Frederick Place Chambers

Robert Spicer, M A(CANTAB)
Diploma in Legal Studies (CANTAB)
Public Access Barrister
Regulated by the Bar Standards Board

9 Frederick Place
Clifton
Bristol
BS8 1AS
Tel : 0117 9467059
E-mail : Robert.spicer@frederickchambers.co.uk
www.frederickchambers.co.uk

REDUNDANCY: AN OUTLINE OF LAW AND PRACTICE

Redundancy, like much of employment law, is an increasingly complex concept. Its legal definition often bears little relationship with the reality of the distress, mental and physical, caused to workers who have lost their jobs. It is not unknown for employers to dispense with unwanted workers on the pretext of a sham "redundancy", accompanied by minimally acceptable financial compensation. Such false redundancies can be attacked through an application of selected decided cases from the mass of case law. Sham redundancies may involve no redundancy at all, or minimal compliance with statutory procedures as interpreted by case law. In a recent case, a female worker was dismissed for redundancy shortly before her completion of the two-year continuous employment requirement. There was no evidence of redundancy. She was unable to claim unfair dismissal but there were possible claims of breach of contract and/or discrimination. These are discussed in more detail below.

Redundancy law and procedure is highly complex. The statutory provisions are overlaid with a mass of case law. Most of the concepts of redundancy law have been litigated, with complex results. There may be a significant overlap with other areas of employment law, for example discrimination and unfair dismissal.

Areas of future research include the meaning of "workplace", given the number of people working from home, and "affected" by redundancy – does this mean more than workers who are actually at risk of redundancy or who are made redundant?

KEY CONCEPTS:

- **Definition of redundancy**

Closure of business; closure of workplace; reduction of workforce.

- **Redundancy payments**

Suitable alternative employment; statutory trial period.

- **Lay-off and short-time**
- **Guarantee pay**
- **Unfair redundancy dismissal**

No genuine redundancy situation; failure to consult; unfair selection; failure to offer alternative employment; reorganisation and new jobs.

- **Redundancy and discrimination**

Pregnancy/maternity dismissals; race discrimination; indirectly discriminatory selection criteria; Last in first out; disability.

- **Time off to look for work**
- **Collective consultation.**

STATUTORY SOURCE MATERIAL

The following sections of the Employment Rights Act 1996 (ERA) are relevant to redundancy issues: sections 28-35 (guarantee pay); 52-54 (time off work); 105 (dismissal); 135-146 (redundancy); 147-154 (lay-off and short time); 162-165 (redundancy payments).

Section 139: Redundancy.

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,

iii. have ceased or diminished or are expected to cease or diminish.

Section 164: Claims for redundancy payment.

1. An employee does not have any right to a redundancy payment unless, before the end of the period of six months beginning with the relevant date—

a) the payment has been agreed and paid,

b) the employee has made a claim for the payment by notice in writing given to the employer,

c) a question as to the employee's right to, or the amount of, the payment has been referred to an employment tribunal, or

d) a complaint relating to his dismissal has been presented by the employee under section 111.

2. An employee is not deprived of his right to a redundancy payment by subsection (1) if, during the period of six months immediately following the period mentioned in that subsection, the employee—

a) makes a claim for the payment by notice in writing given to the employer,

b) refers to an employment tribunal a question as to his right to, or the amount of, the payment, or

c) presents a complaint relating to his dismissal under section 111,

and it appears to the tribunal to be just and equitable that the employee should receive a redundancy payment.

3. In determining under subsection (2) whether it is just and equitable that an employee should receive a redundancy payment an employment tribunal shall have regard to—

a) the reason shown by the employee for his failure to take any such step as is referred to in subsection (2) within the period mentioned in subsection (1), and

b) all the other relevant circumstances.

4. Subsections (1)(c) and (2) are subject to section 207A (extension because of mediation in certain European cross-border disputes).

5. Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsections (1)(c) and (2).

Section 52: Right to time off to look for work or arrange training.

(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.

(2)An employee is not entitled to take time off under this section unless, on whichever is the later of—

(a)the date on which the notice is due to expire, and

(b)the date on which it would expire were it the notice required to be given by section 86(1), he will have been (or would have been) continuously employed for a period of two years or more.

(3)For the purposes of this section the working hours of an employee shall be taken to be any time when, in accordance with his contract of employment, the employee is required to be at work.

DEFINITION OF REDUNDANCY

Closure of the workplace

- An employee is dismissed for redundancy if it is attributable wholly or mainly to the fact that the employer has ceased or intends to cease to carry on business where the employee was employed.
- *Bass Leisure Ltd v Thomas*: an employee's place of work for the purposes of redundancy is a question of fact. The place where the worker actually worked is a key factor. Mobility clauses are irrelevant for this purpose. This decision was approved by the Court of Appeal in *High Table v Horst*. Where an employee has worked in only one location, that is the place of work regardless of any mobility clause. Where an employee has worked in several locations, the place of work is established by inquiry into the facts, taking account of contractual terms which might be relevant.
- Where an employee is instructed to work at a different location or branch and the employee refuses, right to redundancy pay may be lost because she/he has refused offer of suitable alternative employment.
- Where there is a mobility clause, this may be invoked by the employer to avoid making redundancy payments. In *Home Office v Evans*, the Court of Appeal ruled that an employer was entitled to invoke a mobility clause to avoid a redundancy situation on the closure of part of its business. The motives of the employer were not important. The issue was whether it was legally entitled to invoke the mobility clause.

Case Examples:

Xerox Business Services Philippines Inc Ltd v Zeb UKEAT/0121/16/DM

Z was employed by X. His contract stated that his place of work was Leeds or Wakefield. X decided to transfer some work to the Philippines. Workers were given the choice of rejecting the transfer and being made redundant with a generous redundancy package or to transfer and be made redundant with statutory redundancy pay. X would not be required to carry out the transferring work in the UK. Z asked to be transferred to the Philippines on his existing terms. X rejected the request. It stated that the effect of TUPE was that Z would transfer on his existing terms. He was not employed to work in the Philippines, so his role was redundant because there was no requirement for his work in Wakefield. X dismissed Z and paid his statutory redundancy pay. Z complained of unfair dismissal. His complaint was upheld. The ET found that there was a vacancy in the Philippines. If Z had accepted local terms and conditions, X would have facilitated a move to the Philippines. There had been no redundancy. X appealed to the EAT.

The appeal was allowed. There had been no variation of the contract.

Following the transfer, X was required to employ Z at Wakefield. It was not obliged to employ him in the Philippines at the same salary.

TUPE did not entitle Z to vary his contract unilaterally so as to change his place of work.

References:

Bass Leisure Ltd v Thomas [1994] IRLR 104, EAT

High Table Ltd v Horst and others [1997] IRLR 513, CA

Home Office v Evans [2008] IRLR 59, CA

Reduction of workforce

- See section 139(1)(b), ERA 1996.
- The employer requires fewer employees to do a particular kind of work. There need not necessarily be less work to be done. In *McRea v Cullen & Davison Ltd*, the employer wished to make better use of its resources. A manager who had been on sick leave for a long period was made redundant on his return to work because the employer had decided that the work could be done without him. The IT found that the dismissal was attributable to redundancy.
- Where the employee is dismissed because of diminished requirements, this is dismissal for redundancy. In *Safeway Stores v Burrell*, B started work with S as a petrol station manager. S reorganised management and B's post disappeared. He was told that his position had been made redundant. He complained of unfair dismissal. The ET found in his favour, applying the function test to decide that the requirements of the business to carry out work which B was doing had not ceased or diminished. S appealed to the EAT. The appeal was allowed. If the requirement for employees to do work of a particular kind remained the same, there could be no dismissal by reason of redundancy. The tribunal had erred in failing to ask itself whether there was a true redundancy situation, looking at the overall requirement for employees to carry out work of a particular kind and whether that situation caused B's dismissal.
- *Murray and another v Foyle Meats*. The claimants had contracts with FM to work in a slaughterhouse. The contracts contained a flexibility clause which stated that the claimants could be required to work in other parts of the plant. The market declined and FM made 35% of slaughterhouse workers redundant. The claimants complained of unfair dismissal, arguing that they were not redundant because they could be required to work under the same conditions, although in different departments. The House of Lords found that the claimants had been made redundant. It applied a test of actual causation: was there a reduction in the workforce? Was the dismissal wholly or mainly attributable to that reduction?
- Where the employer retains the same number of employees, but on different work: redundancy where particular job has disappeared altogether. Where job has been changed, for example because of changes in technology see *Amos and others v Max-*

Arc Ltd. The test is whether the changed job requires different aptitudes, skill or knowledge.

- Where the employer dismisses an employee because there is less work to do and the employee refuses to accept a cut in hours, this is redundancy. *Packman t/a Packman Lucas Associates v Fauchon*. F was a bookkeeper employed by P Ltd. P Ltd introduced a software package which reduced the number of hours to be worked by a bookkeeper. P Ltd asked F to reduce the number of hours which she worked. She refused and she was dismissed. The ET found that the reason for dismissal was redundancy. This decision was upheld by the EAT.

- **Particular kind of work**

- *Styles & Sons Ltd v Sanders [1968] 3 ITR 126, DC:* indoor carpenter required to work outside. Held, work unchanged.

- *Kykot v Smith Hartley Ltd [1975] IRLR 372, High Court:* redundancy where employer has same type of work available but needs fewer workers on different time schedule.

- *Arnold v Thomas Harington Ltd [1969] 1 QB 312*: resident emergency fitter taken off emergency work and asked to leave flat above garage. Held, no redundancy. The nature of work as fitter remained the same.

- *Amos v Max-Arc Ltd [1973] IRLR 285, NIRC:* "work of particular kind" means work distinguished from other work of same general kind by requiring special aptitudes, skills or knowledge.

- *European Chefs Ltd v Currell [1971] 6 ITR 37, DC:* pastrycook dismissed as employers wished to produce continental pastries made by a replacement cook. Held, dismissed for redundancy. The requirements for specialised employee had ceased or diminished.

- *Murphy v Epsom College [1984] IRLR 271, CA:* redundancy not only where reduction in number of employees. Key factor is whether kind of work being done has changed. May still be redundancy where quantity of work is not reduced and number of employees unchanged. Tribunal must examine closely elements of job as currently carried out and changes in employer's requirement.

- *ER Sutton v Revlon Overseas Corporation Ltd [1973] IRLR 173, NIRC:* redundancy where job of chief accountant redistributed among junior employees.

- *Managers (Holborn) Ltd v Hohne [1977] IRLR 230, EAT:* unilateral reduction in pay and status held to amount to constructive dismissal with entitlement to redundancy payment.

- *Rank Xerox Ltd v Churchill [1988] IRLR 280, EAT:* No redundancy where employees refuse to move to new place of work. Contracts of employment stated that they might be required to change location.

- Bumping: when an employer offers a redundant employee another employee's job and that employee is dismissed for redundancy. See *Gimber and Sons v Spurrett*.

References:

McRea v Cullen & Davison Ltd [1988] IRLR 200, EAT

Safeway Stores plc v Burrell [1997] IRLR 200, EAT

Murray and another v Foyle Meats Ltd [1999] IRLR 562, HL

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

Packman t/a Packman Lucas Associates v Fauchon UKEAT/0017/12

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

REDUNDANCY PAYMENTS

Source: section 135, ERA: employee has basic right to redundancy payment

Those excluded from payments:

- Independent contractors
- Employment outside Great Britain
- Less than two years continuous employment
- Offer of suitable alternative employment
- Misconduct
- Offer of re-engagement or alternative employment.
- Former registered dock workers and share fishermen
- Crown servants, members of the armed forces or police services
- Apprentices who are not employees at the end of their training
- A domestic servant who is a member of the employer's immediate family.

Payment Calculation

Source: section 162, ERA

Information required:

- Age of employee
- Length of continuous employment
- Amount of gross weekly pay

Working backwards, for each year in which employee was aged between 41 and 64: one and a half week's pay.

For each year aged between 22 and 41: one week's pay.

For each year from start of work to age 22: half a week's pay.

Notes: 20 years maximum calculation

Maximum gross weekly pay: £538

Employment before 18 not counted.

Current maximum redundancy payment: £16,140

Weekly pay is the average earned per week over the 12 weeks before redundancy notice is required.

Note: where an employer becomes insolvent, statutory redundancy pay can be claimed from the government (National Insurance Fund). This also applies where the employer refuses to pay and the worker has taken all reasonable steps to obtain payment.

Case Examples:

Ugradar v Lancashire Care NHS Foundation Trust UKEAT/0301/18/BA

U was dismissed for redundancy by L. She brought claims for contractual and statutory redundancy payments totalling £44,000. L argued that she had been unreasonably refused alternative employment. The ET found that the alternative employment had been unsuitable. Its jurisdiction over contractual claims was limited to £25,000 and it did not award a statutory redundancy payment on the basis that the NHS contractual redundancy scheme stated that it was an enhancement to a statutory payment and the statutory payment was offset against any contractual payment. U appealed to the EAT.

The appeal was allowed. U met the conditions for a statutory redundancy payment, but none had been made. U was entitled to a statutory and a contractual payment.

Kelly v Land Rover (2012) Birmingham ET

K was employed by LR as a manager. He had been an employee for 24 years. He suffered from physical disabilities and neurofibromatosis. During a period of sickness absence LR considered redundancies. K was not informed of this. He was dismissed for redundancy.

The ET found the following:

1. The failure to allow K to engage with the redundancy process amounted to a failure to make reasonable adjustments.

2. LR could have extended the assessment period to allow for K's absence.

Quantum: LR argued that K had failed to fully mitigate his loss. The tribunal agreed, stating that he had not availed himself of all the potential opportunities open to him.

Actual loss of earnings: £65,000

Loss of benefits: company car, healthcare: £20,000

Pension loss: simplified approach: £47,000

Hazel v New Eltham Conservative Club [2013] All ER (D) 318

The claimants were husband and wife who were made redundant. They complained of unfair dismissal. The complaint was upheld on the ground that there was no redundancy situation. The husband would have retired in 4 years' time. Compensation was awarded until his retirement date on the basis that he would have worked until retirement. No consideration was given to reflect the chance that the claimants could have been properly dismissed at some time before retirement. The employer appealed.

The appeal was allowed.

There was sufficient evidence for the employment tribunal to have considered the chance that the claimants might have been properly dismissed at some time before retirement. The task of the tribunal was to assess the loss flowing from the dismissal, using its common sense.

Digital Equipment Co v Clements (1996)

C was made redundant in 1995 and received a severance payment of £20,685. The IT found that he had been unfairly dismissed. If a fair procedure had been used, there was a 50% chance that he would not have been dismissed. The IT assessed the total compensatory award at £43,136. It then deducted severance pay, leaving £22,451. This sum was halved to reflect the finding of a 50% chance of non-dismissal. It then applied the statutory maximum, as it then stood, to award £11,000.

The employer appealed on the basis that the IT had been wrong to deduct the severance payment before applying the 50% reduction.

Decision:

- The contractual severance payment should be deducted from the compensatory award AFTER the award was reduced to reflect the chance that the employee would have been dismissed if the employer had acted fairly.
- An award of £837 was substituted.

McDowell v BAE Systems (Operations) Ltd (2016) Eq Opp Rev 270:37, Bristol ET

M was employed by BAE as a design lead. In January 2015 he was made redundant at the age of 65. The employer's enhanced redundancy scheme was capped at age 65. M received only his statutory redundancy pay and no enhancement. He complained of direct age discrimination. The employer argued that it had legitimate aims in imposing the capping, in that finite funds available for redundancy payments were allocated across the workforce in a fair and equitable manner.

The claim succeeded. The cap itself was not a legitimate aim because it was in itself simply linked to age. Too much of the employer's argument was based on generalisations. It had not presented any figures to explain what finite funds were available to it.

BAE Systems (Operations) Ltd v McDowell UKEAT/0318/16/RN

BAE operated a redundancy scheme which included a cap so that payments were not available to employees aged over 65 who had immediate entitlement to an occupational pension. The cap was applied to M who complained of direct age discrimination. BAE accepted that the cap was discriminatory on grounds of age but argue that it was a proportionate means of achieving the legitimate aims of its severance framework. The ET rejected this argument and did not accept that BAE had shown that this was a windfall case. Because there was no default retirement age, it could not be assumed that redundancy payments to employees in M's position would amount to a windfall. BAE appealed to the EAT.

The appeal was allowed in part. The ET had been correct to conclude that this was not a windfall case. The ET had failed to show a holistic approach to its assessment of the means adopted to achieve the various legitimate aims.

Stevenson v Teesside Bridge and Engineering [1971] 1 All ER 296, DC: an employee may be refused redundancy payment where he declines an offer to work away from home (steel erector).

Managers (Holborn) Ltd v Hohne [1977] IRLR 230, EAT: unilateral reduction in pay and status held to amount to constructive dismissal with entitlement to redundancy payment.

British Coal Corporation v Cheesbrough and Secretary of State for Employment [1990] IRLR 148, HL: average rate of remuneration to be calculated by reference to all hours worked, including overtime, and any remuneration received.

S & U Stores v Wilkes [1974] 3 All ER 401, NIRC: reimbursed expenses not included in average weekly rate of remuneration.

Secretary of State for Employment v Crane [1988] IRLR 238, EAT: circumstances in which employee agreed to work for no pay are included in interpretation of the words "no remuneration was payable".

Simmons v Hoover Ltd [1976] IRLR 266, EAT: an employee serving out notice of redundancy was dismissed for taking part in strike. Held, accrued right to redundancy payment survives second dismissal.

Pickwell v Lincolnshire County Council [1993] ICR 87, EAT: employee worked at a school which had been funded by local authority, but which became grant-maintained. Held, continuous employment for purpose of redundancy pay.

British Coal Corporation v Cheesbrough and Secretary of State for Employment [1990] IRLR 148, HL: average rate of remuneration to be calculated by reference to all hours worked, including overtime, and any remuneration received.

S & U Stores v Wilkes [1974] 3 All ER 401, NIRC: reimbursed expenses not included in average weekly rate of remuneration.

Secretary of State for Employment v Crane [1988] IRLR 238, EAT: circumstances in which employee agreed to work for no pay are included in interpretation of the words "no remuneration was payable".

Suitable Alternative Employment

- Unreasonable refusal of suitable alternative employment results in loss of statutory redundancy pay. S. 141, ERA.
- Offer must be made before end of old job and must start within four weeks.
- Burden of proof on employer to show that suitable offer was made: *Kitching v Ward*.
- Where an employee states that there is no interest in alternative employment, and the employer therefore does not make an offer, the employee is entitled to redundancy payment: *Simpson v Dickinson*.
- Offer of alternative employment must set out terms of new job and differences from old job: *Havenhand v Thomas Black Ltd*.
- Where an employee accepts the new offer, they are treated as never having been dismissed. They may complain of unfair dismissal from the old job: *Hempell v WH Smith & Sons Ltd*; *Jones v Governing Body of Burdett Coutts School.*
- *Hindes v Supersine Ltd [1979] IRLR 343, EAT:* offer of employment suitable only where reasonably equivalent.
- *Carron Company v Robertson [1967] 2 ITR 484, Court of Session:* reasonableness of refusal of employment offer depends upon different factors from those to be considered in deciding suitability of offer. Test of suitability is objective. A test of reasonable refusal depends upon reasons personal to employee.
- *Dutton v Hawker Siddeley Aviation Ltd [1978] IRLR 390, EAT:* a proposal for alternative work is not considered generally suitable where change of trade or type of work. Such an offer may be suitable where it involves temporary change of trade, which an employee may reject after trial.

Statutory trial period

An employee may try out the new job, where it is offered, for a trial period of up to four weeks. These are four calendar weeks and not four working weeks. Where the employee leaves within this period, they may claim redundancy pay in relation to the original redundancy dismissal. *Benton v Sanderson Kayser Ltd.*

Turvey v CW Cheyney & Son Ltd [1979] IRLR 105, EAT: contractual trial period starts when employee tries changes imposed by employer. This lasts for a "reasonable time" and is followed by the statutory trial period which lasts four weeks.

Air Canada v Lee [1978] IRLR 392, EAT: an employer imposing new terms of employment technically amounts to breach of contract. Held, employee has reasonable time to consider reaction to changes. In effect, there is a right to a reasonably long trial period for new terms to be assessed.

Turvey v CW Cheyney & Son Ltd [1979] IRLR 105, EAT: contractual trial period starts when employee tries changes imposed by employer. This lasts for a "reasonable time" and is followed by the statutory trial period which lasts four weeks.

Benton v Sanderson Kayser Ltd [1989] IRLR 19, CA: four weeks means four consecutive calendar weeks, not four working weeks.

Unreasonable refusal of a suitable offer

Burden of proof on employer to show that:

- Offer was suitable
- Refusal was reasonable.

Suitability includes job related factors, eg pay, hours of work and location.

Reasonableness relates to worker's individual circumstances.

Change of work location: whether reasonable depends on factors including travel issues and childcare.

Case Examples:

Bird v Stoke-on Trent Primary Care Trust: B's job was described as being at risk, following the restructuring of the NHS. She was invited to apply for whatever other posts were available. Unsuccessful applicants would be made redundant. B did not apply for any of the other posts because they were exclusively managerial. She was made redundant, but the employer refused to pay her redundancy payment of £70,000. The ET stated that B had refused to engage in the process of seeking alternative employment and had decided to secure the redundancy cash payment. B appealed to the EAT which allowed the appeal and remitted the matter to a fresh tribunal. It found that the ET had substituted its own view about the reasonableness of the reason for B's refusal rather than considering whether someone in her particular circumstances could reasonably have taken the view of the alternative post which she did.

RR Donnelly Global Document Solutions Group Ltd v Besagni and others [2014] ICR 1008, EAT

Statute reference: Transfer of Undertakings (Protection of Employment) Regulations 2006, reg.7

B and others were employed by a local authority in its parking enforcement department. Contracts were transferred to R which confirmed that B and others would be required to relocate. B and others refused to relocate and were dismissed for redundancy. They complained of automatic unfair dismissal in that they had been dismissed for a reason connected with their redundancy. The ET upheld their claims, stating that the phrase "entailing changes in the workforce" did not apply to a change of location. R appealed to the EAT.

The appeal was dismissed. The fact that many transfers of undertakings involved a change in the workplace negated rather than supported an interpretation which involved a change of

location. Otherwise, employees dismissed for refusing to relocate would be deprived of a finding of automatic unfair dismissal and that would go against the grain of the Regulations.

Carron Company v Robertson [1967] 2 ITR 484, Court of Session: reasonableness of refusal of employment offer depends upon different factors from those to be considered in deciding suitability of offer. Test of suitability is objective. A test of reasonable refusal depends upon reasons personal to employee.

References:

Kitching v Ward [1967] ITR 464

Simpson v Dickinson [1972] ICR 474, NIRC

Havenhand v Thomas Black Ltd [1968] 2 All ER 1037

Hempell v WH Smith & Sons Ltd [1986] IRLR 95, EAT

Jones v Governing Body of Burdett Coutts School [1998] IRLR 521, CA

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

Bird v Stoke-on-Trent Primary Care Trust UKEAT/0074/11

Devon Primary Care Trust v Readman [2013] IRLR 878, CA

SHORT-TERM WORK & LAY-OFFS

Temporary Lay-Offs

Workers can claim statutory redundancy pay that they are eligible for and have been temporarily laid off, without pay or less than half a week's pay for either:

- More than 4 weeks in a row
- More than 6 non-consecutive weeks in a 13-week period.

Employers must be informed of the intention to claim statutory redundancy pay within 4 weeks of the last non-working day in the 4 or 6-week period.

The claim could be rejected if normal work is likely to start within 4 weeks and continue for at least 13 weeks.

Reduction of redundancy payments:

- Misconduct
- Employees nearing retiring age.

Where an employer fails to pay, the redundant worker may apply for payment direct from National Insurance Fund.

Disputes are referred to Employment Tribunal: section 170, ERA.

Redundancy payments not subject to recoupment.

Time limit for claims: six months from "relevant date"

Relevant dates:

- Contract terminated by notice: date when notice expires
- Contract terminated without notice: date of termination
- Fixed term contract: date on which fixed term expires
- Employee taken to have been dismissed: date on which notice expires
- Special rules where employee worked for trial period.

Where an employee has a contract which allows them to be temporarily laid off without pay, or put on shorter working hours with a cut in pay, sections 147 to 150 of ERA apply. These rules apply where a worker has been laid off or placed on short-time for at least four consecutive weeks or 6 weeks in a 13-week period. There is a procedure for notices and counter-notices which allows the worker to resign and claim redundancy pay.

Craig v Bob Linfield and Son: C was employed by B for 10 years. His contract included the right for the employer to lay off workers for an indefinite period without pay. C was laid off for four weeks. He complained of unfair constructive dismissal on the basis that the lay-off had been longer than was reasonable and that B was in repudiatory breach of contract. The ET dismissed the complaint. C appealed to the EAT.

The EAT dismissed the appeal. It stated that Parliament had provided a statutory scheme which provided for a four-week period during which there was no entitlement to claim a redundancy payment. Even if there were an implied term that a period of lay off would extend no longer than was reasonable, Parliament had set out a four-week benchmark from which there would have to be cogent and well-evidenced reasons to depart. There were no such reasons in this case.

Reference:

Craig v Bob Linfield & Son Ltd UKEAT/0220/15

GUARANTEE PAY

Workers may be entitled to a guarantee payment where they are not provided with work on a normal working day because of lesser requirements of the employer's business for the type of work. Eligibility is as follows:

- Continuous employment for at least one month
- Availability for work
- No refusal for reasonable alternative work
- Not laid off because of industrial action.

The maximum payment is £30 a day for 5 days in any three-month period. Failure to pay guarantee pay is an unlawful deduction from wages.

UNFAIR REDUNDANCY DISMISSAL

- Automatically unfair dismissal for specified reasons
- No genuine redundancy situation
- Failure to consult
- Unfair selection for redundancy
- Failure to offer alternative employment.

Key case: *Williams v Compair Maxam Ltd*

CM was losing business and decided to cut costs. It was decided to keep a team of core staff members. Other employees were dismissed on grounds of redundancy. This was based on personal preference and the trade union was not consulted. Some dismissed workers complained of unfair dismissal. The ET dismissed the complaints on the basis that personal preference was a reasonable method selection for redundancy. The workers appealed to the EAT which allowed the appeal and stated that there were five principles which employers should apply, as follows:

- Early warning: employers should give as much warning as possible about redundancies.
- Consultation with trade union.
- Fair selection criteria: should not be based on personal opinion but should be judges against, for example, attendance record, efficiency, disciplinary record and attendance.
- Fair selection in accordance with decided criteria.
- Consideration of alternative employment.

The EAT also stated that the employer should do as much as is reasonably possible to mitigate the impact on the workforce and to satisfy workers that the selection has been made fairly and not on the basis of personal whim.

<u>Employers must act reasonably.</u> This generally involves consultation and warning.

- Selection process must be fair
- Employer must make reasonable efforts, where practicable, to find suitable alternative employment
- Employer must consult and warn.

Polkey v AE Dayton Services Ltd (1988): test of reasonableness may be satisfied in following circumstances:

Employer taking view that, in exceptional circumstances of particular case, normal appropriate procedures would have been futile, would not have changed decision to dismiss, and could be dispensed with.

Effect of failure to consult is a question of fact for the ET.

No genuine redundancy situation

Moon v Homeworthy Furniture (Northern) Limited: In hearing a complaint of unfair dismissal for redundancy, an ET can investigate the origin of the redundancy situation, including questions such as unfair selection or lack of notice, but it cannot investigate the reasons for creating the redundancies. It cannot investigate the commercial and economic reasons which caused a closure nor investigate the rights and wrongs of the employer's decision.

References:

James W Cook & Co (Wivenhoe) Ltd v Tipper and others [1990] IRLR 386, CA

Moon v Homeworthy Furniture (Northern) Ltd [1976] IRLR 298, EAT

Failure to consult

Williams v Compare Maxam Ltd: employer should give as much warning as possible of impending redundancies, to enable trade unions and affected employees to consider alternative solutions and to find possible alternative employment.

Case Examples:

University and College Union v University of Stirling (2015) Times, May 19, Supreme Court

In 2010 a Scottish employment tribunal decided that dismissal following the non-renewal of a limited term contract was not excluded from the definition of "dismissal as redundant" for the purposes of an employer's duty to consult. This decision was reversed by the EAT. The Scots Inner House upheld the decision of the EAT. The claimants appealed to the Supreme Court.

The appeal was allowed.

An employee was dismissed as redundant for the purposes of an employer's duty to consult on proposed collective redundancies if the reason for the dismissal was not something to do with him personally but was a reason relating to the employer, for example the need to effect business change.

The expiry and non-renewal of a limited-term contract amounts to a dismissal. The question is whether the dismissal related to the individual or to the needs of the business.

Keeping Kids Company (In Compulsory Liquidation) v Smith and others (2018) Morning Star, April 20, EAT

KKC applied for a government grant in June 2015. The application included a proposal to make half its staff redundant in September 2015. The application was successful and KKC received £3 million. Following a police investigation into child sexual abuse allegations reported in the media on July 30, KKC could not meet the requirement of obtaining matching funding from philanthropists and the government asked for the money to be returned. KKC went into liquidation and all its employees were made redundant. A number of employees claimed protective awards on the basis that the company had failed to consult. KKC argued that it had not known the names of employees being made redundant, and that adverse publicity related to the child abuse investigation amounted to "special circumstances". The ET found that there had been a proposal to dismiss by June 2015 and the company should

have started the consultation process promptly after that date. The full 90 days protective awards were made. KKC appealed to the EAT.

The appeal was allowed in part.

Events which occur after a proposal to make more than 20 employees redundant cannot be used as a defence for failing to consult.

E Ivor Hughes Educational Foundation v Morris and others [2015] IRLR 696, EAT

Statute reference: Trade Union and Labour Relations (Consolidation) Act 1992, ss. 188, 189

M and others were employed as teachers at a private school. At a meeting in February 2013 the employer decided that the school would close at the end of the summer term if pupil numbers did not increase. In April 2013 all the teachers were dismissed for redundancy with effect from July 2013. There was no consultation. The ET found that the duty to consult had arisen in February 2013 and awarded the maximum 90 days protective award. The employer appealed to the EAT.

The appeal was dismissed. The duty to consult had arisen in February 2013 and there were no special circumstances which made it impracticable to consult.

Vining v London Borough of Wandsworth (2017) Morning Star, September 15, Court of Appeal

The claimants were employed as parks constables by LBW. They were dismissed for redundancy following a reorganisation of the parks police service and complained of unfair dismissal. Unison brought proceedings seeking protective awards for LBW's failure to consult about proposed redundancies. LBW argued that the claimants were employed in the police service and were not employees protected from unfair dismissal and were excluded from the obligation to consult. The ET found that they were not employed in the police service. The EAT reversed this decision in the light of the decision in *London Borough of Redbridge v Dhinsa* that parks police were employed under police service contracts. The claimants appealed to the Court of Appeal.

The appeal was allowed.

The right to be consulted was one of the essential elements protected by Article 11 (freedom of association) of the *European Convention on Human Rights*.

A union must be allowed to pursue a claim for a protective award about whether there has been a failure to consult, even if its members do not have collective consultation rights.

The case would be remitted to the ET to decide whether or not there had been a failure to consult.

Note: Police forces have remedies to replace employment rights from which they are excluded. Parks police have no such remedies. This could not be justified.

Kelly v The Hesley Group Ltd [2013] IRLR 514, EAT

Statute reference: Trade Union and Labour Relations (Consolidation) Act 1992, s.188

H Ltd employed 300 people at a school. The company decided that, because of financial pressures, it needed to change the employees' contracts by reducing their hours and freezing their salaries. The company proposed the changes in August 2010. It sought agreement to the changes. By November 2010 it was realised that job losses were possible if the contracts were not agreed. In December 2010 the company decided to terminate the original contracts and offer re-employment on revised terms. 32 employees did not accept the new terms. The company advised them that it was entering into collective consultation in relation to the 32 and consulted with a joint consultative committee. This committee did not have a negotiating function. Its constitution provided for the nomination and election of members, but the employer co-opted people onto it.

The claimants brought proceedings on the basis that they were entitled to a protective award for failures in the consultation process. They argued that the word "proposing" in section 188 of the 1992 Act should have been interpreted as "contemplating" and that consultation should have begun at an earlier stage, in November 2010. The ET rejected the claims on the ground that there was no duty to consult before the employer had formulated its proposals, applying the decision in *MSF v Refuge Assurance plc*. The claimants appealed to the EAT.

The appeal was allowed.

It was clearly established that there was no duty to consult before an employer had formulated its proposals.

The tribunal had failed to determine whether the committee representatives were appropriate.

Consultation with a view to reaching agreement was not to be equated merely to the passive receipt of information about an employer's plans. The fact that the committee was not a negotiating body was problematic.

It is not enough to provide an opportunity for consultation on particular topics. The requirement to consult with a view to reaching agreement does not mean that the employer is disentitled from having a firm position. It does mean that he must be prepared to listen and to move from it of good reason is shown.

To the extent that compliance with the legislation is technical, this may be reflected in compensation but not in liability.

References:

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

R v British Coal Corporation ex p Price [1994] IRLR 72, DC

Rowell v Hubbard Group Services Ltd [1995] IRLR 195, EAT

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

Davies v Farnborough College of Technology [2008] IRLR 14, EAT

Alexander v Brigden Enterprises Ltd [2006] IRLR 422, EAT

Elements of consultation

Failure to consult with an individual may make dismissal unfair but compensation may be reduced (Polkey reduction) where it made no difference to decision to dismiss.

Consultation involves consideration of options to avoid redundancy. These may include early retirement, seeking volunteers, alternative employment, layoff and short-time working.

Consultation involves not just communicating a previous decision. Must be at a formative stage where there is adequate information for response, adequate time to respond and conscientious consideration of the response by the employer.

Definition of consultation: jointly examining and discussing problems of concern to management and workers to seek mutually acceptable solutions through a genuine exchange of views and information.

Fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consulter thereafter considering those views properly and genuinely.

The employee must be given sufficient information to challenge, correct and supplement the information which the employer may wrongly have considered when assessing selection for redundancy.

Mugford v Midland Bank: if the employer has not consulted with either the trade union or the employee, the dismissal will normally be unfair unless the tribunal decides that consultation would have been a futile exercise.

Alexander v Bridgen Enterprises Ltd: employers have to tell employees the reason for the redundancy, the selection criteria they are using and must give them their assessment. This includes an individual's score in a selection process.

R v British Coal Corporation and Secretary of State for Trade ex p. Vardy [1993] IRLR 104, High Court: consultation requirements in respect of pit closures held matters of public law. A judicial review appropriate.

British United Shoe Machinery Co Ltd v Clarke [1977] IRLR 297, EAT: the question for the tribunal was whether failure of the employer to follow Code of Practice as to warnings and consultation would have made any difference. Where a lack of consultation would have made no difference to the overall result, then the finding of unfair dismissal cannot be justified.

GEC Ferranti Defence Systems Ltd v MSF [1993] IRLR 101, EAT: there was no fixed standard for amount of detail required to be supplied for statutory consultation procedure. A question of fact and circumstance.

Robinson v Carrickfergus Borough Council [1983] IRLR 122, CA: technical officer dismissed for redundancy. There was no agreed or customary redundancy procedure. The employer did not consider the possibility of alternative employment. There was no consultation with union. Held, as unfair dismissal.

Kelly v Upholstery & Cabinet Works (Amesbury) Ltd [1977] IRLR 91, EAT: a case of unfair dismissal where no consultation on redundancy unless exceptional circumstances.

Duffy v Yeomans & Partners Ltd [1993] IRLR 368, EAT: a test in relation to the consultation objective. Whether a reasonable employer could have dismissed employees for redundancy without consultation in light of facts known to the employer at the time.

Case examples:

Argos Ltd v Kuldo [2020] 2 WLUK 670, EAT

K was employed by A as a group central costs manager. In September 2016 A made a number of redundancies. K was not made redundant, but her responsibilities were changed. In 2017 A identified 55 positions as being at risk of redundancy. K was told that she would be placed in a pool with another worker and that they would both be considered for the new post of central costs manager. K was given information about the consultation process. She was then told that the other worker had resigned and that she would be given the new role without risk of redundancy. A stated that it had applied a 70:30 rule, whereby an old post could be transferred to a new post if there was a difference of not more than 30 per cent between the two roles.

K objected to the new post on the basis that it had lower status, fewer responsibilities and a change of job content. A treated this as a grievance and responded that K would be transferred to the new post. K asked A to confirm in writing that her employment was terminating on the ground of redundancy. A responded that K would be carrying out the same work as before, but under the job title of the new role. K appealed unsuccessfully against this decision. In November 2017 K resigned. She complained of unfair dismissal and wrongful dismissal and claimed a redundancy payment.

The ET found that there had been no individual consultation with K and this was a breach of the implied term of mutual trust and confidence.

A had failed to carry out a proper analysis of the similarities between the old post and the new post. This was also a breach of the implied term of mutual trust and confidence.

Further, A's failure to conduct a proper assessment in relation to K's grievance appeal also amounted to a breach of the implied term.

These breaches were repudiatory and K had been constructively dismissed.

A Ltd appealed to the EAT.

Decision:

1. The appeal against the finding of constructive dismissal was dismissed.

2. In relation to the unfairness of the dismissal, the appeal was upheld. There had been no clear finding in the ET of the reason for the dismissal.

3. In relation to the claim for redundancy pay, the suitability of alternative employment could be relevant to the fairness of the dismissal and to the question whether K was not entitled to a redundancy payment because she had unreasonably refused suitable alternative employment. The ET had not analysed this legal framework.

4. The case was remitted to the ET to consider whether the constructive dismissal, for which the reason was redundancy, was fair in all the circumstances, and to determine the outstanding claims for wrongful dismissal and a redundancy payment.

Thomas v BNP Paribas Real Estate Advisory and Property Management UK Ltd (2017) Morning Star, January 6, EAT

T was one of five people identified as being at risk of redundancy. He was placed in a pool of one. In January 2014 he was told that he was at risk of redundancy. He attended two consultation meetings at which he was told that there were no alternative posts available. A letter to T was addressed with the wrong name. He was made redundant. He appealed against the decision, arguing that the consultation process had been a sham with a predetermined outcome and that he had been selected because he was aged 60. The appeal was rejected and he complained of age discrimination and unfair dismissal. The ET rejected the complaints. It found that the consultation had been reasonable and there was no evidence to show that the company had a practice which involved dismissing people who were approaching age 60. T appealed to the EAT.

The appeal was allowed in part. The tribunal had itself described the consultation as perfunctory and insensitive. Any dismissal was likely to have been unfair. The tribunal's decision that the consultation was reasonable could not stand.

In relation to the claim of age discrimination, the tribunal had applied the law correctly. It had considered and rejected the evidence put forward by T. The reason for the dismissal had been redundancy and not age.

Unfair selection

- The employer is under a duty to choose a fair pool from which to select redundant workers. *Fulcrum Pharma (Europe) Ltd v Bonassera and another*: The employer placed a human resources manager in a pool of one and made her redundant. It did not consider whether her assistant should have been placed in the pool. The ET found that this was an unfair dismissal. The decision was upheld by the EAT.

- The inclusion of a subordinate worker, whose job is to be retained, in the pool, depends on factors including whether the senior employee can accept a junior role, differences in pay and work, the length of employment and qualifications.

- Criteria for selection from the pool must be reasonable. Multiple selection criteria may include length of service, productivity, timekeeping and attendance and adaptability.

- Chosen criteria must be applied fairly and objectively. *Graham v ABF Ltd*: G was selected for redundancy on the basis of his low score related to his attitude to work. He had used obscene language and displayed hostility. This had resulted in complaints by colleagues and his manager. Selection criteria included quality of work, efficiency in carrying out work and attitude. The EAT found that the dismissal had been fair.

- *Grant v BSS Group plc:* Where there was a pool of two employees, the failure to carry out similar or identical levels of consultation, after provisionally selecting one person for redundancy, was unfair.

- *E-Zec Medical Transport Service Ltd v Gregory*: G was employed by E, a private ambulance company, as an ambulance driver and administrator. She reduced her work

hours to look after her disabled daughter. The company started redundancy proceedings. Selection criteria included service, absence, sickness, disciplinary record, performance, commitment, attitude, skill base and team working. This was not explained to workers and the union was not consulted. G was selected for redundancy and went to a meeting, described as a consultation meeting, where she was given a prepared notice of redundancy. G complained of sex discrimination, disability discrimination and unfair dismissal. The ET upheld the unfair dismissal complaint on the basis that E had failed to consult and that the criteria were based on personal judgment. The EAT upheld this decision. The redundancy process fell outside the range of reasonable responses.

- The ET will not order disclosure of all assessments of workers in the redundancy pool unless these are relevant to unfairness. *British Aerospace v Green and others:* BA decided to make 530 workers redundant. All employees were assessed and scored. G and others complained of unfair dismissal and applied for disclosure of all employees' scores. The Court of Appeal ruled that this would impose an excessive burden on BA. The question was whether the company had applied a fair procedure. If a selection process is to function effectively, its workings should not be officiously scrutinized or subjected to a minute analysis.
- *FDR Ltd v Holloway:* the IT ruled that a worker claiming unfair selection for redundancy was entitled to disclosure of documents and particulars related to seven others in the selection pool who were not made redundant. This decision was upheld by the EAT which stated that disclosure was relevant and necessary for the proper determination of the claim that selection criteria were unfairly applied.
- Large or medium-sized employers will normally be expected to use a methodical selection approach which awards potentially redundant workers with points and dismissing those who score least. Small employers must use a fair selection method.
- *Mental Health Care (UK) Ltd v Biluan and Makati:* M carried out a redundancy exercise covering a pool of 48 workers, of whom 19 were to be made redundant. Workers were assessed with reference to criteria of competency, disciplinary record and sickness absence record. The competency assessment was based on a series of exercises designed for use in a recruitment process and did not take account of past performance. The results of the assessments were accepted by M as being surprising, but they were not reviewed. The claimants' complaint of unfair dismissal was upheld by the ET and the EAT. The recruitment-style process was inappropriate.

Evidence of decision

Agarwal v Cardiff University UKEAT/0115/19/RN

A, a clinical senior lecturer employed by C, was dismissed for redundancy. She brought a number of claims in the ET, including unfair dismissal, all of which were dismissed. She appealed to the EAT, arguing that the ET had failed to identify the decision maker in relation to the redundancy and that the mental processes of the decision maker could not be subjectively examined.

The appeal was dismissed.

The decision makers had been adequately identified without the need to identify each member of the redundancy committee.

The ET's choice of witnesses and evidence had been a sensible and permissible case management decision.

The ET was entitled to reach the conclusion that A's dismissal was genuinely by reason of redundancy.

Case Examples:

Gwynedd Council v Barratt UKEAT/0206/18

PE teachers at a number of schools were being reorganised into one large school. The large school was to be on their original site. The number of PE teachers was to be reduced. The local authority announced that all staff would be dismissed. The new staffing was to be decided by an application process and unsuccessful applicants would be made redundant. The claimants were not given an opportunity to make representations in respect of the decision to dismiss or to lodge appeals. The redundant workers complained of unfair redundancy dismissal. Their claims succeeded in the ET which found that the claimants had not been dismissed because a redundancy situation had arisen but because of the method that the employers chose to deal with the redundancy situation. The lack of appeal or review of the process of requiring the claimants to apply for their own jobs was substantively and procedurally unfair. The employers appealed to the EAT, partly on the basis that the normal fairness requirements in *Williams v Compare Maxim Ltd (1982)* did not apply because this was a reorganisation and not a redundancy.

The appeal was dismissed. There had been no error in the ET's approach to fairness.

Even where the principle in *Morgan v Welsh Rugby Union (2011)* can be relied on by an employer, this does not rule out at least some of the Williams guidelines.

Note: *Morgan v Welsh Rugby Union*. Where an employer reorganises so that old roles disappear and are replaced by new jobs, this may legitimately rely on something like an interview process to assess employees' ability to perform in the new roles. The ET will look to see whether a fair process was followed and whether there is any indication of bias. It will consider whether all aspects of the dismissal were within the band of reasonable responses.

Davies v DL Insurance Services Ltd UKEAT/0148/19/RN

D was made redundant by DL. He applied unsuccessfully for a number of alternative roles and brought claims in the ET for unfair dismissal for redundancy, reinstatement or re-engagement, and compensation. The ET found that D had been unfairly dismissed for redundancy. It awarded compensation, but it did not make a re-engagement order on the basis that it had not been given enough information to identify a suitable alternative role for D. D appealed to the EAT on the grounds that the ET had erred in giving inadequate reasons for its decision on re-engagement and failing to apply the correct legal test.

The appeal was allowed and the matter remitted to the same ET. The ET had failed to ask itself the correct question in relation to re-engagement, and had failed to apply the correct approach by considering that, to avoid making an order, it was enough for the employer to say that D was not the best candidate.

Doolan v Interserve Facilities Management Ltd (2013) Eq Opp Rev243:22, London South ET

D, an autistic man, was employed by IFM. He was warned of possible redundancy, but he did not understand the seriousness of this because of his disability. The selection pool for redundancy included a rage of employees. D scored lowest and was subsequently made redundant. He complained of unfair dismissal and disability discrimination.

The disability discrimination claim succeeded. The redundancy selection criteria applied by IFM had put D at a substantial disadvantage. Adjustments should have been made to remove that disadvantage.

Connolly v London Probation Trust (2013) Eq Opp Rev 239:29, London Central ET

C was employed by LPT for 26 years. In 2003 she was diagnosed with cerebella ataxia. This condition affected her mobility and eyesight and she became a wheelchair user. LPT made a number of adjustments to enable her to carry out her role.

In August 2011 LPT began redundancy consultation. "Standard of work performance" was one of the criteria used in redundancy selection. C's standard of work received a score of zero on the basis that she had not met requirements. C complained of disability discrimination, claiming that there had been a failure to make reasonable adjustments in assessing her standard of performance.

Decision of the ET:

There had been a provision, criterion or practice (PCP) of reliance on the scoring of standard of performance. C had suffered a substantial disadvantage of being scored zero, which might not have been the case if she had been given the required training. The appraisal put her at a disadvantage compared to someone who did not have the same mobility issues. It would have been a reasonable adjustment to have ensured that training was provided to C.

Remedy: recommendation that LBT's policies did not discriminate and that reasonable adjustments were made where a work performance assessment was to be made.

Darr v LRC Products (1993)

D complained of unfair selection for redundancy. The Industrial Tribunal upheld the complaint and ordered re-engagement. The employer refused to re-engage and D sought additional compensation. The IT refused on the ground that D had already been paid £11,000 redundancy payments – more than the tribunal would have awarded. The IT did not state reasons or calculations. On appeal to the EAT, held:

The IT had erred in failing to give adequate reasons for its finding.

Boorman v Allmakes Ltd (1995)

A basic award for unfair dismissal cannot be reduced by the amount of a redundancy payment where an IT finds that the dismissal was not for redundancy. But such payment may be offset against a compensatory award.

Bristol Channel Ship Repairers Ltd v O'Keefe [1977] IRLR 13, EAT: where employee claims unfair dismissal and it emerges that the true reason for the dismissal was redundancy, then burden of proof is upon employer to justify method of selection for redundancy. The employer must produce evidence of selection method and factors taken into account.

Vickers Ltd v Smith [1977] IRLR 11, EAT: management has power to select for redundancy. The tribunal can only interfere where the choice is so wrong that the decision would not have been reached by any reasonable or sensible management.

Watling & Co Ltd v Richardson [1978] IRLR 255, EAT: tribunal must not substitute own views for that of employer, where latter are reasonable.

Gargrave v Hotel & Catering Industry Training Board [1974] IRLR 85, EAT: when employee claims dismissal for redundancy unfair because other employees were not made redundant, it must be shown that the others are in the same unit of selection. The scope of this unit of selection depends upon the following factors: department where redundancy arose; job description of affected employees; degrees of skill within description.

Agreed procedures

Jackson v General Accident, Fire & Life Assurance Co Ltd [1976] IRLR 338, EAT: The meaning of agreed procedure, relating to agreement between employer and employee as to the method of selection for redundancy. Does not include mere expression of intent or hope as to employer's future policy.

Henry v Ellerman City Lines Ltd [1984] IRLR 409, CA: An implied procedural agreement can be regarded as agreed procedure and need not be expressly agreed.

Suflex Ltd v Thomas [1987] IRLR 435, EAT: Redundancy procedure of "last in first out subject to exceptions" held too uncertain.

Cross International v Reid [1985] IRLR 387, CA: It is a matter for tribunal as to whether special reasons for departure from agreed procedure. Justification put forward by the employer must be within range of reasonable responses which a reasonable employer might make.

Rolls-Royce Motor Cars Ltd v Price [1993] IRLR 203, EAT: "Last in first out" selection process that can be a departure from agreement. An employer may depart from the agreed "last in first out" procedure where the agreement could prevent continuation of business in difficult circumstances.

International Paint Co Ltd v Cameron [1979] IRLR 62, EAT: "Last in first out" procedure and length of employment. Under "last in first out" agreed procedure, an employee is entitled to have length of employment counted in the same way as continuous service is normally assessed.

References:

Williams v Compare Maxam Ltd [1982] IRLR 83, EAT

Robinson v Carrickfergus BC [1983] IRLR 122, NICA

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

Fulcrum Pharma (Europe) Ltd v Bonasser and another UKEAT/0198/10

Bessenden Properties v Corness [1974] IRLR 338, HL

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

Graham v ABF Ltd [1986] IRLR 90, EAT

Grant v BSS Group plc UKEAT/0832/02

E-Zec Medical Transport Service Ltd v Gregory UKEAT/0192/08

British Aerospace plc v Green and others [1995] IRLR 433, CA

FDR Ltd v Holloway [1995] IRLR 400, EAT

Mental Health Care (UK) Ltd v (1) Biluan (2) Makati UKEAT/0248/12

Green v A&I Fraser (Wholesale Fish Merchants) Ltd [1985] IRLR 55, EAT

Barbar Indian Restaurant v Rawat [1985] IRLR 57, EAT

Vokes Ltd v Bear [1973] IRLR 363, NIRC

Elliott v Richard Stump Ltd [1987] IRLR 215, EAT

Avonmouth Construction Co v Shipway [1979] IRLR 14, EAT

Bumping

This arises where an employer dismisses an employee who works in a non-redundant post to make way for a more suitable employee who works in a redundant post. The bumped employee may be able to complain of unfair dismissal. Unfairness, in the context of bumping, is a question of fact for the ET.

Barbar Indian Restaurant v Rawat (EAT 204/84

R was employed by B, a restaurant owner, as a kitchen assistant. B also owned a shop and it decided to close the shop and move shop workers to the restaurant. R was dismissed for redundancy. The EAT ruled that the business in which R was employed continued as before and there was no redundancy. The concept of bumping only applies within one business.

Failure to offer alternative employment

Employers have a duty to look for alternative employment and to offer suitable alternative vacancies. Vacancies with associated employers should also be considered. A trial period should be allowed. Failure to allow a trial period may make the dismissal unfair.

Case Examples:

George v London Borough of Brent UKEAT/0507/13/SM

G was employed as a library manager by B. She was made redundant and was offered an alternative role which was two pay grades lower than the previous role and required a change in location. B's redundancy policy included the right to a four-week trial period. This was refused. G refused the new position. She was dismissed for redundancy and complained of unfair dismissal. The ET dismissed the claim on the basis that G had not refused the new job offer because the trial period had been refused. G appealed to the EAT, which has now considered the claim three times.

The appeal was allowed and the matter remitted to a fresh tribunal. Given that it was conceded that the failure to offer a trial period was unlawful, how could something unlawful be also fair and reasonable?

Reorganisation and new jobs

Asif v Elmbridge BC: A was employed by E as an IT administrative officer. Two other workers had the same job and another had a similar post. Another similar post was vacant. E decided to scrap these jobs and create three new positions of IT customer services officer. A redundancy selection procedure resulted in A scoring lowest and being given notice of redundancy. She complained of unfair dismissal. The ET rejected the complaint. It ruled that A was not appointable to the new post. This was upheld by the EAT which stated that it was open to E to conclude that an employee had done so badly in the assessment exercise that the employee could not be appointed to a new post with greater responsibilities.

References:

Asif v Elmbridge BC UKEAT/0395/11

Cumbria Partnership NHS Foundation Trust v Steel UKEAT/0635/11

Green v Barking & Dagenham LBC UKEAT/0157/16

REDUNDANCY & DISCRIMINATION

Age Discrimination

Kirk v Citibank 3200291/2018, East London Employment Tribunal

Facts Citibank made K redundant from his post of chair and managing director of the bank's energy and natural resources division for Europe, the Middle East and Africa. A senior manager allegedly told him that he was old and set in his ways. K argued against the redundancy and complained that the consultation exercise had been a sham. He was dismissed in February 2018 and claimed age discrimination and unfair dismissal.

Decision 1. The claim of age discrimination was upheld. The provision of information which resulted in his dismissal was directly linked to his age.

2. K had been unfairly dismissed. He was not given notice of a proposed reorganisation until after the decision to dismiss him for redundancy had been made.

3. There had been no meeting with K to discuss alternative roles nor did the employer approach K's responses to the consultation exercise with an open mind.

Palmer v Royal Bank of Scotland plc UKEAT/0083/14/MC

RBS operated a VER (Voluntary Early Retirement) policy. This allowed employees over the age of 50 to take VER. RBS then decided to change the policy so that only employees over the age of 55 could choose VER. RBS announced that it would be making redundancies and deferred the change in the VER policy. Employees who were at risk of redundancy, including P, had already decided between VER, voluntary redundancy or redeployment. RBS allowed employees between the age of 50 and 55 to change their decision and opt for VER instead. P had opted for voluntary redundancy at the age of 49 and did not qualify for VER. She argued that she should be allowed to change her mind and choose redeployment instead, in the hope that the redeployment process would take long enough for her to reach the age of 50 so that she could then opt for VER. RBS did not allow her to do this. She complained of age discrimination. The complaint was dismissed by the employment tribunal. She appealed to the EAT.

The appeal was dismissed.

The tribunal had been entitled to conclude that less favourable treatment had not been established. P's comparators could lawfully have chosen VER but P, at her projected date of leaving employment, could not.

The tribunal had correctly identified a legitimate aim on the part of RBS and had decided that the means of achieving it were appropriate. It had not sufficiently balanced the importance of achieving the aim against the discriminatory group, of which the claimant was part, of being denied the chance to revisit their options after the delay in making the adjustment to the policy on VER.

Demosthenous v Sosa Factory Ltd (2016) Eq Opp Rev 272:24, Watford ET

D was dismissed for redundancy at the age of 67. She complained of age discrimination.

The ET found as follows:

- In the absence of any evidence of redundancy, the burden of proof on the claim passed to the employer.
- The claim succeeded.
- No proper procedure had been followed by the employer.
- In relation to comparators, two employees aged 58 and 60 were proper comparators despite the narrow difference in age, because D's age group was those entitled to draw state pension whereas the comparators were not.

Injury to feelings award: one off act: serious matter with substantial effects: £5000 plus £552 interest plus reimbursement of tribunal fees.

Pregnancy/maternity dismissals

Redundancy dismissal because of pregnancy or maternity is automatically unfair. No minimum qualifying period of continuous employment applies.

A woman who is made redundant during maternity leave must be offered any suitable vacancy.

Case Examples:

Sefton Borough Council v Wainwright [2015] IRLR 90, EAT

Statute reference: Maternity and Parental Leave etc Regulations 1999, regs. 10, 20; Equality Act 2010, s.18

SBC carried out a restructuring process. This resulted in two posts being made into one, which meant that either W or her colleague would be appointed to the new post. W was on maternity leave in July 2012 when interviews for the post were carried out. W was unsuccessful. She was made redundant in April 2013. She complained of direct sex discrimination and automatic unfair dismissal. The ET found that regulation 10 of the 1999 Regulations applied. This gave W the right to special treatment in that, where there is a suitable available vacancy, it must be offered to a claimant on maternity leave. A failure to do so renders a subsequent dismissal automatically unfair. W had also suffered direct sex discrimination. SBC appealed to the EAT.

The EAT ruled that the dismissal had been automatically unfair.

The direct discrimination claim would be remitted. The fact that regulation 10 of the 1999 Regulations applied did not necessarily mean that there had been direct sex discrimination.

SBC had paid £400 to lodge the appeal and £1200 for the hearing. W was ordered to pay the £400 and half the hearing fee – a total of £1000.

Race discrimination

This may arise where retained white workers score equally or worse than black, Asian or other ethnic minority workers.

Case Examples:

Base Childrenswear Ltd v Otshudi UKEAT/0267/18/JOJ

O, an employee of C, was made redundant. She stated that the real reason for her selection for redundancy was her race. At a meeting she was intimidated by managers. She appealed against her dismissal and lodged a grievance. Both were ignored. C refused to engage in the ACAS early conciliation process. She complained of race discrimination. The ET upheld the claim and made the following awards:

- £16,000 for injury to feelings (middle Vento band).
- £5000 aggravated damages for failure to respond to the grievance and appeal, subsequent conduct of litigation and failure to apologise.
- £3000 for personal injury (depression).
- A 25% uplift for breach of the ACAS Code.

C appealed to the EAT. The EAT decided that the injury to feelings award was appropriate. The aggravated damages award was reduced by £1000 to avoid double counting with the 25% uplift.

Sex Discrimination

Dykes v Premier Risk Service LLP (2014) Eq Opp Rev 253:30, Leeds ET

D was employed as a part-time health and safety expert. Her employing company carried out a restructuring exercise which involved the abolition of D's job. She was given the opportunity to apply for a full-time post, but she was unable to apply because of childcare responsibilities. She was made redundant and complained of unfair dismissal and direct and indirect sex discrimination.

The decision of the ET was as follows:

1. There was no direct discrimination. D was made redundant because she did not apply for the full-time post and not because she was a woman.

2. There was a provision, criterion practice (PCP) of requiring employees to work full-time. This put women at a disadvantage.

3. The employer's reasons for deleting the part-time post were based on stereotypical and prejudiced assumptions about part-time workers.

4. In the absence of evidence of a need for a restructuring which resulted in the part-time post being deleted, the claim of indirect sex discrimination was upheld.

Geller and Geller v Yeshurun Hebrew Congregation (2016) Morning Star, August 19, EAT

Mr G was employed by YHC in 2011. A year later his wife started working for YHC on an ad hoc basis. YHC later suggested that the couple should be paid a joint salary. This was accepted.

In 2013 it was decided that Mr G would be made redundant. Before he was informed of this, he told his employer that his wife was pregnant. Mrs G stated that she should also be considered for redundancy. Both were made redundant at the end of 2013. They lodged a number of claims in the employment tribunal including sex discrimination in that YHC had failed to treat Mrs G as an employee and had failed to pay her properly. The claims were dismissed on the basis that YHC had not treated Mrs G less favourably because of her sex but because it genuinely believed that she worked for them on an ad hoc basis. Mrs G appealed to the EAT.

The matter was referred back to the tribunal for reconsideration.

The tribunal had overlooked the important point that discrimination can be conscious or subconscious.

The tribunal had failed to go through the two-stage burden of proof test in section 136 of the *Equality Act 2010.* Its treatment of the test had been rudimentary. There were primary facts from which discrimination could be inferred. At that stage the burden of proof would have shifted and it would have been for the employer to demonstrate a non-discriminatory reason for treatment.

Haynes v Neon Digital (Document Solutions) Ltd and Others (2012) EqOppR224:30, Bury St Edmunds ET

H was dismissed from her employment with N shortly after S, the managing director of N, was informed that she was pregnant. She was told that the reason for her dismissal was redundancy. She complained of unfair dismissal and sex discrimination.

The ET found as follows:

S was not a credible witness. His general attitude to female employees was sexist and he commented on the size of H's breasts. S told her to "grow a pair of balls". It was not a coincidence that H was put on notice of redundancy and dismissed shortly after S learned of her pregnancy.

S's comments and conduct amounted to direct sex discrimination and harassment. They created an environment which was intimidating, hostile, degrading, humiliating and offensive.

H was awarded £11,000 for injury to feelings, based on the middle Vento band because there was a continuing course of conduct.

S's solicitors had sent a letter to H demanding £26,000 compensation to recover recruitment costs to replace another employee who had left the company. The tribunal stated that this was an act of intimidation and awarded £3000 aggravated damages.

Indirect discrimination: selection criteria

Whiffen v Milham Ford Girls' School: W had been employed by M for five years on a series of fixed-term contracts. Her contract was not renewed when M applied a redundancy selection procedure. The procedure made temporary workers redundant first and then applied the selection procedure to permanent staff. W claimed indirect sex discrimination on the basis that 77 per cent of women teachers were permanent employees but 100 per cent of male teachers were. The ET found that a smaller number of women could meet the requirement of permanent employment necessary to come within the selection criteria. However, this policy was justified because the redundancy policy was gender-neutral. On appeal to the Court of Appeal, that court overturned this decision. Indirect discrimination is intended to go beyond a requirement which, on the face of it, is gender neutral, to consider the effect of that requirement in any particular case.

Unjustified selection of a part-time worker for redundancy would now be a breach of the *Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000*.

Case Examples:

McFarland v Kincull Ltd (2016) Eq Opp Rev 273:23, Industrial Tribunal of Northern Ireland

M was employed by K from 2004 until 2014 when she was dismissed for redundancy aged 47. Her dismissal followed discussions as to possible redundancy. A new post was created and M was excluded from applying because it was a requirement that candidates were educated to degree level. M complained of indirect age discrimination on the basis that people of her age were particularly disadvantaged because they were less likely to be educated to degree level than younger people.

The complaint was upheld.

Statistics showed people aged 45 to 54 were less likely to be graduates and were therefore put at a particular disadvantage.

The criterion was not objectively justified because the employer could not show that it had carried out the required objective balance between discriminatory effect and the needs of the business.

The legitimate aim for the new role could have been achieved, without the necessity for a degree, by other means such as experience.

Rolls Royce plc v UNITE the Union: R entered into collective agreements with UNITE which stated that the selection criteria for redundancy would be achievement of objectives, self-motivation, expertise, versatility and personal contribution to a team. Each worker would also receive one point per year of continuous service. R took the view that the long service award amounted to unlawful age discrimination because it benefited older workers. UNITE argued that the award could be objectively justified and fulfilled a business need.

The Court of Appeal found that the long service award was lawful provided that it reasonably appeared to R that the criterion fulfilled a business need. Further, even if the award was indirectly discriminatory, it could be objectively justified. The legitimate aim was the reward of loyalty and the overall desirability of achieving a stable workforce in the context of a fair redundancy selection process. Proportionality was achieved by the fact that length of service was only one of a substantial number of criteria.

Disability

Disabled workers may be selected for redundancy because of the employer's failure to make reasonable adjustments to allow for their disability. The disabled may be disadvantaged in selection criteria in relation to issues such as mobility and sickness absence. Employers have a duty to modify selection criteria to make reasonable adjustments.

In relation to disabled workers, employers should take additional measures to seek alternative employment.

Public authority workers should carry out an equality impact assessment before deciding on selection criteria.

McCorry and others v McKeith [2017] IRLR 253, Northern Ireland Court of Appeal

M was employed as an advice assistant. She had a disabled daughter who was looked after by a family friend while she was at work. Her employer thought that M's place was at home. She was told, against her wishes, to be absent from work for some periods to care for her daughter. M was later dismissed for redundancy. She complained of associative direct disability discrimination. The industrial tribunal found that she had established a prima facie case that she had been discriminated against because she had been the primary carer of her disabled daughter. The burden of proof therefore shifted to the employer which had not put forward any convincing or coherent explanation for its decision to make her redundant. The employer appealed to the Northern Ireland Court of Appeal.

The appeal was dismissed. There was evidence of a difference in status, a difference in treatment and a reason for differential treatment. In the absence of an adequate explanation, a tribunal could conclude that the employer had committed an unlawful act of associative disability discrimination.

X v Y Ltd (2018) UKEAT 0261-17-0908

X suffers from Type 2 diabetes and obstructive sleep apnoea. His employers had concerns about his performance. He complained of disability discrimination. He received, anonymously, an email from a lawyer to another lawyer which set out how to use a redundancy procedure to dismiss X, when in reality it was a cloak for dismissing him for

performance and sickness issues. X wished to use the email in his complaint. The ET refused to admit it on the basis that it was legally privileged. X appealed to the EAT.

The appeal was allowed. The email could be used in ET proceedings. Advice sought or given for the purpose of iniquity could not be privileged. The advice in the email was an attempted deception of X and of the ET. The iniquity in the email was to disguise acts of victimisation or discrimination as a redundancy dismissal.

Russell v College of North West London [2014] Eq Opp Rev 252:28, EAT

R suffered from Meniere's disease (a disorder of the inner ear) and was accepted to be a disabled person. She was selected for redundancy when the Bradford Score (a scoring mechanism) showed that she had the highest sickness absence in her pool. She complained of unfair dismissal, disability discrimination, victimisation and harassment. The ET dismissed all the complaints except for unfair dismissal. The tribunal found that she had been unfairly selected because the scoring mechanism was fatally flawed. It applied an 80% Polkey deduction. R appealed to the EAT.

The EAT ruled that the selection criteria were applied equally to disabled and non-disabled employees. R had been selected for redundancy not because of her disability but because of her level of absence.

Even if all disability-related absences had been ignored, R would still have been dismissed because the level of her non-disability related absence was also higher than that of the next most absent employee.

Charlesworth v Dransfield Engineering Services Ltd (2017) Morning Star, July 28, EAT

C was employed by D as a branch manager. In November 2014 it was decided that his job could be deleted and that this would save D £40,000. C was diagnosed with renal cancer and was off work sick from October to December 2014. In 2015 C was given four weeks' notice and dismissed for redundancy. C complained of direct disability discrimination and discrimination because of something arising in consequence of his disability. The ET rejected the claims. It found that D would not have treated someone without a disability differently from the way in which C was treated. D needed to make savings and the redundancy had nothing to do with his disability. C had not been dismissed because of his absence. C appealed to the EAT.

The appeal was dismissed. The ET's decision that the Claimant's absence resulting from his disability was not an operative cause of his dismissal for redundancy was reached without error of law or perversity.

Balson v Foray Motor Group Ltd UKEAT/0288/16/RN

B was disabled because of depression. He was made redundant following his scoring the least number of points in a redundancy exercise. He complained of disability discrimination in that he had suffered unfavourable treatment in his scoring and dismissal and that his ability to score well was adversely affected by his depression. The ET dismissed the claim. He appealed to the EAT, arguing that the tribunal had erred in preferring the evidence of the employer's witness and B's manager.

The appeal was dismissed. The reasoning of the ET had been sound and did not disclose any error of law.

JP Morgan Europe Ltd v Chweidan [2011] IRLR 673, CA

C was employed by JPM as an executive director. In 2007 he suffered a serious back injury. He returned to work for restricted hours. C complained that his 2007 bonus had been reduced because of his disability. He was dismissed for redundancy and complained that his selection for redundancy had been because of his disability. The employment tribunal found that he had been unfairly dismissed and subjected to direct disability discrimination. JPM appealed to the EAT and then to the Court of Appeal.

The Court of Appeal found that the tribunal's decision in relation to direct discrimination could not stand. A non-disabled person would similarly have been dismissed.

IPC Media Ltd v Millar [2013] IRLR 707, EAT

M was employed by IPC as a journalist. She suffered from osteoarthritis. She was made redundant following a company restructuring. She was not given the opportunity to apply for two vacancies for which the ET considered she was potentially appointable. She complained of disability discrimination. The ET ruled that the failure to give her the opportunity to apply for the vacancies was because of her absences caused by her disability and was discrimination arising in consequence of disability. IPC appealed.

The appeal was allowed. There was no evidence that the relevant decision maker was aware of M's absence history. There was no evidential basis for the burden of proof to have shifted.

Redcar and Cleveland Primary Care Trust v Lonsdale [2013] Morning Star, October 4, EAT

L was employed by C in a band six position. Her eyesight deteriorated and she was registered blind. She was assessed by occupational health and redeployed into a band four post. C underwent a restructuring exercise. L was told that her band four post was at risk of redundancy. She asked if she could apply for a band six post. This was refused and a disabled colleague was appointed to the band six post. L complained of disability discrimination, including a failure to make a reasonable adjustment because C had not allowed her to apply for the band six role. The ET found that C had failed to make a reasonable adjustment. C appealed to the EAT.

The appeal was dismissed.

L had suffered a substantial disadvantage when she was redeployed from a band six to a band four post as a direct result of her visual impairment. That was the reason she was precluded from applying for the band six role.

By failing to allow L to apply for the higher-grade post, the employer had not taken into account that disabled employees can sometimes be treated more favourably than those who are not disabled.

References:

Whiffen v Milham Ford Girls' School [2001] IRLR 468, CA

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

Rolls Royce plc v UNITE the Union [2009] EWCA Civ 387

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

TIME OFF TO LOOK FOR WORK

Employees with at least two years continuous employment are entitled to reasonable time off during a redundancy dismissal notice period.

Reasonableness involves a balance between the needs of employers and employees. Time off must be allowed during working hours.

References:

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

Ratcliffe v Dorset CC [1978] IRLR 191, EAT

COLLECTIVE CONSULTATION

Trade Union and Labour Relations (Consolidation) Act 1992,ss. 188-198

Employers must inform and consult with representatives of workers who may be affected by proposed redundancy dismissals or by measures taken in connection with those dismissals.

This arises where 20 or more workers are proposed to be dismissed at one "establishment" within a period of 90 days.

There is no precise definition of "establishment". In general terms, it is the unit to which employees were assigned to carry out their duties.

Seahorse Maritime Ltd v Nautilus International (2019) Morning Star, February 15, Court of Appeal

S Ltd, a company based in the UK, supplied crew members to ships operated by other companies, including Sealion Shipping Ltd, which were mainly based outside the UK. S Ltd's employees were required to work on any of Sealion's ships. Most worked on one ship from four to six weeks and some moved between ships. In 2015 Sealion took some ships out of service, putting crew members at risk of redundancy. Nautilus, the trade union, claimed protective awards on the basis that S Ltd had failed to consult with it although it was proposing to dismiss 20 or more employees. The union had to show that the fleet of ships counted as an establishment. The ET accepted that the whole fleet was an establishment. This decision was upheld by the EAT and S Ltd appealed to the Court of Appeal.

The appeal was allowed. As crew members were assigned to particular ship, each ship was an establishment and there was no obligation to consult. There was not a sufficient connection between the ships and the UK for the case to come within UK law.

Failure to inform or consult can result in a claim for a protective award.

Government department employees, the police and armed forces are excluded.

Fixed-term employees: excluded unless it is proposed to cut short their contracts.

Redundancy has a different definition for these purposes: it includes dismissals for reasons not related to the workers concerned, for example reorganisation. Consultation applies in the following circumstances:

- Where the employer proposes variation of contracts

- Where the employer proposes to redeploy workers on substantially different contracts.

The general principle is that consultation must take place with trade union representatives or with elected worker representatives.

"Affected employees" includes workers who will not be made redundant but whose working conditions will be changed.

The following points are relevant to collective consultation;

- Where it is proposed to make 100 or more workers, consultation must start at least 45 days before the first dismissal. Where the redundancy proposal is for at least 20 but not more than 100, consultation must start at least 30 days before.
- Consultation must begin when an employer is contemplating collective redundancies.
- Consultation means negotiation. It must take place when redundancy proposals are at a formative stage.
- Employers must disclose in writing the following:
- * Reason for the proposals
- * Number of employees proposed to be made redundant
- * Proposed methods of selection
- * Calculation of redundancy payments.
- Where there is no trade union or elected representatives, each affected worker must be provided with this information.

QUESTIONNAIRES

The use of a questionnaire to obtain information from an employer is no longer governed by statute, and the ET has no power to draw an adverse inference from an employer's failure to answer.

Questionnaires are now covered by detailed ACAS guidance. There is no set form. The Legal Action Group recommends that questions should be set out in the following categories:

- Information on the facts of the matter
- The treatment of other workers
- Statistical and procedural issues.

SUMMARY OF REDUNDANCY ISSUES

- Time off work to look for new employment
- Eligibility for redundancy pay
- Eligibility for unfair dismissal claim
- Chances of success of claim

- Potential amount of compensation
- Eligibility for discrimination claim.

MISCELLANEOUS CASES

Written notice

Haywood v Newcastle upon Tyne Hospitals NHS Foundation Trust [2018] UKSC 22, Supreme Court

The Trust identified H's post as redundant. If her employment terminated by reason of redundancy on or after her 50th birthday on July 20, 2011, she could claim a non-actuarially reduced pension. H told the employer that she was taking two weeks annual leave from April 18. The Trust issued 12 weeks written notice of redundancy on April 20. It was delivered to her home on April 21 by recorded delivery. A relative collected the letter from the sorting office on April 26. On April 27 H read the letter. She claimed that the notice period ran from April 27 and expired on July 20. The Trust argued that there was a common law rule that notice was given when the letter was delivered to an address.

The Supreme Court found that when an employee was dismissed on written notice posted to her home address, and there was no express provision in the contract of employment as to when the notice period would run, the court would imply a term that written notice only took effect when it came to the employee's attention and she had either read the notice or had a reasonable opportunity of so doing. The presumption of receipt at the address was rebuttable.

Causation

Sanders v Ernest Neale [1974] IRLR 236, NIRC: There is no redundancy where an employee is dismissed for taking part in industrial action, even where circumstances suggest redundancy.

Change in terms of employment

Johnson v Nottinghamshire Combined Police Authority [1974] 1 WLR 358, CA: there is no redundancy where there is a proposed change in hours of work but no change to the nature of work or total number of hours.

Curling v Securicor Ltd [1992] IRLR 549, EAT: employers must make their position clear where they intend to rely on the contractual mobility clause in cases of potential redundancy.

Stevenson v Teesside Bridge and Engineering [1971] 1 All ER 296, DC: an employee may be refused redundancy payment where he declines an offer to work away from home (steel erector).

Chapman v Goonvean and Rostowrack China Co [1973] 1 WLR 678, CA: an employer who had for many years provided free transport to work withdrew the service on economic grounds. The employer offered to continue to employ workers affected on the basis that they

would make own arrangements for transport. Workers refused and left employment. Held, as was not dismissal by reason of redundancy.

Diminished need

Lesney Products & Co Ltd v Nolan [1977] IRLR 77, CA: no redundancy where hours of work of employees reduced by a cut in overtime, where work requirement was unchanged and the need for employees remains constant.

Cowen v Haden Carrier Ltd [1983] ICR 1, CA: the meaning of redundancy. Whether contractual duties are diminished. All terms of employment must be considered in order to discover whether an employee has been made redundant.

Hindle v Percival Boats [1969] 1 WLR 174, CA: the tribunal has a duty to look at facts objectively to discover true causes of dismissal, in order to discover whether there was redundancy.

Dismissal

Carry All Motors v Pennington [1980] IRLR 455, EAT: where the work of two employees is merged to create one new job to be done by one of them, then the other dismissed employee is made redundant. Although workload has remained constant, the number of employees required has diminished.

Pillinger v Manchester Area Health Authority [1979] IRLR 430, EAT: an employer cannot automatically dismiss employees where funds run out or are withdrawn. Employers should look for other funds or ask employees to accept lower-paid work. Failure to do so can make dismissal unfair.

North East Coast Ship Repairers Ltd v Secretary of State for Employment [1978] IRLR 149, EAT: an employer's inability to employ an apprentice after the end of fixed-term apprenticeship contract is not in itself a dismissal for redundancy.

Offer of alternative employment

Cambridge and District Co-operative Society Ltd v Ruse [1993] IRLR 156, EAT: an employee's personal perception of alternative employment offered may amount to reasonableness.

Presumption of redundancy

Willcox and another v Hastings [1987] IRLR 298, CA: Where two employees dismissed at same time, one because of diminution in requirements for employees and one not, and tribunal cannot decide which is which, then the dismissal will be presumed to be because of redundancy unless the contrary is proved.

Rationalisation

Banerjee v City and East London Area Health Authority [1979] IRLR 147, EAT: employer must bring evidence of significance of rationalisation, reasons for rationalisation and reasons for which dismissal was necessary.

Strikes

Simmons v Hoover Ltd [1976] IRLR 266, EAT: an employee serving out notice of redundancy was dismissed for taking part in strike. Held, accrued right to redundancy payment survives second dismissal.

Transfer of undertaking

Crompton v Truly Fair (International) Ltd [1975] IRLR 250, High Court: company sold one factory. The new owner retained all staff but manufactured a different product. Held, as no "transfer". Employees could claim redundancy payments from old employer.

Pickwell v Lincolnshire County Council [1993] ICR 87, EAT: employee worked at a school which had been funded by local authority but which became grant-maintained. Held, continuous employment for purpose of redundancy pay.

Warnings

Gray v Shetland Norse Preserving Co Ltd [1985] IRLR 53, EAT: it is the duty of an employer to give as much notice as possible of impending redundancies. This does not extend to warning an employee that poor attendance record may lead to selection for redundancy.