

Redundancy

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An Amicus guide
for members


amicus
the union

Redundancy

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Understanding redundancy

INTRODUCTION

Redundancies have become an all too depressing feature of the modern economic landscape. Globalisation, increased competition for business, technological change and offshoring have all contributed to the continuing tide of job losses in the UK.

Redundancy affects not only individuals, but their families and local communities as well. For this reason Amicus seeks to use all means possible to safeguard jobs. Our aim is always to reach agreements which avoid the need for compulsory redundancies and mitigate the consequences for those affected. Whilst we try to reach job security agreements, which avoid redundancies completely, it is not always possible.

Amicus believes that compulsory redundancies should be the last resort, considered only when measures such as the following have been tried:

- early consultation before job losses become inevitable;
- ending contracting-out and overtime working;
- moving people to alternative jobs with appropriate training and protection of pay and rights;
- suspending recruitment;
- ending the use of temporary and agency staff; and
- negotiating the introduction of short time working arrangements.

These steps are sometimes still not enough to prevent job losses. In this event we believe that volunteers should be sought before any compulsory redundancies are considered. There should be written agreements on the method of selection and compensatory payments. Counselling, time off for job interviews, help with retraining programmes and assistance with removal and travelling expenses should be made available to those affected by redundancy.

This booklet sets out basic rights and discusses the main issues likely to be raised in a redundancy situation. Amicus has a network of

professional full-time officials (supported by the Union's solicitors where necessary) with experience in dealing with redundancy situations.

As members, as soon as you become aware of potential redundancies contact your local official for advice.

• What is redundancy?

Redundancy situations occur in many forms. It is important to understand these different forms in order to establish whether a dismissal is a genuine redundancy. Entitlement to certain statutory protections, such as compensatory payments, depends upon dismissals falling within the legal definition of redundancy.

The statutory definition of redundancy is set out in the Employment Relations Act 1996 (ERA). Section 139 defines redundancy as follows:

'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 attributable wholly or mainly to:

(a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the

place where the employee was so employed, or

b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind, in the place where he was so employed, have ceased or diminished or are expected to cease or diminish.'

This definition governs whether an employee has the right to claim a redundancy payment, and whether redundancy has been established as the reason for dismissal. The circumstances of a dismissal must fall exactly within the wording of the definition for a redundancy reason for dismissal to be established.

Sub-paragraph (a) covers the situation in which the business at the place or places where the employee could be required under his contract to work, is closed down.

An employment tribunal will not look behind the fact of the closure to enquire into the reason, or justification, for such a course of action, thus giving employers a considerable amount of discretion in fairly dismissing employees for redundancy.

In the case of closure employees are likely to be fairly dismissed for redundancy. Employees may,

however, be able to refuse the employer's request to transfer to another workplace. This right will apply if a contract of employment states that a person will only work in a particular place. An employer may make an offer of a 'suitable' job at another location considered convenient in terms of issues such as travel and domestic arrangements. An employer may try to deny the employee redundancy pay if such an offer is refused (see *ALTERNATIVE EMPLOYMENT*).

Circumstances may be altered if an employee has a mobility clause in their contract of employment. An employer wanting to make job cuts may bring such a clause into effect. In such a case the employer must make it clear that the mobility clause is being relied upon as an alternative to redundancy. Even then a mobility clause may not prevent a finding of dismissal by reason of redundancy.

The issue for consideration under sub-paragraph (b) is whether a business requires so many employees to carry out certain work. There are many situations in which an employer may require fewer employees.

A decline in work may mean that some, or all, of the existing workforce becomes surplus to requirements. Alternatively, an employer may decide to use

fewer employees to undertake the same workload.

The introduction of new technology or some other form of workforce reorganisation may also result in redundancies as new posts are created and existing duties are re-allocated.

It is possible for an employee to be dismissed by reason of redundancy despite the fact that the employer still requires the same number of employees to do their particular job.

Employers may carry out bumping, which means a surplus employee is moved from one section into the job of an employee in another section. The displaced employee is then deemed to be dismissed by reason of redundancy.

Employees may also be able to claim redundancy payments if they are kept on lay-off or short-time working for any length of time.

An employee qualifies to claim a redundancy payment if they are laid off or kept on short-time working for four or more consecutive weeks, or for a total of six or more weeks out of 13 (where not more than three weeks were consecutive).

Redundancy has a substantially different meaning for the purposes of statutory

consultation and notification requirements. Under Section 195(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (the TULRCA), redundancy is defined as covering a '*dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related*'.

Employers are, therefore, under an obligation to inform and consult wherever collective dismissals result from, for example, proposals to reorganise or restructure undertakings, or to re-allocate job duties, even though there are no redundancies as traditionally defined. This would include the situation where an employer gives notice to terminate existing contracts and then offers new terms.

Case Study 1

Rolls Royce Motor Cars

Rolls Royce Motor Cars was condemned by an employment tribunal in 1995 for its 'hasty, intimidating, inadequate and chaotic' treatment of redundant workers.

In October 1991, the company had announced 420 redundancies and over a period of no more than two and a half days managers assessed 2,100 employees.

The tribunal ruled that it was not reasonably practicable for 23 managers to properly and fairly assess a large number of employees in this short time.

The tribunal heard that having terminated consultation with Amicus, the company informed those that were 'below the line' following assessment that their jobs were at risk and that they would have to show at an interview over the next two days why they should be re-assessed and reprieved.

Many failed to do this and the tribunal found that: 'the conditions in which the individual consultations took place were... hasty, intimidating, inadequate and chaotic' and added that: 'it was impossible for applicants to contribute in any meaningful way to the consultation period.'

• CONSULTATION

Tribunals expect employers to consult over any proposed redundancies. In recent years UK law governing employers' duties to consult and provide information to employees' representatives on redundancies has been substantially overhauled.

The most significant change involved the revision of the mechanism for determining who should be consulted and informed in the event of a redundancy.

The revision stemmed from a European Court of Justice ruling that UK legislation breached the EC Collective Redundancies Directive by limiting the right to be consulted over redundancies to representatives of independent unions recognised by an employer. If the employer refused to recognise a union then there was no duty to consult anybody about redundancies! The European Court of Justice ruled that existing UK law was insufficient because workers enjoyed no protection where an employer objected to union representation in the company.

As a consequence, the Conservative Government amended Section 188 of TULRCA which imposes obligations upon employers to consult over redundancies.

The amendments, which came into force on 1 March 1996, unfortunately still make it possible for unscrupulous employers to avoid consultation with trade unions over redundancies. Furthermore, they remove information and consultation rights in the case of redundancies affecting under 20 employees. Not surprisingly trade unions have expressed serious misgivings about the amendments. The Government has stated that the 20 requirement will be repealed.

From April 2005 new laws to consultation have been introduced. The Information and Consultation Directive requires employers to inform and consult on a much wider range of issues than at present. The regulations will be phased in and will eventually apply to any undertaking employing 50 or more employees. More details are contained in the Amicus Guide *Information and Consultation at Work* which you can get via our website or through despatch at Hayes Court the details of which are the front of this document.

• Who should be consulted?

An employer proposing to make 20 or more employees redundant over a 90 day period must consult 'appropriate representatives' of the threatened employees. These 'appropriate representatives' may be either representatives of independent trade unions recognised by the company or representatives elected by the threatened or affected employees. There is an obvious threat to trade unions in these consultation provisions. An employer may choose to by-pass the unions by arranging for the election of employee representatives.

Non-statutory guidance issued by the Department of Trade and Industry (DTI) advises that where a trade union is recognised for collective bargaining purposes in a workplace, the employer must consult with the Union rather than elect to consult with other employee representatives. Where an employer does not recognise a union in respect of a particular category of employees, it may only consult through elected representatives in respect of these employees.

The new provisions mean, in effect, that an employer may consult a recognised trade union for one group of employees and elected representatives for another. The new consultation requirements have raised a number of questions which have yet to be

answered. Clarification on a number of these questions is only likely to come as the new provisions are tested in the courts. In the meantime it is essential that trade union representatives seek to ensure employers consult with recognised trade unions when any job losses are proposed.

Even where the Union is not recognised by the employer, it is worth remembering that employers are under an obligation to invite employees to elect their own representatives, and trade union representatives can stand for such positions.

• When should consultation begin?

As required by Section 188 of TULRCA, an employer proposing to make redundancies must begin consultation 'in good time' and in any event:

- where the employer is proposing to dismiss 100 or more employees at one establishment within a period of 90 days or less, at least 90 days before the first of the dismissals takes effect; and
- where the employer proposes to dismiss at least 20, but less than 100, employees, at one establishment within 90 days or less, at least 30 days before the first of the dismissals takes effect.

The required periods for consultation are to be calculated by reference to the date on which the first dismissal proposed by the employer would take effect. This means the proposed date of the first dismissal, and not the actual date of the first dismissal.

• **Disclosure of information**

Proper consultation begins with the disclosure of specific information in writing to the appropriate representatives as required by Section 188 of TULRCA. The information to be disclosed is as follows:

- the reasons for the redundancy proposals;
- the numbers and descriptions of the employees whom it is proposed to dismiss as redundant;
- the total number of employees of any such descriptions employed by the employer at the establishment in question;
- the proposed method of selecting the employees who may be dismissed;
- the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the

dismissals are to take effect; and

- the proposed method of calculating redundancy payments to individual employees, if this differs from the statutory scheme.

This information must be disclosed by being 'given to each of the appropriate representatives by being delivered to them', or sent by post to an address notified by them to the employer, or, in the case of union representatives, sent by post to the union at the address of its head or main office. If the employer chooses the first of these three options, the information must be delivered personally, in written form, to appropriate representatives.

The consultation required by Section 188 must include consultation about ways of avoiding the dismissals, reducing the number of employees to be dismissed and mitigating the consequences of the dismissals. Furthermore, consultation must be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

This process can be expected, depending on the circumstances, to cover matters such as the re-allocation of work, the retraining and redeployment of

employees, as well as other methods of avoiding dismissals or minimising the numbers involved. Similarly, in looking at ways of mitigating the impact of redundancies, consideration should be given, for example, to counselling for employees, and the provision of information on training and retraining opportunities elsewhere.

Although 'the employer's duty to consult with a view to reaching an agreement' does not impose a duty to bargain, or imply the joint regulation of the redundancy process, it clearly goes beyond merely listening and responding to representations made by appropriate representatives. Any representations or counter proposals should be carefully considered in the course of a genuine attempt to reach some form of accommodation or understanding on the issues raised.

An employer proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less must send written notification to the DTI at least 90 days before the first of those dismissals takes place.

If consultation with appropriate representatives is required, the notice to the DTI must identify them and state the date on which consultation with them began. A copy of the HR1 must be given to the appropriate

representatives of employees who are the subject of the employer's proposals. The DTI may require the employer to provide further information.

• **Failure to inform and consult**

If an employer fails to comply with any of the requirements for consultation or fails to do so within the appropriate time limit, a complaint may be made to an employment tribunal by the trade union (where the failure relates to trade union representatives) or by the employee representatives (where the failure relates to employee representatives) or by any employees who have been or may be dismissed as redundant (in any other case).

Complaints must be presented to an employment tribunal before the date on which the last of the dismissals to which the complaint relates takes effect or during the period of three months beginning with that date. The tribunal may decide to extend the period if it is satisfied that it was not reasonably practicable to bring the complaint during the three month period but it is very difficult to persuade them to do this.

Where the tribunal finds that the employer has breached Section 188, it makes a

declaration to that effect and may order that a protective award is made to all employees affected. A protective award covers every employee who was made, or is proposed as, redundant and requires the employer to pay them their normal weekly wages for a 'protected period'.

The length of the protected period will be what is considered to be just and equitable by the tribunal in the circumstances, having considered the seriousness of the employer's default. The tribunal should look at what information, if any, was disclosed to the union (or employees' representatives) and when, and determine whether the employer undertook consultation with a view to reaching agreement. The maximum limits for the award are:

90 days' pay may be awarded even where the minimum consultation period is only 30 days. Recent case law has also confirmed that the starting point for any protective award (that is where an employer has breached its obligations to consult collectively) should be 90 days' pay unless there is good reason to award less.

These time periods begin on the date on which the first dismissal to which the complaint relates was proposed to take effect, or the date of the award, whichever is the earlier.

Case Study 2 GBE International (Andover)

Amicus members sacked by GBE International in Andover were awarded over £100,000 in compensation for the company's failure to consult the Union before dismissing them for redundancy.

Immediately after the company went into receivership the Receivers sacked 175 workers, including 74 Amicus members. An Amicus Regional Officer immediately lodged an application with the employment tribunal claiming that the company should have consulted with the Union. Even though the company was in receivership, it was still obliged to follow the consultation procedure set out in Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.

The employment tribunal accepted that it was no defence that Receivers had been appointed, and a protected period of 90 days, giving a right to 90 days' pay, was ordered by the tribunal.

Although the company was not in a position to pay anything under the award, the Government guarantees up to eight weeks of this entitlement.

The members who were sacked by the Receivers in this way were also entitled to guaranteed notice pay and statutory redundancy pay from the Government.

Case Study 3 CJR Fryson & Sons

Amicus member Mr Sennitt worked for his employer CJR Fryson & Sons in Ely for more than 17 years.

The company went into receivership in 1990 and Mr Sennitt was made redundant in September of that year. The business was sold to another company on the same day and he was offered work on considerably less favourable terms and conditions, which he refused. After he was denied a redundancy payment from the Redundancy Payments Office, Amicus took the case to employment tribunal on Mr Sennitt's behalf.

- The tribunal ruled that a suitable offer of alternative employment had been turned down and as a result there was no entitlement to a redundancy payment.
- The case was then taken to an employment appeal tribunal (EAT) which found that Mr Sennitt was in fact entitled to a payment as there had been a transfer of undertakings and the alternative work involved a substantial and detrimental change in terms – in short it did not amount to an offer of suitable work.

It should be noted that if an employee, covered by a protective award, receives payments under their contract of employment during the protected period, those payments no longer go to discharge the employer's liability under the protective award. Put simply, the protective award cannot be offset against wages or salary received during the notice period or money in lieu of notice, if the notice period coincides with the protected period.

If an employee remains employed during a protected period and they:

- (a) are fairly dismissed by their employer for a reason other than redundancy; or
- (b) unreasonably terminate the contract of employment; or
- (c) unreasonably refuse an offer of suitable alternative employment made to take effect before or during the protected period,

then they will not be entitled to payment under the protective award in respect of any period during which they would have been employed but for the dismissal, termination or refusal of employment.

- **Employer's defence**

An employer may be excused by the tribunal for dispensing with the full consultation required under Section 188 if they can show that there were special circumstances which made it not reasonably practicable for them to comply with the requirements, and that they took all the steps which were reasonably practicable in the circumstances. Special circumstances may include, for example, an unforeseen financial crisis which makes it necessary to close down a plant at short notice meaning that consultations can only take place during a shorter period than that prescribed by law. If an employer is in proper control of the business, such special circumstances should not arise very often. Ultimately, it will be for a tribunal to determine whether the special circumstances defence should be accepted.

- **Individual consultation**

Employers also have a duty to consult with individual employees selected for redundancy. This is the case even where consultation has taken place with the recognised union or appropriate representatives. The employees in question should be told why the redundancy exercise is being undertaken, the reasons for their redundancy and how they have been selected. Employees should also be advised if there is any alternative employment available for them. Failure by the employer to comply with these requirements may render an individual employee's selection for redundancy unfair.

- **The statutory dispute resolution procedures**

The statutory dispute resolution procedures now apply in certain circumstances relating to redundancies. Where collective consultation provisions apply (that is, where 20 or more employees are proposed to be dismissed) statutory dispute resolution procedures do not apply. However, if there are less than 20 employees who have been proposed to be made redundant, then the employer must set out the reasons for the proposed dismissal in writing and invite the employee to a meeting to discuss the matter. Failure to do this will, in cases where less than 20 people are dismissed as redundant, result in the redundancy being automatically unfair, although if redundancy was inevitable then compensation is likely to be limited. It is important that employees also comply with the statutory dispute resolution procedures, by attending all meetings the employer invites them to, and appealing against any dismissal on grounds of redundancy. A failure to do so will mean that an Employment Tribunal can reduce any compensation awarded by up to 50%.

- **SELECTION FOR REDUNDANCY**

The criteria used by an employer to select employees for redundancy must be both reasonable and fairly applied.

When faced with a potential redundancy situation or an employer wishing to renegotiate an existing redundancy policy, the workplace representative should make clear that the method of selection is ultimately the responsibility of the employer. The union policy in such matters is to oppose redundancies wherever possible and particularly any attempt to introduce compulsion. Previous advice to workplace representatives has been that if compulsion was introduced by the employer then the only criteria which could meet the test of objectivity was one based on service, normally last in first out (LIFO). Under the new Age Regulations, which came into effect on 1st October 2006, such an approach is likely to be unlawful unless a business reason can be established to justify this method of selection. Where the union's members have given an unambiguous mandate, (ideally by workplace ballot of which a written record has been kept), for the LIFO criteria to be pursued, the workplace representative may seek to have the criteria used. If, as is likely, the employer resists such a criterion, the workplace representative should endeavour to secure other objective criteria (i.e. criteria which are capable of being measured by existing evidence), but make clear that the final selection criteria is the employer's decision and reserve the right to challenge it through an appeal process both internally and externally, (i.e. Employment Tribunal, subject to legal advice)

As far as possible an employer should seek to establish criteria for selection which do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, experience and efficiency at the job. Subjective judgements may form part of the assessment, but criteria such as 'attitude' are more likely to be regarded as unfair. It is not acceptable for selection to be based on the personal opinion of the person making the selection. Selection influenced by sex, age, race or disability is likely to be both unfair and discriminatory. Employers cannot use age as a selection criterion unless it can be objectively justified.

Employers need to show that in selecting a particular employee they had compared him or her in relation to the selection criteria with those others who might have been made redundant. Any selected employee should be consulted (see *Individual consultation* on page 13).

The setting of criteria should not be left solely to the employer. Wherever possible, Amicus should be consulted during the process to determine the selection criteria. It should, however, be noted that the courts have ruled that it is not necessarily unfair to use criteria not agreed by a trade union, as long as the selection criteria are reasonable.

Some years ago, employers had to follow agreed selection procedures or risk claims for automatic unfair dismissal. The law has now been changed however and selection in contravention of an agreed procedure will not now be automatically unfair. It can, however, still be argued that such a dismissal is unfair on general principles.

Preferred selection processes are often contained in collective agreements. Historically, the most common method of selection has been (LIFO), where those with the shortest continuous service in the company are dismissed first. As pointed out above, such a method is now likely to be unlawful.

In recent years, many employers have moved to different methods of selection using a range of criteria. Employers have claimed that LIFO can mean that the remaining workforce does not have the skills, experience and versatility necessary for future success. Employers now departing from LIFO must ensure that the criteria used are those which a 'reasonable' employer would have used. If no reasonable employer would have selected for redundancy on the grounds in question, then the dismissals are likely to be unfair.

The dismissal of an employee selected for redundancy will be unfair if it is discriminatory on the grounds of race, age, sex or disability or on the grounds of a person's trade union activity. Discriminatory criteria may arise where there appears to be no obvious intention to discriminate. One such case is where part-time workers are dismissed for redundancy in advance of full-time workers. The application of such criteria could be unlawful discrimination on the grounds of sex because a considerably smaller proportion of women than men can work full-time because of child care responsibilities. Unfair dismissal is discussed in more detail later in this guide.

• NOTICE

In addition to their duty to consult, employers must give every redundant employee notice of dismissal. This notice should be stipulated in the employment contract, but must be at least a week for those with more than a month, but less than two years' service. For those with more than two years, it is a week for every year of service up to a maximum of 12 weeks. This statutory entitlement is in Section 86 of the ERA.

An employer may require the employee to work all or part of their notice, or may not want them to attend work at all. An employee not required to work their notice, must be paid money in lieu of notice for the whole or the balance of their unworked notice period.

Even if an employer has announced redundancies and given an indication as to which people are likely to be on the list of dismissals, it is important that these employees do not panic and leave their jobs too early, despite the temptation to seek and accept other work as soon as possible. Employees leaving before the start of the notice period will lose their right to a redundancy payment.

Case Study 4

Rolls Royce, Bristol

A total of £38,000 compensation was secured for Amicus member, Andy Robertson after the Union's solicitors proved that he had been unfairly selected for redundancy on the grounds of his Union activities.

- Andy had worked as a fitter at Rolls Royce, Bristol for eight years. With the announcement of large scale redundancies in 1993, his Union workload increased and towards the end of the year he was informed he had been selected for redundancy.

- The company operated a selection procedure which involved gradings for categories such as attendance and service where Andy scored well and for subjective criteria such as flexibility and adaptability where he scored poorly. When challenged over his low grades the company said the reason for the scoring was that he 'never took his trade union hat off'.

The tribunal ruled unanimously that Rolls Royce was guilty of discrimination on the grounds of trade union activities and said the company should only have assessed his work as a fitter.

- **Time off to look for work**

Employees with at least two years' continuous employment who have been given notice of dismissal for redundancy, are entitled to reasonable time off to look for a new job, attend job interviews, or to arrange training for future employment. The time off must be agreed with the employer. Employees exercising this right are entitled to be paid as normal for the time taken off.

If an employer refuses to give reasonable time off, a complaint may be made to an employment tribunal under Section 54 of the ERA. In the event of the complaint succeeding, the tribunal must make a declaration to that effect and order the employer to pay the amount due to the employee. If an employer refused time off and the employee stayed at work as a consequence, the employee will be paid for working normally and receive an equivalent tribunal award.

- **Leaving before the end of the notice period**

An employee who leaves their employment before the expiry of the statutory notice period may lose the right to a redundancy payment. If, however, an employee gives written notice to terminate their employment on a date earlier than that given by the employer, the right to a redundancy payment will not be lost if the employer raises no objection. The employer may, however, object and serve the employee with a counter-notice requiring them to withdraw their notice of resignation and stating that should they leave early their right to a redundancy payment will be contested.

If the employer withholds the redundancy payment, the employee may apply to an employment tribunal which will decide whether the employee is entitled to the full payment, or no payment, or part of the payment. The tribunal will consider whether the employee's action in leaving prematurely is reasonable or unreasonable in the circumstances.

If, however, the employer and employee agree by mutual consent to substitute some other date of termination for that specified by the employer, no such question arises. It is certainly advisable to try to get the agreement of the employer if an employee wishes to leave early. The procedure for dealing with notices and counter-notices in the above circumstances are extremely complex and members should seek advice from their Amicus full-time officer before taking action.

- **REDUNDANCY PAY**

- **Pre-conditions for payment**

Under Part XI of the ERA, employees dismissed for redundancy may be entitled to a statutory redundancy payment. The conditions that need fulfilling for a person to be entitled to a statutory redundancy payment are:

- that they were an employee;
- that they had been continuously employed for a period of two years (although the requirement for a qualifying period of employment may be open to challenge on the basis that it discriminates against women and contravenes European law);
- that they were dismissed; and
- that the dismissal was by reason of redundancy. Only 'employees' are entitled to claim a statutory redundancy payment which means that self-employed people and those engaged under a contract for services are not eligible to make a claim. Ultimately it will be for a tribunal to decide whether a person is an 'employee'. Among the matters which the tribunal will take into account are a person's tax schedule, how they are paid, whether they provide their own equipment and who controls or directs their work. Formerly, different rules of continuity applied to full-time and part-time employees. A challenge to the rules of continuity as they affected part-timers, on the basis that they were discriminatory and contrary to European law was successful in *R v Secretary of State for Employment, ex parte EOC [1994]*. As a result, the Employment Protection (Part-Time Employees) Regulations 1995 were introduced to amend the EPCA so that all part-time employment counts towards continuity in the same manner as full-time employment. ***The current maximum weeks pay for calculating a redundancy payment from 1 February 2006 is now £290 per week. The Government is currently reviewing this figure.***

- **Exclusions from the right to payment**

The following groups of people do not qualify for the right to a statutory redundancy payment:

- merchant seamen, former registered dock workers engaged in dock work (covered by other arrangements) or 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;
 - employees who ordinarily work outside Great Britain under their contracts of employment; and
 - employees who have unreasonably refused an offer of suitable alternative employment or have unreasonably terminated the alternative employment during the statutory trial period (for more detail see ALTERNATIVE EMPLOYMENT).
- **Calculating the redundancy payment**

From 1 October 2006, when the Age Regulations came into force, the upper age limit on unfair dismissal and redundancy has been removed, as well as the lower age limit for redundancy pay. The statutory redundancy payments will be made on the following basis:

- Up to the age of 21 - 0.5 week's pay for each completed year of service
- 22 - 40 years of age - 1 week's pay for each completed year of service
- 41+ years of age - 1.5 weeks' pay for each completed year of service

The amount of the redundancy payment is based on the employee's age and length of continuous employment at the relevant date and average gross weekly wage at the calculation date. The maximum amount of a week's pay allowed in computing a statutory redundancy payment is currently £290 (1 Feb 2006). This figure is reviewed on an annual basis. If a person earns less than £290 per week they will receive their gross week's pay. For each complete year of service, up to a maximum of 20, employees are entitled to:

Examples of redundancy payment calculations

Mr A aged 56 with 9 years' service, earns £280 a week: Mr A will receive one and a half weeks' pay for each year of service: $£280 \times 1.5 \times 9 = £3,510$.

Mrs B aged 33, with 7 years' service (during which she took maternity leave of 29 weeks), earns £180 a week: The maternity leave did not break the continuity of Mrs B's employment and counts as service in the redundancy calculation. She will receive one week's pay for each year of service: $£180 \times 7 = £1,260$

Ms C aged 35, with 18 years' service from age 17, who earns £170 a week. She will receive, half a week's pay for each of the four years' service from age 18 to 21 (service before age 18 is not taken into account), and one week's pay for each of the 13 years' service from age 22 to age 35, a total of 15 weeks' pay: $£170 \times 15 = £2,550$.

See Appendix 3 for more information on redundancy payments.

(a) one and half week's pay for each year of employment which consists wholly of weeks in which the employee was not below the age of 41;

(b) one week's pay for each year of employment (not falling within (a) above which consists wholly of weeks in which the employee was not below the age of 22; and

(c) half a week's pay for each year of employment not falling within either (a) or (b) above.

• The relevant date

The relevant date is defined as the date on which the notice given to the employee expires, that is normally the date on which the job or employment contract ends. Where, however, the employer gives less than the required statutory notice, the extra notice which should have been given is added on, so that the relevant date for that employee is later than the date the job ended. If, under the contract of employment, the employee was entitled to a longer period of notice, and this notice was given but not worked, the relevant date may be even later.

Notice is calculated on total service. In order to calculate the number of years of continuous employment, employees must count backwards from the relevant date.

• A week's pay

The amount of a week's pay to be taken into account is that to which the employee is entitled under the terms of their contract of employment at the calculation date.

The calculation date is the date on which the employer gives the employee the minimum notice to which they are legally entitled, or the date on which such notice should have been given to expire on the last day of the contract. If an employee is dismissed without notice or with less than the statutory minimum notice, the calculation date will be the date on which their employment ended.

Example 1:

An employee with two years' service and one month's contractual notice:

Given notice of dismissal on 1 April to expire on 30 April.

Calculation date: 14 April (i.e. the start of two weeks' statutory notice)

Example 2:

An employee with 10 years' service and 10 weeks' statutory notice

Given notice of dismissal on 1 April to expire on 9 May

Calculation date: 1 April

Alternating shift patterns may mean that working hours and, therefore, earnings vary from week to week. To counter this variability the employee's week's pay will be determined by averaging the number of hours worked in a week at the average hourly rate over 12 week period before the calculation date. Where earnings vary because of piecework or productivity bonus arrangements, the week's pay is arrived at by multiplying the number of hours normally worked in a week by the average hourly earnings over the 12 complete weeks before the calculation date.

For the purpose of arriving at the average hourly earnings, only hours actually worked are taken into account, and any week in which no work at all is done is replaced by the next earlier week to make up

the total of 12. Premium rates are disregarded and hours are reckoned at the normal basic rate.

For workers with no normal working hours, a week's pay will be an average of their pay, including any overtime, in the 12 complete weeks before the calculation date. In general, overtime will not be included in the normal working hours for calculating a week's pay. If, however, an employee's contract of employment fixes the number of standard plus overtime hours to be worked in any week, the normal weekly hours will include that overtime. It is possible that a pay increase will be negotiated to take effect at the time employees are under notice. If the pay increase falls after the calculation date, it will not be included in the calculation of the employee's week's pay, even if the increase is backdated to an earlier date.

• Redundancy pay and pensions

Employees entitled to an occupational pension upon redundancy may find that it is offset against entitlement to redundancy pay. Under the Redundancy Payments Pensions Regulations 1965, the right to redundancy pay may be excluded, or the amount payable reduced, where an employee has the right to pension benefits exceeding a certain amount. A pension will qualify if it is payable for life, or commutable to a lump sum.

The annual value of the pension must be equal to one-third of annual pay and be able to be paid immediately. If the annual value of the pension is less than one-third or if the pension is not payable immediately (but payable within 90 weeks), the employee may be entitled to a proportion of their redundancy payment.

• Claiming a redundancy payment

The legal duty to make a redundancy payment lies with the employer. The payment should be made at, or soon after, the time of dismissal. Employees do not need to make a claim unless the employer fails to pay or disputes the entitlement. If there is a dispute about the amount of the payment or whether it should be made at all, the employee should make a written request to the employer or refer the matter to an employment tribunal, or both, within six months of the relevant date.

The statutory dispute resolution procedures, which came into force on 1 October 2004, now mean that a claim for a redundancy

payment can only be made to an Employment Tribunal if the employee has first complied with the minimum requirements under the statutory grievance procedure. Employees must therefore ensure that they send a letter to their employer setting out their grievance in respect of the failure to make a redundancy payment, and then wait 28 days, or they will be prevented from pursuing a claim to an Employment Tribunal.”

If an employee has already made a written claim for a statutory redundancy payment to their employer within six months of dismissal there is no time limit in making a claim to an employment tribunal. Under Section 165 of the ERA, an employee is entitled to a written statement indicating how their redundancy pay is calculated. An employer is breaking the law if they fail to supply the relevant employees with this statement.

• **Employer default or insolvency**

If an employer fails to pay as a result of default or insolvency, employees may make a claim for a redundancy payment under Section 166 of the ERA. If insolvency is the reason for non-payment an application can be made directly to the Secretary of State. In all other cases, the employee must take ‘all reasonable steps’ to recover payment. Such steps could include a claim to the employment tribunal. If the Secretary of State makes a payment to the employee out of the National Insurance Fund, all subsequent rights to recover the redundancy payment from the employer rest with the Secretary of State.

• **Collective redundancy agreements**

In many cases unions negotiate collective agreements with employers to deal specifically with redundancy situations. These agreements may include measures to avoid redundancy, such as overtime bans or retraining; consultation procedures; selection criteria; and details of enhanced redundancy payments in excess of the statutory amounts. Although it is no longer automatically unfair for an employer to depart from an agreed procedure or customary arrangement relating to selection for redundancy, tribunals will expect employers to show good reasons for any departure. Many employees have better redundancy entitlements under their contracts. If an existing employment contract offers enhanced redundancy terms (whether agreed with the individual or incorporated into the employment contract as a result of a collective agreement) then the employer is obliged to honour those terms.

• **Voluntary redundancy**

Employers seeking to reorganise their business or make reductions in the labour force will often attempt to do so by voluntary means. Enhanced terms may be offered to encourage employees to volunteer to leave their jobs. Collective agreements between unions and employers will often stipulate that volunteers should be sought before any compulsory redundancies are considered. In some cases employers may restrict the offer of enhanced terms to specific areas of the workforce, in order to retain key skills or individuals.

As such exercises are voluntary, the employer does not have to accept every request to volunteer. In order to ensure that they do not forfeit the right to a redundancy payment, employees wanting to leave under a voluntary scheme must obtain their employer’s full consent to a request to volunteer for redundancy before deciding to leave. Volunteering for redundancy should not, however, affect a person’s right to claim unemployment benefits.

• **Redundancy payment and tax**

Under the Income and Corporation Taxes Act 1988, redundancy and termination payments up to £30,000 are tax free. Above this level, income tax is payable at the normal rates, depending on an individual’s income throughout the year. Pension lump sum payments will be taxed separately under different statutory arrangements. Tax will be levied in the normal way on payment in lieu of notice, holiday pay and arrears of pay for work done.

• **ALTERNATIVE EMPLOYMENT**

Employers have a duty to consider whether employees likely to be affected by redundancy can be offered suitable alternative work. Under Section 141 of the ERA, an employee under redundancy notice will lose entitlement to redundancy compensation if they are offered suitable alternative employment and unreasonably refuse that offer.

• **When should the offer be made?**

To comply with Section 141 of the ERA, an employer must make an offer of alternative employment before the employee's existing contract comes to an end. In addition, the start date for the new employment must be immediately after the termination of the old job, or at least within four weeks. For the purposes of continuity there is some leeway. If an employee's old contract ends on a Friday, Saturday or Sunday and the new contract begins on the following Monday, it is still treated as commencing immediately after the end of the original contract. The four week interval is also calculated in this way.

• **The offer**

Offers of alternative employment may be made by the employer or, if the company is part of a group of companies, an 'associated employer'. Offers can be made verbally or in writing, although the latter is preferable. In either form the offer should be reasonably precise and contain enough information to allow the employee to make an informed decision.

Employees accepting an employer's offer of re-engagement on the same terms and conditions will be treated as if they had not been dismissed. If they refuse re-engagement on the same terms, they would have to show a tribunal why this course of action was reasonable. An employee may be able to claim unfair dismissal if they are not offered suitable alternative employment because the employer failed to look for it, or if there is suitable work available, but it is not offered to the employee.

• **Reasonable refusal and suitability**

If a person turns down an offer of alternative employment, their entitlement to a redundancy payment depends on whether the refusal was reasonable. In deciding whether such a refusal was reasonable or not, a tribunal will consider the suitability of the alternative job offered. If the terms of the job are different from an employee's former contract, it must be suitable alternative work. The

terms and conditions of employment must be broadly comparable and the skills and experience required must be within the employee's capability. Although there are no fixed definitions as to what is unsuitable, a tribunal would take a number of factors into account including:

- Changes in pay;
- changes in working hours or working time;
- a change in the status or grade of an employee;
- changes in the way work is carried out; and
- changes in work location.

The work must also be suitable to the individual in question. An individual employee's circumstances may be a factor which needs to be taken into account. Such factors may include:

Domestic circumstances Employees with child care responsibilities may find it impossible or difficult to make new arrangements to cover changed working hours in the alternative job. Dependant relatives, children's schooling or family issues may also make an offer unsuitable and be grounds for reasonable refusal.

Timing of the offer

If an employee is offered alternative work late in their notice period and has in the meantime found another job their refusal may be considered reasonable.

Travelling difficulties

If the job offered is at a new location causing the employee to incur increased travelling expenses or difficulties in travelling, refusal could be reasonable.

Health

An employee in poor health expected to take on more strenuous duties or who would have difficulty travelling to a new location may be able to reasonably refuse an alternative offer.

The situation is different when the proposed change is provided for within the employment contract. For example, an employer may propose to invoke a mobility clause. In such an instance, however, the employer must make it clear that the mobility clause is being relied upon as an alternative to redundancy. Particular care needs to be taken in such situations and you should consult your Amicus full-time officer. If an employer refuses to pay a redundancy payment in such

circumstances, the employee can apply to an employment tribunal. It is for the tribunal to consider all the facts mentioned above in reaching a decision as to whether the employee should receive all, part, or none of their redundancy payment.

The tribunal must take account of any attempts made by the employer to alleviate potential difficulties in making an offer of alternative employment. In the case of relocation, an employer may offer to alter working hours or pay travelling expenses. If a job requires different skills, an employer may arrange training.

• **Trial periods**

Employees under redundancy notice who are offered and accept alternative work are allowed a trial period of up to four weeks. During this time they can decide whether the new job is suitable. Entitlement to a trial period is guaranteed whether or not an employer agrees. Even if no trial period is offered, the first four weeks in the new job will count as one, entitling an employee to leave and claim a redundancy payment during or at the end of the four week period. If a person works beyond the four week period, they lose their entitlement to a statutory redundancy payment.

It is important to note that the trial period is counted in calendar weeks rather than working weeks. This fact means that periods of closure for company holidays will count towards the trial period. Employees and employers can agree to extend a trial period, but this provision only applies for the purposes of retraining. An agreement for an extension in the trial period should be in writing and be made prior to the commencement of the new contract.

There is no limit to the number of trial periods that an employee can have, but offers of jobs must be made before the end of the existing contract and must begin immediately on the ending of the existing contract or within four weeks thereafter. The time limit for making an application to the employment tribunal for a redundancy payment runs from the date on which the final trial period ends.

Some collective agreements may provide for a longer trial period. Employee's rights under such an agreement are solely contractual. An employee's entitlement to a redundancy payment will depend on the terms of the agreement. To preserve the right to a statutory redundancy payment, the employee must leave within the four week period.

• **UNFAIR DISMISSAL**

Under Section 98(4) of the ERA, employers selecting people for redundancy must show that the decision to dismiss was reasonable. There are also a number of circumstances in which a redundancy dismissal will be automatically unfair. Employees must present their claim of unfair dismissal to an employment tribunal before the end of the period of three months beginning with the date of termination of their employment.

• **Automatically unfair redundancy**

There are a number of circumstances in which dismissal for redundancy may be considered unfair. To make an unfair redundancy selection claim on any of the following grounds, the redundancy situation must have affected one or more other employees in the same undertaking holding similar positions to that held by the dismissed employee, and who have not been dismissed by the employer.

• **Trade union grounds**

A dismissal will be automatically unfair if the reason (or the principal reason) for selecting the employee in question for redundancy is their trade union membership, duties or activities (Section 153 TULRCA). It is also unfair to select an employee because they are not a member of any trade union or a particular trade union or had refused or proposed to refuse to become or remain a member.

• **Health and safety**

If an employee is a safety representative, appointed either by the employer or fellow employees, and is selected for redundancy as a result of the role they perform, the dismissal will be automatically unfair. In addition any employee who has done any of the following may also appeal to the tribunal on the same grounds:

- raised health and safety issues directly with the management because there was no representative;
- left or intended to leave the workplace because he reasonably believed circumstances of serious and imminent danger which he could not reasonably have been expected to avert existed;
- refused to return; or
- taken steps to protect personal safety and the safety of others, and considers that this has led to unfair selection.

• **Assertion of a statutory right**

Dismissal of an employee will automatically be regarded as unfair if the reason or principal reason for it was that the employee brought

proceedings against the employer to enforce a statutory right, or alleged that the employer had infringed such a right. These include:

- all rights conferred under the ERA – such as the right to guarantee payments and to look for work;
- rights under Part II of the ERA 1996 – e.g. unlawful deductions from pay;
- the right to minimum notice;
- rights under TULRCA, e.g. time off for union duties and activities;
- rights under the National Minimum Wage Act 1998; and
- rights under the Working Time Regulations 1998.

• **Pregnancy, maternity and parental rights**

The dismissal will be automatically unfair if the reason, or principal reason, for the dismissal is related to:

- Pregnancy, childbirth or maternity, or any reason connected with these; or
- Taking or seeking to take:
 - ordinary or additional maternity leave;
 - ordinary or additional adoption leave;
 - parental leave;
 - paternity leave;
 - time off for dependants.

If an employer intends to dismiss an employee on grounds of redundancy whilst they are on ordinary maternity leave (of 26 weeks) or additional maternity leave (of 26 weeks), the employer is required to offer the employee any suitable alternative vacancy that exists before the old employment ends. The alternative position must not be on terms that are substantially less favourable than those of the old contract. A failure by an employer to comply with this requirement will render a dismissal automatically unfair, even if the need for redundancy was genuine and the dismissal would otherwise be fair.

• **Race and sex discrimination**

Any redundancy selection criteria which discriminate directly or indirectly (without justification) on the grounds of race or sex will not only be unfair, but may also give rise to claims of sex or race discrimination for which there is no limit on the amount of compensation which may be awarded. The most prevalent form of redundancy discrimination cases have concerned the practice of selecting part-time workers for redundancy ahead of full-timers. In a number of situations such a procedure discriminates against women.

• **Disability**

The Disability Discrimination Act 1995 made it unlawful for an employer to discriminate against a disabled employee by dismissing them or subjecting them to any other detriment.

• **Reasonableness**

Even if a dismissal is not automatically unfair for the reasons outlined above, it may still be unfair if the employer did not act reasonably in dismissing the employee in question. A tribunal will have to decide whether, in all the circumstances, including the size and administrative resources available to the undertaking, the employer acted reasonably in dismissing the employee.

The House of Lords has stated that: 'in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation.'

In 1982, the employment appeal tribunal (EAT), in the case of *Williams v Compair Maxam Ltd* listed the principles which reasonable employers adopt when dismissing for redundancy employees who are represented by an independent trade union that they recognise. Although these are not principles of law, they do represent standards of behaviour which have been adopted by industrial tribunals and the EAT by which to judge the fairness of dismissals for redundancy where a trade union is recognised by an employer. In redundancy exercises involving trade unions, a reasonable employer will:

- seek to give as much warning as possible of impending redundancies so as to enable the union and the employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere;
- consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant.

When a selection has been made, the employer will consider with the union whether it has been made in accordance with those criteria;

- whether or not an agreement as to the criteria has been agreed with a trade union, seek to establish criteria for selection which, so

far as possible, do not depend solely on the opinion of the person making the selection, but can be objectively checked against such things as attendance record and efficiency at the job;

- seek to ensure that the selection is made fairly in accordance with these criteria and consider any representations the union may make as to such selection; and
- seek to see whether instead of dismissing an employee they could offer alternative employment.

Following the changes to the law regarding consultation, these principles will be equally relevant whether the employees being dismissed for redundancy are represented by employee representatives or an independent trade union.

• Business reorganisations

An employer may embark on a reorganisation of the business, creating new positions with new grades or titles. As part of this process some or all employees may be dismissed, with individuals being offered or being invited to apply for the new posts. As long as the employer can show that the reorganisation was for genuine business reasons, and that they consulted properly with the workforce and behaved reasonably in all the circumstances, such actions will probably not be considered unfair. If, however, the reorganisation was merely a sham exercise designed to get rid of certain employees, a claim for unfair dismissal is likely to succeed.

• Maintaining your Union membership

Unemployed members do not have to pay contributions, and are still eligible for member services. However you must contact the Union and make the situation clear to them. The number to ring is: 020 8462 7755. You will be asked for your membership number and the area in which you live.

A wide range of information and guidance on finding another job, training programmes and state benefits can be obtained from www.jobcentreplus.gov.uk and www.dwp.gov.uk/

• REDUNDANCY PAYMENTS

Ready Reckoner for calculating the number of weeks' pay due, for redundancies made on or after 1 October 2006. To calculate the number of weeks pay per year of service that you are entitled to use the table below and and:

- Identify your age; then
- Identify your years of service

The corresponding figure will be the number of weeks redundancy pay that you are entitled to. For example, if you are 38 years old and have 12 years of service, you will be entitled to 12 weeks redundancy pay. (* see notes on following page)

Age	Service (Years)																			
	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	
18*[1]	1																			
19	1	1½																		
20	1	1½	2																	
21	1	1½	2	2½																
22	1	1½	2	2½	3															
23	1½	2	2½	3	3½	4														
24	2	2½	3	3½	4	4½	5													
25	2	3	3½	4	4½	5	5½	6												
26	2	3	4	4½	5	5½	6	6½	7											
27	2	3	4	5	5½	6	6½	7	7½	8										
28	2	3	4	5	6	6½	7	7½	8	8½	9									
29	2	3	4	5	6	7	7½	8	8½	9	9½	10								
30	2	3	4	5	6	7	8	8½	9	9½	10	10½	11							
31	2	3	4	5	6	7	8	9	9½	10	10½	11	11½	12						
32	2	3	4	5	6	7	8	9	10	10½	11	11½	12	12½	13					
33	2	3	4	5	6	7	8	9	10	11	11½	12	12½	13	13½	14				
34	2	3	4	5	6	7	8	9	10	11	12	12½	13	13½	14	14½	15			
35	2	3	4	5	6	7	8	9	10	11	12	13	13½	14	14½	15	15½	16		
36	2	3	4	5	6	7	8	9	10	11	12	13	14	14½	15	15½	16	16½	17	
37	2	3	4	5	6	7	8	9	10	11	12	13	14	15	15½	16	16½	17	17½	
38	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	16½	17	17½	18	
39	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	17½	18	18½	
40	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	18½	19	
41	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	19½	
42	2½	3½	4½	5½	6½	7½	8½	9½	10½	11½	12½	13½	14½	15½	16½	17½	18½	19½	20½	
43	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	
44	3	4½	5½	6½	7½	8½	9½	10½	11½	12½	13½	14½	15½	16½	17½	18½	19½	20½	21½	
45	3	4½	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	
46	3	4½	6	7½	8½	9½	10½	11½	12½	13½	14½	15½	16½	17½	18½	19½	20½	21½	22½	
47	3	4½	6	7½	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	
48	3	4½	6	7½	9	10½	11½	12½	13½	14½	15½	16½	17½	18½	19½	20½	21½	22½	23½	
49	3	4½	6	7½	9	10½	12	13	14	15	16	17	18	19	20	21	22	23	24	
50	3	4½	6	7½	9	10½	12	13½	14½	15½	16½	17½	18½	19½	20½	21½	22½	23½	24½	
51	3	4½	6	7½	9	10½	12	13½	15	16	17	18	19	20	21	22	23	24	25	
52	3	4½	6	7½	9	10½	12	13½	15	16½	17½	18½	19½	20½	21½	22½	23½	24½	25½	
53	3	4½	6	7½	9	10½	12	13½	15	16½	18	19	20	21	22	23	24	25	26	
54	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	20½	21½	22½	23½	24½	25½	26½	
55	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	21	22	23½	24	25	26	27	
56	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	21	22½	23½	24½	25½	26½	27½	
57	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	21	22½	24	25	26	27	28	
58	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	21	22½	24	25½	26½	27½	28½	
59	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	21	22½	24	25½	27	28	29	
60	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	21	22½	24	25½	27	28½	29½	
61*[2]	3	4½	6	7½	9	10½	12	13½	15	16½	18	19½	21	22½	24	25½	27	28½	30	

18* [1] - It is possible that an individual could start to build up continuous service before age 16, but this is likely to be rare, and therefore we have started Table 2 from age 18.

61* [2] - The same figures should be used when calculating the redundancy payment for a person aged 61 and above.