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REDUNDANCY - A Timely Reminder

Introduction

In the current economic climate it is an unfortunate fact that the subject of redundancy will loom large for many employers and employees alike. This Article seeks to give a plain English summary of the current law and procedure behind this subject, offering the reader a reminder of the concepts and principles involved. This article is by no means an exhaustive statement of the law, and it is always advisable to take legal advice before taking any step which may lead to a redundancy arising.

Definition of redundancy

A redundancy arises where there is (1) a dismissal of an employee (2) caused wholly or mainly by (3) either a 'business closure', a 'workplace closure' or a 'reduced requirement for employees'. All three elements must be proved.

Redundancy situations

Most redundancy situations are relatively straightforward and easy to recognise, but sometimes there are complicating factors. For example, where there is a 'workplace closure' the contract of employment may require the employee to relocate to another workplace without the need for dismissal. Contracts of employment should always be checked before taking any step which may lead to a redundancy.

The most problematical redundancy situation is where there is a 'reduced requirement for employees', often arising after a business reorganisation or restructuring, or as a result of a downturn in business. This is because there are often subtle and subjective factors involved. The subtlety derives from a focus on a requirement for 'employees' rather than 'work'. For example, a redundancy situation can still arise when the amount of work remains the same, or even increases, provided fewer employees are required to carry out that work. Conversely, mere changes to the way work is carried out will not necessarily amount to a redundancy situation if the requirement for employees remains the same. The subjectivity derives from the fact that employers are often best placed to make commercial decisions affecting their business. In an acknowledgement of this fact, in the absence of manifest unreasonableness the law is often hesitant to challenge an employer's judgement in such matters.

Obligations on employers

A redundancy is a potentially fair reason for dismissal, which means that an employee who is dismissed by reason of redundancy may be unable to claim 'unfair dismissal'. However, for this to be the case the employer must have acted reasonably throughout.

In particular, the employer must have warned and consulted affected employees, objectively and fairly selected the employee for redundancy, and taken all reasonable steps to avoid the redundancy and minimise its impact. Examples of such reasonable steps include offering any suitable alternative jobs, retraining, restricting overtime and recruitment, and inviting early retirement and voluntary redundancies.

Employers frequently fail to objectively and fairly select an employee for redundancy. Where a selection is to be made, the correct pool of employees must be established from the outset. This tends to be a department or a group of employees carrying out similar work. Employees on long-term sick leave or maternity leave must not be overlooked. Once the pool has been established the employer must apply objectively reasonable and verifiable criteria, often using forms and a scoring system. Examples of such criteria include the 'last in first out' principle, performance and ability, and attendance record, but always avoiding any criteria which could be discriminatory. Finally, the criteria must be fairly applied to each employee. Any failure at any stage is likely to amount to unreasonableness on the part of the employer, and may result in an unfair dismissal.

In some circumstances it may be reasonable for an employer to dismiss an employee to create a vacancy into which another otherwise redundant employee can be redeployed. This practice is known as 'bumping', and may be appropriate where a redundant senior and long service employee is to be retained at the expense of a junior colleague. However, 'bumping' will not be appropriate in all cases, and so it is always advisable to take legal advice before taking any steps.

The obligation on an employer to offer a redundant employee any suitable alternative jobs extends to offering vacancies within associated businesses, but does not extend to creating new positions. It is not enough to merely make an offer, sufficient information must be supplied to enable the employee to come to an informed decision. Further, the employer must offer such vacancies as the employee is prepared to consider, including even jobs of lower status. Special rules apply to employees on maternity leave, who have an automatic right to be offered any suitable vacancies.

An employer must consult with affected employees at every stage, especially during the selection process, and must give each employee every opportunity to put forward suggestions as to how redundancy can be avoided. All such suggestions must be given due consideration. Any failure to properly consult is likely to amount to unreasonableness on the part of the employer, and may result in an unfair dismissal.

Even where all the necessary steps have been correctly followed, an employer must still comply with the 'statutory dismissal procedure' before proceeding with the redundancy. Compliance is a legal requirement where employees have at least one year of continuous employment, but as a matter of good practice there should be compliance in all cases. The procedure is highly prescribed, and so it is always advisable to take legal advice to ensure compliance.

Special rules

Special rules apply where an employer is proposing to make 20 or more employees redundant over a period of 90 days or less, known as a 'collective redundancy' situation. Employers should beware of such situations, because the penalties for non-compliance are harsh. There are also special rules where the employer is insolvent. These special rules are outside the scope of this Article.

Employees with at least 2 years of continuous employment who are given a notice of redundancy have a right to take a reasonable amount of time off with pay to seek alternative employment or to arrange training for future employment.

Redundancy pay and notice

Redundant employees with at least 2 years of continuous employment are entitled to a 'statutory redundancy payment'. The amount is prescribed by law and should be tax exempt. Claims must generally be presented within 6 months of the date of dismissal. The

entitlement can not be avoided, except as part of a legally binding 'compromise agreement' or a conciliated 'settlement agreement'. However, the entitlement may be lost if an offer of suitable alternative employment has been unreasonably refused.

Employees may in addition be entitled to an enhanced redundancy payment. Provision for this will usually be found as an express term in the contract of employment, but may be implied through custom or practice. When dealing with this entitlement, employers should beware of the risk of age discrimination. Enhanced redundancy pay calculated according to age and length of service may be age discriminatory unless the calculations are based upon the statutory redundancy pay formula, with certain permitted adjustments. Given the risk, it is always advisable to take legal advice when dealing with enhanced redundancy payments.

In addition to statutory and enhanced redundancy payments, employees will also be entitled to a payment in lieu of any period of notice not worked.

How Sykes Anderson LLP can help

As the reader will note from the content of this Article, the subject of redundancy is complex and fraught with exposure for employers. However, provided employers comply with the various legal requirements and correctly follow the required procedures, the law will generally provide protection against claims for unfair dismissal. Sykes Anderson LLP has substantial experience of advising clients in this area of law, and can advise both employers and employees alike at every stage.

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