

Managing the workforce

Cutting costs and restructuring

Introduction

Schools are having to consider ways in which to manage the workforce in order to reduce overheads. As a school's biggest regular outgoing, reducing staffing cost has to be an option, however difficult this may at first be. Whilst redundancy will be a last resort, when faced with such a situation, schools must ensure the correct procedure is followed and applied fairly to avoid potential claims from affected employees.

Redundancy and restructuring

Although alternatives (e.g. not replacing departing staff; where applicable, using probation periods appropriately and effecting dismissals of staff with under a year's service) may sometimes be preferable when pupil numbers fall, or budgets are cut, redundancies may be the only practical way to rebalance pupil to staff ratios and cut costs.

Redundancy situations fall into three categories:

- Business closure (closure of the business altogether).
- Workplace closure (closure of one of several sites, or relocation to a new site).
- Diminished requirements of the business for employees to do work of a particular kind.

The legal test for redundancy:

- ◇ Closure:- 'ceasing or intending to cease to carry on the business (or close the workplace) in which the employee is employed'; or
- ◇ Reduced requirement:- reduced 'requirement for employees to carry out work of a particular kind'.

Either of these two tests must be met, in order for a redundancy situation to arise. If they are not however, there may still be a business reorganisation eg. where the needs of a particular position change without a head count reduction. Typically, we refer to such a case as a 'restructure'.

The line between restructuring and redundancy

Restructuring, can be a fair reason for terminating employment. However, the line between what is a restructure and what is a redundancy can often be a fine one. In either case, similar procedures relating to dismissals need to be followed.

The Employment Appeal Tribunal has formulated a three-stage test for determining whether a dismissal is by reason of redundancy:

1. was the employee dismissed? If yes,
2. had the requirements of the business for employees to carry out work of a particular kind ceased or diminished? If yes,

3. was the dismissal of the employee caused wholly or mainly by the state of affairs identified at stage 2 above?

If the answer to all three stages is 'yes', there will be a redundancy dismissal.

Dismissing fairly for redundancy

To ensure a dismissal for redundancy is fair, schools must establish that:

- redundancy is the real reason for the dismissal (using the three-stage test above).
- they acted reasonably, in all the circumstances, in treating redundancy as the reason for dismissing the employee. Reasonable actions in such circumstances include:
 - ◇ warning and consulting employees, or their representative(s), about the proposal;
 - ◇ identifying the correct pool from which to select potentially redundant employees and select against proper criteria; and
 - ◇ considering suitable alternative employment. The employer must, where available, offer suitable alternative employment within its organisation.

Planning and communication

The key to scoping a redundancy exercise is planning and communication. When announcing potential redundancies, a clear and consistent message is needed. Communication should be formal and regular, whether delivered face to face or in writing. For instance, if you are hoping to generate enough voluntary redundancies to avoid compulsory redundancies, far better to say a decision has yet to be taken, rather than nothing at all. Silence is likely to be interpreted as the worst-case scenario.

When planning, it is recommended that the following policy decisions are made at the outset:

1. Where **change management procedures** exist, ensure these are reviewed and a step by step approach taken to compliance.
2. Identify the staffing **structure** you want within your budget parameters.
3. Prepare objective **selection criteria** which will achieve the outcome that you want.
4. Identify whether to accept **voluntary redundancies**. Whilst unions may be more receptive to, and supportive of, this approach, staff who are most likely to get jobs elsewhere are the ones prone to volunteer.
5. Consider what **terms** will be offered for redundancy.

Whilst there is a statutory cap on a weeks' pay (currently £525) collective agreements often exist enhancing this to an actual weeks'. Or the decision may be taken to make a discretionary enhancement.

6. Remember to include those employees on **long-term sick leave** or **maternity leave** in the redundancy consultation process. They should be kept informed of the position,

receiving the same information in writing as other employees, as well as being actively involved in the consultation process.

Failure to consult with absent employees may result in claims of sex discrimination, disability discrimination and/or constructive unfair dismissal. It is also important to remember that any employees on maternity leave have an automatic right to be offered suitable alternative work (where available).

Consultation obligations

Depending on the number of affected individuals, there may also be a legal obligation to collectively consult with trade unions or employee representatives. Under the Trade Union and Labour Relations (Consolidation) Act 1992 (**TULRCA**), this obligation arises where 20 or more individuals are to be affected by dismissal.

In accordance with section 188 of TULRCA, an employer is under a duty to inform and consult with the appropriate representatives of staff where it is proposed to dismiss as redundant 20 or more staff in a 90-day period. This section provides that consultation must:

- be with the 'appropriate representatives' of affected staff;
- last for at least 30 days (20 to 99 employees) 45 days (100 or more employees) before the first notice of dismissal takes effect; and
- be with a view to avoiding dismissals, reducing the number of dismissals and mitigating the consequences of dismissal.

A failure to comply with s.188 TULRCA can ultimately result in an Employment Tribunal making a protective award in respect of every employee for whom a school has failed in its collective consultation obligations. This is up to 13 weeks' gross pay per employee. It is therefore vital to comply with s.188 TULRCA if the obligation to do so arises.

Redundancy process

Collective consultation

Establish how many redundancies are being proposed. Where the proposal amounts to 20 or more in a 90-day period, collective consultation obligations will arise under TULRCA eg. election of employee representatives and/or consultation with recognised trade unions. If fewer than 20 redundancies are proposed, it will be necessary to follow a fair procedure (as detailed below). Consultation is with a view to reaching agreement, on ways and means of avoiding or reducing dismissals and mitigating the consequences.

Where the requirement for collective consultation arises, the Secretary of State must be notified of the school's plans to make collective redundancies. Where the proposal is to dismiss 20 to 99 employees within a 90-day period, the Secretary of State must be advised at least 30 days before the first dismissal takes effect, being the date on which notice is to expire; or at least 45 days before the first dismissal takes effect where it is proposed to dismiss 100 or more employees. The notification must be in writing on a form HR1 and a copy must be provided to the employee representatives. Employees cannot be given notice of dismissal until the Secretary of State has been notified.

Warning meeting and follow up letter

As a group, meet with all employees who are at risk of redundancy. Explain the business reasons behind the need for redundancy and all other options explored. Where relevant, explain the pools and proposed selection criteria. Inform affected staff that the proposed criteria will be available for their comments prior to the scoring.

Explain how many jobs are at risk of redundancy and consider whether voluntary redundancies should be discussed at this stage. Ensure to ask employees and union(s) for suggestions of ways to avoid redundancies. Also explain that those identified at risk of redundancy will have the right to take time off to seek alternative employment.

Selection and scoring

There are a range of methods of carrying out a selection exercise for redundancy, and this is only a suggested method. Key principles are transparency, objective criteria (e.g. performance and ability) and full opportunity for those affected to make representations. This is consultation, not negotiation.

Where consultation is in respect of a restructure with proposed new posts, it is usually best to select by application for the new roles and interview. Those affected should be given an indication of the criteria upon which they will be assessed. Where a more straightforward head count reduction is needed, then scoring criteria can be used.

Score each potentially redundant employee using the selection criteria and scoring guidelines. Ideally three people should conduct the scoring, each as individuals, before the scores are aggregated. This demonstrates that the scoring process was objective.

Second letter and first individual meeting

Write to those employees who have been provisionally selected for redundancy, inviting them to a meeting to discuss their provisional selection. Inform them of the scoring breakdown (with names redacted) and the score of the lowest scoring person.

Hold meetings with each selected employee individually and discuss the scores, the proposal to select them for redundancy, alternative vacancies and the terms of the redundancy. Consider the employee's comments and follow up any suggestions made to avoid redundancies.

To provide a clear paper trail, carefully document any suggestions and responses in case it is called upon in the future.

Second individual meeting

Meet with the employee to provide them with feedback on the previous meeting. Respond in full to comments raised in relation to the scoring and any suitable alternative employment. Ensure you consider all other comments raised.

Confirmation of decision

Write to the employee confirming the decision to dismiss by reason of redundancy and specify the termination date and payment calculations. Repeat the right to take time off to seek alternative employment, and the employee's right of appeal.

Appeal

Any appeal meeting should be conducted by individual(s) who were not involved in the original decision, and who, in accordance with the school's procedure, have the authority to hear the appeal.

Trade unions

Employees will undoubtedly approach their unions, at least for reassurance about their future, if nothing else. Understandably, the unions will want to resist any job losses amongst their membership and will challenge the selection criteria. It is advisable to involve the unions as early on as possible, providing them with the same information. By giving union representatives an opportunity to access information and become a part of the support process, you will help them address any employee concerns or worries.

The duty to involve the trade unions will be greater in the maintained sector and a review of collective agreements and any Information and Consultation Agreement is an essential first step to any change management process.

Redundancy entitlement and calculation

All employees with at least two years' continuous service will qualify for a statutory redundancy payment. Calculation of redundancy payment is based on the following:

Age factor (see below) x weekly salary (subject to a statutory cap) x length of service (subject to a maximum of 20 years)

The appropriate age factors are as follows:

- 0.5 x number of years' service up to the age of 21
- 1 x number of years' service between ages 22 and 40
- 1.5 x number of years' service from the age of 41

Under the Redundancy Payments (Continuity of Employment in Local Government, etc.) (Modification) Order 1999, when staff move between maintained schools and academies, service is counted as continuous for the purposes of a redundancy payment and should be borne in mind.

Other legal considerations

As well as following the above suggested procedure, schools should ensure they consider the following:

- Suitable alternative employment. What constitutes suitable? Consider the school's entire vacancy list, as alternative employment may not be obvious.
- Maternity leave. Any employee on maternity leave in the redundancy pool must be offered any suitable alternative vacancy in preference to others.
- Settlement agreement. Depending on whether an enhanced redundancy payment is to be offered, schools may want to consider making such a payment conditional upon the employee entering into a settlement agreement thereby extinguishing any future claims the employee may have.

Summary

- Identify the needs of the school.
- Early planning is essential.
- Engage in consultation with staff and, where necessary, trade unions.
- Keep channels of communication open with staff. Remember, staff will be anxious; prolonged periods of silence will only add to that anxiety.
- Maintain the trust and confidence of those staff who remain with the school.

For further information in relation to redundancies and/or restructuring please contact Naseem Nabi of Veale Wasbrough Vizards on 0117 314 5630 or at nnabi@vww.co.uk

Note: This guidance is for general purposes only. Specific legal advice should be taken on any particular issues.