



Alternatives to redundancy and the importance of following a fair process

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Redundancies may seem the only option for employers wanting to stay afloat in the current climate, however there are many different routes an employer can go down before having to resort to laying off staff.

If the employer simply sends the employees home, it is under a contractual obligation to continue to pay them, even if they do not provide them with any work. However there are alternatives.

These include short term measures such as requiring employees to use holiday during a period of closure. Employers are entitled to tell employees when to take holiday and so this could be useful if the employer wishes to shut for a short period of time, the only obligation on employers is that they must tell employees about the planned closure a number of days before, at least twice the number of days they require staff to take off. This should be accompanied by an explanation of why the closure is necessary. Alternatively the employer can ask the employee to take a period of unpaid leave. This would allow the employee to remain employed and return to work in the future but would allow the employer to cut costs in the short term. The downside of this of course is that the employee does not get paid for the period of absence and so may be unfeasible.

More medium term options might include having a temporary lay-off; a period where employees are not provided with work. This allows employers to not pay these employees for a period until the situation requiring the laying off has ended. However this cannot be used unless there is an express right to do so in the contract of employment (which is uncommon) or alternatively if this is subsequently agreed by the parties.

Short-term working is another option that allows employers to temporarily lay off staff for specified number of hours a day or days a week, but its use is subject again to there being an express right to do so in the contract. Or the employer may simply want to ask the employee to work reduced hours during the period of uncertainty. It is worth noting however that while these measures may be practicable for employees who are able to work from home or are 'essential' workers in businesses needing to cut overheads, this does not really provide a solution to the issue of what to do about employees who are willing to work but cannot, due to the nature of their jobs, work from home.

One option that could provide a longer term solution is designating certain employees as 'furloughed' under the government's 'Coronavirus Job Retention Scheme'. The designated workers will still be employed during this time, but they cannot perform any work. HMRC will reimburse 80% of the wages of these workers to the employers up to a maximum of £2,500, allowing them to keep employees on the books. There is no obligation for employers to pay the other 20% of wages to employees, although they may choose to do so. Once employers decide which staff to designate as 'furloughed', they need

the employee's agreement, and this should be in writing and include details such as the start date of the furlough period and when it will be reviewed.

If there is no alternative to redundancy that a business can pursue, for example if the business has had to close or cease trading, then employers should be careful to follow a fair and transparent procedure. Doing so should not only avoid unfair dismissal claims being brought if the employee has been continuously employed for more than two years but should also prevent opening up the employer to liability for discrimination, for which there is no qualifying period of service.

Employers should remember that even if there is a genuine redundancy situation and it is obvious that the employee's role is no longer needed, unfair dismissal claims can still be brought as employers have to follow a fair procedure, for example holding collective or individual consultations, and if reasonable, allowing the employees to seek redeployment within the organisation. Compensation for unfair dismissal is capped at £88,519 as of 6 April 2020 or one year's salary, whichever is the higher.

Employers should also be aware that redundancies can invite discrimination claims if not handled correctly. For example some employees may need reasonable adjustments to be made to the redundancy process due to a disability and some may require extra assistance from the employer to find redeployment due to a positive duty on them by reason of the employee's disability. It could also be the case that if criteria and the process by which employees are selected for redundancy are not clear and objective, there could potentially be claims of discrimination on the grounds of sex or age. Compensation for discrimination remains uncapped and can include compensation for injury to feelings as well as for any financial losses suffered.

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