1973] IRLR 363, NIRC, though later cases have suggested the duty in *Vokes* is too onerous.
66 *Elliott v Richard Stump Ltd* [1987] IRLR 215, EAT.
67 *Avonmouth Construction Co v Shipway* [1979] IRLR 14, EAT.

8.30 Employees who unreasonably refuse a suitable alternative offer will reduce their chances of winning an unfair dismissal case or receiving full compensation if they do win. They will also lose their entitlement to statutory redundancy pay (see above).

8.31 One of the main purposes of consultation is to consider other employment, eg, transfer to another workplace, as an alternative to dismissal. The ET will look at vacancies existing during the consultation period (regardless of whether there was actual consultation) and during the employee's notice period as well as at the time of dismissal itself. For relevant evidence in an unfair redundancy dismissal, see para 9.16.

Reorganisation and new jobs

8.32 Where the employer reorganises so that the old roles disappear and are replaced by new jobs, the approach can be different. Whereas traditional redundancy selection involves consultation and assessment of past performance to some degree, appointment to new roles is more forward-looking and can legitimately rely on something like an interview process to assess employees' ability to perform in the new roles.[68] This is especially so if the new job is at a high level and involves promotion. Even if there are sufficient vacancies to match the number of potentially redundant employees, it may well be fair for an employer to make an employee redundant if s/he is unable to meet the standard required for the new job. The tribunal will still look to see whether a fair process was followed and whether there was any indication of bias. A dismissal could be unfair if the new job is very similar to the disappearing job, or if the employer does not abide by a collective agreement to slot in displaced staff without competition.[69] It is also arguable that, even if the employer is entitled to test the redundant employee's capability to carry out the new job, the employee should be assessed before the post is opened up to external applications.[70] Although this different kind of redundancy process is common nowadays where there are public sector reorganisations, the tribunal will still consider whether all aspects of the

68 *Morgan v Welsh Rugby Union* [2011] IRLR 376, EAT. For examples see also *Asif v Elmbridge BC* UKEAT/0395/11 and *Cumbria Partnership NHS Foundation Trust v Steel* UKEAT/0635/11.

69 *Cumbria Partnership NHS Foundation Trust v Steel* UKEAT/0635/11.

70 *Morgan* and other recent cases do not seem to focus on this question.

dismissal (consultation, right of appeal etc) were within the band of reasonable responses.[71]

Redundancy and discrimination

Pregnancy/maternity dismissals

8.33 Selection for redundancy dismissal due to pregnancy, maternity or a related reason is automatically unfair and no minimum qualifying service is required to make a claim. Where a woman is made redundant while pregnant or on maternity leave, but not due to that fact, the normal test of fairness applies. However, a woman made redundant on maternity leave must be offered any suitable available vacancy, however inconvenient for the employer.[72] Failure to do this is automatically unfair dismissal. Redundancy selection due to pregnancy or maternity may also be sex discrimination under the EqA 2010. See para 11.1 onwards regarding pregnancy dismissals.

Race discrimination – direct

8.34 In any case where a black, Asian or other minority ethnic worker, or someone born abroad, has been selected for redundancy, it is worth checking that there has been no direct discrimination. Indications may be the racial composition of those made redundant as compared with those retained. It is essential to ascertain why the employer says the worker has been selected. A common indicator of direct race discrimination is where retained white workers score equally badly or worse on the selection criteria. A non-statutory questionnaire should be used to establish the selection criteria and whether they were consistently applied between black and white workers. If that is not answered, seek an order for information from the tribunal.[73] Direct discrimination may also occur because of other protected characteristics, eg religion, age, sex or sexual orientation. For evidence to prove direct discrimination, see chapter 16.

71 *Green v Barking & Dagenham LBC* UKEAT/0157/16.

72 See paras 11.61 and 6.63.

73 See para 21.2 for the non-statutory questionnaire procedure.

Indirectly discriminatory selection criteria

8.35 Criteria for selecting which workers are made redundant are frequently indirectly discriminatory.[74] Criteria such as hours worked, flexibility, mobility or attendance records could adversely affect women. Black workers may suffer from criteria based on conduct records, internal appraisals or customer complaints, if they have been subjected to direct discrimination in those areas. Unjustifiable selection of a part-time worker would be a breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.[75] The selection first of workers on temporary or short fixed-term contracts may be unjustifiable indirect race or sex discrimination under the EqA 2010.[76]

Last in, first out (LIFO)

8.36 Length of service is still sometimes applied as a means of redundancy selection. Although in many workplaces this requirement clearly disadvantages women, young people and black and other minority ethnic workers, it is a traditional selection method which has often been found justifiable in the past. Where LIFO has an obvious adverse impact, the following approach should be taken to challenge its justifiability:

- The higher the proportion of black and women workers made redundant due to the application of this criterion, the stronger the necessary justification from the employer.[77]
- The employer must show that the use of LIFO serves a real business need. Nowadays employers' main concern is to retain a balanced and flexible workforce.[78] This need is unlikely to be served by overemphasis on length of service.
- Current working practices show that workers are employed increasingly on short-term and temporary contracts and little premium is placed on long service by employers.

74 See para 13.27 onwards.

75 SI No 1551. See para 11.105 onwards.

76 For example, as in *Whiffen v Milham Ford Girls' School* [2001] IRLR 468, CA; it may also be a breach of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002; see paras 1.41–1.49. See also list of indirectly discriminatory criteria in appendix B.

77 *Hampson v Department of Education and Science* [1990] IRLR 302, HL.

78 IRS Employment Trends 504.

- The mere fact that a particular requirement has been widely used in the past does not make it justifiable now. Nor should it be an objective justification that LIFO is or was preferred by certain trade union negotiators.

Use of the criterion may be hard to challenge as indirect age discrimination if it is simply one of several selection criteria, especially as redundancy selection criteria may be considered a 'benefit' in age discrimination law under the EqA 2010, which requires a lower level of justification by the employer.[79]

Redundancy and disability

8.37 A disabled worker may be selected for redundancy because of failure to make reasonable adjustments to allow for his/her disability. For example, s/he may not score well on selection criteria such as hours worked, flexibility, mobility, or sickness record. S/he may be unable to fulfil new flexible working practices or multiple duties. The employer needs to make appropriate reasonable adjustments by modifying selection criteria, eg by being careful not to hold it against a disabled worker that s/he has refused to work overtime in the past.

8.38 The employer may be expected to take a more active role in seeking appropriate alternative employment than may be required of an employer under ordinary unfair dismissal law. The duty to make reasonable adjustments applies to any suitable vacancies, eg modifications to equipment or provision of training. Chapter 15 deals with disability discrimination generally.

Preventing discriminatory dismissals

8.39 In rare cases, it may be possible to prevent a public employer embarking on a discriminatory redundancy selection policy by means of an application for judicial review in the High Court; it will be necessary clearly to establish that the policy definitely has discriminatory effect and on a fairly widespread basis.[80] With public authorities, it is

79 *Rolls Royce plc v UNITE the Union* [2009] EWCA Civ 387; [2009] IRLR 576. See para 14.22.

80 *R v Hammersmith & Fulham LBC ex p NALGO* [1991] IRLR 249, DC.

arguable that they should carry out an equality impact assessment before deciding what criteria to choose.[81]

Time off to look for work

8.40 An employee who has been continuously employed for at least two years has the right to reasonable time off during the notice period (where s/he is being made redundant) to look for a new job or make training arrangements for future employment.[82] It is irrelevant whether the employee has turned down an offer of suitable alternative employment.[83] It is not necessary to have concrete job interviews; the time can be used going into job centres for example. There is no statutory requirement to give the employer proof of where s/he has been, though this may be relevant to whether the time was 'reasonable'.

8.41 There is no set amount of time which the employee can have off. It is a question of what is reasonable, balancing the employer's needs against the employee's. However, the employee is only entitled to be paid for a maximum of two-fifths of a week's pay for time off taken during the whole notice period. The employer must give the time off during working hours and cannot ask the employee to rearrange his/her hours or make up the time.[84]

Collective consultation

8.42 There are special rules under Trade Union and Labour Relations (Consolidation) Act 1992 ss188–198, whereby an employer must inform and consult with the appropriate representatives of any employees who may be affected by proposed redundancy dismissals or by measures taken in connection with those dismissals. The duty arises when an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. If the employer fails to inform or consult, the trade union or employee representative (as applicable) can bring a claim for

81 See para 12.35 onwards regarding the public sector duty.

82 ERA 1996 s52. There are a few excepted professions. See ERA 1996 ss192, 199 and 200.

83 *Dutton v Hawker Siddeley Aviation Ltd* [1978] IRLR 390, EAT.

84 *Ratcliffe v Dorset CC* [1978] IRLR 191, EAT.

compensation on behalf of the employees. This is known as a 'protective award'. Individual employees can only bring a claim for failure to inform or consult if there is no union or elected employee representative. As with all claims, it is important when writing the tribunal claim form to be clear if a claim for failure to inform and consult is being made under the 1992 Act, as distinct from other claims which may also be itemised on the form, eg unfair dismissal. For more detail, see chapter 2.