European Working Group of Labour Law

Termination of a contract at the initiative of the employer based on economic grounds (individual and collective termination)

United Kingdom Report

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General Legal Framework

a. What are the main rules on termination of a contract at the initiative of the employer?

In the UK, termination of employment is mainly governed by statute, though in some respects it is infused with common law concepts of contract law. Termination of employment at the initiative of the employer is controlled through the UK's unfair dismissal law, a legal concept invented in 1971[1]. It has survived in successor Acts of Parliament since that time.

The starting point for exploration of the specific grounds for termination is Part X Employment Rights Act 1996 ('the 1996 Act'). Employees must qualify for protection[2] under the 1996 Act before acquiring a right not to be unfairly dismissed by an employer[3]. Once an employee has qualified for protection against unfair dismissal, an employer who wishes to terminate that employment can only do so on specific grounds. These grounds can be found in section 98 of the 1996 Act. They are as follows:

- Capability or qualifications[4]
- Conduct[5]
- Retirement[6]
- Redundancy[7]
- Statutory prohibition[8]
- 'Some other substantial reason' ('SOSR')[9]

Each of these grounds amounts to a 'potentially fair reason' in law for terminating an employee's employment.

Each potentially fair reason (save for retirement) is a gateway to a more general test of reasonableness under section 98(4)[10] of the 1996 Act. Only if this further test is

[1] Under the Industrial Relations Act 1971.
[2] As to why, see part b below.
[3] Section 94(1) : '*An employee has the right not to be unfairly dismissed.'*
[4] Section 98(2)(a).
[5] Section 98(2)(b).
[6] Section 98(2)(ba) was repealed as from 6th April 2011 with some transitional provisions. This reason has its own test of reasonableness under s.98ZG.
[7] Section 98(2)(c).
[8] Section 98(2)(d)
[9] Section 98(1)(b).
[10] Section 98(4) : '*...the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in*

satisfied can the dismissal be considered fair. The focus is upon the employer's conduct[11] rather than the justice of the individual case. Since the early 1980's, unfair dismissal in the UK has granted a broad discretion within which a dismissing employer can act without being judged to have acted unfairly. This has become known as the *'band of reasonable responses'*. Only dismissals outside the band are adjudged to be unfair. The test applies to the decision to dismiss[12], as well as the procedural means by which that decision is reached[13]. There has been criticism of this test, the complaint being that it misrepresents the true statutory test by widening the concept of *reasonableness*[14].

There are automatically unfair grounds of dismissal. There is no qualifying period in respect of these[15]. Examples of these are dismissal on the grounds of trade union membership, some transfer of undertakings terminations (for which see below) and enforcing statutory rights in respect of working time. In the context of redundancy, selecting people on prohibited grounds is unlawful and automatically unfair[16].

Moving more specifically to economic dismissals, the phrase 'economic reasons' is not used in the statute. This term is used merely to summarise two separate grounds of termination in section 98 of the 1996 Act which are driven by the business needs of the employer.

Termination for economic reasons finds expression in section 98 through the gateways of 'redundancy' and where the employer's need to reorganise amounts to a 'substantial reason'. Examples of where an employer may rely on SOSR for termination typically arise in situations where the employer wishes to introduce new terms and conditions to the employment contract. An employee may resign in protest at such changes. A tribunal examining the fairness of the dismissal would then consider the reasonableness of the employer's actions in making the changes.

Redundancy as a term is more extensively defined in section 139[17] of the 1996 Act. Putting the definition of redundancy more concisely, an employer must demonstrate a

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treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.'

[11] See s.98(4) and the words *'…the determination of the question whether the dismissal is fair or unfair…depends on whether…employer acted reasonably…'*

[12] *Iceland Frozen Food v Jones* [1983] ICR 17 (EAT)

[13] *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 (CA).

[14] H. Collins, *Justice in Dismissal* (Clarendon Press, Oxford, 2003).

[15] The qualifying period for ordinary unfair dismissal is 1 year of continuous employment. See part b below.

[16] Section 105 ERA 1996.

[17] S.139(1) : '*For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to- (a) the fact that his employer has ceased or intends to cease-(i) to carry on the business for the purposes of which the employee was employed by him, or (ii) to carry on that business in the place where the employee was so employed, or (b) the fact that the requirements of that business- (i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.'*

'cessation of business' or 'diminishing requirements' which can be either permanent or temporary[18].

Economic reasons for termination can also arise where there is to be, or there has been, a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006[19] (TUPE 2006). Under regulation 7(1)(b) of TUPE 2006 termination of employment can only occur where there is an economic, technical or organisational reason entailing changes in the workforce[20] (known as 'ETOR'). Where a reason for termination falls within reg. 7(1)(b), the termination shall be regarded as a termination for 'redundancy' or 'SOSR'. The test of reasonableness under section 98(4) also applies[21]. ETOR represents a narrower test for an employer to satisfy than the wider 'SOSR' for termination purposes.

The statutory remedies for unfair dismissal are compensation and two types of re-employment order[22]. Compensation is split between a basic award and compensatory award. Employees made redundant qualify for a redundancy payment[23]. Calculation of the payment uses a formula based on the age of the employee, the number of years of completed service with the employer and a figure for gross weekly pay that has a statutory maximum[24].

b. What is the personal scope of these rules?

The protection against unfair dismissal applies to employees only[25]. Therefore, other types of workers, for example the self-employed or those placed with an employer through an agency are excluded from protection under the statutory regime.

Qualification for protection arises after 1 year of continuous employment by the date of termination[26]. There is also a territorial qualification which has no statutory rule,

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[18] s.139(6) : '*In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason*.'

[19] SI 2006/246 which enact the Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82.

[20] Reg. 7(1) : '*Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is- (a) the transfer itself; or (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce*.'

[21] The effect of reg. 7(2) and (3) TUPE 2006 together.

[22] For more detail see Part 5 below.

[23] Employees who refuse to accept changes in the workplace and resign as a result, or refuse to accept a reasonable offer of employment elsewhere within the employer's organisation will not be entitled to a payment. Redundancy payments only apply to those made redundant. Those who lose their jobs through a reorganisation, amounting to SOSR, will not qualify for a payment.

[24] Currently £430 (about €508) for dismissals on or after the 1st February 2012.

[25] Defined under s.230(1) of the 1996 Act : '*In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'*. A contract of employment *means a contract of service or apprenticeship* (s.230(2) of the 1996 Act).

[26] S.108(1) of the 1996 Act. From the 1st April 2012 the qualifying period will rise to 2 years.

and which is dependent upon a fact-based assessment of what the employee's base of employment was at termination[27].

At common law, there is no protection against termination. Where the contract is not a fixed-term contract, the only cushion is a period of notice which can be expressly provided for in the contract. Alternatively, and in the absence of express provision, a notice period that is reasonable can be implied. Where a contract has been terminated and notice pay is due, an action for 'damages' can be brought to recover the contractual pay due.

c. Is there additional protection provided through collective bargaining/agreements?

The 1996 Act makes provision for employers and employees to agree dismissal procedures and opt out of the statutory scheme for dismissals of a particular description[28]. It has been used on only one occasion but this came to an end in 2001[29]. The Secretary of State can make an exemption order for such an agreement. Certain conditions must be met before exemption is granted. The conditions show that a higher standard of protection will not necessarily flow from such an agreement. For example, remedies provided for in the agreement must *on the whole…be as beneficial as (but not necessarily identical with) those provided in respect of unfair dismissal*[30].

Termination of the Contract based on economic grounds

1. Social Actors

Apart from *employers* and *employees*, the social actors that can become involved in the events surrounding the termination of employment on economic grounds in the UK are:

Trade Unions

In the UK, an employer who intends to dismiss 20 or more employees within a 90 day period has a duty to consult with the employees' representatives. Employee representatives can be trade union officials. Trade unions recognised by the employer must be consulted with even if the employees who might be affected are not members of the union[31]. Employee representatives receive information from the employer on specified matters. The information can include the reasons for the need for redundancies or reorganisation, the numbers affected, method of selection and the period over which they may take effect. The employee representatives can then make constructive counter-proposals to the employers' plans with a view to avoiding dismissals. If there is no recognised trade union, an

[27] *Lawson v Serco Ltd* [2006] IRLR 289 (HL).
[28] S.110(1) and (2) of the 1996 Act.
[29] It was used by the Joint Industry Board for the Electrical Contractors Industry. The Secretary of State revoked the order as the conditions were no longer met.
[30] S.110(3)(d) of the 1996 Act.
[31] TULR(C)A 1992, s.188(1B)(a).

employer must allow for the election or appointment of employee representatives[32]. If no representatives are elected or appointed, the employer must provide the compulsory information to each employee but does not need to consult[33].

Works Councils

In the absence of a trade union presence in a workplace, procedures for providing information, consultation and participation could have a part to play where an employer has consultation obligations prior to making redundancies or implementing a reorganisation within its business. The inspiration for this framework is derived entirely from EU law.

At national level, a Directive[34] on the provision of information and consultation was enacted through the Information and Consultation of Employees Regulations 2004 ('ICER')[35]. ICER had a phased implementation by reference to a minimum number of employees an undertaking employed : 6th April 2005 (150); 6th April 2007 (100) and 6th April 2008 (50). Therefore, a large number of employer undertakings are not captured by ICER. Employee representatives are appointed and information about the economic health of the undertaking can be requested and must be provided[36]. Such a process could lead to an early teasing out of information that would otherwise emerge under compulsory consultation[37]. There is no time-table set down in ICER, though the obligations are predicated on the provision of information prior to any employer decision being made[38].

The framework inspired by the European Works Council Directive[39] was also transposed into UK law through the Transnational Information and Consultation of Employees Regulations 1999 ('TICER'). TICER applies to cross border undertakings in the EU with at least 1,000 employees within Member States and at 150 in at least two of the Member States. The breadth of information to be

[32] TULR(C)A 1992, s.188(1B)(b).
[33] TULR(C)A 1992, s.188(7B).
[34] Council Directive 2002/14/EC of the European Parliament and of the Council of the 11th March 2002 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L80
[35] SI 2004/3426
[36] ICER 2004, r.20(1).
[37] Whilst ICER includes information about redundancies, once compulsory consultation obligations arise under TULR(C)A 1992, s.188, the latter statutory provisions take precedence : ICER r.20(5). An unpublished research paper on the impact of ICER ("Capability Theory, Employee Voice and Corporate Restructuring : Evidence from UK Case Studies", by Simon Deakin & Aristea Koukiadaki) notes how ICER awkwardly cuts across TULRCA (p.4).
[38] Council Directive 2002/14/EC (n 34) Recitals 6 and 13 and Guidance provided by the DTI in 2006 at paragraph 61.
[39] Council Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees [1994] OJ L254.

provided covers a broad range of issues about the financial health of the employer[40].

The Government

For collective redundancies that cross the numerical threshold, the employer must notify BIS[41] at least 30 days before any terminations take effect (in respect of a least 20 employees) and 90 days (in respect of 100 employees). The notification must identify representatives and when the consultation began. The purpose of the notification is to encourage government to put forward counter-proposals for avoiding redundancies[42] or alerting other agencies about retraining employees. Despite DTI Guidance supporting the purposes of the Directive, UK law does not expressly reflect the same.

[40] TICER 1999, Schedule, paragraph 7(3) : *'The information and consultation meeting shall relate in particular to the structure, economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.'*

[41] Department for Business Innovation and Skills. Notification to BIS is required by TULRCA 1992, s.193.

[42] Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225, Art 4(2).

2. What are the main procedural requirements in case of dismissal (individual/collective) and what are their aims?

In the United Kingdom, the statutory procedural requirements for dismissal by reason of redundancy are set out in the Employment Rights Act 1996 (ERA 1996) and the Trade Union and Labour Relations (Consolidated) Act 1992 (TULR(C)A 1992). The relevant sections of TULR(C)A transpose the EC Collective Redundancies Directive 98/59/EC.

The predominant procedural obligations are individual and collective. There is a requirement for fair and objective selection for dismissal and the duty of the employer to consult with representatives prior to any dismissals taking effect.

Individual Dismissal Procedure

If it is established that the reason for dismissal is redundancy (see section 3 below), the employer must ensure that procedural requirements are followed. The criteria were established by case law.

In *Williams and others v Compair Maxam*[43] and *Polkey v AE Dayton Services Ltd*[44] it was established that reasonable employers should seek to act in accordance with the following principles.

1. *The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
2. *The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.*
3. *Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish the criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance records, efficiency at the job, experience or length of service.*
4. *The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such section.*
5. *The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.* [45]

Further, the EAT held that these principles could only be departed from where some good reason is shown to justify such departure In *Grieig v Sir Alfred McAlpine & Son Northern*

[43] [1982] ICR 156
[44] [1987] IRLR 503
[45] [1982] ICR 159

Ltd.[46] the EAT found that the fact that the employer was experiencing particularly difficult circumstances did not excuse the need for the employer to adhere to basic principles of fairness and reasonableness.

The House of Lords decision in the case of *Polkey v AE Dayton Services Ltd*, elaborated further on these established principles of reasonableness in redundancy dismissals.

"In the case of redundancy the employer will normally not act reasonably unless he warns and consults any employees affected or their representative adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is not permitted to ask in applying the test of reasonableness is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken".[47]

A failure to follow the guidance given in these cases as to the general standards of good practice may render the dismissal unfair.

Fair selection

A fair selection process of employees for redundancy must comply with section 98(4) of ERA 1996. The system for selection must be deemed to be fair which includes the chosen criteria, avoidance of bias and consultation. The manner in which the system was applied in practise must also be deemed to be fair. In order for an employee to be able question the fairness of their individual selection for redundancy, case law has demonstrated that transparency of scores and assessment is sensible in being able to demonstrate a fair approach if challenged, as in the case of *John Brown Engineering v Brown*.[48]

To be procedurally fair in consideration of selection criteria, selection must comply with the general requirements of legislation outlawing discrimination on the grounds of race, sex, disability, religion or belief, sexual orientation and age.[49]

Collective Dismissal Procedure

Collective Consultation

An employer is obliged to consult with employees over redundancies. This duty is outlined in TULR(C) Act 1992,

'*Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all with the appropriate representatives of any of the employees who may be*

[46] [1979] IRLR 372
[47] [1988] ICR 163
[48] Deakin & Morris, p 495, 5.184, 2009
[49] Deakin & Morris, p. 497, 5.186, 2009

affected by the proposed dismissals or may be affected by measures in connection with those dismissals' [50].

There are two possible sources from which 'appropriate representatives' may be drawn. If the employees are of a description in respect of which an independent trade union is recognised by the employer, the employer must consult representatives of that union, irrespective of whether the affected employees are union members. If there is no recognised trade union the employer must consult 'employee representatives' who must be elected by employees for the purposes of redundancy consultation. [51]

The collective consultation process shall begin in good time and in any event, where the employer is proposing to dismiss 100 or more employees at least 90 days before the first dismissal takes place and otherwise the period is at least 30 days[52].

Requirements of collective consultation
TULR(C)A 1992 lays out clearly the requirements of the given consultation period. Consultation should be genuinely complete before redundancy notices can be issued. The agenda for consultation should include ways of a) avoiding dismissals, b) reducing the numbers of employees to be dismissed, c) mitigating the consequences of the dismissals.[53]

Similarly, article 2 of the Collective Redundancies Directive 1998 dictates that consultation should begin with workers representatives in good time, with a view to reaching agreement and that the consultation process should cover ways of avoiding collective redundancies, reducing the numbers of those affected and ways of mitigating the consequences.[54]

In order to achieve a meaningful consultation between employer and employee representatives, TULR(C)A 1992 and the Directive require that certain information is disclosed in writing during consultation:

a) the reasons for the proposals
b) the numbers and descriptions of employees it is proposed to dismiss as redundant
c) the total number of employees of any such description employed at the establishment in question
d) the proposed method of selection for redundancy
e) how the dismissals are to be carried out, taking account of any agreed procedure, including the period over which the dismissals are to take effect
f) the proposed method of calculating the amount of redundancy payments to be made to those who are dismissed[55]

[50] TULRCA 1992, s188 (1)
[51] Deakin & Morris, p.803, 9.35
[52] TULRCA 1992, s188 (1A)
[53] TULRCA 1992 s188(2)
[54] Directive 98/59/EC
[55] TULRCA 1992 s188 (4)

This information should be handed to local employee representatives or sent by post to an address notified to the employer or, in the case of a trade union, to the address of the union's head or office.[56]

When should consultation start?
Where some elements of the consultation process have been outlined clearly within the law, there are others that are more ambiguous. Both TULR(C)A 1992 and the Directive refer to consultation that should 'start in good time' yet exactly when is open to interpretation. There has been some debate in the case law as to whether consultation should start when an employer is 'proposing' or 'contemplating' redundancies. TULRCA 1992 requires consultation when an employer is 'proposing' redundancies[57] whereas the directive considers consultation upon 'contemplation' of redundancy[58]. In the context of collective redundancies the landmark ECJ decisions made in the *Junk v Kuhnel*[59] case confirmed the purpose of the directive.

'Consultation should avoid terminations of contracts of employment or reduce the number of such terminations'

Deakin & Morris[60] go on to explain,

'Achievement of that purpose would be jeopardised if the consultation of employees were to be subsequent to the employer's decision'.

The important outcome of the *Junk* case is inevitably to give employers the message that it is vital to start consultation with employees on potential redundancies as soon as practically possible. This is further discussed in the case of *USA v Nolan* where the Court of Appeal concluded;

'It is unclear whether the obligation arose when the employer was proposing, but had not yet made, a strategic business or operational decision that will foreseeably or inevitably lead to collective redundancies or, only when that decision has been made, such that the employer was proposing consequential redundancies'.[61] This case is currently pending before the Court of Justice of the European Union.

Where 'proposing' appears to suggest a degree of planning and resolution on the part of the employer thereby pre-empting what should be a meaningful period of consultation, 'contemplating' infers more of a loose suggestion that redundancies could be a possibility.

[56] TULRCA 1992 s188 (5)
[57] TULRCA 1992, s.188(1)
[58] Directive 98/59/EC
[59] Junk v Kuhnel (2005) CMLR 42 (ECJ)
[60] Deakin & Morris, p.800, 9.33
[61] USA v Nolan (2011) IRLR 40 (CA)

The emphasis that is put on the consultation procedure and the stipulations of statute are clearly in place to ensure that all avenues have been explored and have been exhausted before the final decision to make redundancy dismissals is made. In addition, employees need to be afforded the opportunity to influence the process and mitigate the consequences.

Penalties for failure to consult

If an employer fails to comply with their statutory obligation, affected employees or their representation may present a complaint to an Employment Tribunal who in turn can make a protective award in respect of employees in relation to whom the employer has failed to adhere to their statutory obligation, The protective award entitles employees to receive their normal pay for the period of the award (the protected period) which may not exceed 90 days.[62]

In the original ET decision made in the case of *Susie Radin Ltd v GMB and Others* the intention of a protective award was highlighted in its purpose as to ensure that employers pay due diligence to consultation. Moreover, upon appeal, the EAT affirmed that the intent of the protective award is to be punitive and not compensatory;

'*There is nothing in the statutory provisions to link the length of the protected period to any loss in fact suffered by all or any of the employees. The required focus is not on compensating the employees but on the default of the employer and its seriousness. It is that seriousness which governs what is just and equitable in all circumstances. I find it impossible to see how compensation for loss could be implied into the statutory provisions.'*[63]

[62] TULRCA 1992, s 189 (4)
[63] [2004] EWCA Civ 180 26

3. The 'economic' reason for dismissal

How is this "economic" reason described, what should be understood by "economic" reason? For instance, could transnational relocation be considered as an "economic" reason? Based on this reason, can the dismissal be either, individual, plural or collective? In this case, is the meaning of the "economic reason" changing in any way? (a less strict requirements, for instance). Is the employer obliged to justify the dismissal or to prove the economic situation and how?

Redundancy is defined in Section 139(1) Employment Right Act (ERA) 1996:

> 'For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –
> (a) the fact that his employer has ceased or intends to cease –
> (i) to carry on the business for the purposes of which the employee was employed by him, or
> (ii) to carry on that business in the place where the employee was so employed, or
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> (b) the fact that the requirements of that business –
> (i) for employees to carry out work of a particular kind, or
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.'

The above definition envisages four different scenarios, which give rise to an '*economic reason'* for redundancy, namely:

a) The employer is shutting down the entire business (The business disappears.);
b) The number of people doing that job is to be reduced but not eliminated (Fewer people are required in the job.);
c) The employer eliminates the work the employee does, either generally or in the particular place of work (The employee's job disappears entirely.); and
d) The employer is shutting down the business in the place where the employee works (The place of work disappears.).

This is a broad definition which covers a wide range of overlapping situations which must be *wholly or mainly attributable* to one of the above economic reasons. With regard to the UK statutory definition of redundancy it is worth noting three key omissions:

1. Nothing is explicitly said in the definition as to the *reasons why* the employer's requirement ceases or diminishes. This is illustrated by section 139(6) ERA 1996:

'…In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason'

In other words, any reduction may be permanent or temporary and for whatever reason. Therefore, a reduction in the workforce because of a loss of orders and a reduction because of a wish to increase profits are both covered within the definition[64]. Dismissing an employee for redundancy is a fair ground of dismissal[65]

2. The statutory definition does not suggest any *objective test* of the needs of the business. A UK employment tribunal will *not* normally go behind the employer's assessment of what the business requirement was, as to whether this satisfied the definition of redundancy. Tribunals will not assess the merits of the employer's decision to make the redundancy but will apply the statutory definition to the facts presented[66]. The general view of tribunals (as with unfair dismissal in the UK) is that to make a finding of fact as to the business environment would lead to the courts substituting the judgment of industry which is resisted upon the grounds of expertise and policy (preserving the managerial prerogative). Therefore, employers are generally not required to prove anything with regard to the legitimacy of the actual decision to dismiss, but may be judged in relation to how redundancies are *handled* with regard to employee selection and consultation (see section above and section 5 below).

3. Notwithstanding the increasingly global nature of business, there is no provision in the ERA or any other UK statute that covers transnational relocation (except for information and consultation obligation under TICER 1999, considered above under 'general framework).

It is however, worth noting that the definition of redundancy in the Trade Union Labour Relations (Consolidation) Act (1992) section 195 (1), is wider than that of the ERA, in that for the purposes of collective consultation, a redundancy dismissal is "for a reason not related to the individual concerned or for a number of reasons all of which are not so related" (see section 6), however the focus for this question shall remain the definition for individual redundancy contained within the ERA.

The business disappears

If the employers cease business, there is rarely in practice any dispute that employees' employment was ceased by reason for redundancy. The only complication that can arise when the employer ceases business but someone else takes over. In such a scenario, there is no dismissal in UK and no redundancy because employment is automatically taken

[64] *Cook v Tipper* [1990] ICR 716
[65] Section 98 Employment Rights Act 1996
[66] *Moon v Homeworthy Furniture (Northern) Ltd* [1977] ICR 117, *AUT v Newcastle-upon-Tyne University* [1987] ICR 317, *James W Cook & Co (Wivenhoe) Ltd v Tipper* [1990] ICR 716

over by the new owner and UK legislation (TUPE[67], section 218 ERA 1996[68]) affords employees the benefits of the Acquired Rights Directives[69]. There are exceptions if dismissals occur for economic, technical or organisational reasons (as mentioned in 'General Framework above). Moreover, in the event of the employer entering insolvency a redundancy can arise[70].

Fewer people are required in the job

Where the business survives but the job disappears –dealing with the three scenarios – paragraphs (a)(i) and (b)(i) and (ii) in the statutory definition is not quite as straightforward. In defining elements of the definition, a wide body of case law and diverse tests (contractual and factual) emerged as to the meaning of *'requirement of a business'* and '*work of a particular kind*'. Under the factual test, the court asked the question whether the work he or she was actually doing is now gone. In contrast, in using the contractual test, the court sought to determine whether the work that the employee could be required to do under the contract had disappeared. Initially, the latter contractual test gained ground in a number of Court of Appeal decisions[71], until judgment was handed down in *Safeway Stores plc v Burrell*[72]. Prior to *Safeway*, the contractual approach had the effect of making it difficult to establish a redundancy where the contractual obligations were drafted to include a level of flexibility. However, in Safeway, Judge Clark, in returning to the original wording of the section, held that the contractual and factual tests were both artificial constructions of the statutory wording. It was pointed out in his judgment that the wording focused upon the need for employees (plural) – not the individual. Consequently, he ruled that the decisive issue was whether a redundancy situation had arisen and whether the employee had lost of employment because of it.

In *Murray v Foyle Meats Ltd*[73], the House of Lords, approving the earlier judgment in *Safeway*, held that the correct process in determining 'redundancy' when the business had survived was to answer the following sequence of questions:

a) Was the employee dismissed?
b) If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
c) If so, was the dismissal of the employee caused wholly or mainly by the state of affairs identified at (b)?

Lord Irvine LC, in *Murray*, set out the relevant approach:

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[67] Transfer of Undertakings (Protection of Employment) Regulations 2006
[68] Section 218, Employment Rights Act 1996 preserves continuity of employment through a transfer of a business.
[69] Directives 77/187/EEC and 2001/23/EC
70 Insolvency Act 1996, s.168
71 Nelson v BBC [1977] IRLR 148,CA and Nelson v BBC (No 2) [1980] IRLR 346, CA
[72] [1997] ICR 523.
[73] [1998] ICR 423

> "…the language of [section 139 (1) paragraph (b)] is in my view simplicity itself. It asks two questions of fact. The *first* is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The *second* question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation"

The fact that the total amount of work to be done remains constant is irrelevant, there is a redundancy, provided the number of employees required to discharge it has diminished[74]. There is also a redundancy in the case of 'bumping' where A's job disappears, but A is retained (as a good performer) and given B's job, with B being dismissed instead. B is redundant as a result of a reduced need for employees to carry out a particular kind of work and the dismissal was attributable to this fact (*Murray*). This increases the importance to the employer of compliant redundancy procedures to avoid a finding of unfair dismissal (see section 5).

The employee's job disappears entirely

Automation or the entire outsourcing of a unit, department or function can also give rise to a redundancy under section 139[75]. However, unlike the statutory definition, in reality many employees' jobs change gradually or *partially* – i.e. the required skills. Where there has been a diminished requirement for employees to perform work of a particular kind, the employment tribunal will for the purposes of determining 'redundancy' look at the *work function* of the employee with the organisation not necessarily his/her formal job or his/her associated title. Whilst the nature of the job may change, if the work function remains, an employee who refuses to accept the changes in relation to his/her job or resigns in response to them will not qualify for 'redundancy' (their termination /resignation would be classified as a misconduct dismissal or alternatively a potential claim for constructive dismissal (see General Legal Framework).

There is no absolute right in UK labour law to have employment continued indefinitely on the same terms and the courts and tribunals have given employers a significant degree of discretion to achieve efficiencies where there is diminution in the work function, without becoming liable for redundancy payments[76]. The employer retains the right to re-organise and make extensive changes to employee terms and conditions without being liable for redundancy payments as long as the underlying work function remains the same[77]. For example, the function of a 'boatbuilder' was held to have remained the same even though the boat yard went over to fibreglass boats instead of wooden ones which the dismissed employee was historically used to making[78]. The approach of the UK courts and tribunals stems from the statutory definition in section 139 ERA 1996 which clearly

[74] *Sutton v Revlon Overseas Corpn* [1973] IRLR 173
[75] *Bromby & Hoare Ltd v Evans* [1972] ICR 113 KIR 160; *Amos v Max-Arc* Ltd [1973] ICR 46,
[76] *Chapman v Goonvean and Rostowrack China Clay Ltd* [1973] 2 All ER 1063
[77] *Martland and Others v Cooperative Insurance Society Ltd* [2008] All ER (D) 166
[78] *Hindle v Percival Boats Ltd* [1969] 1 All ER 836

focuses upon work function as opposed to job particulars. Moreover, their interpretation of statute reflects a belief that legislation is not to hinder management prerogative in the realm of organisational change. Whilst there are more onerous procedural requirements governing collective redundancy (see section 2) the UK statutory definition of redundancy, by focusing primarily upon the work function, does not afford any greater substantive protection to collective groups of employees facing dismissal than individuals.

However, this approach is mitigated by two factors. Firstly, the courts and tribunals will *not* permit an employer to use a 'false reorganisation' as a cover for dismissals which are in reality due to redundancy[79]. Secondly, the ability of UK employees who have been dismissed or resigned in response to changing work patterns to claim unfair/constructive dismissal gives the employee the opportunity to claim superior remedies (as opposed to statutory redundancy). In other words, it may be in the employee's interest *not* to be made redundant as, redundancy is a fair ground for dismissal, prohibiting any action for unfair dismissal which might arise out of harsh treatment during a re-organisation.

With regard to an unfair dismissal claim, due to the more generous remedies available (see General Legal Framework), an employer may attempt to prove a redundancy by demonstrating a diminished need for work of a particular kind. However, if this cannot be supported upon the evidence it is likely that an employer will assert that the dismissal was fair in that the reorganisation amounted to 'some other substantial reason'(see General Legal Framework and below) [80] – but it remains open to the tribunal to make its own finding of fact as to the reason for dismissal.

The place of work disappears

Within the statutory definition, redundancy is described as: 'in the place where the employee was so employed'. Consequently, the definition of place can be decisive to any potential redundancy claim[81]. Issues arise for the individual employee when they are ordered to relocate to a different area or work across multiple sites contrary to their wishes. As a result, a preliminary issue becomes one of the employer's contractual authority to make such an order. In the event the employee's contract contains an express mobility clause, this will often prove decisive[82] as the traditional UK approach to contract law is that an express term should not be subject to extension or restriction by any claimed implied term – such as a stipulation inserted into the contract by courts[83]. If an employee refuses to comply with his contractual terms, he/she may be denied redundancy payments as a result of failing to comply with a reasonable request[84] as this would be categorised as 'some other substantial reason' for fairly dismissing the employee[85].

[79] *Johnson v Nottinghamshire Combined Police Authority* [1974] 1 All ER 1082 at 1087
[80] Section 98, Employment Rights Act 1996
[81] *Rowbotham v Arthur Lee & Sons Ltd* [1975] ICR 109
[82] *Sutcliffe v Hawker Siddely Aviation Ltd* [1973] ICR 560
[83] *Nelson v BBC* [1977] ICR 649
[84] *Stevenson v Teeside Bridge and Engineering Ltd* [1971] 1 All ER 296, 10 KIR 53
[85] Section 98(1)(b) Employment Rights Act 1996

However, the Court of Appeal ruled that a factual approach[86], taking into account all the evidence to the actual place of work should primarily resolve the question, subject to the condition that if the employee had previously been mobile the court will then consider the terms of the individual's contract and it may find that the employee is under an obligation to accept suitable alternative work if offered by the employer[87], the refusal of which would defeat any claim for redundancy and would lead to a fair dismissal as described in the above paragraph.

In the absence of any express contractual term, the employment tribunal must consider upon the evidence whether to imply an appropriate term to reflect the intentions of the parties[88]. However, if an employer wishes to rely upon a mobility clause, he should do so clearly and not as an afterthought, in the event of which, the courts and tribunals are unlikely to allow the employer to rely upon the clause in order to defeat a redundancy claim[89].

Reorganisation / 'some other substantial reason' dismissals

The statutory definition of redundancy is framed with regard to the *labour requirements of the business*. Confusion can arise as to the difference between a 'redundancy' and a 'reorganisation'. Often UK employers are uncertain as to whether planned changes to structures simply amount to a reorganisation or will give rise to a redundancy situation, in which case a proper redundancy exercise must be undertaken and redundancy payments will need to be made. 'Redundancy' is a technical, legal definition; while 'reorganisation' simply means a change in working structures, and has no specific legal meaning. As the Employment Appeal Tribunal (EAT) stated:

> 'Each case involving consideration of the question whether a business reorganisation has resulted in a redundancy situation must be decided on its own particular facts. The mere fact of reorganisation is not in itself conclusive of redundancy or, conversely, of an absence of redundancy.'[90]

Therefore, a particular reorganisation *may* involve making redundancies, if the *definition* of redundancy is met; or it *may not* - where, for example, work is re-organised more efficiently, but *without* the need for a reduction in the number of employees doing a particular kind of work.

If the proposed re-organisation is of a *minor* nature and can be viewed as merely as updating the same job, such as learning new ICT skills, then it is unlikely that such

[86] *Bass Leisure Ltd v Thomas* [1994] IRLR 104
[87] Section 141, Employment Rights Act 1996, *O'Brien v Associated Fire Alarms Ltd* [1969] 1 All ER 93
[88] *GEC Telecommunications Ltd v McAllister* [1975] IRLR 346
[89] *Curling v Securicor Ltd* [1992] IRLR 549, EAT
[90] *Corus and Regal Hotels plc v Wilkinson* EAT 0102/03

organisational changes would amount to a breach of the individual employee's contract and therefore refusal to accept such changes would likely result in a conduct dismissal[91].

Moreover, if the reorganisation created *major* changes which resulted in a *decrease* in the employee's work, the redundancy may be fair according to the statutory definition[92] - preventing a claim for unfair dismissal. It is likely that the court or tribunal would examine the 'kind of work' the dismissed employee was contracted to do and if after re-organisation, the 'kind of work' changed and the employee was unable to perform the new 'kind of work', the individual may be dismissed as redundant and replaced (without a reduction in headcount)[93].

If however, the changes are major and do not produce a redundancy according to the statutory definition (such a reduction in the employee's work), the employer may argue that the dismissal is still fair, albeit for 'some other substantial reason'[94] in which case, no redundancy payment and the employee may not be able to succeed in a claim for unfair dismissal.

In considering whether an individual was unfairly dismissed as a result of a reorganisation, the courts and tribunals will ask three questions:

1) Was the re-organisation necessary?;
2) Was it necessary to insist upon changing the employee's job in order to put the plan into effect; and
3) Was there sufficient consultation (see section 2 and 5)

Given the courts and tribunals reluctance to substitute their judgement for that of management, it is unsurprising that a mere 'sound business reason'[95] is all that is substantively required to satisfy the first two questions. The employer is afforded an extremely wide discretion as to his conduct in that the decision to dismiss for redundancy fell 'within the range of reasonable responses' which is a question of fact for an employment tribunal to determine[96] (see also section 4 below).

[91] *Cresswell v Board of Inland Revenue* [1984] ICR 508
[92] Section 139, Employment Rights Act 1996
[93] *Murphy v Epsom College* [1985] IRLR 271, CA
[94] Section 98 (1) Employment Rights Act 1996
[95] *Hollister v National Farmers Union* [1988] ICR 142
[96] *Gillham v Kent County Council (No 2)* [1985] IRLR 18, CA

4. Social and economic interests

a. Is one of the aims of the rules to consider all the parties' interests? For instance, is the employer obliged to examine alternatives to dismissal?

One of the aims of the legislation regarding economic dismissals in England and Wales is to impose on employers a duty to consider the interests of employees and attempt to avoid redundancies.

Considering alternatives to redundancy is one of the five stages of fairness to employees set out in relation to redundancy dismissals in the leading case of *Williams v Compair Maxam Ltd*[97]. The employer should consider the redundant employee for similar positions, even subordinate ones[98]. Moreover, a failure to consider 'bumping' that is; giving employee A employee B's position and making employee B redundant, can render a dismissal unfair as per the principle in *Murray v Foyles Meats Ltd*[99]

A dismissal may be found to be unfair under section 98 ERA 1996 if no consideration is given to alternative employment within the company (or group of companies) as per *Vokes Ltd* v *Bear*[100]. What will be considered 'suitable alternative' employment will depend upon the circumstances of the case; for example an employer should offer the redundant employee a post 'even if it is at a lower salary or it is a less prestigious position'[101]

An employer will be expected to set out in their redundancy procedure how they intend to minimise or avoid redundancies. Measures suggested by ACAS[102] include:

(i) Natural wastage
(ii) Restrictions on recruitment
(iii) Retraining and redeployment
(iv) Reduction or elimination of overtime
(v) Introduction of short-time working
(vi) Seeking applicants for early retirement or voluntary redundancy
(vii) Termination of the employment of temporary or contract staff

Although there is provision for all parties' interests to be considered, arguably British employers are given considerable latitude to make decisions appropriate for the economic well-being of their business. For instance, the scope for the employee to question the decision to make redundancies is very limited. If the employer asserts that it is not

[97] [1982] ICR 156. See section 2.
[98] *Fulcrum Pharma (Europe) Ltd v Bonassera and another* UKEAT/0198/10/DM; *Taymech Limited v Ryan* UKEAT/663/94; *Lionel Leventhal Ltd v Mr J North* UKEAT/0265/D4/MAA
[99] [2000] 1 AC 51.
[100] [1974] ICR 1.
[101] (*Avon-mouth Construction Co Ltd v Shipway* [1979] IRLR 14).Tolley's Employment Handbook, 26th Edition, 2011 at p1168
[102] ACAS, *Redundancy handling* at p7

practicable for the business to implement alternatives (e.g. reduction in hours rather than dismissals) the tribunal would be unwilling to sit in judgment on what is effectively a business decision[103]. To this extent the obligations on the employer at the outset (before the start of the redundancy process) to consider alternatives to redundancies are not onerous. However, employee representatives must be consulted on alternatives to redundancy as part of the consultation requirements within TULR(C)A 1992[104].

Furthermore, the Employment Rights Act 1996 recognises at section 98(1)(b) that a dismissal can be for a potentially fair reason, if the reason is *'Some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held'*. One of the reasons that can be 'substantial' is 'Business Reorganisation'. This allows a level of freedom for the employer to make business decisions according to the economic climate through streamlining and reorganisation. For instance, in difficult economic times, an employer may decide to cut wages or require employees to work extra hours. If the employee refuses to accept these changes then they may be fairly dismissed if the employer's actions are considered reasonable. The reasonableness of implementing such business changes does not require such business changes being 'desperate'[105].

This principle was upheld in the recent case of *Garside & Laycock Ltd v Booth*[106], in which the EAT held that an employee had been fairly dismissed when his medium sized employer was in economic difficulties and he refused to accept a modest pay cut (5%). Because dismissals for SOSR rather than redundancy do not have the same statutory consultation requirements it could be argued that this provision affords a greater freedom to employers to make economic decisions that may lead to dismissals.[107]

b. Is there a duty of adaptation or reinstatement of the workers?

Overall, the duties of adaptation/reinstatement are not onerous. The employer when considering redundancy should consider whether the affected employees can be deployed elsewhere and in some circumstances a failure to consider redeployment or other alternatives (e.g. cut in salary) may render the dismissal unfair. The consultation process, whether collective or individual, should cover this.

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[103] *James W Cook & Co (Wivenhoe) Ltd v Tipper* [1990] IRLR 386.

[104] Collective consultation requirements are set out under section 2.

[105] As set out in *Catamaran Cruisers Ltd v Williams* [1994] IRLR 386 EAT at paragraph 19: *"We do not accept as a valid proposition of law that an employer may only offer terms which are less or much less favourable than those which pre-existed if the very survival of his business depends upon acceptance of the terms… a re-organisation or re-structuring of a business may well be a reason which falls within s.57(1)(b) [the statutory predecessor of what is now s.98(1)]. Indeed, it may be that, if, to quote from the Court of Appeal judgment, 'a sound good business reason is shown,' this may constitute 'a substantial reason' within the meaning of the section, even if the alternative to taking the course they propose is not that the business may come to a standstill, but is merely that there would be some serious effect upon the business."*

[106] [2011] IRLR 735

[107] See also section 3 above

Whether the employer can demand adaptation or reinstatement and whether the employee is obliged to consent to redeployment will turn on the individual contract of employment. In *O'Neill v Merseyside Plumbing Co Ltd*[108] the Claimant employee worked as a gas fitter but when there was a diminishment in this type of work he was redeployed as a plumber. He did not want to work as a plumber and was therefore dismissed. It was questioned whether the dismissal was by reason of redundancy (and therefore the claimant would be entitled to a redundancy payment). The National Industrial Relations Court (ET at the time) held that if the contract had stated that the employee was retained as a gas fitter, then the company would not be entitled to insist on redeployment. However, if the employee was retained as a general plumber then his refusal to work as a plumber (despite the diminishment in gas fitting work) would constitute a breach of contract justifying dismissal for misconduct rather than redundancy.

An employee is not deemed to have been dismissed if he/she is offered renewed or alternative employment with his employer or associated employer[109] and in this circumstance will not be eligible for a redundancy payment if the offer is unreasonably refused[110]. Reasonableness of refusal is judged by the suitability of the alternative employment. Suitability *'means something substantially equivalent to the employment which has ceased'* (Lord Parker CJ in *Taylor v Kent County Council* [1969] 2 QB 560).

c. Is there a priority list for dismissals ("last-in first-out" or "social selection", for instance?)

Employers are free to choose their own selection criteria. These should be capable of objective assessment[111]. 'Last-in, First-out' ("LIFO") was a dominant criterion used for many years, particularly prior to the 1980s when trade unions had greater influence over industrial relations. The Trade Unions generally found LIFO to be the 'least unfair' method of selection for redundancy. The advantage of LIFO for employers was that it (largely) avoided criticism that criteria were unfair or unfairly applied.

It is now rare for an employer to use LIFO as a sole criterion though length of service is a common criteria amongst several to be used. It can also be used as a 'tie-breaker' if all other considerations are equal.

In 2009, the Court of Appeal considered whether LIFO was in breach of the Employment Equality (Age) Regulations 2006 in the case of *Rolls Royce v Unite*[112] and held that it was not; that it was a proportionate means of attaining legitimate aims (i.e. achieving stability and loyalty through rewarding length of service). It has however been questioned whether LIFO would now be incompatible with the regulations if it was the sole criterion used[113]. It is likely that the criterion would also be deemed unfair if it disproportionately

[108] [1973] ICR 96.
[109] S146(1) ERA 1996
[110] s141 ERA 1996
[111] *Williams v Compair Maxam* above
[112] [2009] EWCA Civ 387.
[113] Harvey on Industrial Relations and Employment, Volume 1 at [1687.01].

resulted in the dismissal of female or ethnic minority workers. Some of the selection criteria that are now commonly used include skills or experience, standard of work performance, attendance or disciplinary record[114]. All of these criteria should be judged objectively according as much as possible to measurable evidence. For example, work performance may be judged by *'reference to the company's existing appraisal system'*[115].

Social selection is not used save that, as stated above, the proportionate effect on certain social groups may affect the criteria selected.

d. Is the employer allowed to hire new employees once the dismissals have taken place?

If the needs of the business change there is not a bar on recruitment. However, if the employer hires new staff following redundancies they may be in evidential difficulties in proving the statutory test under section 139 ERA if a dismissed employee brought a claim for unfair dismissal claiming that they were not redundant i.e. that their dismissal was not for a fair reason.

e. What are the guarantees for the employees prior to dismissals taking place (money, right for training, guarantee for replacement etc) and how are they implemented: social plan, (collective) negotiations?

Employers are under a duty to consider suitable alternative employment prior to dismissals taking place as explained above at question 4a.

Furthermore, during the notice period of redundancy employees are allowed time off to look for work or make training arrangements for future employment under section 52(1) ERA 1996:

> *(1) An employee who is given notice of dismissal by reason of redundancy is entitled to be permitted by his employer to take reasonable time off during the employee's working hours before the end of his notice in order to—*
>
> *(a) look for new employment, or*
>
> *(b) make arrangements for training for future employment.*

In order to qualify for the right the employee must have been continuously employed for 2 years[116].

The statute does not specify what amount of time should be allowed; it is determined solely by the question of reasonableness. Arguably the provision is fairly generous to the employee since there is no requirement as to proof of having an interview or

[114] As cited in the ACAS Guide '*Redundancy handling'* at page 18
[115] ACAS '*Redundancy handling'* at page 19
[116] s52(2) ERA 1996.

appointment. If the employee wished they could spend the time looking for work by searching classified advertisements or notices. They are not obliged to account for their time to their employer. Nevertheless, an employee using their notice period to look for work is not entitled to full pay[117].

It has been held that the employer must allow the employee time off during normal working hours and is unable to demand that the time be made up elsewhere.[118]

5. Consequences of dismissal based on economic grounds and access to the Court

a. What are the consequences of a lawful dismissal?

A lawful dismissal will lead to the employee being redundant and receiving redundancy pay (subject to qualification for the same).

An employee is entitled to statutory redundancy pay if s/he meets the necessary eligibility requirements:

(i) s/he is an employee
(ii) s/he has at least two years' continuous service;
(iii)s/he has been dismissed for redundancy.

For the purpose of calculating statutory redundancy pay, there is a presumption that the dismissal is by way of redundancy unless the employer can rebut this presumption by proving otherwise.

Statutory redundancy pay under section 162 ERA 1996 is calculated in the same way that a tribunal calculates the basic award for an unfair dismissal[119].

The relevant period is the time of continuous employment leading up to the effective date of dismissal. Different rates are applied depending on the age of the employee as follows:

- One and a half weeks' pay for each year of employment when the employee was not below the age of 41
- One week's pay for each year of employment when the employee was below 41 but not below 22
- Half a week's pay for each year of employment below the age of 22

A week's pay is capped by a statutory maximum[120] which is determined in line with inflation. It is currently £400 (approximately €478).

The employee's pay is calculated by a weekly average with reference to the 12 weeks prior to dismissal.

[117] It can be reduced to 2/5 of weekly pay for time spent off looking for work
[118] *Ratcliffe v Dorset CC* [1978] IRLR 191, EAT.
[119] s119 ERA
[120] s227(1)(a) ERA 1996

An employee can bring a claim in the tribunal for a redundancy payment even if in other respects the dismissal was lawful under section 163 ERA 1996, including a claim for financial loss caused by the failure of the employer to pay the statutory redundancy pay.

b. When is the dismissal considered to be unlawful and what are the consequences?

A redundancy dismissal can be unlawful by virtue of the failure to consult under the Trade Union & Labour Relations (Consolidation) Act 1992 ("TULR(C)A 1992") (which gives effect to the EC Collective Redundancies Directive 98/59/EC), or as an unfair dismissal under the Employment Rights Act 1996.[121] The failure to consult collectively is dealt in section 2 and below in 5c.

Unfair dismissal by reason of redundancy
An employee can claim unfair dismissal if their dismissal for redundancy was not carried out fairly[122], although the tribunal will not investigate the commercial merits of the decision to make redundancies.[123]

Consequences of unlawful dismissal
If the employee is found to have been unfairly dismissed then they are entitled to compensation. The amount of any redundancy payment is set off against the compensation in order to avoid double recovery. Compensation is assessed in accordance with section 123 ERA 1996 and this would include past and future loss of earnings as well as other benefits. Compensation is capped by section 124 ERA 1996 at £68,400 /€81,840. This limit is reviewable annually in line with inflation.

Tribunals can also make an order for reinstatement/reengagement. These are rarely ordered (the Annual Tribunal Service statistics show in 2009/2010, that only 6 cases of reinstatement or re-engagement were made out of 57,400 claims of unfair dismissal presented = 0.01%). However, this may become more common in the current economic climate since when it is harder to obtain work following dismissal compensation will become a less desirable remedy. However reinstatement/ reengagement would be highly unusual in the case of an economic dismissal because the reinstatement should not result in over-manning[124].

If however, the employer satisfies the tribunal that despite any unfairness in the process (as set out above) there was a genuine economic need for the dismissal and the employee would have been (or would be likely to) to have been dismissed in any event, the tribunal

[121] These provisions are set out under the general framework and section 2.

[122] As per the requirements set out in *Polkey v Dayton Services* [1988] ICR 142 at 162-163 that is to consult, fairly select and take steps to minimise or avoid redundancies. This is dealt with under the General Legal Framework , sections 2 and 3c.
[123] *James W Cook & Co (Wivenhoe) Ltd v Tipper* [1990] ICR 716, CA
[124] *Cold Drawn Tubes Ltd v Middleton* [1992] ICR 318, EAT

will reduce the compensation to reflect the chances of losing the job if a fair procedure had been followed[125] .

c. Do the employees and employee's representative body have access to a Court in case of termination at the initiative of the employer? Where does the burden of proof lie?

The Employment Tribunal has the jurisdiction to deal with complaints regarding the breach of consultation in relation to redundancy and unfair dismissal. The Tribunal consists of a Judge and 2 lay members. An appeal from a Tribunal decision will go to the Employment Appeal Tribunal.

A representative body on behalf of employees or affected employees may recover a protective award under section 189 TULR(C)A 1992[126] because this is a collective right.

In relation to unfair dismissal under ERA 1996, the burden is with the employer to prove (i) the reason was for dismissal and (ii) that it was one of the potentially fair reasons (i.e. redundancy or Some Other Substantial Reason). The burden is then neutral as to whether the employer acted reasonably in all the circumstances in treating the reason for dismissal as a sufficiently serious one to dismiss the employee. The tribunal must judge the actions of the employer objectively according to the standard of the reasonable employer and not substitute its own view[127] .

The claimant in an unfair dismissal case will be the employee rather than the representative body though in a suitable case the tribunal has case management powers to join claims arising from similar facts so that they may be heard together (Rule 10 Employment Tribunals Regulations 2004). For example, if two or more employees claim unfair dismissal as a result of the same redundancy procedure there will be a considerable overlap of evidence (i.e. whether there was a redundancy situation and whether the procedure was fair) and so their claims may well be joined[128].

[125] in accordance with the procedure set out in *Polkey* v *AE Dayton Services Ltd* [1988] ICR 142
[126] Details are given on this in section 2
[127] *Foley v Post Office; HSBC Bank Plc v Madden* [2000] IRLR 827
[128] e.g. *Cold Drawn Tubes Ltd v Middleton* [1992] ICR 318, EAT

6. Are there any law changes projected or new draft legislation on dismissal based on economic grounds? If that is the case, which are the main objectives and new rules?

The UK government is currently considering a review of dispute resolution in the workplace and is consulting on the obligation to consult in redundancy situations.

As part of a wider commitment given by the UK Coalition government (elected in May 2010) to engender a labour market that is flexible, effective and fair, the government embarked upon an 'Employment Law Review'. The review is tasked with looking 'at all the laws and regulations that impact the functioning of the labour market, examining each stage of the employment life cycle'.[129]

The UK has a reputation for having a 'laissez-faire' approach to employment regulation; 'according to the Organisation for Economic Cooperation and Development (OECD), the UK has one of the most lightly regulated labour markets amongst developed countries, with only the US and Canada having lighter overall regulation'[130]. Despite this, the government believes that more can be done to relax or rationalise existing regulations where necessary and remove over burdensome process and administration. The intended result will be to encourage employers to take on more staff and to promote economic growth through a strong labour market.

The Employment Law Review will take place in the context of;

'the increase in the pace of decision-making in all areas of life as a result of innovations in information and communications technology; and the need to facilitate a labour market that can generate economic growth in the face of a global economic downturn'[131]

Accordingly, one of the main themes of the Employment Law Review is to make change easier, allowing for change to happen in a way that is flexible and economically efficient, whilst remaining fair for individuals.

As part of the Employment Review, The Department for Business, Innovation and Skills (BIS) has recently called for evidence on the operation of the rules for collective redundancy consultation, in particular the consultation periods. The purpose being, as stated by the government, to:

'reduce the fear factor for employers to encourage them to take on new employees and manage them effectively.....to create a level playing field for good employers'[132]

[129] BIS 'Flexible, Effective, Fair: Promoting Economic Growth through a Strong Labour and Efficient Labour Market, October 2011, p 5
[130] OECD Indicators of Employment Protection 2008, in BIS 'Flexible, Effective, Fair: Promoting Economic Growth through a Strong Labour and Efficient Labour Market, October 2011
[131] BIS, Call for Evidence, Collective Redundancy Rules 2011, p 8
[132] BIS, Call for Evidence, Collective Redundancy Rules 2011, p 2

As an element of the same Employment Review and for the same purpose, the government has already extended the qualifying period for unfair dismissal from one year to two years. This will come into effect in April 2012.

Following the conclusion of the call for evidence which closed at the end of January 2012 and the subsequent review, policy proposals will be submitted for public consultation in 2012. Changes to legislation in the area of collective redundancy consultation can surely be expected. From the government paper, the potential changes envisaged are:

Minimum time periods?
It is likely that the time periods for collective consultation will be reduced. Many employers have reported that the 90 day minimum time periods for consultation, before a proposed dismissal can take place, are too long and claim that this can debilitating for business recovery.

On the issue of the timing of consultation and the obligation of an employer to start consultation 'in good time' we have already seen that there is some confusion as to what constitutes 'in good time' (see section 2). Should the ultimate aim of the consultation process be to reach agreement through meaningful discussion, as opposed to fulfil minimum time requirements as set by legislation?

Enforcement?
It can be interpreted when reading the same BIS document that the review may also cover government enforcement of workplace rights. The intention is to ensure the elimination of unnecessary burdens on business, whilst protecting vulnerable groups of people. This may suggest some changes to the arena of penalties or protected payments in the event that an employer does not abide by its collective consultation duties. Along the same theme Deakin & Morris argue that existing sanctions available against an employer who fails to fulfil its duty to consult is 'wholly inadequate'.

'A financial penalty (protected award) allows an employer to ultimately buy its way out of its legal obligations and fails to take into account the fact that consultation may have prevented the job loss all together'.[133]

Instead Deakin & Morris point to a proposal that was made at the time of revisions being made to the Collective Redundancies Directive, that redundancies implemented in breach should be null and void. There have been cases in the past where decisions regarding redundancies have been halted by the courts pending full and complete resolution of procedural obligations (consultation). In such cases a failure to follow procedure would have constituted a breach of an order of the court. Although these cases have proven successful, this is an expensive and cumbersome mechanism[134].

A further criticism of the enforcement process is that an employee is reliant on their elected representatives taking the matter to an employment tribunal. There may be

[133] Deakin & Morris, p.816, 9.42
[134] Deakin & Morris, p. 817, 9.42

political or apathetic reasons why a union or employee representative may not wish to pursue this. There is a strong case for allowing an individual freedom to apply directly to an Employment Tribunal in this respect although this is contrary to the government's objective to reduce the number of Employment Tribunal applications.

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