Coronavirus (Covid-19) Emergency

Redundancy Consultation Factsheet

This factsheet has been compiled to assist employers, employees and their representatives where a redundancy situation arises as a result of or during the current Coronavirus (Covid-19) emergency. It is important to note that Government guidance for employers and businesses is being published and updated on a regular basis and employers, employees and their representatives should continue to keep themselves updated with the most recent advice available.

This factsheet should be considered in conjunction the Labour Relations Agency detailed Advisory Guide - Advice on Handling Redundancy. A further range of redundancy resources can also be found on the Agency's website.

1.0 Redundancy

1.1 The Coronavirus Job Retention Scheme (CJRS) is designed to support employers whose operations have been severely affected by Coronavirus (Covid-19) in allowing them to retain employees on a furloughed basis for a defined period of time.

1.2 It is unfortunate however that even with support measures such as the CJRS in place the Coronavirus situation may result in some businesses having to cease trading or reduce the size of their workforce through redundancy.

1.3 In these circumstances the normal legal provisions regarding redundancy continue to apply and it is essential that employers carefully plan and prepare for handling redundancies, given the sensitivity of the issue and personal impact on employees and their families.

1.4 The statutory rules governing redundancy procedures are as contained in the Employment Rights (NI) Order 1996.

1.5 In progressing any redundancy exercise employers will have to follow a fair procedure including application of their own procedure, where one exists.

1.6 Furthermore there is a requirement on employers to take steps to avoid compulsory redundancies where possible.

2.0 Redundancy Consultation

2.1 The duty to collectively consult arises under Part XIII of the Employment Rights (NI) Order 1996.

2.2 It is considered good practice for employers to consult individually or with recognised trade union(s)/employee representatives, if applicable, in circumstances where less than 20 employees may be affected.

2.3 In all other instances, employers must consult the appropriate representatives of employees affected by the proposed redundancies, or by any measures taken in connection with those redundancies.

2.4 Where a trade union is recognised in respect of any of the affected employees, the trade union must be consulted. In other cases, the employer may consult with representatives directly elected by the affected employees or with an existing standing body of representatives elected or appointed for some other purpose where it is appropriate to do so.

2.5 Where directly elected representatives are required, there are specific statutory rules governing the election and the adequacy of representation produced by that election, which employers should consider.

2.6 Employers should note that where the duty to consult applies, they **must** also notify the Northern Ireland Statistics and Research Agency (NISRA) (acting on behalf of the Department for the Economy (DfE)) in advance of the proposed redundancies. Further details on the advance notification arrangements can be found on the DfE website.

2.7 Consultation begins with the provision of information on the relevant proposals to representatives.

2.8 Consultation should include ways of:

- avoiding the redundancies;
- reducing the number of employees to be made redundant; and
- mitigating the effects of the redundancies.

2.9 The employer must carry out meaningful, genuine consultation with a view to reaching agreement with appropriate representatives on these issues. This duty applies even when the employees to be made redundant are volunteers. It is not considered sufficient for the employer to merely set-out proposals and hear counter-proposals. Consultation should begin while the proposals are still at a formative stage.

2.10 The consultation process should begin in good time and be completed before any redundancy notices are issued.

2.11 The **Employment Rights (Northern Ireland) Order 1996** stipulates:

"that 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 statutory provision) 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"

2.12 A failure on the part of the employer to comply with the rules on information or consultation, or on the election of representatives, can result in a protective award being made by an industrial tribunal. The maximum award is up to 90 days' gross pay for each dismissed employee. The statutory cap on a week's pay does not apply. The award is not based on loss of earnings, but on the seriousness of the employer's default.

2.13 It is also important that employers do not assume that collective consultation negates the duty on their part to consult with the affected employees on an individual basis. (Further information on consultation with individuals is provided in **Section 3.0** below)

3.0 Consultation with Individuals

3.1 Employers should not assume that collective consultation negates their duty to conduct individual consultation with the affected employees regarding:

- the reasons for the proposed redundancies
- the selection criteria to be applied along with its application to that individual employee, and;
- the existence of alternative employment opportunities

3.2 Employers should make sure that their employees know about any agreed redundancy procedure and the opportunities available for consultation and discussion.

3.3 Considerable case law exists covering redundancy[1] within which the importance of consultation with individual employees has been accepted.

3.4 In practice individual consultation should normally take place before a final decision to dismiss is reached. It affords the employee an opportunity to put his or her case to the manager carrying out the selection, so that the latter may reach a fully informed decision.

3.5 It has also been recognised in case law that redundancy can be unfair where a union has been consulted but not the individual employee.

3.6 It is therefore considered best practice to consult the individuals who are going to be made redundant, regardless of the size and spread of the organisation and the overall numbers of employees affected.

3.7 A tribunal will consider the overall procedure up to the date of termination in determining whether the employer has acted reasonably or not in dismissing an employee on the grounds of redundancy.

4.0 Redundancy Consultation Period

4.1 While the overriding requirement is for consultation to take place "in good time", specified minimum periods must elapse between the start of consultation and the date of the first dismissal. The minimum period will depend on the numbers of dismissals proposed.

[1] See in particular Mugford v Midland Bank Plc [1997] IRLR 208 and Williams and others v Compair Maxam Ltd [1982] IRLR 83

4.2 It is vitally important that employers note the requirements regarding redundancy consultation periods. Consultation must begin:

- at least 30 days before the first person is made redundant, if 20 to 99 employees are to be made redundant at one organisation within a period of 90 days or less;

  or

- at least 90 days before the first person is made redundant, if 100 or more employees are to be made redundant at one organisation within a period of 90 days or less.

5.0 Furlough and Redundancy

5.1 The Government guidance is clear that employees retain the same employment rights while they are furloughed under the Coronavirus Job Retention Scheme (CJRS) and afterwards; including in relation to redundancy and protection from unfair or discriminatory dismissal.

5.2 When the CJRS comes to an end employers must make a decision, depending on their circumstances, as to whether employees can return to their duties and if not, it may be necessary to consider termination of employment by way of redundancy. In such cases, the usual employment law rules will apply in relation to the substantive and procedural fairness of any such redundancy process.

5.3 It is important for employers to note that the duty to consult staff about any redundancy proposals and allow them to comment on these before they are finalised, and rules about what a fair consultation should entail, will continue to apply irrespective of whether staff are furloughed or not.

5.4 An important consideration will be the practical arrangements associated with conducting redundancy consultation processes in adherence with public health advice for staff who are furloughed and remotely-based.

5.5 Under Part XIII of the Employment Rights (NI) Order 1996, where it is accepted that 'special circumstances' exist, allowances can be made which permit a deviation from the normal rules governing consultation exercises. However employers must still take such steps towards compliance as are reasonably practicable. The term 'special circumstances' is interpreted very narrowly and it remains to be seen whether or not the Coronavirus emergency will constitute 'special circumstances' for the purposes of the Order. In any event even where the emergency itself may be considered as possibly constituting or contributing to 'special circumstances', decisions applying to individual employers and situations are likely to be fact-specific.

5.6 In that context employers are advised to take steps to conduct what consultation they can, when they can.

5.7 The Government has clarified that 'whilst on furlough, employees who are union or non-union representatives may undertake duties for the purpose of individual or collective representation of employees or other workers.' Accordingly employees and staff representatives will still be allowed to 'accompany' colleagues to redundancy meetings even where furloughed themselves.

5.8 At the time of writing, the rules and Government guidance in relation to the application of the CJRS is an area which is continually developing. Employers, employees and representatives can find the latest guidance at Gov.uk/coronavirus.

6.0 Redundancy Payments

6.1 Employers must observe relevant requirements regarding the payment of statutory redundancy payments, notice period payments and any other contractual obligations.

6.2 The calculation for statutory redundancy pay to which an employee may be entitled is based on age, length of service and normal weekly pay up to a certain limit. These Limits change every April and are available on our website at www.lra.org.uk

This factsheet has been developed to assist anyone dealing with or affected by redundancy during the Coronavirus emergency. It gives unbiased advice to employers, employees and their representatives. Where we have provided legal information it is for guidance only and should not be considered as a complete statement of the law. It may be prudent to seek legal advice when dealing with any redundancy matter.