ALTERNATIVE EMPLOYMENT IN A REDUNDANCY SITUATION

It is important as part of a fair redundancy procedure for an employer to consider whether it, or any associated employer, has any vacancies that would be suitable for employees who would otherwise be made redundant. There is no obligation on an employer to actually create new jobs for redundant employees, but a failure to offer any available alternative employment may make a redundancy dismissal unfair. This article looks at the law on considering and offering alternative employment in a redundancy situation.

Consideration of alternative employment

Once you have identified the number of jobs that are at risk of redundancy, you should seriously consider whether there are any alternative positions available elsewhere within the business (including within associated companies) and discuss these with affected employees at the redundancy consultation meetings.

During the redundancy consultation procedure, employees should therefore be advised of other vacancies within the business, even if you might otherwise have assumed them to be unacceptable, for example, because the role is on a reduced salary, involves a loss of status or is in a distant geographical location. All alternatives should be fully explored with the employee and the details confirmed in writing. For these purposes, it is up to the employee to decide whether any alternative employment you have offered, or permitted them to apply for, is acceptable for them (of course, if the alternative role clearly requires skills, qualifications or experience that the employee does not have and cannot easily gain with some training, then it is not necessary to draw it to their attention). Never discount any potentially viable options and always give the employee a reasonable opportunity to fully consider alternative employment that is available.

Where more than one potentially redundant employee is interested in an available alternative role, it is advisable to carry out a fair and objective selection exercise for determining who should secure the alternative position. Possible methods of selection include formal interviews, a selection matrix and/or a written assessment. Any selection process for alternative employment should be objective and only include criteria which are relevant to the new role.

The duty to offer alternative employment on redundancy continues throughout the redundancy consultation process and the employee's notice period until the effective date of termination of their employment. This means that if you serve notice of redundancy on an employee and during their notice period an alternative position then unexpectedly arises, you will need to give them the option of applying for that position.

Alternative employment and family-friendly leave

Employees who have been provisionally selected for redundancy whilst on maternity, adoption or additional paternity leave are legally entitled to be offered any suitable alternative employment in preference to other employees who are also at risk of redundancy. In practice, this means that employees on maternity, adoption or additional paternity leave are not required to apply for any suitable alternative position but should automatically be offered it, even if other employees at risk of redundancy appear to be stronger candidates.

This rule only applies to those who are actually on maternity, adoption or additional paternity leave during the redundancy process. It does not apply to those who are due to take
maternity, adoption or additional paternity leave shortly or those who have recently returned from such leave.

Note that this is a right to be offered suitable alternative employment in priority to other potentially redundant employees – it is not a right not to be selected for redundancy in the first place.

**Unreasonable refusal of suitable alternative employment**

An employee who is dismissed by reason of redundancy loses their right to a statutory redundancy payment if they unreasonably refuse an offer of suitable alternative employment.

'Suitable alternative employment' for these purposes must be either on the same terms and conditions as the employee’s current contract of employment or suitable employment in relation to the employee.

The offer of alternative employment:

- Must be made by the employee’s employer or an associated employer.
- Must be made before the ending of the employee’s employment under their current contract of employment.
- May be oral or in writing.
- Must take effect either immediately on the ending of their employment under the current contract i.e. at the end of the employee’s contractual or statutory notice period (this includes the old job ending on a Friday and the new job starting on the following Monday), or after an interval of not more than four weeks.

A job offer which would take effect prior to the employee’s dismissal under their current contract will not satisfy the statutory requirements for this particular purpose of avoiding liability to make a statutory redundancy payment (although, of course, if the employee accepts that job offer, there is no dismissal and hence no redundancy in any event). Thus, if you wish to potentially avoid redundancy payment liability, the employee should still be given notice of dismissal from their current position, with the offer of suitable alternative employment to commence at the end of their notice period.

The two other issues to be considered here are:

1. When is an alternative job offer suitable?
2. What is an unreasonable refusal?

When presenting the alternative position to the employee, the employer is under an obligation to clearly identify the new position and to set out the differences between it and the current job. Only when this has been done will the employee be in a position to make a reasoned decision.

The question of the suitability of an offer of alternative employment is an objective matter, whereas the reasonableness of the employee’s refusal depends on factors personal to them and is a subjective matter to be considered from the employee’s point of view. Whilst these are separate questions, the employment tribunal is entitled to look at factors which may be common to both. For example, a loss of status may be a reason for holding that the work offered is not suitable and also for having been reasonably refused.
The following are some of the factors that can be taken into account when assessing whether a job amounts to suitable alternative employment:

- The rate of pay and the value of any contractual benefits.
- The duties and level of responsibility of the new job.
- The status of the new job.
- The place of work and its proximity to the employee's current workplace (and whether or not the employee has a mobility clause in their contract of employment).
- The hours of work and any shift patterns.
- The working environment.

There may be many reasons for a refusal of alternative employment being reasonable, such as:

- It involves an inconvenient geographical relocation.
- It involves greater travelling time to and from work.
- The terms and conditions interfere with unavoidable family commitments.
- It does not carry the same level of status and responsibility.
- It requires considerable retraining.

Where alternative employment is declined by an employee in circumstances where you believe it to be suitable, the employee should be asked to put forward their reasons for turning down the job offer, so that they can be examined for reasonableness. If an employee is of the view that the position is not suitable, you should consider what steps, if any, could be taken to make the position more suitable. For example, if the employee argues that the distance to the new location is too far, consider offering to pay travel costs, perhaps allowing the employee to travel outside peak hours or assisting them to find alternative ways of travelling to the new location.

If the alternative employment offered is unsuitable and/or the employee's reasons for refusing the alternative employment are reasonable, the employee will be regarded as having been dismissed by reason of redundancy on the date on which their original job role came to an end and they will still be entitled to a statutory redundancy payment.

**Trial period**

If the terms and conditions of the new contract of employment differ from the provisions of the current contract of employment, the employee has a statutory trial period of four calendar weeks, beginning with the ending of their current employment, in which to decide whether the alternative employment is suitable for them. This period also enables the employer to assess the employee's suitability.

The four-week period may be extended by agreement between employer and employee where this is for the purpose of retraining the employee for employment under the new contract.

Such an agreement must:

- Be in writing.
- Be made before the commencement of the trial period.
- Specify the date upon which the trial period is to end.
- State clearly the terms and conditions of employment which will apply to the employee at the end of the trial period.

The trial period can lead to three situations:

1. The employee accepts the alternative employment and continues in employment after the expiry of the trial period – they are deemed not to have been dismissed for the purpose of determining any liability for a statutory redundancy payment. Thus, there will have been no dismissal and no redundancy. Instead, the employee’s terms and conditions will be amended to reflect the new position.

2. The employee terminates the alternative employment during or at the end of the trial period – the position reverts back to that of redundancy and they are treated as having been dismissed on the date on which their original contract of employment came to an end for the purpose of determining liability for a statutory redundancy payment i.e. the date of the redundancy for the purpose of calculating statutory redundancy pay is the date on which the original job ended and not the date of termination of employment at the end of the trial period. Whether a redundancy payment is then payable will depend on whether termination of the alternative employment by the employee was reasonable or unreasonable and whether the terms of the alternative employment were suitable or not.

3. The employer terminates the alternative employment during or at the end of the trial period, for a reason connected with or arising out of any difference between the new contract and the original contract – again the position reverts back to that of redundancy and the employee is again treated as having been dismissed on the date on which their original contract of employment came to an end for the purpose of determining liability for a statutory redundancy payment. A statutory redundancy payment will be payable, assuming the employee meets the other relevant qualifying conditions.

However, if, during or at the end of the trial period, the employer dismisses the employee for a reason unconnected with or not arising out of any difference between the new contract and the original contract (for example, the employee is dismissed because of gross misconduct during the trial period), they can then potentially claim unfair dismissal on the basis of the fairness of the dismissal in the trial period, provided they have two years’ continuous employment. That will not be a redundancy.