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HANDLING REDUNDANCIES

A GUIDE FOR UNION REPS

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RETURN TO CONTENTS ▲

CONTENTS

1 WHAT IS REDUNDANCY? 05

2 COLLECTIVE REDUNDANCY CONSULTATION 09

3 INDIVIDUAL REDUNDANCY CONSULTATION AND SELECTION 18

4 REDUNDANCY DISMISSAL NOTICES 24

5 REDUNDANCY PAY, NOTICE AND HOLIDAY 25

6 REDUNDANCY AND INSOLVENCY 30

7 APPRENTICES 33

8 CHALLENGING REDUNDANCY DISMISSALS 34

9 MOVING FORWARD 35

10 USEFUL RESOURCES 39

INTRODUCTION

This TUC guide to redundancy is written against the backdrop of the coronavirus (Covid-19) public health emergency, but the information and guidance in it is designed to support union reps for the long haul.

Thousands of jobs, including apprenticeships, are already being lost to redundancy across the UK as a result of the pandemic. Jobs in manufacturing, aviation, oil and gas, hospitality, leisure, entertainment and retail are among those under immediate threat but jobs could be at risk in just about every sector of the economy.

The law requires employers to consult properly and act fairly and without discrimination whenever they make staff redundant. This is the case no matter how urgent or dire the economic challenges they are facing. Bad employers that break the law can be made to face legal penalties.

We've put together this guide to help you support members at every stage of the redundancy process, including helping them access the knowledge, training and skills they need to move forward afterwards.

The guide is not legal advice. While we have tried to be as accurate as possible, we cannot take responsibility for any loss arising from use of the information included. Reps should always seek prompt legal advice from their trade unions when required, as employment tribunal deadlines are very short.

The information in this guide is also subject to changes in government support schemes. Reps can refer to www.gov.uk for the latest detail on these.

RETURN TO CONTENTS ▲

SECTION ONE

WHAT IS REDUNDANCY?

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Redundancy dismissals happen when an employee loses their job through no fault of their own.

The word 'redundancy' has two different legal meanings. The first is used for individual redundancy rights: to a fair dismissal; to access suitable alternative job opportunities; to time off to look for work; and to a redundancy payment when redundancy cannot be avoided. The second meaning, used in the specific context of collective redundancy consultation, is explained in section 2.

INDIVIDUAL REDUNDANCIES

A worker can be made redundant if the reason for their dismissal is that the employer needs fewer employees to do a particular kind of work, or to work in a particular location. This technical definition of redundancy is found in section 139 of the Employment Rights Act 1996 (ERA). Tribunal judges call this a 'genuine redundancy situation' and, for those who qualify, it will trigger the right to a redundancy payment.

Here are some examples of genuine redundancy situations:

- economic pressures have forced an employer to close some retail outlets and jobs are lost
- an employer relocates to a new site
- an employer introduces more efficient technology, removing the need for some jobs and creating new ones
- a large order is lost, leading to a fall in work
- one business buys another, leading to duplication of roles in the new business.

There can be a redundancy dismissal even if your job still exists but has been given to another employee whose own job was eliminated as long as, overall, the employer needs fewer employees.

RETURN TO CONTENTS ▲

What if the employer wants major changes to job roles?

Sometimes a very significant change to job roles – where the new job is something completely different from the old one – can be a redundancy situation.

However, members in this position should check with their union as the legal position is rarely straightforward. For example, the employer may disagree as to the extent of the job changes. Or they may argue that the members' employment contracts allow the employer to insist on making the changes they want, so that the members are not being dismissed for redundancy at all but, instead, for refusing to obey the employer's 'reasonable' order. Even if the two jobs are very different, the new job may be 'suitable alternative employment' meaning, again, no redundancy pay.

When representing members in this situation, it is important to remember that job role changes must not breach members' rights not to suffer discrimination under the Equality Act 2010. And reasonable adjustments must be made for any member with a disability.

Job role changes should never be made without proper consultation. Any employer that behaves in this way risks destroying trust. If there is a recognised union, consultation should be with the union.

If 20 or more employees are affected, collective consultation is a legal requirement. Otherwise, the employer risks being forced to pay a financial penalty (protective award).

See section 2 on collective redundancy consultation for more information.

What if the employer wants a cut in pay and hours?

Instead of making members redundant, the employer may demand cuts to hours and pay, leaving members doing the same job, but for fewer hours and less pay. Sometimes they will offer a choice: either take a cut in hours and pay or take redundancy.

When wages are cut to below half a normal week's pay, this is known in law as 'short-time working'. If this state of affairs lasts for longer than four weeks in a row, or for more than six non-consecutive weeks, spread over a 13-week period, any

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"Job role changes should never be made without proper consultation. Any employer that behaves in this way risks destroying trust"

employee who has worked for more than two years may be able to claim a redundancy payment from their employer. Strict rules must be followed, which can be found in ERA sections 148–154. You can find out more about them in the TUC's work rights portal, WorkSmart. Check with an officer in your union if you, or the members you represent, are in this situation and are unsure what to do.

The legal situation is more complicated when cuts to hours are not severe enough to amount to short-time working. Here, the employer is likely to argue that members have not been made redundant since their job still exists, even though their hours and pay have been cut. The legal position is even less straightforward if members' employment contracts include a contract term which implies that the employer may cut hours and pay without their agreement.

RETURN TO CONTENTS ▲

Temporary cuts to pay and hours can be a way of avoiding redundancies, but they should always be by agreement. A collective response is likely to be best in this situation: see the next section for more information.

Cutting pay unilaterally may also give rise to wage claims (unlawful deduction of wages) in the employment tribunal. Tribunal deadlines are very short, so do not delay asking for advice from your union if needed.

WHO HAS REDUNDANCY RIGHTS?

Only 'employees' have redundancy rights. This includes employees on a fixed-term or part-time employment contract and apprentices. Neither 'workers' nor the genuinely self-employed have redundancy rights.

Temporary agency workers don't have redundancy rights – unless they are direct employees of the employment agency or business they work for.

Employees who are dismissed for redundancy after working for two full years are entitled to a statutory redundancy payment. They will lose this right if they unreasonably refuse an offer of suitable alternative employment. There is a short trial period (four calendar weeks) to try out the alternative role. Staying in the new role beyond the trial period is likely to mean the statutory redundancy payment is lost. These rules are explained in more detail later in this guide.

Who is an employee?

An 'employee' is anyone with an employment contract. It doesn't have to be written down, although it usually will be.

Whether or not someone is an employee, a worker or self-employed is decided by applying complicated 'employment status' laws. All too often, bad employers use these laws to avoid basic employment rights, including the redundancy rights described in this guide. The TUC campaigns for all workers, including agency workers, zero-hours contract workers and casual workers, to be entitled to the same floor of rights currently enjoyed by employees.

Fixed-term employees

The expiry and non-renewal of a fixed-term contract because the employer needs fewer employees to do a particular kind of work or in a particular location will be a redundancy dismissal. Typical examples are where a post has lost its funding, a project has ended, or a course has been cut.

Qualifying fixed-term employees whose contracts are not renewed must be paid a redundancy payment.

Fixed-term employees have some important extra rights under the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002:

- It is against the law to select an employee for redundancy because they have a fixed-term contract.
- Fixed-term employees at risk of redundancy must be treated equally to permanent employees at the same employer. This applies to all aspects of the redundancy process, including redundancy pay, selection, redeployment, and retraining opportunities.

Fixed-term employees cannot contract out of these rights. Any contract term waiving redundancy rights will be void.

RETURN TO CONTENTS ▲

There may also be indirect sex discrimination if fixed-term employees are prioritised for redundancy in workplaces where more women than men have fixed-term contracts.

Voluntary redundancies

Inviting voluntary redundancies is one obvious way of cutting down on compulsory redundancies. But employers are not obliged to ask for volunteers, and a compulsory redundancy dismissal will not be unfair just because there were willing volunteers and the employer did not approach them.

In practice, once a member has accepted voluntary redundancy, it will be difficult to challenge the loss of their job in an employment tribunal, so it is important to be certain the terms are satisfactory. Voluntary redundancy terms are often better than compulsory redundancy, but there is no law that states they must always be better.

Members should check that accepting voluntary redundancy does not invalidate any income protection policies they hold against debts such as loans, a mortgage or credit cards.

Any redundancy payment will be taken into consideration when working out eligibility for income-based state benefits.

Employers should consult over voluntary redundancy procedures, which must be fair and non-discriminatory. And they should give employees clear written information about the terms on offer, whether employees will be required to sign a settlement agreement (see later) and the criteria to be applied when deciding who to accept for voluntary redundancy.

RELOCATION REDUNDANCIES

A relocation redundancy is where the employer relocates and no longer wants employees to work in the 'place where they are employed' (ERA section 139).

There are legal pitfalls when representing members in a relocation redundancy. In a complicated relocation redundancy, you should ask for advice from a union official.

Pay close attention to members' written contract terms. They may contain a mobility or relocation clause: this allows the employer to insist that employees move to a new location. The employer may be able to rely on this kind of contract term to avoid making redundancy payments.

In addition, the job in the new location may be 'suitable alternative employment', meaning that turning it down is likely to jeopardise any redundancy payment (see **Alternative Jobs**).

Mobility clauses can lead to equality concerns. There may be indirect sex discrimination, since women are more likely to be second earners. Where employees are disabled, employers must make reasonable adjustments, for example, allowing the employee to work permanently from home, or agreeing to more flexibility in their travel arrangements and working hours.

As regards bargaining over the terms of relocation redundancies, there is no legal right to extra pay or expenses to compensate for the costs of relocation, unless the employment contract says so. If employees are required to relocate permanently to homeworking, the employer should at least fund the reasonable costs of equipment necessary for their health and safety, or any equipment or other requirement (such as a laptop, or extra broadband width) they need to do their job.

Any reasonable adjustments for a disabled employee must be funded by the employer. (There may be help via the government's **Access to Work** scheme for adjustments that it is not reasonable to expect the employer to pay for).

RETURN TO CONTENTS ▲

SECTION TWO

COLLECTIVE REDUNDANCY CONSULTATION

WHAT THE LAW SAYS

All employers must consult collectively if they propose to carry out 20 or more redundancy dismissals at one establishment over a 90-day period. Where a union is recognised, collective consultation must be with the union. An employer that fails to consult can be taken to an employment tribunal and forced to pay a financial penalty, called a 'protective award'.

These collective consultation rights are found in Chapter II (section 188 onwards) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). They are based on European Union law — the Collective Redundancies Directive.

When it comes to collective consultation, a redundancy dismissal is any "dismissal for a reason not related to the individual concerned". This is wider than the definition used to claim unfair redundancy dismissal and a redundancy payment, as explained at the start of this guide. The key difference is that collective consultation obligations can be triggered even if there is no reduction in the number of employees.

The duty to consult collectively is always owed by the employer, even if it is a subsidiary and all strategic decisions on redundancies are taken by head office.

Even if fewer than 20 employees are at risk of redundancy, the employer must still consult individually with those whose jobs are at risk (see section 3 on individual consultation and selection). Otherwise, the resulting redundancy dismissals may be unfair (see section 8, Challenging Redundancy Dismissals).

TWENTY OR MORE PROPOSED REDUNDANCY DISMISSALS

The legal obligation to consult collectively is triggered if an employer proposes to dismiss 20 or more employees (including apprentices) at one establishment over a 90-day period. It makes no difference if the employer plans to redeploy some (or even all) of the affected employees to other jobs so that eventually fewer than 20 will end up being made redundant. This is because the whole point of collective consultation is for unions and employers to work together from the start of the consultation period to try to find ways to avoid compulsory redundancies or mitigate their effects, such as through redeployment in-house.

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> **"The whole point of collective consultation is for unions and employers to work together from the start of the consultation period"**

For the same reason, all voluntary redundancies within the 90-day period must be counted.

Ending of fixed-term contracts

Dismissals that result from the expiry and non-renewal of fixed-term contracts are not counted when calculating whether 20 or more redundancy dismissals are proposed in a 90-day period. An exception is if the employer proposes to end a fixed-term contract before its expiry date for a reason unrelated to the individual employee.

For example, an employer's decision to end a fixed-term contract mid-way through the fixed term because course funds are cut will count as a proposed redundancy dismissal for the purpose of

RETURN TO CONTENTS ▲

> **The 'affected employees' who are entitled to be consulted include not only those at risk of losing their job but also any employee who may be affected indirectly**

the 20-employee threshold, whereas not renewing the same fixed-term contract when it expires because course funds are cut will not count.

It is important to note that this way of counting fixed-term employment contracts for the purpose of collective redundancy obligations is completely separate from the legal rights of fixed-term employees not to be unfairly dismissed or treated less favourably than their permanent colleagues in the redundancy process, as explained above. The expiry at the end of its term and non-renewal of a fixed-term contract is a dismissal and can trigger redundancy rights. Fixed-term employees have these rights no matter how many are at risk of redundancy. Speak to a union official if you are not sure about this.

'Dismissal and re-engagement'

The practice of giving employees notice to end their employment contracts while at the same time issuing new, worse contract terms (so-called 'dismissal and re-engagement') has become an unwelcome feature of the industrial landscape. It is often described as the 'nuclear option' because this sort of management behaviour always destroys trust.

Any proposal to end the employment contracts of 20 or more employees and to re-engage them on new contract terms will always trigger the legal duty to consult collectively with a recognised union under TULRCA section 188. The union must be consulted even if most of the employees decide to accept the new conditions, otherwise, the employer can be pursued in the tribunal for a protective award.

WHO MUST THE EMPLOYER CONSULT WITH?

Consultation must be with the 'appropriate representatives' of all employees who are affected by the proposed redundancies, or by measures taken in connection with the redundancy proposals.

Where an employer recognises an independent trade union, the appropriate representatives are the union reps from that union. This is regardless of whether those at risk of redundancy are union members.

If there is no recognised union, the appropriate representatives can be either:

- an existing representative body, such as a staff association; or
- employee representatives who are elected for a specific redundancy consultation exercise.

The 'affected employees' who are entitled to be consulted include not only those at risk of losing their job but also any employee who may be affected indirectly. For example, if an employer decides to cut an administrative team, this could indirectly affect a sales team that may have to take on some of the administrative function. A failure to consult with all affected employees can lead to a protective award.

Consulting a standing body

An employer can consult collectively over redundancies with an existing representative body (such as a staff association) only if it:

- was elected or appointed for information and consultation purposes
- has been authorised by all the affected employees to act on their behalf in all aspects of the redundancy consultation, and
- has genuine legal power under its constitution to negotiate on behalf of affected employees (and not just to listen passively and report back).

RETURN TO CONTENTS ▲

THE EMPLOYER'S DUTY TO PROVIDE INFORMATION

The employer must provide reps with the following statutory information in writing:

- reason(s) for the redundancies
- number and descriptions of employees proposed to be made redundant
- total number of employees of any description
- proposed selection procedure
- proposed method for carrying out redundancy dismissals, including timescale
- proposals for calculating redundancy pay if it is to exceed the statutory minimum
- the number of temporary agency workers working for the employer
- where those agency workers are working
- what types of work they are carrying out.

Consultation must not be delayed because the employer does not have all the statutory information. Any outstanding information must be passed to reps as soon as it is available.

"Where no independent union is recognised and there is no suitable standing representative body, the employer must carry out elections for employee representatives"

If challenged, it is the employer's legal responsibility to prove that an existing staff association is authorised by all affected employees to represent them and has the legal power and independence from management to be able to negotiate on their behalf. Otherwise, the employer risks a financial penalty (protective award) for failing in its duty to consult collectively.

Electing representatives

Where no independent union is recognised and there is no suitable standing representative body, the employer must carry out elections for employee representatives.

Any employee whose job is affected by the redundancy proposals can put themselves forward for election. A union member whose own job is affected can put themselves forward and ask for practical support from their union.

Affected employees must be invited to elect employee representatives "long enough before the time when the consultation is required". All must get a proper chance to vote: this includes anyone who is absent, for example if they are off sick or on maternity, adoption or shared parental leave. Disruption caused by the coronavirus pandemic – for example, due to the need for social distancing, or because staff are furloughed, shielding, off sick, self-isolating or working from home – is no excuse for not carrying out a fair election that follows the rules. An employer that fails to organise a fair election risks being ordered to pay a financial penalty (protective award).

The rules require the employer to:

- arrange for a fair election with voting in secret and a fair process for counting the votes, and
- decide how many representatives are needed (enough reps must be chosen to represent all the affected groups of employees) and their term of office.

Employers can opt to run a digital election, as long as it is sufficiently confidential and secure and votes can be accurately counted. For large-scale redundancies, some employers may decide to use an external election services provider.

Employee representatives and candidates for election are protected from unfair dismissal and detrimental treatment for taking on the role.

RETURN TO CONTENTS ▲

EMBEDDING EQUALITY IN REDUNDANCY CONSULTATION

Employers should always put equality at the centre of their redundancy decision-making process. This is especially important during the Covid-19 pandemic. There is plenty of evidence that Covid-19 does not impact on everyone equally, both in terms of the disease itself and its economic impact. Reps can help ensure equality concerns are recognised and properly addressed. The best way, for all employers, is through a structured equality impact assessment (EIA) of the redundancy proposals, sharing the results with reps. EIAs do not have to be onerous or complicated.

Public sector employers (and private and voluntary sector employers delivering public services) must be able to show that when making redundancies they complied with their public sector equality duty to have due regard to the need to promote equality and eliminate discrimination, which they can do by carrying out an EIA. In Scotland and Wales, EIAs are a legal requirement for these employers.

WHEN MUST COLLECTIVE CONSULTATION BEGIN?

Employers must begin consulting collectively 'in good time'. The law says that as a minimum:

- for proposals to dismiss as redundant 100 or more employees over a period of 90 days or less, consultation must begin at least 45 days before the first redundancy dismissal takes effect
- for proposals to dismiss as redundant 20 or more employees but fewer than 100 over a period of 90 days or less, consultation must begin at least 30 days before the first redundancy dismissal takes effect.

These are minimum consultation periods. Sometimes more time will be needed.

Redundancy dismissal notices must not be issued until collective consultation is completed.

The employer's legal duty to consult with reps is triggered as soon as the employer has put together proposals that, if implemented, would lead to 20 or more redundancy dismissals at one establishment.

Consultation must not be limited to how to carry out job cuts the employer has already decided on. Rather, unions should be consulted over whether the redundancies are needed at all. This includes the economic case and practical alternatives. Otherwise, the employer will have failed in its duty to consult over ways of avoiding redundancies.

Consultation must begin while proposals are still at a formative stage. Reps must be given a genuine opportunity to influence the outcome, respond and make counter-suggestions that must, in turn, be consulted over.

Consultation must be meaningful and "with a view to reaching agreement" (TULRCA section 188(2)). Meaningful consultation means properly exploring all reasonable ideas suggested by reps to avoid redundancies, reduce their number, or mitigate their effects. And it means not imposing pre-conditions to consultation, trying to limit its scope, or cutting it short. Otherwise, the employer risks being ordered to pay a protective award.

CONSULTATION TOPICS

The employer's legal duty under TULRCA section 188 is to consult collectively in good time about ways to:

- avoid dismissals
- reduce the number of dismissals
- mitigate their consequences.

There must be proper consultation on all three of these statutory headings, or else the employer risks being made to pay a protective award. If employee representatives do not raise them, then the employer must.

Consultation over ways to avoid or reduce redundancies

Some potential ways of avoiding redundancy dismissals or reducing their number include:

RETURN TO CONTENTS ▲

- finding other savings
- cuts to management pay and bonuses, so that the pain of cuts falls on those who have done well out of good times and are in the best position to afford it
- cuts to shareholder dividends
- asking for volunteers
- using the government's coronavirus Job Retention Scheme (JRS) while it remains available
- recruitment freezes
- reducing use of agency staff
- temporary cuts to overtime or discretionary benefits
- short-term salary freezes
- temporary pay cuts (with an agreed review/end date)
- sabbaticals or secondments
- unpaid leave
- temporary flexible working, more part-time working, and job shares
- homeworking to reduce overheads
- retraining
- redeployment with the employer, or an associated employer.

The government's furlough scheme will end on 31 October 2020. There will be a one-off payment of £1,000 to employers for every furloughed employee earning on average at least £520 a month (the lower earnings limit) who stays in their job until the end of January 2021.

CHECKLIST: NEGOTIATING A FAIR REDUNDANCY SELECTION PROCESS DURING COVID-19

Here are some specific issues of concern for reps:

- Will redundancy consultation meetings take place remotely or face to face?
- What material will employees get in advance of their meeting so they can prepare? How long in advance? What form will it take?
- If meetings are to take place remotely:
  - Do all affected employees have access to suitable IT equipment (and broadband), which they are able to use?
  - What steps will be taken to ensure the process is secure and confidential?
  - What about members whose first language is not English?
  - What arrangements will be made for employees to be fairly represented by their chosen rep and to confer in private?
  - What will a virtual appeal look like?
  - What adjustments will be made for disabled employees?
- If meetings take place in person, what arrangements will be made to ensure safe travel and social distancing and for members to be fairly represented by their chosen rep?

RETURN TO CONTENTS ▲

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In any negotiation to avoid redundancies that involve cuts to pay and conditions to keep the business afloat, it is very important to agree clearly and in writing that, if redundancies cannot be avoided, redundancy pay and notice pay will be based on normal (100 per cent) wages. Otherwise, members risk ending up with smaller redundancy payments than they might have expected.

And if pay and hours are cut to try to save jobs, the employer must agree to a corresponding reduction in workload for those affected.

While the JRS remains available, employers should consider furloughing employees instead of making them redundant, since the purpose of the JRS is to support employers in holding onto staff and avoiding redundancies.

As this guide was about to be published, the government announced a new Job Support Scheme. Initial information on the scheme can be found here. It opens on 1 November 2020, with further government guidance to follow, so reps will want to keep informed on what support this can offer in protecting jobs, too.

Consultation over redundancy selection method

If compulsory redundancies are unavoidable, collective consultation will be needed over the redundancy selection process. Potential topics include:

- the selection pool (this is the group of employees at risk of redundancy)
- selection criteria
- the selection method
- the appeal process
- equality-proofing, including reasonable adjustments for disabled employees
- making sure the selection process is both safe and fair during the coronavirus pandemic (this may involve negotiating temporary changes to an existing redundancy procedure).

An existing redundancy procedure may already cover some of the above topics.

Consultation over mitigating effects of redundancies

Under TULRCA section 188, **the employer is legally obliged to consult on how to mitigate the effects of collective redundancies**. Potential topics include:

- redundancy pay, including any enhanced redundancy payments
- arrangements for notice or notice pay and unused holiday or holiday pay
- the use of settlement agreements, including practical arrangements and the employer's contribution to the cost of taking legal advice
- support for training, career planning, job searching, cv writing
- the role of union learning reps
- paid time off for training and looking for work
- support or signposting to help employees access information about managing personal finances, accessing state benefits and pensions
- specific support for apprentices.

TUPE and collective consultation

TUPE stands for the Transfer of Undertakings (Protection of Employment) Regulations 2006. These protect people when their employer changes, such as when a company is taken over or a public service is contracted out.

In 2014, the law changed to allow collective redundancy consultation to start in some situations before a transfer has taken place under the Transfer of Undertaking Protection of Employment Regulations 2006 (TUPE) and for that consultation to count towards the 30/45 minimum consultation period required by TULRCA section 188.

RETURN TO CONTENTS ▲

CHECKLIST: REPRESENTING MEMBERS – COVID CHALLENGES

There are practical barriers to be overcome for reps to carry out their representative role safely and effectively while Covid-19 remains a public health emergency.

Here are some specific issues to consider with your employer:

- What arrangements will be made to provide suitable secure IT equipment and training (including data protection training) for all reps, so they can be sent confidential documentation by their employer and keep it secure?
- Agree secure, confidential arrangements for online meetings with management, with confidential break-out rooms.
- What IT support will be provided to reps?
- What arrangements will be made to enable union reps to access all affected employees, including those on furlough? What contact information will be provided? (The union will only have contact details for its own members)
- What confidential and secure facilities will be put in place to enable reps to communicate with affected employees about the proposed redundancies:
  - If meetings are to be face to face, how will they take place safely? And what arrangements will be made for employees who cannot attend for public health reasons?
  - If briefings are to be online, what arrangements will be made for employees without access to secure IT? What about reasonable adjustments for disabled employees or those whose first language is not English?

Unions opposed this development, which brings no benefit whatsoever to employees facing redundancy and is simply aimed at minimising consultation and reducing the employer's wage bill. Take advice from an officer of your union if you and your members find yourselves in this situation.

WHEN DOES COLLECTIVE CONSULTATION END?

Collective consultation ends either because the parties reach agreement on all relevant issues or because agreement proves impossible. In its guide *Handling Large-Scale Redundancies* employment conciliation service Acas says that "as long as there has been genuine consultation with a view to reaching agreement, an employer can end the consultation". This should be done, adds Acas, only "when the employer can demonstrate that they have listened and responded to the views and suggestions raised". In other words, collective consultation should not end just because 30/45 days have expired. If genuine issues remain outstanding, it must continue.

As well as collective consultation, there must be individual consultation with all employees at risk of redundancy. This is looked at in section 3 on individual consultation.

RIGHTS OF REPS IN A COLLECTIVE REDUNDANCY EXERCISE

The employer must allow reps access to affected employees and "such accommodation and other facilities as may be appropriate" (TULRCA section 188(5A)).

Union reps are entitled to reasonable time off for certified training in their representative role. There is an Acas Code of Practice, *Time Off for Trade Union Duties and Activities*.

Employees are entitled to legal protection if they are victimised or dismissed for acting as reps in a collective redundancy exercise.

RETURN TO CONTENTS ▲

Her Majesty's Revenue and Customs (HMRC) has confirmed that employees can act as representatives in a collective redundancy consultation exercise, and union reps can carry out their normal union duties, even if they are furloughed on the coronavirus Job Retention Scheme.

Confidentiality and data protection

To consult meaningfully with reps, your employer will probably need to share confidential and sensitive information about the business throughout the redundancy consultation process. It is very important to follow your employer's instructions on maintaining confidentiality and keeping data secure.

It is your employer's responsibility to train you properly and to provide secure IT facilities and IT back-up support if you are working from home when carrying out your rep role. However, it is sensible to take some practical steps of your own to make sure your working methods and systems at home are secure.

A breach of confidence by a union rep in a redundancy consultation exercise can have serious disciplinary consequences, including dismissal.

You must also keep safe and secure the private information of union members that you hold while acting as a union rep. Have a look at the useful practical guidance from the Information Commissioner on data protection and working from home, as well as your own union's resources on taking care of personal data.

FAILURE TO CONSULT – THE PROTECTIVE AWARD

Where an employer breaches its collective consultation obligations under TULRCA section 188, a complaint can be made to an employment tribunal. There are strict deadlines so urgent legal advice should be taken. Your union will probably have its own internal procedures to follow if you think a legal claim might be needed.

The threat of a protective award can be a powerful weapon against employers that do not take their collective consultation obligations seriously (a tribunal can award up to 90 days' pay for each affected employee). Except where an employer is insolvent, protective awards are calculated using uncapped earnings. Depending how many jobs are at risk, they have the potential to be very large indeed.

The special circumstances defence

An employment tribunal must make a protective award unless your employer can prove that 'special circumstances' made it not reasonably practicable to consult.

Employment tribunals interpret this defence very narrowly. Special circumstances must be something that could not have been anticipated – events that overtake your employer out of the blue.

The special circumstances defence is not a 'get-out-of-jail-free card' for employers that fail to consult. Even if special circumstances prevented full consultation, the employer must still show that it took all reasonable steps to consult in the time available if it wants to reduce the size of the award (or sometimes escape it altogether).

It is far from certain that tribunals would regard the coronavirus pandemic as a special circumstance that justified a failure to consult. In particular, the financial cushion provided by the government's furlough scheme until the end of October 2020 leaves little room for employers to justify failing to consult fully with unions over this period.

Insolvency is not a special circumstance entitling employers to avoid consulting with unions. There is more information about insolvency and collective redundancy consultation in section 6 later in this guide.

THE EMPLOYER'S OBLIGATION TO NOTIFY BEIS

Employers must notify the Department for Business, Energy and Industrial Strategy (Beis) of all proposals to dismiss 20 or more employees as redundant. This is done using Form HR1: 'Advance notification of redundancies', which is sent to the Redundancy Payments Service (RPS). The RPS circulates the information to government departments and agencies offering job support and/or training services, including Jobcentre Plus.

RETURN TO CONTENTS ▲

GETTING THE UNION VOICE HEARD

As well as negotiating behind closed doors to try to save jobs, unions are using many innovative ways to influence redundancy decisions. There are plenty of examples at national, local and sector level, including:

- lobbying MPs, local councils and select committees
- national and local media
- digital campaigns, including webinars and online events
- pressuring shareholders
- engaging the public, for example with letter-writing campaigns
- building coalitions with other campaigning organisations in the voluntary sector
- commissioning research into the impact of job losses and publicising the results
- focusing on specific groups that stand to lose out, such as apprentices
- making a case to a regulator based, for example, on the threat of job cuts to safety or professional standards
- as a last resort, balloting for industrial action.

Organising and building union membership for the long haul is crucial. So is keeping the membership database up to date, so that members can be quickly reached by phone or email. Sharing successes across the movement is key, as is learning what works. In 2020, the TUC held its first-ever digital organising conference – Organise 2020. As well as your union's materials, you can access the TUC's resources and training to help your branch prepare. When redundancies are coming down the line, the more members the union has, the stronger its voice.

Be sure to publicise news of successes, for example better redundancy terms. This will help:

- keep members motivated
- show others what is possible if you act together
- build union membership.

RETURN TO CONTENTS ▲

SECTION THREE

INDIVIDUAL REDUNDANCY CONSULTATION AND SELECTION

WHAT A FAIR PROCEDURE LOOKS LIKE

All employers must follow a fair redundancy procedure before deciding to dismiss for redundancy.

If fewer than 20 redundancy dismissals are proposed within a 90-day period, the formal TULRCA section 188 collective consultation procedure will not be triggered. Nevertheless, employers should still consult the workforce over their proposed selection pool, method, and criteria.

Employers that impose redundancy selection processes without consultation risk carrying out unfair redundancy dismissals. They also risk losing the trust of their workforce, including employees who kept their jobs this time around, by failing to treat them with dignity and respect.

Some employers have a specific redundancy procedure. Employers should follow their own procedure, but it must meet the basic standards of fairness set out above.

TO CARRY OUT A FAIR SELECTION FOR REDUNDANCY, EMPLOYERS SHOULD:

- give employees at risk of redundancy as much warning as possible
- consult employees on the best ways to minimise hardship
- agree lawful, fair and objective selection criteria
- carry out the selection fairly and without discrimination
- consult individually with any employee at risk of redundancy, listen to what they have to say, and respond fairly
- offer an alternative job, if possible.

THE SELECTION POOL

Unless the entire business is closing down, the first step in any redundancy selection process is usually to decide on the group of employees at risk of redundancy, known as the 'selection pool'. This is the group from which redundancies are to be made.

The law gives employers a lot of freedom to decide on the selection pool, as long as they act reasonably, do not discriminate (for example, targeting disabled employees), or act unlawfully in some other way (for example by targeting trade union reps).

Reps should be alert to the risk of discrimination relating to the coronavirus pandemic. For example, targeting furloughed employees for redundancy is likely to result in unfairness and discrimination. Many furloughed employees are likely to have been shielding due to long-term health conditions, being pregnant or caring for children.

It is not against the law to have a pool of just one person, provided their job genuinely is the only one at risk of redundancy. However, be alert to the possibility of unlawful behaviour (for example, deliberately targeting someone for redundancy because they have blown the whistle at work).

Neither is it against the law to have a pool of the entire workforce: it all depends on context.

SELECTION CRITERIA

Employers must always use fair and non-discriminatory selection criteria. The more objective and measurable the chosen criteria and the less they rely on individual line management discretion, the more likely they are to be fair. In practice, the law gives employers plenty of flexibility to choose selection criteria, as long as they act fairly and reasonably.

RETURN TO CONTENTS ▲

Ian Forsyth / Getty Images

"In practice, the law gives employers plenty of flexibility to choose selection criteria, as long as they act fairly and reasonably"

When setting up a redundancy selection process, it is crucial that everyone involved – managers and employees – clearly understands how the scoring works. That is, how the selection criteria are scored and why.

For example, if 15 points are available on a selection matrix for 'outstanding' performance, there should be clear, verifiable criteria so that everyone agrees what factors qualify a performance as 'outstanding'. And there should also be a checking mechanism between managers, so that they score consistently, and to eliminate management favouritism.

An employer can decide to give extra weight to any selection criteria it feels are particularly important to the organisation moving forward.

Selection criteria must not be discriminatory. Specifically, employers must not discriminate on grounds of sex, sexual orientation, gender reassignment, race, religion or belief, disability, marriage or civil partnership, pregnancy or maternity. And they must not be unlawful for any other reason, for example penalising someone because of their trade union membership, they have blown the whistle on wrongdoing at work, or asked to exercise a statutory right, such as the right to request flexible working.

Part-time and fixed-term employees also have specific statutory rights not to be treated less favourably than their full-time or permanent colleagues in a redundancy selection exercise.

Employers can reduce the risk of unlawful discrimination by consulting properly on the selection criteria. The Equality and Human Rights Commission (EHRC) recommends using a combination of criteria and making sure potentially discriminatory criteria do not decide the outcome. The EHRC says that: length of service; absence record and working hours; and training and qualifications are the three types of selection criteria most at risk of producing a discriminatory outcome.

Employers should be particularly wary of using 'attendance' or 'productivity' during the coronavirus pandemic as criteria for redundancy selection because the impact of the virus may skew employees' scores, creating a high risk of discrimination. There is evidence that Covid-19 disproportionately impacts on workers with characteristics protected by the Equality Act 2010 (EA 10), including Black and minority

RETURN TO CONTENTS ▲

ethnic (BME) workers, male workers and those who are older, disabled or pregnant.

In addition, employees who are living with someone who is shielding may be protected from what is called 'associative discrimination'. This is where they do not themselves have a protected characteristic under EA 10, but they are penalised because they associate with someone (such as a disabled person) who does.

There is also a risk of sex discrimination, since women are more likely to have taken on extra caring responsibilities during the pandemic.

Some employees (many with protected characteristics) will have been furloughed, while others will have had their normal roles temporarily disrupted to help their employer cope with the pandemic.

There should be consultation over adjustments to the selection criteria to take account of these factors.

It is always against the law to include any pregnancy-related sickness absence when assessing for redundancy. This would include a pregnant woman having time off work to shield because of the coronavirus pandemic.

Some reasons for selecting for redundancy can never be fair and must never be used. They include:

- union-related reasons, including union recognition or participating in protected industrial action
- health and safety reasons, including refusing to work in circumstances of serious and imminent danger
- asserting a statutory right, for example to request flexible working or to be paid the national minimum wage
- taking or requesting leave for family reasons
- acting as an employee representative or a pension fund trustee, or acting as a companion or rep in a discipline or grievance hearing
- asserting working time rights, such as the right to a rest break
- making a protected disclosure (whistleblowing)
- an employee's part-time or fixed-term status
- pension auto-enrolment
- pregnancy, maternity leave or childbirth
- an unlawful TUPE-related reason
- a spent conviction (except for roles covered by the Exceptions Order to the Rehabilitation of Offenders Act 1974).

The employer must make reasonable adjustments to all aspects of the redundancy selection process for any disabled employees at risk of redundancy.

Many disabilities are hidden from view. An employer will be required to make reasonable adjustments to its redundancy process to help accommodate an employee's disability only if they know (or ought to know) about it.

The TUC has lots of resources to support disabled members, including when threatened by redundancy.

INDIVIDUAL CONSULTATION MEETINGS

An employee who is identified as being 'at risk' of redundancy must be invited to at least one individual redundancy consultation meeting. The employer must supply details of the selection criteria, the employee's own scores and an explanation of the scoring method used far enough in advance of the meeting for the employee to be able to prepare properly. Employers do not have to provide other employees' scores.

In normal times, redundancy consultation meetings take place face to face, though Acas says a meeting can be by phone if both parties agree and there is a clear need – for example, if an employee works remotely.

During the coronavirus pandemic, some redundancy consultation meetings are likely to take place remotely. Acas says that "during coronavirus, it's likely that your employer will consult with you remotely, for example over the phone, or using video or conference-calling technology".

RETURN TO CONTENTS ▲

skaman306 / Getty Images

"Acas recommends that employers set up a formal appeals process as part of their redundancy procedure. Refusing to allow employees to appeal can make a redundancy dismissal unfair, because it takes away the chance to persuade the employer to change its mind"

Any meeting, however it is conducted, must be a genuine opportunity for the employee to fully understand the issues, express their views and challenge the employer's assessment, and for the employer to listen, genuinely consider those views, and give a reasoned response. More than one meeting may be needed. Employment tribunals will not allow employers to use the pandemic to justify lowering standards of fairness when selecting for redundancy.

If there is a negotiated redundancy procedure in place specifying face-to-face meetings, employers will need to secure the union's agreement to a temporary change to the procedure to allow for remote meetings.

BEING ACCOMPANIED

All good employers allow employees to be accompanied to redundancy consultation meetings, as part and parcel of a fair redundancy process. Where unions are recognised, negotiated redundancy procedures typically provide a right to be accompanied.

Special arrangements should be made for disabled, vulnerable or young workers, or for those who do not speak English as a first language. For many disabled members, allowing them to be accompanied to their redundancy consultation meeting is likely to be a reasonable adjustment under the Equality Act 2010.

The Acas Code of Practice on disciplinary and grievance procedures and the statutory right to be accompanied (ERA section 10) do not apply to straightforward redundancy consultation meetings. However, they will normally apply to a grievance meeting about the redundancy process. For example, the Acas code and the statutory right to be accompanied will apply to any grievance meeting to discuss allegations of discriminatory selection, or allegations that the employer has failed to pay a contractual redundancy payment.

APPEALS

Acas recommends that employers set up a formal appeals process as part of their redundancy procedure. Refusing to allow employees to appeal can make a redundancy dismissal unfair, because it takes away the chance to persuade the employer to change its mind.

Where a union is recognised, negotiated redundancy procedures typically include a right to an appeal hearing, to someone more senior than the original decision-maker.

Whether a redundancy dismissal is fair will be tested by looking at the overall fairness of the whole procedure, including any appeal. The bottom line is that the employee must have at least one proper opportunity to challenge their selection and to persuade their employer to change its mind.

An unsuccessful appeal does not extend the dismissal date or change it in any way. Any tribunal claim must be brought within three months (less one day) of the dismissal date. You should ask for advice from an officer in your union without delay, following your union's own internal procedure, if you think a member might have a tribunal claim. See section 8, Challenging Redundancy Dismissals.

RETURN TO CONTENTS ▲

RESTRUCTURING: REDUNDANCY CONSULTATION OR JOB INTERVIEW?

Redundancy procedures do not always have to be based around a selection pool, selection criteria and consultation. Increasingly, employers use selection processes that look more like a recruitment process, by 'restructuring' the organisation, creating new jobs and inviting employees to compete for those jobs, with the unsuccessful 'candidates' declared redundant. This type of approach to redundancy is more likely to be fair if the employer is genuinely creating new jobs in a restructuring that requires different skill sets and experience.

Whatever process is used, employers must behave fairly and reasonably. Employees at risk must be given a proper chance to put their case, in at least one meeting, as to why they should not be selected. And they should be offered the chance to compete with co-workers whose jobs are also at risk of redundancy for any suitable alternative vacancy in the restructuring. In general, employers should not open roles to an external candidate if there are employees at risk of redundancy with the skills and experience needed for those roles.

REAPPLYING FOR YOUR OWN JOB

You might be asked to reapply for your own job, which could help your employer decide who to select.

If you do not apply or your application is unsuccessful, you'll still have a job until your employer makes you redundant.

ALTERNATIVE JOBS

If there are suitable jobs in-house

If the employer has any suitable alternative jobs that could avoid an employee's redundancy, they should be given the chance to apply for them. This includes vacancies in companies in the same group as the employer.

Employers should be considering alternative jobs as soon as they realise redundancies are likely, and they should carry on looking right up to the dismissal date.

Members should be warned to be careful before refusing an offer of another job by their employer or an associated employer. An unreasonable refusal of suitable employment can cost a member their redundancy payment. Employees need a good reason to turn down a job and keep their right to a redundancy payment, for example:

- the pay is lower
- the job does not enable the employee to use their skills
- the job is further away, and commuting is unfeasible
- they cannot fit the hours around family life, for example childcare.

Refusing to work a trial period can make it harder to show that a new job was unsuitable, but this will depend on how different it is from the old job.

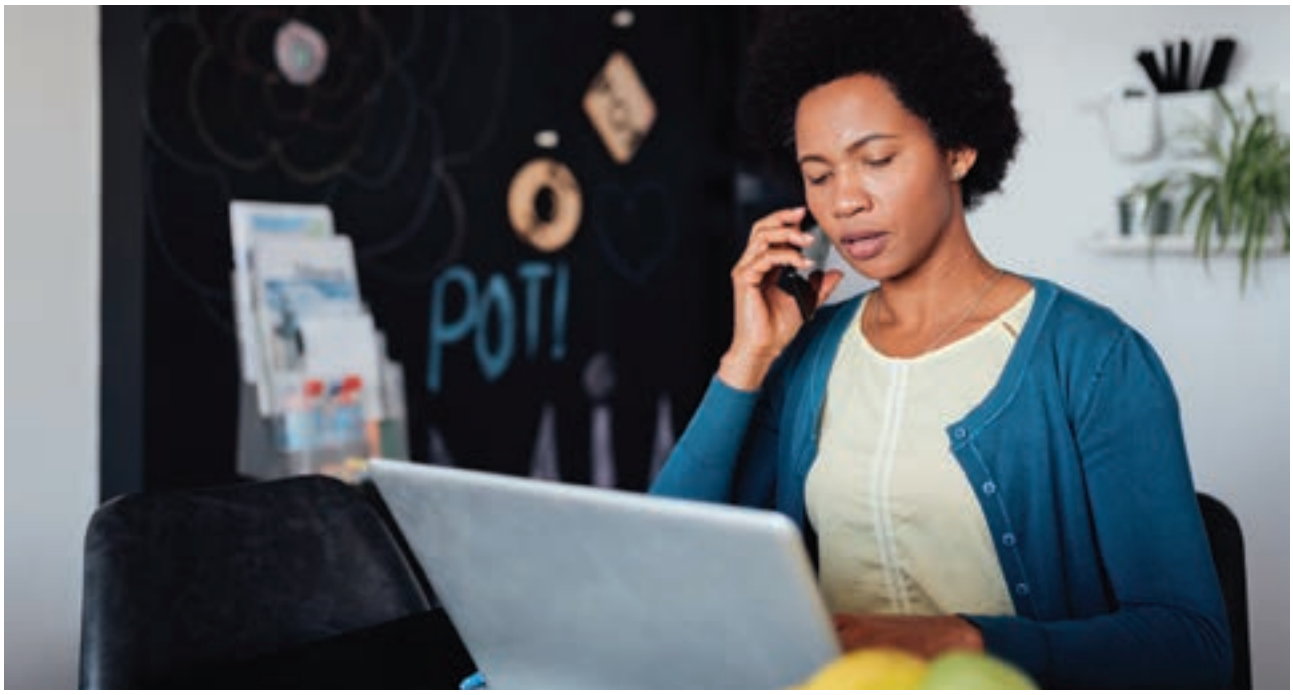
For an employee who is on maternity, adoption or shared parental leave, the rules for employers are much stricter. They must offer the employee a suitable available vacancy if there is one. They must be offered the vacancy – not just the chance to compete for it with a co-worker who is not on maternity, adoption or shared parental leave. Not offering the job is likely to make any resulting redundancy dismissal automatically unfair.

The statutory trial period

Employees who are under notice of dismissal for redundancy are entitled to spend a four-calendar-week statutory trial period in the new job role. The four weeks start at the end of the employee's notice period. It is a good idea to get the dates for the trial period in writing to avoid any confusion. The employer must provide written notice of the terms and conditions of the new job (including pay) and confirmation of the date the trial period will end.

If an employee agrees to work a statutory trial period and the role proves unsuitable, they must reject it in writing before the trial period ends. Remaining in the role beyond the four weeks will mean the employee loses their right to a statutory redundancy payment, even if the job is unsuitable.

RETURN TO CONTENTS ▲



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Union reps can negotiate contractual agreements with the employer that allow members to work a longer (but not a shorter) trial period without losing their right to contractual redundancy pay. If you are unsure about this, it is a good idea to take advice from an official at your union.

If an employee rejects an offer of alternative employment before the end of the statutory trial period, their date of dismissal will be the date their original employment contract ended – not the date the statutory trial period ends.

Employees on maternity, adoption or shared parental leave

An employee whose role is at risk of redundancy while on maternity, adoption or shared parental leave has stronger rights to alternative employment. They have the right to be offered a suitable available vacancy with the employer, or a subsidiary or associate in the employer's group of companies.

To have a right to be offered the vacancy, it must be suitable and appropriate for the employee and on terms and conditions that are not significantly less favourable than their existing terms.

If an employee is dismissed because the employer failed to offer them a suitable available vacancy, that dismissal will automatically be unfair.

Employees have this right from their first day on the job.

If more than one employee absent on maternity, adoption or shared parental leave is suitable for a vacancy, the employer can select the best qualified, using fair, non-discriminatory selection criteria.

If there is more than one suitable available vacancy, the employee on leave probably cannot insist on their preferred choice.

Members who are on maternity, adoption or shared parental leave during a redundancy or restructuring exercise should be encouraged to engage actively with their employer. For example, it makes sense for them to confirm, early and in writing, any willingness to accept a role on less favourable terms to avoid redundancy, such as fewer hours, shift work, a lower banding or a relocation. They should make sure the employer knows how to reach them, and check communications regularly, including in their email junk box.

RETURN TO CONTENTS ▲

SECTION FOUR

REDUNDANCY DISMISSAL NOTICES

GETTING NOTICE OF REDUNDANCY

Once consultation has ended, the employer can issue redundancy dismissal notices.

The redundancy notice must include a written statement explaining how the redundancy payment has been calculated (ERA section 165).

RIGHT TO TIME OFF TO LOOK FOR WORK

An employee who has worked for their employer for at least two years and has been given notice of dismissal for redundancy has a legal right to reasonable paid time off during working hours to look for another job, for example to attend interviews, capped at 40 per cent of a week's pay.

Unions may be able to negotiate better rights than this. See section 9, Moving Forward.

Xavier Arnau / Getty Images

LEAVING EARLY

An employee who resigns while the employer is still consulting over redundancies, but before being given notice of dismissal for redundancy, has no right to a statutory redundancy payment (ERA section 142). Anyone who wants to leave early with a severance payment will need to negotiate terms for voluntary redundancy.

An employee who has been issued with a redundancy dismissal notice can agree with their employer that they can leave without working their full notice (usually because they have found another job) and still retain their right to a statutory redundancy payment. Any agreement needs to be reached clearly, in advance and in writing.

An employer who objects to the employee leaving early must serve a written objection notice, requiring them to work their whole notice and warning that if they don't they may lose their statutory redundancy pay. (An employment tribunal can order the employer to make a partial payment.)

RETURN TO CONTENTS ▲

SECTION FIVE

REDUNDANCY PAY, NOTICE AND HOLIDAY

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STATUTORY REDUNDANCY PAY

An employee dismissed for redundancy must be paid a statutory redundancy payment if:

- they have worked for their employer for at least two years, and
- they have not unreasonably refused an offer of suitable alternative employment.

Compared with other developed economies, the UK's statutory redundancy pay regime is not generous.

Some employees have a contractual right under their employment contract to better redundancy pay than the statutory minimum, especially where a union is recognised.

Statutory redundancy pay is based on a formula awarding a set number of 'weeks' pay', based on age and complete years of continuous service for the employer or an associated employer.

Statutory redundancy pay is based on weekly wages at the date of the redundancy dismissal notice. This is important for members who cut their hours from full- to part-time, for example on returning from maternity leave. No matter how many years they spent working full-time, all their statutory redundancy pay will be based on their part-time wage.

STATUTORY REDUNDANCY PAY IS:

- half a week's pay for each full year of employment while aged below 22
- a week's pay for each year while aged 22–40
- a week and a half's pay for each year while aged 41 or over.

The government **website** has an online **ready reckoner**.

RETURN TO CONTENTS ▲

A 'week's pay'

Statutory redundancy pay is based on a capped week's pay. It is revised every year in April. For redundancy dismissals on or after 6 April 2020, a week's pay is £538.

Employers' pension contributions must be included in the calculation of a week's pay, up to the statutory cap.

There is also a cap on the number of full years that count towards the payment. This is 20 years, working backwards from the dismissal date. From April 2020, the maximum statutory redundancy payment, after working for 20 years for the same or an associated employer, is £16,140.

Where an employer changes as a result of a compulsory (TUPE) transfer, continuous years spent working with the old employer must be included when calculating an employee's statutory redundancy pay, up to the 20-year maximum.

If wages vary from week to week, a 'week's pay' should be averaged over the 12 weeks up to the date of the redundancy notice. Any weeks when the employee earned nothing must be disregarded, and earlier weeks must be added, working backwards to make up a maximum of 12.

Where gross weekly pay (including employer pension contributions) is below the statutory cap, redundancy pay must be based on actual wages.

Even if an employer has been breaking the law by paying employees below the national minimum wage (NMW) rate for their age, their statutory redundancy pay must be based on the correct NMW rate.

NMW underpayment is policed by HMRC's national minimum wage enforcement team. It can be contacted via the Acas helpline: 0300 123 1100, or by complaining online to HMRC.

If the employer cuts short an employee's statutory notice when dismissing them for redundancy, the missing notice must be added to their continuous service to work out their redundancy pay. This may result in a larger redundancy payment.

> **"Where there is no contractual right to enhanced redundancy pay, an employer may decide to offer enhanced redundancy pay on a discretionary basis"**

Redundancy pay after furlough

All employees who are made redundant after being furloughed by their employer under the government's coronavirus Job Retention Scheme (JRS) must have their statutory redundancy pay calculated using their normal 'pre-furlough' wages (100 per cent pay). From 31 July 2020, it is against the law (the Employment Rights Act 1996 (Coronavirus – calculation of a week's pay) Regulations 2020) for employers to pay statutory redundancy pay at the reduced furlough rate.

Employers are not allowed to use the JRS to fund redundancy payments.

CONTRACTUAL REDUNDANCY PAY

Many employers provide redundancy pay that is more generous than the statutory minimum, especially at workplaces where a union is recognised.

Promises about contractual redundancy pay transfer automatically on a TUPE transfer.

Without clear written evidence, for example in a written statement of employment particulars or a staff handbook, proving a contractual right to enhanced redundancy pay is likely to be an uphill struggle.

Where there is no contractual right to enhanced redundancy pay, an employer may decide to offer enhanced redundancy pay on a discretionary basis, usually in return for employees signing a document known as a settlement agreement.

RETURN TO CONTENTS ▲

laflor / Getty Images

Redundancy pay and career breaks

If a member arranges a career break with their employer, it is essential that they agree clearly, in advance and in writing, what effect this will have on their redundancy rights. The member may be able to agree with the employer that if they are made redundant after returning from the break, earlier service will be included when calculating their redundancy pay.

If a member does not reach agreement before starting their career break, any earlier period of continuous service, no matter how long, will be excluded when their redundancy pay is calculated.

NOTICE OR NOTICE PAY

As well as a redundancy payment (if eligible), an employee dismissed for redundancy must be given their notice. An employer that does not want employees to work their notice must pay them notice pay (often called 'pay in lieu of notice'.)

Notice must be at least:

- one week, after working continuously for between one month and two years, or
- one week for each year of continuous employment between two and 12 years, up to a maximum of 12 weeks' notice after 12 years of work.

Some members may have more generous contractual notice rights.

Notice pay for employees with regular weekly or monthly wages must be based on their wages on the date they are given notice of dismissal.

Notice pay where wages change from week to week must be based on average weekly wages over the 12 weeks up to the redundancy notice. Any weeks when the member earned nothing at all must be disregarded, and earlier weeks added, to reach a maximum of 12.

Some of the rules on calculating notice pay are complicated.

If employees are off sick during their notice period and their employment contract entitles them only to statutory notice, they must be paid their normal wages during their notice period, even if they have already run out of sick pay.

Similarly, if employees are on statutory maternity, adoption or shared parental leave and their contract entitles them only to statutory notice, they must be paid their normal wages during their notice.

The rules are different if an employee's employment contract entitles them to notice that is a week (or more) longer than the statutory period of notice. Here:

- If an employee is off sick during their notice period, the employer has to pay only their contractual entitlement to sick pay. This might be statutory sick pay or, if a member has already used up their statutory sick pay entitlement, nothing at all.
- For a member on maternity, adoption or shared parental leave during their notice period, the employer has to pay only their contractual entitlement to maternity, adoption or shared parental pay. This may be the statutory minimum, or if they have used up their paid entitlement, nothing at all.

RETURN TO CONTENTS ▲

NOTICE PAY AFTER FURLOUGH

Some employers have been using the government's coronavirus Job Retention Scheme (JRS) to pay the wages of furloughed employees who are working out their notice after having been made redundant. While this practice goes against the spirit of the JRS – which is to keep people in work – it is not against the law.

The JRS cannot be used to cover lump sum payments in lieu of notice.

Statutory notice pay for furloughed employees must be based on their normal pre-furlough wages. Ask for help from an official at your union if your employer is paying statutory notice pay at the lower furlough wage. This is against the law.

TAKING HOLIDAY OR RECEIVING HOLIDAY PAY

Employees who are made redundant must be paid for any holiday they have built up but not taken when the employment ends.

In general, the law allows employers to require employees to take unused holiday while working out their notice. The employment contract often includes a specific term setting out what the rules are. If there is no contract term, the employer must give twice as much notice as the amount of holiday employees are expected to take. For example, two weeks' advance notice would need to be given to require an employee to take one week of holiday.

Employees who missed out on taking holiday in the correct holiday year because of the effects of the coronavirus pandemic must be allowed to carry forward up to four weeks of that holiday into the next two holiday years. If they are made redundant without having used up this holiday, the employer must pay them for it. This change to the law is to benefit key workers who have lost out on holiday because they have been working, as well as others who were self-isolating or had the virus.

HOLIDAY PAY AND FURLOUGH

Employees who were furloughed before being made redundant must be paid for any statutory holiday while on furlough at their pre-furlough wage.

TAX AND NATIONAL INSURANCE

Redundancy pay is free of tax and national insurance up to a maximum of £30,000. Income tax and (from April 2020) employer's national insurance contributions must be paid on anything over this amount.

Notice pay and holiday pay are wages, so they must be paid net of tax and national insurance. It makes no difference if the member's employment contract contains a term allowing the employer to make a payment in lieu of notice (PILON).

Tax is complicated, so always take advice, especially if you are uncertain.

SETTLEMENT AGREEMENTS

It is common for employers to expect employees to sign a settlement agreement giving up their right to bring an employment tribunal claim, in return for any redundancy package that is more generous than their basic statutory entitlement. Employees must take legal advice from a 'relevant legal adviser' on any settlement agreement, otherwise it will not be valid. A relevant legal adviser can be a solicitor, certified trade union official or certified advice worker. Where the advice is given by a solicitor, the employer should contribute to the cost (usually between £350 and £500 plus VAT).

PUBLIC SECTOR REDUNDANCY PAY

Voluntary and compulsory redundancy and pension arrangements across the public sector are the result of established collective bargaining arrangements in place over many years. Your union will have information about the specific arrangements that apply where you and your members work.

Public sector redundancy terms will transfer to the new private or voluntary sector employer on a TUPE transfer. This also applies if the business is transferred again ('second generation outsourcing'), or if contracts are taken back in-house. TUPE protection was weakened in 2014, making it easier for employers to threaten cuts to contract terms following a transfer. Despite this change to the law, it remains the case that any changes to members' contract terms must be by agreement, reached through collective bargaining with the union where one is recognised. TUPE law is complicated and if necessary, advice should be taken from union

RETURN TO CONTENTS ▲

Westend61 / Getty Images

“Voluntary and compulsory redundancy and pension arrangements across the public sector are the result of established collective bargaining arrangements in place over many years”

solicitors. Members should be encouraged to keep their employment contract documentation in a safe place, so that they can prove their redundancy terms if challenged by their new employer. In practice, securing union recognition by the new employer and organising will be key to defending members’ redundancy terms once they have transferred out of the public sector.

Government has confirmed, that despite the contribution of key workers during the coronavirus pandemic, it will look to implement a planned cap of £95,000 on nearly all types of public sector termination payment – not just redundancy pay – under the new Restriction of Public Sector Exit Payments Regulations 2019.

Unions opposed this cap which, once implemented, will override complex negotiated agreements reached between employers and public sector unions, in which key workers sacrificed other terms and conditions to retain their redundancy and pension arrangements. The government’s messaging suggests that this change to the law will affect only high earners, but this is not the case. Unions have shown that the cap will reduce the redundancy pay of many key workers across the public sector with long service, for example NHS nurses.

No implementation date has been announced for this change as yet. There will be some important waivers and exemptions, and important differences in Scotland and Wales. Reps whose members are affected will need to take advice from their national union.

RETURN TO CONTENTS ▲

SECTION SIX

REDUNDANCY AND INSOLVENCY

WHEN AN ADMINISTRATOR IS APPOINTED

The appointment of insolvency administrators is an extremely worrying development for staff, especially at a time of economic crisis. But there is an important difference between administration and liquidation ('winding up'). At its heart, administration is a company rescue procedure designed to help restructure a still-viable company and save at least some jobs (even if this ends up proving impossible). By contrast, liquidation is for terminal cases, where there is no hope of saving the business, with the unavoidable loss of jobs.

The first 14 days of an administration can be crucial. Administrators have a 14-day window to decide whether to 'adopt' the employment contracts of staff caught up in a business collapse. Multiple redundancies are often made in this initial 14-day period. Employees who get to keep their jobs beyond the first 14 days stand a better chance of recovering unpaid wages, over the statutory minimum paid by the government's Redundancy Payments Office (RPO) in an insolvency, that is, assuming there is anything left for creditors. And if their part of the business is successfully sold, they should transfer to the new employer under TUPE.

Administrators appointed during the coronavirus pandemic have been able to use the JRS to retain employees on furlough, instead of making them redundant immediately.

There are some key collective and individual rights to be aware of in an insolvency.

INSOLVENCY AND COLLECTIVE CONSULTATION

Whether an insolvent employer faces rescue or winding up, normal information and consultation rules continue to apply. Financial difficulties, even the appointment of an insolvency practitioner, do not remove the employer's legal obligation to consult collectively with a recognised union if 20 or more redundancies are proposed, nor do they provide an excuse for failing to consult.

In practice, when a business faces financial collapse, things often happen fast and in secret. All too often collective consultation obligations fall by the wayside. Caps on payments by the RPO in an insolvency mean that employees frequently lose out on most or even all their protective award, even if redundancies are made with no consultation at all.

However, it can be a different story if a buyer is found. Liability for a protective award normally transfers to the buyer of a new business under TUPE, even if it is bought from an administrator. These are complex issues and tribunal deadlines are short (just three months, less one day, from the date of the TUPE transfer) so reps in this situation should urgently seek help from an officer at their own union. Unions are experts at recovering protective awards for their members.

PAYMENTS FROM THE REDUNDANCY PAYMENTS OFFICE

When an employer is insolvent, statutory redundancy pay and certain other payments can be claimed from the Insolvency Service. The claim is made online to the RPO. There is an email address for help: redundancypaymentsonline@insolvency.gov.uk.

The claim can be made as soon as the member is made redundant, but they will need a 'CN' (case reference) number from the insolvency practitioner in charge of the employer's insolvency. No claim can be made without the CN number. The claim to the RPO must be made within six months of the dismissal date, otherwise it will be rejected.

RETURN TO CONTENTS ▲

Richard Johnson/Getty Images

There is an online portal called furlough and redundancy for employees made redundant by an insolvent employer after being on furlough under the JRS.

There are two forms: RP1 for the statutory redundancy payment, wages, and holiday pay; and RP2 for statutory notice pay. The Insolvency Service provides a useful guide to completing the form 'What to do when you've been made redundant'.

Here is what can be claimed from the RPO:

- statutory notice pay
- statutory redundancy pay
- wage arrears, including wages, overtime, bonuses, commission and any protective award (up to eight weeks' pay in total)
- holiday pay (up to six weeks' pay).

The eight weeks of pay need not be consecutive: employees can choose the highest paid weeks of arrears.

"Administrators appointed during the coronavirus pandemic have been able to use the JRS to retain employees on furlough, instead of making them redundant immediately"

All payments by the Insolvency Service are capped (£538 per week for anyone made redundant on or after 6 April 2020). Any payment above this must be claimed as a debt in the employer's insolvency.

The Insolvency Service has produced a more detailed guide, *Explaining Your Redundancy Payments*, which is also helpful.

If the Insolvency Service rejects any part of the claim, a claim against the secretary of state for Beis can be made to the employment tribunal. The claim deadline is three months (less one day) from the date the secretary of state writes to the member notifying the rejection. The first step (which must be taken before issuing the claim) is to complete an Early Conciliation Notification Form, available from Acas.

RETURN TO CONTENTS ▲

Sometimes, employers collapse without paying over the most recent pension contributions (employer's and employees') into the pension scheme. Pension scheme trustees may be able to claim unpaid contributions from the National Insurance Fund for the 12 months up to the insolvency. The Pensions Advisory Service will have more information about this (helpline: 0800 011 3797).

Members of defined benefit pension schemes (workplace pension schemes that provide benefits based on salary and length of service) may be able to claim some compensation from the Pension Protection Fund (PPF) if their pension is wound up underfunded on the employer's insolvency and cannot be rescued.

If employees were getting statutory sick pay, or maternity, adoption, shared parental or paternity pay when their employer went bust, these payments become the responsibility of HM Revenue and Customs (HMRC). Its Statutory Payments Disputes Team can be contacted on 03000 560630. Members should have their national insurance number ready when they phone.

A statutory redundancy payment (but no other payments) can also be claimed from the RPO where the employer has not formally been declared insolvent, if the employee can show that they have taken 'all reasonable steps' to recover the payment. All reasonable steps normally means an employment tribunal judgment against the employer.

Sometimes members caught up in an insolvency may need to issue employment tribunal claims. For example, a new business that buys an insolvent employer from an administrator will normally inherit the old employer's employment liabilities (beyond any payments already made by the RPO) under TUPE, such as potential claims for automatically unfair dismissals carried out before the transfer. These are complex issues and tribunal deadlines are very short, so urgent legal advice should be sought.

CLAIMING BENEFITS

The Insolvency Service advises anyone made redundant that it is very important to apply for Jobseekers Allowance (JSA) or Universal Credit (UC) immediately. They should keep any letters, or take screenshots of the acceptance/rejection that confirms what the member is eligible for.

When the RPO calculates the member's notice pay, it is always obliged to subtract the amount of JSA or UC the member was entitled to receive during their notice period, even if they didn't claim it. A member who applies for benefits and is rejected will need to prove this to the RPO to get their full notice pay. There is more information on the Insolvency Service factsheet: 'What to do when you've been made redundant'.

There are links at the end of this guide to good sources of information about the impact of redundancy on benefits, tax and pensions.

RETURN TO CONTENTS ▲

SECTION SEVEN

APPRENTICES

APPRENTICES AND REDUNDANCY

In normal times, apprentice redundancies are rare unless a business is closing down.

Apprentices are employees. They have rights to protection from unfair dismissal for redundancy. They also have rights not to be selected for redundancy for a reason that is discriminatory, or unlawful in some other way, for example because they complained about poor health and safety at work. In some situations, they may also be able to claim damages for contract breach, if their apprenticeship contract is ended early for no good reason.

As with all employment claims, tribunal deadlines are very short (just three months, less one day, from dismissal), so it is important not to delay seeking help.

vm / Getty Images

APPRENTICES AND COVID-19

The Covid-19 pandemic is having a significant impact on apprentices, their employers and learning providers, with disrupted learning, financial strain and redundancy.

The Department for Education (DfE) has made temporary changes to the normal rules on breaks in learning and end-point assessments. It has stated its ambition to find redundant apprentices another employer within 12 weeks. Their training provider must also help. Reps can check that apprentices know about this commitment – and can help make sure it is actually happening on the ground. Apprentices can also contact the Redundancy Support Service for Apprentices on 0800 015 0400 for advice.

Reps should also ensure that apprentices made redundant part-way through their apprenticeship get a proper record of part-completion, as evidence of what they have learned.

Under current apprenticeship funding rules, apprentices made redundant with less than six months of their apprenticeship agreement left to run can complete the apprenticeship without finding a sponsoring employer, but they should be supported to find a new employer where possible. In September 2020 the government began the process of changing the law to allow funding to continue for apprentices to complete their training if they are at least 75 per cent of their way through their programme at the point of redundancy.

From 1 August 2020 to 31 January 2021, employers are to get a one-off payment of £2,000 for each new apprentice aged under 25, and £1,500 for each aged 25 and over.

The TUC's unionlearn has **resources and advice** for apprentices and reps, and will keep this updated as the law and information changes.

RETURN TO CONTENTS ▲

SECTION EIGHT

CHALLENGING REDUNDANCY DISMISSALS

Redundancy is a potentially fair reason for dismissal. The law allows employers to reduce or reorganise their workforce, provided they act fairly, do not discriminate, and honour redundancy rights, including making a redundancy payment to employees who qualify.

Employees (including fixed-term employees and apprentices) can challenge unfair or discriminatory redundancy dismissals in an employment tribunal (ET). In most cases, two years' service is needed to challenge the fairness of a dismissal. But no term of service is needed if the member was selected for most (although not all) automatically unfair reasons. (The exceptions are dismissals that are automatically unfair because of a breach of TUPE or the laws relating to spent convictions, where two years' service is needed.)

No term of service is needed to challenge an employer (or a manager) who engages in discrimination, harassment or victimisation in breach of the Equality Act 2010 while making redundancies.

Employees who are owed unpaid wages and other money claims, such as holiday pay, can bring a wage claim in the ET.

In most cases, successfully challenging a redundancy dismissal in an ET is likely to be an uphill struggle. In general, tribunals give employers a lot of freedom to decide how to carry out redundancies, as long as they follow a fair procedure that gives employees a genuine opportunity to make their case as to why they should not be made redundant.

For example, an ET will not re-calculate a manager's scores in a selection exercise if they disagree with the employer's assessment (although if the scores are so badly out of kilter that no reasonable employer could have produced them, or if they include a significant mathematical error, the dismissal is likely to be unfair). Even if an employer takes on replacement staff to do the job of employees dismissed as redundant, their dismissals will not necessarily be unfair. The employer might be able to show that the situation changed because they picked up an unexpected order or contract.

Even if a claim is successful, ET compensation awards are usually a lot lower than members might hope for, especially if the tribunal concludes that the member would still have been made redundant had a fair procedure been followed.

ETs take a very strict approach to tribunal deadlines, which are very short. For most categories of claim, a member has just three months (less one day) to bring their claim. Your union will have procedures to follow if you think the member may have a legal claim. It is important to act quickly and never leave taking action until the last minute.

The first step in any ET claim is to submit a form called an Acas Early Conciliation (EC) Notification Form. This step must be taken before the claim deadline has expired otherwise the claim will almost certainly be dismissed. There is information about Acas EC on the Acas website.

If you suspect that the member has been selected for redundancy for trade union-related reasons, you should contact your union's legal department urgently. There may be extra protection available, known as interim relief, but only if an ET claim is issued within seven days of the member's dismissal. No extensions of time are allowed. Acas EC does not apply to a claim for interim relief.

RETURN TO CONTENTS ▲

SECTION NINE

MOVING FORWARD

Peter Muller / Getty Images

LEARNING AND TRAINING

Employer support for learning and training is a key part of the collective consultation process. TULRCA section 188 says employers must consult collectively on ways of "mitigating the effects" of redundancies. With Covid-19, this is especially important in sectors such as retail that are likely to suffer long-term scarring, or where the collapse of a single employer devastates an entire local economy.

The fact that employees are furloughed or working from home does not diminish in any way the employer's legal responsibility to consult over reskilling employees selected for redundancy.

WHY RESKILLING MATTERS

Reskilling is vital for members because it boosts their chances of getting another job by improving their skills, qualifications and employability, provides a chance to change career and builds confidence in their ability to find new work.

It is also good for employers because it improves the morale of staff left behind to see their co-workers treated fairly. Boosting retention and attendance also cuts the cost of agency staff.

It is also important for your union, because members value the work the union does to help them retrain to move forward. They are more likely to stay union members, or to rejoin in their new role.

It is also vital for the UK's economic recovery from the effects of the Covid-19 pandemic, which is why the TUC is campaigning for a nationwide new jobs guarantee and other measures on skills.

NEGOTIATING OVER SKILLS TRAINING

A negotiated learning package should enable staff to access affordable learning of a high enough standard to help them gain the skills and qualifications they need to find another job.

RETURN TO CONTENTS ▲

Ideally, retraining packages should allow members time off, for example to access:

- qualified information, advice and guidance (IAG) from an expert provider, such as the National Careers Service
- training in English and maths by a qualified person, if needed
- digital skills training
- training on CV writing, completing an online job application, letter writing, interviews (virtual and face to face) and job search techniques
- local reskilling courses, where available
- support and advice on financial information and budgeting
- one-to-one advice sessions with a union learning rep (ULR)
- advice from Jobcentre Plus on how to access benefits such as universal credit.

Shift work, family commitments, low confidence and poor English skills can make it harder for some workers to access learning. Employers must not discriminate in the supply of skills training.

Employers who are subject to the public sector equality duty are legally required to consider how their retraining offer to redundant staff promotes equality of opportunity and eliminates discrimination.

In addition to time off, the agreement should include a commitment that staff can change shifts or alter work patterns to access learning. Part-time staff and night-shift workers must be included.

The same reskilling opportunities must also be offered to employees who are losing their jobs while on maternity, adoption or shared parental leave.

The coronavirus pandemic means that far more learning and training will have to be delivered via virtual platforms, webinars and podcasts. Reps can help ensure that employers do not overlook staff who are disabled, or who cannot easily access digital technology.

JOBCENTRE PLUS RAPID RESPONSE SERVICE (JRRS)

The JRRS is designed to support employees facing redundancy before they lose their jobs. The service is run by a network of Jobcentre Plus senior managers, working with the employer and local partners. Each local partnership may be different, depending on the redundancy situation. The service can be an important resource for union reps. Jobcentre Plus will contact any employer that notifies 20 or more redundancies to Beis, but its services are intended for any size of employer that is making job cuts.

Jobcentre Plus can provide help with:

- CV writing and job search
- benefits information
- training and new skills
- work trials for eligible employees.

It can also provide extra help for disabled employees, such as Access to Work.

There is also a discretionary Jobcentre Plus Flexible Support Fund (FSF) to help individual jobseekers back into work, for example, providing grants to cover travel expenses to get to an interview, or tools, clothing or uniforms to start work.

The government has promised to increase the funding of the FSF, the JRRS and the National Careers Service in response to the coronavirus pandemic, and to fund a new online private sector one-to-one job-finding support service.

RETURN TO CONTENTS ▲

Chris J Ratcliffe/Getty Images

CASE STUDY – COLLAPSE OF THOMAS COOK

The collapse of holiday company Thomas Cook in October 2019 had a huge impact on nearly 10,000 staff who faced redundancy.

General union Unite stepped in with learning support for these workers. Unite learning organisers across the country ran advice sessions and classes, including a mass meeting at Gatwick Airport, where Thomas Cook staff were addressed by staff from Jobcentre Plus, who answered questions on benefits, and by National Careers Service (NCS) staff, who talked about the short courses it offers. As a result of that meeting, the NCS ran workshops on writing CVs.

Unite also used its Learn with Unite programme to signpost members to training opportunities and set up bespoke courses for redundant staff.

The union also ran ICT, Functional Skills (English), Employability Skills and Train the Trainers courses. At Bristol Airport, the union asked City of Bristol College to deliver a training course to enhance employability and support members' journeys back into work.

Unite also launched a new training partnership with distance-learning provider **The Skills Network** offering funded qualifications via distance learning.

UNION LEARNING FUNDS

Many unions have a union learning fund project able to provide support in redundancy situations around skills, including English (and Welsh in Wales), maths and computer skills, financial and health information, job seeking, CV writing, job application form completion, interview skills and so on. Courses can take place in the workplace, online through distance learning or at the union's own offices. They can be run across the country wherever redundancies are made.

UNIONLEARN PLATFORMS

Unionlearn's Mid-Life Development Review and Value My Skills tools and workshops are particularly useful for employees faced with redundancy, supporting them to review and develop their transferable skills.

There's other useful information, guides and resources from unionlearn, too.

These include free e-learning modules, details of learning opportunities available through partner providers, Careerzone, a one-stop shop for career information, and the Climbing Frame.

RETURN TO CONTENTS ▲

Nikola Ilic / Getty Images

The Climbing Frame portal has resources for ULRs, information on bite-sized and free learning, courses, qualifications, the union role and working with providers and employers.

Union learning support is also available in Scotland at Scottish Union Learning and in Wales, where information can be found on the website of Wales TUC Cymru.

ROLE OF UNION LEARNING REPS

ULRs need enough facility time to play their role in connection with the planned redundancies, which will involve surveying learning needs, discussions with members, liaising with the employer and consulting with learning providers. How much time is needed will depend on how many ULRs are in place and how many redundancies are planned.

There may already be a learning agreement in place to draw on.

In a workplace with a recognised union, ULRs have a legal right to a reasonable amount of time off to carry out their duties (TULRCA section 168A; Employment Act 2002 section 43). These duties include addressing learning or training needs, providing information and advice, promoting the value of learning, preparing, and consulting with the employer. ULRs also have a right to paid time off for training. There is information in paras 16–17 of the Acas Code of Practice Time off for Trade Union Duties.

Existing ULRs should get involved in the redundancy consultation process as early as possible. There should be enough ULRs to cover all shifts and workplaces.

With a large-scale redundancy, reskilling and employability activities should ideally be coordinated through a joint committee, bringing together management and union reps. This means union reps can ensure they are involved in all aspects of the redundancy consultation process and that reskilling is given the focus it deserves. The committee should be chaired by a senior manager, which demonstrates commitment and makes sure decisions have leadership buy-in and will be implemented without delay.

Each site where redundancies are taking place should have a named person to coordinate learning activity and there should be regular progress reports.

RETURN TO CONTENTS ▲

SECTION TEN

USEFUL RESOURCES

Your union will have its own resources for you to draw on. Here are some other sources of information or support you may find useful:

General

TUC

TUC Education

Acas

GOV.UK (redundancy pages)

Information on job search and skills training

Unionlearn for tools, resources and information on skills and apprenticeships.

There is also lots of helpful information on the TUC's WorkSmart career coach website.

There is a Jobcentre Plus Rapid Response Service. More information on the Rapid Response Service and on the different services in Scotland and Wales is available.

The National Careers Service is the government's careers portal.

The Apprenticeships portal is the government's portal for apprentices and employers.

Information on money and pensions

The government-funded Money and Pensions Service brings together three agencies – the Money Advice Service the Pensions Advisory Service and Pensionwise.

The Pension Protection Fund provides help and advice for members of defined benefit pension schemes whose employer fails.

When searching online for advice and information about money and pensions, always check that the website is genuine – and beware of scammers.

Help with benefits and tax

Benefits advice is available from: Citizens Advice, Turn2Us and Entitled to.

Free help on understanding tax for the low paid is available from TaxAid, the Low Income Tax Reform Group and Tax Help for Older People.

RETURN TO CONTENTS ▲

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