

Brachers Bitesize

Restructures and Redundancies

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Key Issues

Key Issue 1 – Collective vs Non Collective

- The Issue:
 - Extra Requirements for a Collective Process
 - Materially impacts on the process
 - Materially impacts on the timing and duration of consultation
 - Impacts on the financial and legal risk

Collective Redundancies

- The Law - Section 188 TULR(C)A 1992:
 - An employer
 - Proposes
 - **20 or more (longer time period for 100 or more)**
 - “Dismissals” / “Redundancies” - wider meaning
 - At one “establishment”
 - Within a period of 90 days

Collective Redundancies

- Key Points to note in counting:
 - One employer, not one group.
 - “Establishment” means the local business unit (at present).
 - For Section 188 purposes you count the proposed dismissals.
 - Not the number at risk
 - Not the likely net outcome taking into account any new roles or vacancies.

Example A

- Employer A has 30 Production Operatives.
- They are all employees.
- All work at Site A. All are employed by the same legal entity.
- The Employer is proposing to reduce this to 11 Production Operatives at Site A.
- It is proposing to create 5 new Supervisor roles at Site A which would suit some of these employees and it is confident will be filled from those otherwise made redundant.

Example A

- For collective redundancy purposes the Section 188 proposed dismissals number is 19.
- It is not 30 - the number of employees who would be at risk.
- It is not 14 – the net number of likely reduction in headcount taking into account the new roles being created.

Example B

- Employer A has 100 Production Operatives.
- They are all employees.
- All work at Site A. All are employed by the same legal entity.
- The Employer is proposing to reduce this to 79 Production Operatives at Site A.
- It is proposing to create 2 new Supervisor roles at Site A which would suit some of these employees and it is confident will be filled from those otherwise made redundant.

Example B

- For collective redundancy purposes the Section 188 proposed dismissals number is 21.
- It is not 100 - the number of employees who would be at risk.
- It is not 19 – the net number of likely reduction in headcount taking into account the new roles being created.

Key Tip

- Understand at an early stage:
 - The at risk population (how many, who, where etc.)
 - The S188/HR1 number
 - The likely net outcome number (redundancy costs)
 - Do the collective rules apply

Key Issue 2 – Is it a “redundancy”?

- The Issue:
 - Different concepts of “redundancy” apply for collective and non-collective.
 - Different legal rules apply to true “redundancy” dismissals than apply to other restructuring related dismissals e.g. changes to terms and conditions dismissals.
 - In the future, with the new Employment Bill, this distinction will become even more important.

Is it a redundancy? – ERA 1996

The Law - Section 139:

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, (*Business Closure*) or

(ii) to carry on that business in the place where the employee was so employed, (*Site Closure*) or

Is it a redundancy? ERA 1996

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.
(Reduced Need for Employees to do work or a particular kind)

Is it a redundancy? TULR(C)A 1992

The Law – Section 195 Construction of references to dismissal as redundant etc.

(1) In this Chapter references to dismissal as redundant are references to dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related.

(2) For the purposes of any proceedings under this Chapter, where an employee is or is proposed to be dismissed it shall be presumed, unless the contrary is proved, that he is or is proposed to be dismissed as redundant.

Example C

- Smith Ltd has 10 Call Handlers at Site A and none elsewhere.
- Smith Ltd proposes having only 5 jobs doing this particular kind of work at Site A and making 5 “redundancies”.
- Highly likely to be redundancies within Section 139 (and Section 162 Redundancy Payments) and Section 195 collective numbers.

Example D

- Smith Ltd has 10 Call Handlers at Site A employed on Terms and Conditions Type A and none elsewhere.
- Smith Ltd proposes having 10 jobs doing this kind of work at Site A on Terms and Conditions Type B. It does not have the contractual right to vary the terms.
- Would be proposed dismissals under Section 195.
- May not be redundancies within Section 139.
- But would fall within a potentially fair “some other substantial reason” dismissal SOSR “fire and rehire” territory. Currently “sound good business reasons” test but much harder soon

Example E

- Smith Ltd is proposing to reduce the number of Call Handlers it employs at Site A from 50 to 35.
- It is also proposing to change the shift patterns of a further 10 employees at Site A to accommodate the reduced workforce in an efficient manner.
- It accepts that it does not have the contractual right to make the shift changes and is therefore proposing to dismiss and re—engage if necessary.

Example E

- Section 188 Collective Rules would apply based on the wider redundancy definition $15 + 10 = 25$.
- You would have 15 “traditional” redundancies to consult on and 10 “SOSR” dismissals to consult on.
- Different case law tests of fairness will apply today.
- Different statutory tests and risks will apply once the new Employment Bill becomes law.
- Arguably only 15 would be due statutory redundancy payments as only 15 are redundant within the Employment Rights Act meaning.

Key Issue 3 – What is a fair process?

- The Issue – What are the key elements of a fair redundancy process:
 - Section 98 Employment Rights Act 1996:
 - S98(2) - Potentially Fair Reason – Redundancy/SOSR
 - S98(4) - Fair Process
- Fair Process required for unfair dismissal law regardless of collective or non collective.

Fairness – Section 98(4) ERA 1996

- The Law - Section 98(4)

The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Fairness – Case Law Principles

- Case Law under Section 98(4) has established that this effectively requires:
 - Fair Warning
 - Fair Consultation
 - Fair Selection
 - Reasonable efforts to seek alternative employment

Fair Warning

- Collective Rules have specific timescales – see below
- Non-Collective have no set timescales.
- Employers should provide employees and their representatives with as much notice as possible about impending redundancies. This allows those affected to seek alternative employment or solutions.
- Do not recommend less than 2 weeks (unless in severe financial difficulties) and normally 2 to 3 weeks for small simple processes.

Fair Consultation – When?

- Unfair Dismissal Law:
 - Consultation “at a formative stage” (proposals)
 - Before any final decisions are reached
- Collective Redundancy Law:
 - before the first of the dismissals takes effect (which means before notice of dismissal is issued).
- Timing is key.

Fair Consultation - For how long?

Collective:

- Section 188 TULR(C)A 1992 – “In good time”
- And not less than 30/45 days (100 or more proposed dismissals – 45)
- Before any dismissal “takes effect”
- Note time does not start until you have representatives in place (can add up to 2 weeks to put representatives in place in some cases)

Non-Collective:

- Fair warning and fair consultation – no prescribed period
- Commonly 2 to 3 weeks for simple processes but can be longer.

Fair Consultation - With who?

Collective:

- Section 188: the employer shall consult:
 - “Appropriate representatives” of
 - “Affected employees”

Non-collective:

- Nothing in statute.
- Case law indicates consultation should be with recognised trade unions (where they exist) and also with the individual employees.

Fair Consultation – How?

Collective:

- No prescribed method of consultation in terms of meetings, correspondence etc.
- Normally a mixture of collective meetings and individual meetings supplemented by Q&A's etc.

Non-collective:

- No prescribed method of consultation in terms of meetings, correspondence etc.
- Normally by individual meetings with the at risk employees. Normally at least 2 individual meetings or more where scoring applies.

Fair Consultation - About what?

Collective:

- TULR(C)A prescribes that the employer shall consult on ways of:
 - avoiding the dismissals,
 - reducing the numbers of employees to be dismissed, and
 - mitigating the consequences of the dismissals,and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.
- Including consulting on pools and selection criteria and enabling scoring to be challenged.

Fair Consultation - About what?

Non Collective:

- Whilst not prescribed in statute we would recommend the same issues i.e. ways of:
 - avoiding the dismissals,
 - reducing the numbers of employees to be dismissed, and
 - mitigating the consequences of the dismissals,and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.
- Including consulting on pools and selection criteria and enabling scoring to be challenged.

Government Notification

Collective:

- Separate requirement to notify the government using form HR1
- Criminal offence to fail to do so
- Technically an unlimited fine

Non-Collective:

- None

Fair Selection – “Pools”

- Unfair Dismissal Law:
 - A reasonable choice of pool within a band of reasonable pools open to a reasonable employer.
 - Normally those doing the same or similar work.
 - Location based pools can be fair or unfair.
- Bumping
- Choice of pool is a key design element to any process.

Fair Selection - Other Points

- Bumping:
 - What is it?
 - Should you use it?
- Volunteers:
 - Do you have to seek them?
 - Do you have to accept them?
 - Pros and Cons?

Fair Selection - Selection Criteria

- Unfair Dismissal Law:
 - Must be fair and be applied fairly and transparently
 - Objective criteria vs subjective criteria
 - Pools of 1 (or where no selection criteria apply beyond the pool)
- Devising Scoring criteria is always one of the most time consuming and tricky elements. Do not underestimate.

Fair Selection - Selection Criteria

- Selection Criteria – Considerations:
 - Is it objectively measurable or is it based on an assessment?
 - Is it appropriate for the role?
 - Is it appropriate for the role as needed in the future?
 - At what point in time is it being assessed?
 - Who can fairly assess it?

Fair Selection - Selection Criteria

- Selection Criteria – Considerations:
 - Can you define it clearly so that an employee can see what they are being scored against and the scorer can clearly understand what they are scoring?
 - Weighting?
 - Tie Breakers?

Fair Selection - Selection Criteria

- Selection Criteria – Considerations:
 - Problem areas:
 - Disabilities
 - Absence records
 - Unreliable data
 - Scorers also at risk

Fair Selection - Selection Criteria

- Selection Criteria – Key Tips:
 - Keep it simple
 - Focus on a few key skills/abilities
 - Score on a recognisable scale i.e. 1 to 10
 - Design to avoid low scores where possible
 - Design to create sufficient gaps i.e. 3, 5, 7, 10 rather than 1,2,3.
 - Use weightings to enhance key requirements.

Fair Selection – Key Tip

- Map it out.
- Organograms may help on any complex or multi-pool process.

Step 1 - Consider whether the current structure charts you have actually reflect the current structure.

Step 2 - Map the as is – include elements such as Part Time/Full Time and salary as job titles do not always indicate all

Step 3 - Map the as proposed to be.

Step 4 - Consider and map out how you will get from A to B including the proposed pools, job reporting/team changes/job title changes etc.

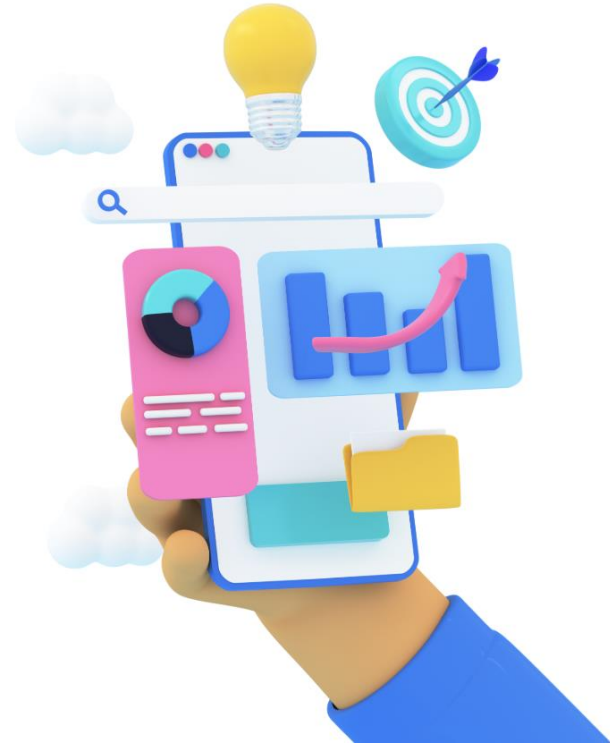
Key Tip - Planning

- Invest in planning
- Plan well, the process is smoother, implementation outcomes are better, people impact is better.
- Launch without proper planning outcomes are poorer all round
- Consider:
 - Total number “at risk” – scale of the process – timetable
 - Total number of selection pools – scale – scoring – criteria development

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