# A GUIDE TO THE LAW ON REDUNDANCY

September 2017, Employment Relations Unit

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Handling a redundancy exercise requires considerably more than merely complying with the basics of statutory employment law. Employers are expected to operate within a well-defined procedural framework established by legislation and case law, which underpin good practice in a redundancy situation.

**Definition of redundancy**

An employee who is dismissed shall be taken to be dismissed for redundancy if the dismissal is attributable wholly or mainly to the fact that:

- the employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or

- the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where they were so employed, have ceased or diminished or are expected to cease or diminish.

(Section 139(1) Employment Rights Act 1996 (ERA))

**Reason for dismissal**

Redundancy is one of the potentially fair reasons for dismissal (s.98 ERA). In the context of redundancy, a dismissal occurs if:

- the contract of employment is terminated with or without notice;
- the individual is on a fixed-term or limited-term contract which ends without being renewed; or
- the employee resigns with or without notice due to a repudiatory breach of contract by the employer (for example if a resignation was in response to wholly unreasonable proposals put forward by an employer in a redundancy procedure).

(s.136(1) ERA)
Is there a dismissal?

Employers contemplating organisational changes will need to assess whether any changes they are proposing have the effect on any individual’s contract of employment of making that employee redundant.

Case law provides that there is a three-stage test to identify redundancy, which requires the court to ask:

- Was the employee dismissed?
- If so, had the employer’s requirement for employees to carry out work of a particular kind ceased or diminished, or was it expected to cease or diminish?
- If yes, was the dismissal caused wholly or mainly by this reason?


Therefore, where a dismissal is the result of workforce reductions, the employee will have been dismissed for redundancy. The test also means that ‘bumped’ or transferred redundancies (where an employee who was not in a redundancy situation is replaced by an employee who was) are potentially lawful.

Where employees have been ‘bumped’, tribunals will still look closely at the reason for dismissal and whether the actual reason was, for example, related to the employee’s capability or conduct.

Where a dismissal occurs due to the employer wishing to reduce the number of hours an employee works, because of a reduction in the amount of work to be done, this may also be a dismissal for redundancy. See Packman Lucas Associates v Fauchon (Advisory Bulletin 591).

The non-renewal of a fixed-term contract that was to cover an absent employee, e.g. someone on sick or maternity leave, will not amount to a redundancy.

Collective consultation

The duty to consult

Where it is proposed to dismiss 20 or more employees at one establishment within a period of 90 days or less, there is a duty to consult about potential redundancies with relevant recognised trade unions or elected employee representatives. The requirements of this duty are set out in s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A).

Employers must consult the recognised trade union(s) about employees likely to be affected by the proposed dismissals or by measures taken in connection
with those proposed dismissals. This covers not only those employees who are likely to be dismissed, but also those who might be affected, for example, by having to take on reallocated work.

The requirement to consult applies even where those vulnerable to redundancy are not union members. If there is no recognised trade union(s), the employer should arrange for employees to elect appropriate employee representatives for consultation purposes.

What constitutes an ‘establishment’?

Although there is no statutory guidance, the European Court of Justice in *Rockfon A/S v Specialarbejderforbundet i Danmark, acting for Nielsen & ors* [1996] IRLR 168 ECJ (Advisory Bulletin 338), held that in defining the term ‘establishment’ the purpose of the EU Collective Redundancies Directive, namely to protect workers, should be the overriding factor.

The ECJ gave further guidance in the case of *Athinaiki Chartopoia AE v Panagiutidis & ors* [2007] IRLR 284 (Advisory Bulletin 525). An establishment may consist of:

- a distinct entity:
  - with a certain degree of permanence and stability;
  - assigned to perform one or more given tasks; and
  - which has a workforce, technical means and an organisational structure allowing for the accomplishment of those tasks.

- It need not have:
  - legal autonomy;
  - economic, financial, administrative or technological autonomy;
  - management that can independently effect collective redundancies; or
  - geographical separation from other parts of the undertaking.

In *USDAW and another v WW Realisation 1 Ltd (in liquidation), Ethel Austin Ltd and another* (C-80/14) (Advisory Bulletin 625), the ECJ applied the same approach as in the *Rockfon* and *Athinaiki* cases and held that “establishment” is the entity to which the workers are assigned to carry out their duties, rather than the employer as a whole.

To avoid risks of challenge around collective consultation, if 20 or more employees are to be made redundant in a 90-day period across the authority as a whole, the LGA would recommend formal consultation with the trade union(s), or elected employee representatives, if there is no recognised union.

What must the employer consult about?

The statutory requirement is that the consultation must be undertaken with a view to reaching agreement and include consultation about:
• avoiding the dismissals;
• reducing the numbers of employees to be dismissed; and
• mitigating the consequences of the dismissals.

Information which must be given to the representatives

Under the statutory requirements, information as set out below must be given to the representatives in writing for the purpose of consultation:

• the reason for the proposals;
• the number and descriptions of employees whom it is proposed to dismiss as redundant;
• the total number of employees of the description employed at the establishment;
• the proposed method of selecting employees for redundancy;
• the proposed method of carrying out the dismissals including the period over which the dismissals are to take effect;
• the proposed method of calculating the amount of any redundancy payments;
• the total number of agency workers working temporarily for and under the supervision and direction of the employer;
  o the parts of the employer’s undertaking in which those agency workers are working; and
  o the type of work those agency workers are carrying out.

When should consultation commence?

Consultation must begin ‘in good time’ once the employer has a proposal to dismiss for redundancy. There is a statutory timetable for consultation which should be regarded as a minimum and is as follows.

<table>
<thead>
<tr>
<th>Number of employees it is proposed to dismiss at establishment over 90-day period</th>
<th>Minimum number of days consultation must begin before first dismissal takes effect</th>
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<tr>
<td>20 – 99</td>
<td>30 days</td>
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<tr>
<td>100 or more</td>
<td>45 days</td>
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Fixed-term contracts that are due to expire as agreed in the contract will not count towards the thresholds of 20 employees or 100 employees for consultation or notification to the Secretary of State (form HR1 – see ‘notifying the relevant government department’ below).

There is no statutory requirement for collective consultation where the redundancies involve less than 20 employees, but the LGA recommends as
good practice applying as a minimum the 30-day consultation period before dismissals take effect.

To be a valid consultative exercise, trade unions must be approached at the time when the possible declaring of redundancies becomes a proposal, not a final decision.

Employers have a defence to complaints that they have not allowed sufficient time to hold meaningful consultations where they can show that it was not reasonably practicable to consult. This defence is difficult for local authorities to raise successfully. If aware that certain decisions may lead to redundancies e.g. budget information, authorities are strongly advised to keep recognised trade unions and/or elected employee representatives as fully informed as possible of developments.

Notices of dismissal should not be issued until the consultation requirements have been complied with. This does not necessarily mean that the employer has to consult for 30/45 days before they can issue notices of dismissal. However, the employer would have to be able to demonstrate that the consultation process had been thorough and was complete before notices were issued (see Junk v Kuhnel [2005] IRLR 310 (Advisory Bulletin 497)).

In the context of a TUPE transfer, where redundancies may be planned after the transfer, it may be possible for pre-transfer consultation with transferring employees by the transferee on collective redundancies to count for the purposes of consultation duties under TULR(C)A. However, such consultation will only be allowed if the transferee employer elects for it by way of a written notice to the transferor employer, and the transferor then agrees to it.

Other circumstances where the duty applies

References to dismissal as redundant refer to dismissal for ‘a reason not related to the individual concerned’ (s.195(1) TULR(C)A). This means that dismissing and renewing the contract of employment to change terms and conditions triggers the requirement to consult collectively, if more than 20 employees in a 90-day period in one establishment are involved (GMB v Man Truck & Bus UK [2001] IRLR 636 EAT (Advisory Bulletin 421)). However, in this situation there would not normally be a right to a redundancy payment.

The ECJ has also held that an employee who resigns in response to an employer’s proposal to amend their terms and conditions will also be a dismissal for the purposes of collective consultation (see the case of Cristian Pujante Rivera v Gestora Clubs Dir, SL and Fondo de Garantia Salarial (Advisory Bulletin 632)).

Penalty for failure to consult – protective awards

The trade union or, in their absence, elected employee representatives or, in their absence, the employees themselves, have three months from the date of
dismissals in which to complain to an employment tribunal that the employer has failed to comply with its statutory duty to consult. If the tribunal so finds, it will make a declaration that the consultation was inadequate and may make a protective award requiring the employer to make payments to those employees who it has dismissed or whom it proposed to dismiss in respect of whom adequate consultation was not carried out.

If the complaint is made by a trade union representative, payment will be made to each relevant employee in that bargaining unit, whether they are a trade union member or not.

The award is for a specified period (‘the protected period’), starting on the date on which the first of the dismissals to which the claim relates takes effect, or the date of the award (whichever is the earlier) and continuing for as long as the tribunal considers appropriate. The maximum limit on the protected period is 90 days in all cases. There is no set-off against other payments already made for an employer’s breach of contract e.g. a payment in lieu of notice.

An employee is entitled to a week’s gross pay for each week (pro rata for part of a week) of the protected period. There is no cap on the amount of a week’s pay for these purposes (section 189(1) TULR(C)A).

**Individual consultation**

Individuals should be warned of, and consulted about, impending redundancies at the earliest possible date, given details of compensation and offered support. This always applies, including where collective consultation takes place.

The duty to consult is separate from the obligation to warn of the redundancies. Consultation must be ‘meaningful’ and occur while the redundancies are still at the proposal stage.

The regime on discipline and dismissal, i.e. the Acas code of practice and the 25% adjustment to awards, which replaced the statutory dismissal procedures, do not apply to redundancy dismissals. However, authorities should still ensure that individuals are informed and consulted over their selection for redundancy to avoid a finding of unfair dismissal. A right of appeal against selection for redundancy should also be provided.

**Notifying the relevant government department**

In addition to consulting the trade union(s) or elected employee representatives, it is necessary to notify the Secretary of State at the Department for Business, Energy and Industrial Strategy on form HR1 of proposed redundancies involving twenty or more employees at any one establishment in a 90-day period. Failure to do so can incur an unlimited fine.
Section 193(1) and (2) TULR(C)A require form HR1 to be provided before any notice of dismissal is issued and, where 20 – 90 employees are to be made redundant, at least 30 days before the first dismissal takes effect (i.e. when notice expires) or 45 days in the case of 100 or more employees.

At the same time, a copy of the HR1 form must also be given to the trade union(s) or other employee representatives who are to be consulted (s.193(6) TULR(C)A).

**Selecting for redundancy**

For the purposes of selecting for redundancy, there are two sorts of redundancy situation. The first is where there is a specific decline in the need for the workforce in certain functions or locations. The second is where there is a general need to reduce the workforce as a whole.

As the question of who to select for redundancy is a major item on which employers have to consult employee representatives, authorities should be clear as to the selection process they intend to use, well before consultation begins. This will not only ease the consultation process, but will also give the authority time to consider fully the implications which selection can have on future performance.

Local authorities will often have a locally agreed protocol or process for dealing with reorganisation and redundancy and therefore need to make sure they are applying the provisions of any such process.

**Pool for selection**

As part of the requirement to act reasonably when dismissing for redundancy, the employer must give careful consideration to the pool from which employees are to be selected.

Generally speaking, employers have a wide degree of discretion in determining the pool, providing they have good reasons for acting as they do.

Where a reduction in the need for employees to carry out work of a particular kind leads to the redundancies, the pool for selection will usually be determined by the kind of work that employees do. Therefore, consideration needs to be given to which employees within the organisation do this kind of work and, where the pool does not include all employees carrying out such work, the reasons for this i.e. in case there is a need to show that it was reasonable to limit the pool. See the case of *Capita Hartshead Ltd v Byard* (Advisory Bulletin 587) where the EAT upheld a tribunal’s decision that a selection pool of one, where the reduction in work related to that employee’s allocated clients, was unfair where there were other employees carrying out the same type of work for other clients.

There may be reasons why an employer decides that the pool should be wider than just the employees that do the kind of work in the area that is being
reduced. It may include other employees with the same skills, but in different areas of the organisation for example. Again, the employer should ensure that it has good reasons for acting as it decides.

In the case of Contract Bottling Ltd v (1) Cave and (2) McNaughton (Advisory Bulletin 604) the EAT overturned the tribunal’s finding that the claimants had not been dismissed for redundancy, as the employer had not identified “the employees who carried out work of a particular kind nor that that particular kind of work had ceased or diminished or was expected to cease or diminish”. A wide range of posts had been included in the pool for selection, with the employer taking the view that it would retrain employees where necessary i.e. it would ‘bump’ a person from a post where the work had not diminished and replace them with an employee whose post was being deleted. Although the EAT did decide that the claimants had been dismissed for redundancy, as their selection satisfied the test in Murray v Foyle Ltd [1999] IRLR 562, the EAT did comment that there was a ‘rather surprising pool’. However, the EAT did uphold the tribunal’s finding of unfair dismissal in this case due to the way the selection criteria had been applied.

Selection criteria

Selection criteria:

- must be clear, objective and precisely defined. The pool for selection and the selection criteria should be clear and understood by managers, employees and employee representatives;
- must be applied in a reasonable, fair and objective manner;
- should not discriminate against staff on the grounds of age, sex, race, disability or any of the other protected characteristics under the Equality Act or on the grounds of part-time or fixed-term status; and
- must not be indirectly discriminatory. Indirect discrimination may occur when a provision, criterion or practice is applied which puts those with a particular protected characteristic, including the individual concerned, at a particular disadvantage and which cannot be justified.

In Rolls Royce v Unite (Advisory Bulletin 553) the Court of Appeal held that the use of length of service as a criterion in a scheme agreed with the trade unions was not indirectly discriminatory on the grounds of age as it was justified. However, this case has to be treated with caution as length of service was one of a number of criteria. It is likely that in many cases the use of ‘last in, first out’ by itself could disadvantage younger workers and would not be justified.

Interviewing as a method of selection

Many local authorities will often, as part of an agreed way of handling redundancy and reorganisation, use interviewing as a way of selecting employees for redundancy. This may be the case whether there is a reduction in posts, or if new posts are created in a reorganisation.
There is a surprising lack of case law on this point. However, in *Morgan v The Welsh Rugby Union* (Advisory Bulletin 574), two individuals were interviewed for a more senior post which was replacing their positions. The employer failed to adhere to its own procedures. Mr Morgan was dismissed on the grounds of redundancy. The EAT held that an employer was allowed to introduce an element of subjectivity to its decision on appointment since this was a new post and the employer had to be more forward-looking than in a straightforward redundancy selection exercise. Whether the process is fair or not will depend on the facts in each particular case. In this case Mr Morgan failed in his claim of unfair dismissal.

This case did not deal with the situation where an interview process is used to reduce posts where the job functions remain the same. Local authorities are advised to take care to ensure that the interview process is objective. In particular, interview questions should relate properly to the job specification. If there is a locally-agreed protocol, care should be taken that it is followed.

However, as the case of *Mental Health Care (UK) Ltd v (1) Biluan (2) Makati* (Advisory Bulletin 605) demonstrates, excluding all subjective elements from a selection exercise can result in a finding of unfair dismissal. In this case, Mental Health Care (UK) Ltd had in effect based its decisions on recruitment-style, competency-based assessment and had not taken into account such things as length of service, appraisal records and the opinion of managers who knew the employees concerned. The tribunal considered this to be grossly unfair and the decision was upheld on appeal by the EAT.

### Redundancy during maternity, adoption, parental or shared parental leave

When dealing with redundancy situations, authorities need to ensure that all staff, including those who may be absent from work due to maternity, adoption, parental and shared parental leave are consulted and kept informed.

It will be an automatically unfair dismissal if an employee is selected for redundancy on the grounds of pregnancy or due to the taking of maternity, adoption, parental and shared parental leave.

Where an employee on these types of leave is part of the pool for selection, the criteria to be used must be the same for all the employees concerned. Furthermore, the criteria must not be such that an employee on leave is put at disadvantage due to their absence as the case of *Riežniece v Zemkopības ministrija and Lauku atbalsta dienests* (Advisory Bulletin 604) demonstrates.

An employee on these types of leave whose post is to be made redundant must be offered any suitable alternative vacancy available in preference to other employees. Failure to comply with this requirement will result in a finding of automatic unfair dismissal. The case of *Sefton Borough Council v Wainwright* (Advisory Bulletin 620) confirmed that the point at which the
obligation arises is not when a woman has been issued with notice of redundancy, but at the point when, in a restructure, her post has been deleted or proposed for deletion. (Further information on this area is available in the Acas guide Managing redundancy for pregnant employees or those on maternity leave.)

Redundancy during these types of leave will end any contractual obligations to both occupational pay and the right to return. The payment of statutory maternity, adoption, paternity and shared parental pay will not be affected and will continue until the end of the relevant statutory pay entitlement (e.g. 39 weeks for SMP) or until the employee starts work for a new employer.

Any payments made to the employee in respect of sick pay, holiday pay, maternity, adoption, paternity and shared parental pay go towards meeting the employer’s obligation to pay full pay during the statutory notice period under s.87 ERA.

If an employee who is pregnant or on maternity or adoption leave is dismissed they are entitled to a written statement of the reason for dismissal regardless of their length of service. This does not have to be requested by the employee.

Employees should also be wary of discriminating on the grounds of sex in relation to women who are absent on maternity leave during a redundancy exercise. Criteria may have to be adjusted or removed to compensate for any disadvantage which such a woman might suffer. However, employers have to be careful not to go too far in their attempts to achieve this aim. In Eversheds Legal Services v De Belin (Advisory Bulletin 577), the EAT held that automatically inflating the score of a woman for a particular criterion to the maximum available was discriminatory against Mr De Belin. An employer should only do what is proportionate to compensate for potential disadvantage.

Automatically unfair selection for redundancy

A dismissal can be found to be unfair without the courts considering the reasonableness of the decision, as required by s.98(4) ERA, i.e. it will be automatically unfair if:

- the reason (or principal reason) for the dismissal is that the employee was redundant;
- it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking and that those in a similar position were not so dismissed; and
- it is shown that the employee’s selection for redundancy was for one of a number of specified reasons. Some of the more common reasons are set out below.

  - asserting a statutory right (s.104 ERA)
  - enforcing the right to the national minimum wage (s.104A ERA)
- applying for flexible working (s.104C ERA)
- a health and safety reason (s.105(3) ERA)
- working time (s.105(4A) ERA)
- making a protected disclosure (s.105(6A) ERA)
- taking protected industrial action (s.105(7C) ERA)
- being an employee representative for the purposes of consultation on redundancy or transfer of undertakings (s.105(6) ERA)
- a reason connected with pregnancy, giving birth or taking maternity leave, parental leave or time off to look after dependants (reg. 20 Maternity and Parental Leave etc Regulations)
- a reason connected to taking paternity or adoption leave (reg. 29 Paternity and Adoption Leave Regulations 2002)
- a reason connected to taking shared parental leave (reg. 43 Shared Parental Leave Regulations 2014)

Also, under TULR(C)A an employee will be deemed to have been automatically unfairly dismissed if they are dismissed for redundancy for a reason connected to:

- the employee’s membership or non-membership of a trade union, or participation in trade union activities (s.153 TULR(C)A)
- or trade union recognition or de-recognition (Schedule A1, para. 162 TULR(C)A).

A dismissal for redundancy will be automatically unfair if the sole or principal reason for dismissal was a transfer of an undertaking. The dismissal will not be automatically unfair where the sole or principal reason for the dismissal is an economic, technical or organisational (ETO) reason entailing a change in the workforce. Where there is such an ETO reason, then the dismissal is still subject to the normal requirements on unfair dismissal. See further LGA’S A Guide to the Law on TUPE

Unfair dismissal and redundancy

As provided above, an employee can in certain circumstances complain to an employment tribunal that their dismissal was automatically unfair. In addition to these special provisions, an employee may complain to a tribunal under the normal unfair dismissal provisions in a redundancy situation.

This may occur where:

- the employee is dismissed, but not for redundancy, and wishes to argue that there was a redundancy situation and that a redundancy payment should therefore be made;
- the employee is dismissed for redundancy but wishes to argue that this was not the real reason for dismissal; or
• the employee accepts that the dismissal was for redundancy, but wishes to argue that the dismissal had not been handled reasonably.

If the employee is replaced there will be strong evidence that the dismissal was not for redundancy. To defend a claim of unfair dismissal an employer has to show a valid reason for dismissal. This may prove difficult if the employer maintains that redundancy was the reason, depending on the circumstances.

**Notice periods**

The amount of notice that an employee is entitled to receive is set out in s.86 ERA (see chart below), unless the contract of employment provides for a longer period.

<table>
<thead>
<tr>
<th>Length of continuous service</th>
<th>Notice required</th>
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<tr>
<td>One month but less than two years</td>
<td>One week</td>
</tr>
<tr>
<td>Two years but less than three</td>
<td>Two weeks</td>
</tr>
<tr>
<td>Each additional year</td>
<td>One additional week</td>
</tr>
<tr>
<td>Twelve years plus</td>
<td>Twelve weeks</td>
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**What if individuals leave early?**

Employees under notice of dismissal for redundancy may ask their employer to allow them to leave their job early, before the expiry of their notice period. Alternatively, they may give the employer a written counter-notice (s.136(3) ERA).

This will not invalidate the right to a redundancy payment except where the employer successfully contests the application. They are still deemed to have been dismissed by the employer, but on the date of expiry of the employee’s notice and not of the original notice from the employer.

**Right to time off to look for work or arrange training**

Employees who will have at least two years’ service when their notice of dismissal for redundancy expires should be allowed reasonable time off during working hours to look for work or to arrange training. The Employment Rights Act provides that an employee is entitled to paid time off, subject to a maximum of 40% of a week’s pay i.e. two days in total for an employee who works five days a week (ss. 52 and 53 ERA).

**Offers of alternative employment**
An employee should be offered appropriate alternative work that is available. Alternative work will be appropriate if the provisions of the new contract as to the capacity and place in which the employee would be employed and the other terms and conditions of employment would not differ from the previous contract, or where there are differences, the work is still suitable in relation to the employee. Whether or not a job is suitable is an objective test and will depend on such factors as pay, grade, job content, status, place of work, etc.

If an employee unreasonably refuses an offer of suitable alternative employment they will not be entitled to a redundancy payment (s.141 ERA). The case of Devon Primary Care Trust v Readman (Advisory Bulletin 606) established that the test should be approached by identifying the employee’s subjective reason or reasons for the refusal and then making an overall judgment of whether the refusal was reasonable.

To preserve continuity and avoid the obligation to make a statutory redundancy payment, the offer of the new job must be made before the redundancy takes effect and start no later than four weeks after the first job ended. Where the termination takes effect on a Friday, Saturday or Sunday, the contract is treated as terminating on the following Monday (s.146 ERA).

Right to a trial period

Offers of alternative employment are subject to a statutory four-week trial period if any term of the new contract differs from the corresponding term in the old contract e.g. place of employment or terms and conditions.

Trial periods can be extended by up to 12 weeks by agreement for the purposes of retraining only. The agreement must:

- be in writing and be made before the start of the new contract;
- set out the date on which the period of retraining will end; and
- set out the terms and conditions that will apply to the employee at the end of the retraining period.

If both sides agree that the trial period is successful, there is no dismissal and the employee has effectively accepted the new post.

If both sides agree that the trial period has been unsuccessful, or the employer believes that this is the case, dismissal takes place as at the original date notified to the employee and a redundancy payment is made. In other words, there is a return to the pre-trial period situation as if it had not taken place.

If, in the view of the employer, the employee unreasonably refuses the new job offer, dismissal takes effect, but the employer can refuse to pay a statutory redundancy payment. Dismissal will still be for redundancy. An employee may make a claim that they are entitled to a redundancy payment and it will be for a tribunal to determine whether the employer was correct in its view that the
employee’s refusal was unreasonable and to refuse to make the statutory redundancy payment.

Contractual trial periods

An employer may wish to have arrangements in place for trial periods which do not fit the statutory definition. For example, if the employee has a long notice period, and is not needed in their existing job, a trial period may be offered within that notice period. The employer should be clear about how such trial periods will operate, given that the statutory rules will not apply. It is advisable that such trial periods should last at least four weeks given that the implication of the statutory arrangements is that this is the period of time necessary for both sides to assess the suitability of alternative work.

Employers should be wary of making contractual arrangements which extend beyond the expiry of the notice period as the usual rules regarding the termination of trial periods do not apply.

Renewal and re-engagement by the same authority

If the contract is renewed or the employee is re-engaged (the offer having been made before the contract expired) then the effect on continuity for statutory rights will be as follows:

- Any ‘break’ of up to four weeks between the ending of the original employment and the re-engagement by the same authority will count for future redundancy purposes and may count for other statutory purposes depending on its length and whether it is covered by the provisions of s.212 ERA, e.g. absence caused by a temporary cessation of work.
- A trial period will count towards continuity for all statutory employment rights (apart from the calculation of the redundancy payment if the trial period is terminated).
- Under s.214 ERA, receipt of a redundancy payment will break continuity for future redundancy payment purposes, but not for other purposes.

The effect of any break in service on conditions of service will depend on the scheme of conditions in question, the reason for and length of the break (see, for example, Part 2, paragraph 14 of the Green Book).

(For details of the effect of the Modification Order where an offer is made by a body covered by that Order, see below under “Offer of a new job with a Modification Order body”.)

Statutory redundancy payments

Continuous service requirement
Section 108 of the Employment Rights Act 1996 (ERA) provides that an employee must have two years' continuous service with the same employer in order to qualify for a redundancy payment (at the relevant date for redundancy).

Under s.216 ERA, any period during which an employee takes strike action will not count towards continuous service. However, continuity of service will not be broken.

Under the Redundancy Payments (Continuity of Employment in Local Government, etc) (Modification) Order 1999 (the Modification Order) when calculating entitlement to, and the amount of, a redundancy payment, authorities must count all continuous local government service and other relevant service up to a maximum of 20 years (s.162(3) ERA).

It is only where bodies are specified on the Modification Order that service will count. Bodies are specified in two ways: (i) by being named (ii) by being described as a generic category of body. For example, local authorities are not all listed by name, but are described in a generic category.

Employees working for bodies that have applied to be included on the Modification Order, but whose application has not been processed at the time of the redundancy, will not benefit.

Further information on the Modification Order can be found on the LGA website.

Calculating the amount of a statutory redundancy payment

Under s.162 ERA, for each year of service that counts, an employee will receive a proportion of weekly pay, which is determined in the following way:

<table>
<thead>
<tr>
<th>Age</th>
<th>Entitlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>21 years or below</td>
<td>Half a week’s pay</td>
</tr>
<tr>
<td>22 - 40</td>
<td>One week’s pay</td>
</tr>
<tr>
<td>41 and above</td>
<td>One and a half week’s pay</td>
</tr>
</tbody>
</table>

Therefore, the maximum entitlement will be 20 years at one and a half week’s pay i.e. 30 weeks’ pay. Details of how to calculate a week’s pay are on page 18.

Calculating age and length of service – the relevant date

The relevant date for calculating age and length of service for redundancy payment purposes is defined by s.145 ERA as follows:
• If the employee's contract is terminated with notice, the relevant date is the date on which the notice expires (i.e. when the termination takes effect).
• If no notice is given, the relevant date is the date statutory notice would have expired if it had been given at the termination date.
• If insufficient notice is given, the relevant date is the date statutory notice would have expired if it had been given on the date notice was actually given.
• If the employee is dismissed upon the expiry of a limited-term contract, the relevant date is the expiry of the contract.
• If the employee resigns during a trial period i.e. the four-week period laid down in s.138 ERA, the relevant date is the date on which the original contract terminated.
• If the employee leaves early (see above) during the notice period under s.136 ERA, the relevant date is the date when the employee's counter notice expires.

Local authorities’ powers to make additional severance payments

Under the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006, local authorities have two main powers:

• To calculate redundancy payments on an employee’s actual weekly pay rather than the statutory maximum (or any amount up to an actual week’s pay); and
• To pay an enhanced severance payment of up to 104 weeks’ pay (including the statutory redundancy payment) to an eligible employee.

Authorities must have a written policy on how they propose to grant severance payments.

Note: these provisions are currently under review.

How to calculate a week’s pay

A week’s pay is calculated in accordance with s.220 ERA. The statutory maximum week’s pay is £489, as from 6 April 2017 (£500 in Northern Ireland).

For employees with normal working hours whose pay does not vary with the amount of work done, a week’s pay is the amount they would receive for working their normal working hours in a week.

If the employee has no normal working hours i.e. the hours vary from week to week, a week’s pay is the average remuneration for the 12 weeks prior to the calculation date (see below). If the employee receives no pay for any of these 12 weeks, the 12-week period is extended to include previous weeks where pay was received.
In *Gilbert and others v Barnsley* (LGA Advisory Bulletin 460) it was established that a week’s pay for a term-time only employee who is paid in equal instalments over the year should be based on the week’s pay for the weeks which are actually worked and not on 1/52 of their annual pay.

The calculation date for determining a week’s pay for statutory, and so enhanced, redundancy pay is:

- If notice is given, the date on which statutory notice would have to have been given to end on the termination date;
- If no notice or less than the statutory notice is given, it is the date employment ends; and
- If the employee resigns during a trial period, the calculation date is the calculation date that applied under the original contract.

**Pay in lieu of notice**

Pay in lieu of notice (PILON) is compensation for not providing employees with the notice period to which they are contractually entitled.

Generally, where there is no PILON clause in an employee’s contract of employment, it is damages for the employer’s breach of contract and may take the form of the gross pay the individual would have been entitled to had they continued in post.

Pay in lieu of notice should only be paid where there is good reason for the employee not working the notice period.

To prevent misunderstanding about the nature of the payment and make it clear that the employment relationship ends when pay in lieu is given, authorities should clearly inform the employee of this when giving a payment in lieu of notice.

**Pay in lieu as custom and practice**

Normal practice in local government is for employees to work out their notice. However, where there is an explicit pay in lieu of notice (PILON) clause in an employee’s contract such a payment will be a contractual payment and so will be taxable. In the absence of a PILON clause, entitlement to be paid in lieu of notice may not be implied into the contract simply because it has occurred more than once with other individuals. However, if pay in lieu appears to HMRC to be paid as an automatic response to termination this may still mean that it is taxable even if there is no contractual basis for it. Further information is available on the HMRC website at [http://www.hmrc.gov.uk/manuals/eimanual/EIM12977.htm](http://www.hmrc.gov.uk/manuals/eimanual/EIM12977.htm) or from your tax office.

For further details on taxation see below “Taxation of payments”
Note: The rules on taxation of pay in lieu of notice are to change from 2018 – see below under “Review of tax and national insurance contribution treatment of termination payments”.

**Early retirement on grounds of redundancy**

Employees qualify for an immediate pension if they are retired early on the grounds of redundancy or business efficiency and are aged 55 or over with 2 years’ qualifying membership.¹ (Separate provisions apply to teachers.)

If an employee has not received an enhanced redundancy payment under the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006, an authority can compensate a member for redundancy by providing an award of additional annual pension up to a maximum of £6,755 (as at 1 April 2017) under regulation 31 of the LGPS Regulations 2013 (provided the resolution to award additional annual pension is made within 6 months of the date the member’s employment ended). This can be provided to a scheme member of any age (under age 75).

¹ A person is deemed to have the necessary 2 years’ qualifying membership if:

- they have spent two years as an active member in the LGPS;
- a transfer has been received in from a different occupational pension scheme (or under a European pensions institution) and the length of service in respect of benefits in that scheme was two or more years;
- the aggregate of the period the person has spent as an active member of the LGPS and of a different occupational pension scheme or European Pensions Institution in respect of which a transfer value payment has been accepted, is two years;
- a transfer value payment has been received in respect of rights accrued in a scheme or arrangement that does not permit a refund of contributions to the member (for example, from a personal pension or stakeholder scheme);
- the member has paid National Insurance contributions whilst an active member and ceases active membership after the end of the tax year preceding that in which the member attains pensionable age (i.e. age 60 for a female or age 65 for a male if the member has a GMP or, in any other case, State Pension Age);
- the member already holds a deferred benefit or is in receipt of a pension from the LGPS (other than a survivor’s pension or pension credit member’s pension);
- a transfer value payment has been made from the LGPS to a qualifying recognised overseas pension scheme; or
- the member ceases active membership at age 75.

In the above bullet points, reference to “LGPS” are reference to the LGPS in England and Wales.
Note: the early retirement provisions in the LGPS are under review.

**Offer of a new job with a Modification Order body**

If the authority gives the employee notice of redundancy and, before the dismissal takes effect, the employee receives an offer of employment from another body specified in Part II of Schedule 2 of the Modification Order, the individual will lose entitlement to a redundancy payment if the new contract starts within four weeks of the end of the employment from which they were made redundant. Where the termination takes effect on a Friday, Saturday or Sunday, the contract is treated as terminating on the following Monday.

In these circumstances the employee’s continuous service will not be broken for redundancy pay purposes.

Authorities are therefore advised to seek written confirmation from the employee at the date of termination that they will not be taking up any other employment covered by the Modification Order within four weeks after the date of redundancy (as defined above).

**Taxation of payments**

In general terms, the following principles apply:

- Compensation for loss of office, i.e. the statutory redundancy payment, payments made under the 2006 Discretionary Compensation Regulations and pay in lieu of notice (where this represents damages for the inability of the employer to give the required notice and the employment ends immediately) are, in aggregate, tax free for the first £30,000.
- Where sufficient notice is given and say, for organisational reasons, the employer does not require the employee to work during some or all of the notice period, this is regarded as a form of ‘garden leave’, and tax and national insurance is deductible on the pay received by the employee.
- Termination payments, except genuine discretionary compensation payments, which are written into the contract, may be regarded as a deferred reward for services rather than compensation for loss of office and may be taxable.
- Lump sum pension benefits are not taxable, but annual pension payments are. Those who receive a return of contributions will have 20% deducted for tax.

**Note**: Due to the complex nature of tax legislation advice on individual cases should be sought from the authority’s HMRC office and on the [HMRC website](https://www.gov.uk).
Review of tax and National Insurance Contributions treatment of termination payments

The Government has reviewed the tax and National Insurance contributions treatment of termination payments. Full details of the review can be found in Advisory Bulletin 640.

Following the changes that will apply from April 2018 any payment made for pay in lieu of notice will be taxed as normal pay, as will any other payment which the employee would have received had they continued in employment and worked their notice period.

Any payment that relates solely to the termination will be exempt from tax and National Insurance contributions up to the limit of £30,000. Anything paid in excess of £30,000 will be taxable (as is currently the case) and will also be subject to employer National Insurance contributions. Provided the payment relates solely to the termination of employment it will remain the case that any excess over £30,000 will not be subject to employee National Insurance contributions.

Lost entitlement to a redundancy payment

An employee who would normally be entitled to a redundancy payment may lose this entitlement where:

- the employee commits an act of gross misconduct (i.e. an offence of a serious nature and/or as defined in the relevant disciplinary procedure) and is dismissed; or
- the employee leaves early before the notice has expired without the employer's agreement.

However, an employee denied a redundancy payment in these circumstances can make a claim for a payment to an employment tribunal. The tribunal can order the employer to pay a statutory redundancy payment, or such part of it that the tribunal considers fit, if it considers it just and equitable to do so.

If an employee has not received a redundancy payment the employee may lose the right to claim a statutory redundancy payment once six months have elapsed from the relevant date unless:

- the employee has made a written claim for redundancy pay to their employer (a letter is all that is needed); and
- a claim for a redundancy payment is lodged with an employment tribunal; or
- a complaint of unfair dismissal has been lodged with a tribunal (this applies even if the three-month time limit for unfair dismissal claims has expired). (Duffin v Secretary of State for Employment 1983 ICR 766)
This is subject to the tribunal’s discretion to award a redundancy payment if the employee failed to do any of these things in the first six months, but did comply with one of these requirements within the following six-month period.

For these purposes the relevant date is the date notice expires or, if no notice is given, the date termination takes effect.

The six-month time limit only applies to a claim for statutory redundancy payments. If the complaint is that a payment should have been made under the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006, the applicable procedure is the authority’s Internal Dispute Resolution Procedure (IDRP). An IDRP complaint normally has to be raised within six months of the termination of employment to which the complaint relates (although the person deciding upon the complaint could extend the period in exceptional circumstances such as incapacity).
## Appendix A – redundancy checklist

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is there a redundancy situation?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has there been adequate consultation?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do you need to notify the Secretary of State?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Have you considered all potentially affected employees, including those, for example, on maternity, adoption, shared parental leave or sick leave?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are your selection criteria sufficiently objective, non-discriminatory and justifiable?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Have you consulted adequately on the selection criteria?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Have you considered suitable alternative offers of employment, including the possibility of trial periods?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Have you given adequate written notice of redundancy?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Is the employee eligible for a redundancy payment?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Is the employee eligible for a severance payment/early retirement benefits?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Have you ensured that the employee is not taking up an offer of alternative employment with another body covered by the Modification Order made before the termination date and commencing within four weeks of the date of redundancy?</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Appendix B – sources of help

Local Government Association

Further guidance is available at

Acas

For Acas guidance see http://www.acas.org.uk/index.aspx?articleid=1611

Government guidance

For Government guidance see https://www.gov.uk/staff-redundant

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