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How to handle organisation change in the context of COVID-19

As the lockdown restrictions ease and employers slowly return to more normal ways of working, it is unfortunately inevitable that the impact of the coronavirus means some businesses will have to implement restructures and redundancies in order to survive.

This article looks at the key employment law provisions in restructuring/redundancy situations and offers practical guidance for managing these challenging processes.

Restructures and reorganisations

There is no definition in employment legislation of 'restructuring' or 'reorganisation', and these terms consequently cover a myriad of steps that could be taken by businesses to change current working arrangements and/or terms and conditions of employment to make their operation more efficient and financially viable. For example, changing business structures or altering duties.

Depending on the nature of the restructuring legal provisions may apply, which will shape the process that should be followed to reduce the risk of challenges/complaints/claims by affected employees as detailed below:

Redundancies

The definition of redundancy is set out at s.139 of the Employment Rights Act 1996. In summary, this covers the following situations:

- A business closure
- A workplace closure
- A reduced need for employees to do work of a particular kind

Redundancy is a potentially fair reason for dismissal but employers must follow an appropriate process in order to minimise the risk of claims for unfair dismissal and/or to enable them to respond to and defend such claims robustly. There may also be, depending upon the number of redundancies proposed, a need to undertake a collective consultation process (see redundancy process section below).

It should be noted that a business restructure could require collective consultation too.

Legal issues/requirements

It is likely that a restructuring, which does not involve reducing headcount, will necessitate changing the terms and conditions of employment of affected staff.

Changing terms and conditions

In circumstances where an employer proposes to change material terms of an employment contract (i.e. pay/benefits/hours/duties) it will ordinarily be necessary to obtain the affected employee's agreement (ideally in writing to avoid disputes down the line) to effect the change successfully.

While the contract may contain a variation clause or flexibility wording, it is unlikely these could be relied upon to make material amendments. Significant changes to key contractual provisions need the agreement of the employee in order to be binding.

If the organisation recognises a trade union for collective bargaining purposes, it may be necessary to agree the change with the TU (which agreement may then be binding on employees for whom the TU is recognised).

In circumstances where the employee does not agree to proposed changes, an employer could:

- impose the change and rely on the employee's conduct thereafter to demonstrate their agreement. However, this route would expose an employer to the risk of challenge and, in a worst case scenario, a claim for constructive unfair dismissal; or
- terminate the existing employment contract and offer re-employment on the new terms (dismiss and re-engage – see collective consultation section below). However, terminating an employment contract creates the risk of a claim for unfair dismissal (and other claims).

The options available where agreement to contract change is not achieved are risky and likely to impact negatively on employee relations and give rise to challenge, so should be approached with caution.

Redundancy process

Where an employer is proposing to make redundancies, careful planning is necessary to ensure the fairness of the process given the risk of unfair dismissal claims and, if applicable, a collective consultation process is followed to mitigate against protective award claims.

Collective consultation

Where it is proposed (i.e. a definite plan likely to result in dismissals), that 20 or more employees in one establishment may be dismissed on the grounds of redundancy within a 90-day period, a collective consultation must be carried out. In such circumstances, an employer is required to notify the secretary of state for BEIS of the proposed redundancies by completing a HR1 form.The collective consultation should:

- Be conducted via appropriate representatives (i.e. TU or established or elected) for 30 days (note the consultation can conclude before the end of the 30-day period, but no dismissal should take effect before then)
- Provide the representatives with prescribed written information, specifically:
    - the reasons for the proposed dismissals;
    - the numbers and descriptions of employees proposed to be dismissed;
    - the total number of such employees employed at the establishment;
    - the proposed method of selecting employees who may be dismissed;
    - the proposed method of carrying out the dismissals;
    - the proposed method of calculating the amount of any redundancy payments; and
    - 'suitable information' about the use of agency workers.
- Be undertaken with a view to reaching agreement with representatives on ways of:
    - avoiding dismissals;
    - reducing the number of dismissals; and
    - mitigating the consequences of the dismissals.

A failure to conduct a collective consultation process or to do so properly can give rise to protective award claims. The compensation that can be awarded for such claims is up to 90 days' (uncapped) pay per affected employee.

While there is a 'special circumstances' defence that employers can rely on where it was not reasonably practicable to undertake the collective consultation process, case law makes it clear that it is difficult to rely on this defence, particularly where no or minimal consultation has been undertaken. The unusual and challenging circumstances of the COVID-19

pandemic is unlikely, in and of itself, to create a special circumstances defence situation.

Fair redundancy process

All redundancy processes (i.e. regardless of size) should include the following elements in order to allow employers to demonstrate that the process was fair, reasonable and equitable, and consequently to reduce the risk of unfair dismissal claims:

- A fair basis for selecting potentially redundant posts
- Consultation directly with each 'at-risk' employee (this individual consultation is in addition to any collective consultation)
- Identification of suitable alternative employment (if available SAE should be offered)

It is worth bearing in mind that the unique circumstances created by the COVID-19 pandemic could present alternative solutions to redundancies. For example, some staff may be amenable to extended periods of unpaid leave at this time on account of being clinically (extremely) vulnerable or due to caring responsibilities, which could provide at least a short-term reprieve from redundancy.

The impact of furlough on redundancy

The Coronavirus Job Retention Scheme (CJRS) enabling employers to furlough staff and receive compensation from the government for salary/associated costs has been subject to recent significant amendment.

The fact that an employer has furloughed staff does not prevent those staff being dismissed on the grounds of redundancy. However, the existence of the CJRS until 31 October 2020 means that employees could challenge the need for redundancies prior to the CJRS ending. The strength of such assertions will diminish from August 2020, at which time employers are required to contribute to the costs of furlough on a gradually increasing basis.

An ET would assess the fairness of a redundancy by looking at all of the relevant circumstances, so the availability of the CJRS will not make redundancies unfair.

Practical issues

If an employer proposes redundancies in relation to roles held by furloughed staff, a number of practical issues arise that need to be addressed before the process starts.

Furloughed staff are absent from the workplace and therefore the usual means of consultation (in person meetings) are less likely to be available. Employers will have to think carefully about how they can consult meaningfully in line with their legal obligations with a remote workforce.

The guidance issued in relation to CJRS states that employee representatives can undertake, while furloughed, duties for the purposes of representing employees. Further, staff participating in a redundancy consultation process will not be providing services/generating income for their employer. Accordingly, it is permissible to consult with furloughed staff (their representatives) about potential redundancies. However, the way in which the consultation is conducted will need to take account of, among other things, the following practical matters:

- whether there is an established means of communicating with staff who are absent from the organisation, meaning they can be reasonably expected to see important communications and, if not, how such communication channels can be established;
- the best way to convey information, which will involve consideration of what equipment/technology staff have access to;
- whether a hybrid approach is required with some meetings conducted simultaneously in person and remotely and, if so, the need for social distancing/other steps to reduce risk such as via the use of protective equipment;

- how to maintain confidentiality generally/when using online communication platforms;
- the appropriate time frame to take account of the above and any collective consultation obligations; and
- acknowledge that the process may be even more stressful than normal given the unusual circumstances and available support highlighted from the outset.

Conclusion

These are difficult unprecedented times and while it is understood that employers may feel under pressure, especially with increasingly bleak predictions about the state of the UK's economy, to take decisive action to preserve their businesses, it is crucial that employers plan carefully to minimise the risks of impairing employee relations, reputational damage and litigation.

Redundancies are never easy but processes conducted sensitively, with effective communications and meaningful consultations that take account of the unique circumstances of the pandemic, will be key to reducing the risk of claims and increasing an employer's ability to defend them successfully.

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