

EMPLOYERS' E-GUIDE NO.1

Redundancy: the 39 steps

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Redundancy: the 39 steps

Employment Relations Unit

introduction

Handling a redundancy exercise requires considerably more than merely complying with the basics of statutory employment law. Employers are expected to operate within a well-defined procedural framework and to follow specific legal provisions, which underpin good practice in a redundancy situation.

This revised guidance takes account of new legislation and developments in case law and is intended for new recruits in local authority personnel departments or for line managers who may be involved in some aspects of handling redundancies. It will also be a useful reminder for personnel managers.

Step 1 definition of redundancy

An employee who is dismissed shall be taken to be dismissed for redundancy if the dismissal is attributable wholly or mainly to the fact that:

- the employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or
- the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished, or are expected to cease or diminish. (*Section 139 (1) Employment Rights Act (ERA 1996)*).

Step 2 reason for dismissal

Redundancy is one of the potentially fair reasons for dismissal (s.98 ERA 1996). In the context of redundancy, a dismissal occurs if:

- the contract of employment is terminated with or without notice;
- the individual is on a limited-term contract which ends without being renewed; or
- because of a repudiatory breach of contract by the employer the employee resigns with or without notice. (*Section 136(1) ERA 1996*.)

Step 3 is there a redundancy?

Employers contemplating organisational changes will need to assess whether any changes they are proposing have the effect on any individual's contract of employment of making that employee redundant.

Developments in case law suggest that there is a three-stage test to identify redundancy, which requires the court to ask:

- was the employee dismissed?
- if so, had the employer's requirement for employees to carry out work of a particular kind ceased or diminished, or was it expected to cease or diminish?
- if yes, was the dismissal caused wholly or mainly by this reason?

Therefore, where a dismissal is the result of workforce reductions, the employee will have been dismissed for redundancy. The test also seems to suggest that 'bumped' or transferred redundancies (where an employee who was not in a redundancy situation is replaced by an employee who was) are no longer prohibited.

The test, first set out by the EAT in **Safeway v Burrell [1997] IRLR 200 EAT** (*LGE Advisory Bulletin 353*), was later endorsed by the House of Lords in **Murray & Anor v Foyle Meats [1999] IRLR 562 HL** (*LGE Advisory Bulletin 403*).

Where employees have been 'bumped', tribunals will still look closely at the reason for dismissal and whether the principal reason was, for example, that the employee was unsuitable or that the issue was one of conduct.

Step 4 who should be consulted?

The duty to consult about potential redundancies with relevant recognised trade unions or elected employee representatives, where redundancies of a certain size are involved, is set out in s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (*TULR(C)A*).

Employers must consult the recognised trade union(s) about employees likely to be affected by the proposed dismissals or by measures taken in connection with those proposed dismissals. This applies even where those vulnerable to redundancy are not union members. Consultation should be in 'good time' (see step 6) once the employer has a proposal to dismiss for redundancy.

If there is no recognised trade union(s), the employees should elect appropriate employee representatives for consultation purposes.

Step 5 what information should be given to the trade union/elected employee representatives?

The information must be in writing and provide:

- the reason for the proposals;

- the numbers and descriptions of employees whom it is proposed to dismiss as redundant;
- the total number of employees of that description employed at the establishment;
- the proposed method of selecting employees for redundancy;
- the proposed method of carrying out the dismissals including the period over which the dismissals are to take effect; and
- the proposed method of calculating the amount of any redundancy payments.

Step 6 when should consultation commence?

The statutory timetable for consultation should be regarded as a minimum and is as follows:

Employees to be dismissed at establishment over 90 day period	Minimum consultation period before first dismissal takes effect
20 – 99	30 days
100 +	90 days

(See further, Step 8)

There is no set period for collective consultation laid down where the redundancies involve less than 20 employees, but the LGE recommends as good practice, applying as a minimum, the 30 days consultation period, before dismissal takes effect.

To be a valid consultative exercise, trade unions must be approached at the time when the possible declaring of redundancies becomes a **proposal, not a final decision**. The consultation must consider ways of avoiding the dismissals and mitigating the consequences of those dismissals. There should be sufficient time to allow the union to formulate constructive proposals and the consultation must be undertaken with a view to reaching agreement.

The requirement to consult employee representatives covers not only those employees who are likely to be dismissed but also those who 'may be affected by the measures taken in connection with those dismissals', eg staff having to take on reallocated work.

References to dismissal as redundant refer to dismissal for 'a reason not related to the individual concerned' (s.195 (1) TULR(C)A). This means that dismissing and renewing the contract of employment to change terms and conditions triggers the requirement to consult, if more than 20 employees in a 90-day period in one establishment are involved. **GMB v Man Truck & Bus UK [2001] IRLR 636 EAT** (LGE Advisory Bulletin 421).

Step 7 should individuals be consulted?

Individuals should be warned of, and consulted about, impending redundancies at the earliest possible date, given details of compensation and offered support.

The duty to consult is separate from the obligation to warn. Consultation must be 'meaningful' and occur whilst the redundancies are still at the proposal stage.

Until 6 April 2009 employers are under an obligation to comply with the statutory dismissal procedure when contemplating dismissing fewer than 20 employees for redundancy. The detail of how these procedures operate is set out in the Employment Act 2002 and the Employment Act 2002 (Dispute Resolution) Regulations 2004 (SI 2004/752). These are minimal procedures and the majority of authorities will have more advanced procedures in place for dealing with redundancy.

However, failure to comply with at least these basic procedures will render the dismissal to which they apply automatically unfair. Employees may be entitled to a minimum award of 4 weeks' pay and any compensatory award made may be uplifted by between 10 and 50 per cent.

Three-step procedure

The standard dismissal and disciplinary procedure (SDDP) is set out in Part 1 of Schedule 2 to the 2002 Act and provides for a three-step procedure consisting of:

- step 1: a statement in writing from the employer of the grounds on which the dismissal is being contemplated and an invitation to the employee to attend a meeting to discuss the matter.
- step 2: a meeting, prior to which the employer must have informed the employee of the 'basis' for the grounds of action proposed as given to the employee in the Step 1 letter.
- step 3: an opportunity for the employee to appeal should the dismissal go ahead.

See further **Alexander & Hatherley v Bridgen Enterprises** (*LGE Advisory Bulletin 519*).

On or after 6 April 2009, the new regime for discipline and dismissal, ie the new ACAS code of practice and the 25% adjustment to awards, which replaces the current statutory procedures, will not apply to redundancy dismissals. The old regime will also not apply, unless a step 1 letter has been issued prior to this date (for further details see *Advisory Bulletin 548*). However, Authorities should still ensure that individuals are informed and consulted over their selection for redundancy.

Step 8 consultation and dismissal notice

Notices of dismissal cannot be issued until the consultation requirements have been complied with. This does not necessarily mean that the employer has to consult for 30/90 days before he can issue notices of dismissal. (See **Junk v Kuhnel [2005] IRLR 310** (*LGE Advisory Bulletin 497*.)

Employers have a defence to complaints that they have not allowed sufficient time to hold meaningful consultations where they can show that it was not reasonably practicable to consult. This defence is difficult for local authorities to raise successfully. If aware that certain decisions may

lead to redundancies eg budget information, authorities are strongly advised to keep recognised trade unions and/or elected employee representatives as fully informed as possible of developments.

Step 9 protective awards

The trade union(s) or, in their absence, elected employee representatives or, in their absence, the employees themselves, have three months from the date of dismissals in which to complain to an employment tribunal that the employer has failed to consult. If the tribunal so finds, it will make a declaration that the consultation was inadequate and may make a protective award requiring the employer to pay the remuneration of the relevant employees. This is an award of one week's pay for each week of the protected period for each employee who has been dismissed as redundant or whom it is proposed to dismiss as redundant. There is no cap on the amount of a week's pay for these purposes.

The award is for a specified period, starting on the date on which the first of the dismissals to which the claim relates take effect, or the date of the award (whichever is the earlier) and continuing for as long as the tribunal considers appropriate. There is no set-off against other payments already made for an employer's breach of contract eg a payment in lieu of notice.

The maximum limit on the protected period is 90 days in all cases. (*Section 189(1) TULR(C)A*).

Step 10 notifying the relevant government department

In addition to consulting the trade union(s) or elected employee representatives, it is necessary to notify the Secretary of State at the Department of Business, Enterprise and Regulatory Reform on form HR1 of proposed redundancies involving twenty or more employees at any one establishment in a 90-day period.

Sections 193 (1) and (2) TULR(C)A provide that the notice must be provided before any notice of dismissal is issued and where 20 – 99 employees are to be made redundant, at least 30 days before the first dismissal takes effect or 90 days before in the case of 100 or more employees.

At the same time, a copy of the HR1 form should also be given to the trade union(s) or other employee representatives who are to be consulted (*s. 193(6) TULR(C)A*).

Step 11 what constitutes an establishment?

Though there is no statutory guidance, the European Court of Justice in **Rockfon A/S v Specialarbejderforbundet i Danmark, acting for Nielsen & ors [1996] IRLR 168 ECJ** (*LGE Advisory Bulletin 338*), held that, in defining the term 'establishment', the purpose of the EU Collective Redundancies Directive, namely to protect workers, should be the overriding factor.

The ECJ gave further guidance in the case of **Athinaiki Chartopoiia AE v Panagiutidis & Others [2007] IRLR 284** (*LGE Advisory Bulletin 525*). An establishment may consist of:

- a distinct entity;
- with a certain degree of permanence and stability;
- assigned to perform one or more given tasks;

- which has a workforce, technical means and an organisational structure allowing for the accomplishment of those tasks

It need not have:

- legal autonomy;
- economic, financial, administrative or technological autonomy;
- management that can independently effect collective redundancies; or
- geographical separation from other parts of the undertaking.

If 20 or more employees were to be made redundant in a 90-day period across the authority as a whole, the LGE would recommend formal consultation with the trade union(s) or elected employee representatives, if there is no recognised union.

Step 12 selection criteria

Essentially, there are two sorts of redundancy situation. The first is where there is a specific decline in the need for the workforce in certain functions or areas. The second is where there is a general need to reduce the workforce as a whole. In determining the selection criteria, authorities are reminded that the selection pool can shape the future composition of the workforce in terms of age, race, sex, disability, skills and working arrangements (eg full-time or part-time).

As the question of who to select for redundancy is a major item on which employers have to consult employee representatives, authorities should be clear as to the selection process they intend to use, well before consultation begins. This will not only ease the consultation process but will also give the authority time to consider fully the implications which selection can have on future performance. Therefore:

- The selection criteria must be clear, objective and precisely defined. The pool for selection and the selection criteria should be clear and understood by managers, employees and employee representatives.
- Any selection criteria, eg a mix of attendance, skills and performance criteria, must be applied in a reasonable, fair and objective manner and should not discriminate against staff on the grounds of age, sex, race, disability or part-time status.
- In addition, selection may also be unlawful under one or more of the discrimination statutes, where the criteria are indirectly discriminatory. This may occur when a provision, criterion or practice is applied with puts or would put a protected group, including the individual concerned, at a particular disadvantage and which cannot be justified.

Step 13 redundancy during maternity or adoption leave

When dealing with redundancy situations, authorities need to ensure that all staff, including those who may be absent from work due to maternity or adoption leave, are consulted and kept informed.

It is automatically unfair dismissal to select an employee for redundancy on the grounds of pregnancy or due to the taking of maternity or adoption leave. An employee on maternity or adoption leave who is under notice of dismissal on the grounds of redundancy must be offered any

suitable alternative vacancy available in preference to other employees. Failure to comply with this requirement will result in a finding of automatic unfair dismissal.

Redundancy during maternity or adoption leave will end the contractual obligations to both occupational maternity and adoption pay and the right to return. SMP and SAP payments are not affected and continue until the end of the Maternity or Adoption Pay Period, or until the employee starts work for a new employer.

Any payments made to the employee in respect of maternity or adoption pay go towards meeting the employer's obligation in respect of notice pay.

If an employee who is pregnant or on maternity or adoption leave is dismissed they are entitled to a written statement of the reason for dismissal regardless of their length of service. This does not have to be requested by the employee.

Step 14 automatically unfair selection for redundancy

A dismissal can be found to be unfair under s.105 ERA 1996 without the courts considering the reasonableness of the decision, as required by s.98(4) ERA, ie it will be automatically unfair if:

- the reason (or the principal reason) for the dismissal is that the employee was redundant;
- it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking and that those in a similar position were not so dismissed; and
- it is shown that the employee's selection for redundancy was for one of a number of specified reasons. Some of the most common reasons are set out below:
 - a health and safety reason (ss.100–105(3) ERA);
 - making a protected disclosure (ss.103A–105(6A) ERA);
 - taking protected industrial action (s.105(7C) ERA);
 - being an employee representative for the purposes of consultation on redundancy or transfer of undertakings (ss.103–105(6) ERA).

Under regulation 20 of the Maternity and Parental Leave etc Regulations 1999, it is automatically unfair to dismiss an employee for reasons connected with pregnancy, maternity, parental leave or dependant care leave. (See further, step 13.)

Also, under s.152 TULR(C)A there exist two automatically unfair redundancy provisions, these relate to where the employee was selected for redundancy for a reason connected to:

- the employee's membership or non-membership of a trade union, or participation in trade union activities (s.153 TULR(C)A), or
- trade union recognition or de-recognition (Schedule A1 para.162 TULR(C)A).

A dismissal for redundancy will be automatically unfair if it is due to the transfer of an undertaking or for a reason connected to a transfer of an undertaking that is not an economic, technical or organisational reason. See further LGE's Employers' e-guide no. 5 - A Guide to the 2006 Changes to the Law on TUPE at www.lge.gov.uk/lge/core/page.do?pagelid=54868.

Step 15 unfair dismissal and redundancy

As indicated above, an employee could in certain circumstances complain to an employment tribunal that the dismissal was automatically unfair. In addition to this special provision, an employee may complain to a tribunal under the normal unfair dismissal provisions in a redundancy situation.

This may occur where:

- the employee is dismissed but not for redundancy and wishes to argue that there was a redundancy situation and that a redundancy payment should therefore be made;
- the employee is dismissed for redundancy but wishes to argue that it was not redundancy (eg that the dismissal was on grounds of trade union membership); or
- the employee accepts that the dismissal was for redundancy, but wishes to argue that the dismissal had not been handled reasonably.

If the employee is replaced there will be strong prima facie evidence that the dismissal was not for redundancy. The employer will still have to show what the real reason was.

Step 16 notice periods

The amount of notice that an employee is entitled to receive is set out in s.86 of the ERA 1996, unless the contract of employment provides for a greater period (see chart below).

Length of continuous service	Notice required
One month but less than two years	One week
Two years but less than three	Two weeks
Each additional year	One additional week
Twelve years plus	Twelve weeks

Step 17 what if individuals leave early?

Employees under notice of dismissal may ask their employer to allow them to leave their job early before the expiry of their notice period. Alternatively, they may issue the employer with a written counter-notice (s. 136(3) ERA 1996).

This will not invalidate the right to a redundancy payment except where the employer successfully contests the application. They are still deemed to have been dismissed by the employer, but on the date of expiry of the employee's notice and not of the original notice from the employer.

Employees who will have at least two years' service when their notice of dismissal for redundancy expires should be allowed reasonable time off during working hours to look for work or to arrange training. An employee is entitled to paid time off, subject to a maximum of 40% of a week's pay ie two days in total for an employee who works five days a week.

Step 18 offers of alternative employment

An employee should be offered appropriate alternative work that is available. Alternative work would be appropriate if the provisions of the new contract as to the capacity and place in which the employee would be employed and the other terms and conditions of his employment would not differ from the previous contract, or where there are differences, the work is still suitable in relation to the employee. Whether or not a job was suitable would depend on such issues as pay, grade, job content, status, place of work, etc.

To preserve continuity, the offer of the new job must be made before the redundancy takes effect, and to start no later than four weeks after the first job ended. Where the termination takes effect on a Friday, Saturday or Sunday, the contract is treated as terminating on the next Monday (*s. 146 ERA*).

Step 19 refusal of alternative employment

If a suitable job offer is made and the employee unreasonably refuses it there may be no liability to make a redundancy payment. An employment tribunal would assess whether the new job was suitable in relation to the employee concerned and whether it was reasonable or not for the employee to refuse it (*s. 141 ERA 1996*).

Step 20 offering a new contract to avoid redundancy

- make the offer before the employment ends to start within four weeks of the date of termination for redundancy.
- give a four-week trial period (see step 21 below).
- agree a longer trial period if this is necessary for retraining.
- if the employee accepts the job, dismissal does not take place.
- if the trial period is unsuccessful: return to the pre-trial period situation as if it had not taken place and pay a redundancy payment.

- if the employee unreasonably refuses the new job offer – dismissal takes effect but the employer can refuse to pay redundancy payment. Dismissal will still be for redundancy and it will be for a tribunal to determine whether the employer was correct in refusing payment.

Step 21 trial periods

Offers of alternative employment are subject to a statutory four week trial period if any term of the new contract differs from the corresponding term in the old contract eg place of employment or terms and conditions.

Trial periods can be extended by agreement for the purposes of retraining only. The agreement must:

- be in writing and be made before the start of the new contract;
- set out the date on which the period of retraining will end; and
- set out the terms and conditions that will apply to the employee at the end of the retraining period.

Step 22 renewal and re-engagement

If the contract is renewed or the employee is re-engaged then the effect on continuity for statutory rights will be as follows:

- Any 'break' of up to 4 weeks between the ending of the original employment and the re-engagement by the same authority will count for redundancy purposes and may count for other statutory purposes depending on its length and whether it is covered by the provisions set out in s.212 ERA, eg absence caused by a temporary cessation of work.
- Employees re-engaged within 4 weeks by another authority covered by the Redundancy Payments (Continuity of Employment in Local Government, etc.) (Modification) Order 1999 (as amended) (the Modification Order) (see step 24 below) will have continuity for redundancy, but not for any other statutory rights.
- A 'trial period' will count towards continuity for all statutory employment rights (apart from the calculation of the redundancy payment if the trial period is terminated).
- Under s.214 ERA 1996, receipt of a redundancy payment will break continuity for future redundancy payment purposes, but not necessarily for other purposes.

Conditions of service benefits

The effect of any break in service will depend on the scheme of conditions in question, the reason for and the length of the break (see, for example, paragraph 14 of the *Green Book*).

Step 23 continuous service

The Employment Rights Act 1996 (ss.108 and 155) provides that an employee must have **two years' continuous service** with the same employer in order to qualify for a redundancy payment (at the relevant date of redundancy) and one year for the right to claim unfair dismissal (at the date of dismissal).

Under s.216 ERA 1996, the period during which an employee takes strike action will not count towards continuous service. However, continuity of service will not be broken.

In calculating entitlement to, and the amount of, a redundancy payment, authorities must count **all** continuous local government service and other relevant service (see step 24 below).

In calculating service for the right to complain of unfair dismissal only service with the authority counts unless the employee has been transferred to the authority under a TUPE transfer or Statutory Transfer Order (STO).

Step 24 qualifying local government service

To qualify for a statutory redundancy payment, employees need to have the required continuous local government service (see step 23 above). The Modification Order 1999 makes it mandatory for authorities to count continuous service in local government (and with other specified bodies) in calculating redundancy payments up to a maximum of 20 years.

It is only where bodies are specified on the Modification Order that service will be counted. Bodies are specified in two ways, (i) by being named (ii) by being described. For example local authorities are not all listed by name but are described in a generic paragraph.

Employees working for bodies who have applied to be included on the Modification Order but whose application has not been processed at the time of the redundancy will not benefit.

Step 25 age profile

Under s.162 ERA for each year of service that counts, an employee will receive a proportion of weekly pay, which is determined in the following way:

Age	Entitlement
21 years or below	Half a week's pay
22 – 40 years	One week's pay
41 and above	One and a half week's pay

Therefore the maximum entitlement will be 20 years at one and a half weeks' pay = 30 weeks' pay.

Step 26 **a week's pay**

A week's pay is calculated in accordance with s.220 of the ERA 1996. The statutory maximum week's pay is updated on a yearly basis. As from 1 February 2009 it is £350.

Overtime does not count unless the employer is contractually bound to provide it and the employee is bound to work it (s.223 ERA 1996).

If the employee has no normal working hours ie the hours vary from week to week, a week's pay is the average weekly remuneration for the 12 weeks prior to the calculation date. If the employee receives no pay for any of these 12 weeks, the 12-week period is extended to include previous weeks where pay was received.

Local authorities have powers to calculate redundancy payments on an employee's actual weekly pay under the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006.

For details of the date on which to calculate a week's pay see Step 30.

Step 27 **local authorities' powers to make severance payments**

As well as the power to calculate redundancy payments on an actual week's pay, local authorities are able to pay an enhanced severance payment of up to 104 weeks' pay (including the statutory redundancy pay) to an eligible employee under the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006.

Authorities must have a written policy on how they propose to grant severance payments.

For details of the power to augment pension service see step 33.

Step 28 **date of termination**

The precise date of termination can have an important impact on the amount of a redundancy payment. It affects the date for assessing continuous service ('the relevant date') and the date used for establishing a week's pay ('the calculation date').

Step 29 **the relevant date**

The relevant date for calculating age and length of service for redundancy payment purposes is defined by s.145 of the ERA as follow:

- if the employee's contract is terminated with notice, the relevant date is the date on which the notice expires (i.e. when the termination takes effect);
- if no notice is given, the relevant date is the date statutory notice would have expired if it had been given at the termination date.

- if insufficient notice is given, the relevant date is the date statutory notice would have expired if it had been given on the date notice was actually given.
- if the employee is dismissed upon the expiry of a fixed-term contract, the relevant date is the expiry date of the contract
- if the employee resigns during a trial period, i.e. the four week period laid down in s.138 of the ERA the relevant date is the date on which the original contract terminated; and
- if the employee leaves early during the notice period under s.136 ERA (see step 17 above), the relevant date is the date when the **employee's** counter notice expires.

Step 30 the calculation date

The calculation date (for determining a week's pay) for **statutory redundancy pay** is:

- if notice is given, the date on which statutory notice starts;
- if no notice or less than the statutory notice is given, it is the date employment ends; and
- if the employee resigns during a trial period, the calculation date is the calculation date that applied under the original contract.

Where an **enhanced redundancy payment** is made under the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 (see step 27) the date used for assessing a week's pay is the termination date.

Step 31 pay in lieu of notice

Pay in lieu of notice (PILON) is compensation for not providing employees with the notice period to which they are contractually entitled.

Generally, where there is no PILON clause, it is damages for the employer's breach of contract and may take the form of the gross pay the individual would have been entitled to, had he or she continued in post.

Pay in lieu of notice should only be paid where there is good reason for the employee not working the notice period.

To prevent misunderstanding about the nature of the payment and make it clear that the employment relationship ends when pay in lieu is given, authorities should clearly inform the employee of this when giving a payment in lieu of notice.

Step 32 pay in lieu as custom and practice

Normal practice in local government is for employees to work out their notice. Entitlement to payment of this type may not be implied into the contract simply because it has occurred more than once with other individuals. If pay in lieu appears to HMRC to be paid as an automatic response to termination this may still mean that it is taxable even if there is no contractual basis for it. Further information is available on the HMRC website at <http://www.hmrc.gov.uk/manuals/eimanual/EIM12977.htm>

Step 33 early retirement on grounds of redundancy

Employees qualify for an immediate pension if they are retired early on the grounds of redundancy (or in the interest of the efficiency of the service) and are aged 55 or over with 3 months' membership or have transferred pension rights of any length into the LGPS from another scheme. For employees who are members of the pension scheme on 31 March 2008 and who are made redundant on or before the 31 March 2010, the relevant age is 50. (Separate provisions apply to teachers.)

If an employee has not received an enhanced redundancy payment under the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 (see step 27) an authority can compensate a member for redundancy by granting them augmented pension service under regulation 12 of the Local Government Pension scheme (Benefits, Membership and Contributions) Regulations 2007. This can be provided to an employee of any age.

Step 34 offer of a new job with a modification order body

If the authority gives the employee notice of redundancy and before the dismissal takes effect the employee accepts an offer of employment from another body specified in Part II of Schedule 2 of the Redundancy Payments (Continuity of Employment in Local Government, etc.) (Modification) Order 1999, the individual will lose entitlement to a redundancy payment.

This only applies where the relevant body makes the offer of a new job before the end of the old contract and the employment starts within the four weeks after the date of redundancy.

Authorities are therefore advised to seek written confirmation from the employee that they will not be taking up any other employment covered by the Modification Order within four weeks after the date of redundancy.

Note: under s.146 of the ERA if the contract ends on a Friday, Saturday or Sunday, it is treated as ending on the Monday of the next week.

Step 35 taxation of payments

In general terms the following principles apply:

- Compensation for loss of office, ie the statutory redundancy payment, payments made under the discretionary compensation regulations and pay in lieu of notice (where this represents damages to the employee for the inability of the employer to give the required notice and the employment ends immediately) are, in aggregate, tax free for the first £30,000.
- Where sufficient notice is given, and say for organisational reasons, the employer does not require the employee to work during some or all of the notice period, this is regarded as a form of 'garden leave', and tax and national insurance is deductible on the pay received by the employee.
- Termination payments, except genuine discretionary compensation payments, which are written into the contract, may be regarded as a deferred reward for services rather than compensation for loss of office and may be taxable.
- Lump sum pension benefits are not taxable but annual pensions are taxable. Those who receive a return of contributions will have 20% deducted for tax.

Note: Due to the complex nature of tax legislation, advice on individual cases should be sought from the authority's HMRC office and on the HMRC website at <http://www.hmrc.gov.uk/manuals/eimanual/EIM12800.htm>

Step 36 **lost entitlement to a redundancy payment**

An employee who would normally be entitled to a redundancy payment may lose this entitlement where:

- The employee commits an act of gross misconduct and is dismissed (ie an offence of a serious nature as defined in the relevant disciplinary procedure).
- The employee leaves early before the notice has expired without the employer's agreement. Employers must be prepared to justify the reason for their refusal as the employee will be able to appeal to an employment tribunal who will examine both the employer's and employee's reasons. The tribunal's decision on what to pay the employee will be based on what is 'just and equitable'.
- If no payment has been made the employee may lose the right to claim a statutory redundancy payment once six months have elapsed from the relevant date unless:
 - the employee has made a written claim for redundancy pay to his employer (a letter is all that is needed);
 - a claim for a redundancy payment is lodged with an employment tribunal; or
 - a complaint of unfair dismissal has been lodged with a tribunal (this applies even if the 3 month time limit for unfair dismissal claims has expired).

This is subject to the tribunal's discretion to award a redundancy payment if the employee failed to do any of these things in the first 6 months, but did comply with one of these requirements within the following 6-month period.

- For these purposes the relevant date is the date notice expires or, if no notice is given, the date termination takes effect.
- The six-month time limit only applies to a claim for statutory redundancy payments. If the claim is that a payment should have been made under the contract, the time limit for claims is six years (five years in Scotland).

Step 37 **jobseeker's allowance**

The position on benefits is extremely complicated and only a few key points can be dealt with here. Employees should seek more detailed advice from their local Jobcentre Plus office. Employees who have been dismissed for redundancy will normally be eligible for immediate receipt of Jobseeker's Allowance. This will be the case even if, for example, the employee volunteered for redundancy, received a statutory redundancy and severance payment or holiday pay.

However, Jobseeker's allowance may not be paid during periods covered by:

- a payment in lieu of notice
- compensation in respect of the un-expired portion of a fixed term contract
- unfair dismissal compensation (up to one year from the date of award)
- a protective award
- occupational pension or personal pension
- the first 26 weeks of a Jobseeker's Allowance claim if the employee is regarded as having resigned voluntarily or lost employment through misconduct.

Step 38 **transfer of undertakings**

Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), where an undertaking or part of undertaking is transferred to another employer or in the event of a service provision change (ie where a client engages a contractor to carry out work on its behalf or where it reassigns such a contract) no dismissals automatically occur in law.

The main consequences of TUPE can be summarised as follows:

- the new employer has to take over the contracts of employment of the employees on existing terms and conditions;
- all rights, powers, duties and liabilities are transferred. Anything done by the old employer prior to the transfer is deemed to have been done by the new employer;
- employees have continuity of employment for all rights;
- any dismissal connected with the transfer is automatically unfair, unless the employer can show an economic, technical or organisational reason ('ETO') entailing changes in the workforce. (Redundancy is one of the most common ETO reasons.);

- employers must consult trade unions or, if not recognised, elected employee representatives on the transfer. Failure to so do could incur an award of up to thirteen weeks' pay for each employee affected;
- collective agreements with recognised trade unions, including an agreed redundancy policy, are transferred to the new employer;
- unless the employees are actually dismissed, no redundancy payments will be payable.

Step 39 **redundancy in practice – costs and management role**

The most obvious cost is the redundancy payment itself. The way this is calculated is set out in the steps 23 to 30 above. The main points to observe are:

- the payments relate to continuous local government service;
- a minimum of two years' continuous local government service is required;
- service from age 41 counts for more than earlier service
- local authorities have discretion to make a payment based on the employee's actual weekly pay rather than the statutory maximum amount; and
- local authorities have discretion to pay an enhanced redundancy payment.

Other costs include those arising from any failure to agree with the trade union(s) and/or individuals:

- handling disputes and grievances;
- preparing for and appearing before employment tribunals;
- increased risk of protective awards; and
- increased risk of unfair dismissal compensation in addition to redundancy payments.

As outlined in the various steps above, the employer has several clear and distinct areas of responsibility in the handling of a redundancy exercise. The management task and general employer responsibility can be summarised as follows:

- completing the consultation exercise with the trade unions/elected employee representatives before notices of dismissal are given;
- consulting/counselling individuals and warning of impending redundancy;
- canvassing volunteers and looking for alternative employment;
- notifying the Department of Business, Enterprise and Regulatory Reform before notice of dismissal is given;
- selecting fairly and giving the required notice;
- giving the employee a written statement of the calculation of the redundancy payment;

- re-organising the allocation of work;
- training/re-training employees;
- assessing the cost of redundancy payments; and
- administering the redundancies.

Appendix A – redundancy checklist

Is there a redundancy situation?	<input checked="" type="checkbox"/>
Has there been adequate consultation?	<input checked="" type="checkbox"/>
Do you need to notify the Secretary of State?	<input checked="" type="checkbox"/>
Have you considered all potentially affected employees (including those on maternity leave/absent through sickness)?	<input checked="" type="checkbox"/>
Are your selection criteria objective, non-discriminatory and justifiable?	<input checked="" type="checkbox"/>
Have you consulted adequately on the selection criteria?	<input checked="" type="checkbox"/>
Have you considered suitable alternative offers of employment, including the possibility of trial periods?	<input checked="" type="checkbox"/>
Have you given adequate written notice of redundancy?	<input checked="" type="checkbox"/>
Is the employee eligible for a redundancy payment?	<input checked="" type="checkbox"/>
Is the employee eligible for a severance payment/early retirement benefits?	<input checked="" type="checkbox"/>
Have you ensured that the employee is not taking up an offer of alternative employment with another body covered by the Modification Order within four weeks of the date of redundancy?	<input checked="" type="checkbox"/>

Appendix B – legislation

The main legislation on redundancy compensation and consultation are to be found in:

- Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) (as amended).
 - Part IV Chapter II: Procedure for handling redundancies
 - Duty of employer to consult representatives s.188
 - Failure to consult: complaints and remedies ss.189–192
 - Duty to notify the Secretary of State s. 193
 - Meaning of ‘redundancy’ and ‘trade union representative’ ss.195–196
- Employment Rights Act 1996, Part X Unfair Dismissal and Part XI Redundancy,
- The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246).

Other legislation affecting redundancy payments:

There are also several statutory instruments, which apply specifically to employees in the local government service. These are:

- The Redundancy Payments (Continuity of Employment in Local Government, etc.) (Modification) Order 1999 SI 1999/2277 (as amended), details all bodies covered for the purposes of continuous local government service.
- Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (as amended) empowers the employer to pay immediate early retirement benefits to those eligible.
- The Teachers’ (Compensation for Redundancy and Premature Retirement) Regulations 1997 [SI 1997/331].
- The Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 [SI 2006/2914].

Appendix C - sources of help

Department of Business, Enterprise and Regulatory Reform

DBERR guidance – see www.berr.gov.uk/employment/redundancy/index.html

For queries and submitting HR1's see

www.berr.gov.uk/employment/redundancy/redund-forms/index.html or phone 0845 145 0004

LGE

LGE guidance – see www.lge.gov.uk/lge/core/page.do?pagelid=54922

'Compensation, severance and redundancy payments: a guide for practitioners' £70 see www.lge.gov.uk/lge/core/page.do?pagelid=54870

ACAS

Acas guidance – see <http://www.acas.org.uk/index.aspx?articleid=1611>

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