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Avoiding the cost of redundancies



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WITH BUSINESSES UNDER THE MOST pressure they have been under since the late 1980s, the challenge of controlling costs has become the number one 'bottom line' issue for owners, directors and managers alike. The first place to look is often the biggest cost – people. But hastily made decisions about redundancies can have long-lasting and detrimental effects. Smart thinking around what is best for the business is the order of the day. Joanna Blackburn and Helen Croft of Mishcon de Reya's employment group examine the alternatives to making employees redundant.

As of May 2009, 2.38 million people were unemployed in the UK, representing an unemployment rate of 7.6% for the three months up to May 2009. The rate in the previous quarter was 6.7%, making this the largest quarterly increase in the number of unemployed people since comparable records began in 1971. And while the past 18 months have posed extremely difficult economic conditions, all the indicators seem to point to the situation continuing. The Chartered Institute of Personnel and Development (CIPD) warned that the public sector alone is likely to shed 0.35 million jobs in the next five years and some forecasters predict that unemployment will exceed 3 million in 2010.

In many organisations employee costs are the highest single item of expenditure and during the past months, many employers have already made a significant number of their employees redundant. But redundancy can be an extremely costly exercise.

COST OF REDUNDANCIES BEYOND THE FINANCIAL

Beyond the financial and managerial costs incurred, there are other costs. Low morale is often felt by the remaining workforce. This can have a knock-on effect on, at a minimum, productivity and staff turnover. In the early 1990s many employers made large numbers of employees redundant, often at great cost, only to find that they were ill equipped to deal with the upturn that followed. Organisations then had to hire new employees when the markets picked up, inevitably leading to additional cost (eg recruitment agents, salary inflation, sign-on bonuses and management time incurred in

interviewing), in addition to the lead-in time that a newly hired workforce requires to reach its full potential.

From a management perspective, redundancy exercises are invariably time intensive. All too often, senior management looks to human resources to deal with redundancy exercises, without realising the input that they themselves will have to contribute to the process. Redundancy exercises will ordinarily involve the business establishing where redundancies need to be made and why, followed by consultation on an individual basis with all those potentially affected, the pooling of employees, the application of selection criteria, the management of searches for alternative employment within the business, the handling of dismissals and the consideration of appeals. Further, employers making more than 20 employees redundant within a 90-day period must undertake collective consultation and must notify the Department of Business, Innovation and Skills (BIS) of the impending redundancies.

An employee who is made redundant is entitled to either work out their notice period or be paid in lieu. In addition an employee who has more than two years' service is entitled to a statutory redundancy payment. This is calculated as half a week's pay for every year of service up to the age of 22, one week's pay between the age of 22 and 41, and thereafter one-and-a-half weeks' pay per year of service, up to a maximum of 20 years' service (s163 Employment Rights Act (ERA) 1996). One week's pay is currently capped at £350, but this will rise to £380 from 1 October 2009.

In addition some employers have contractual redundancy policies in place. Alternatively, if an employer has routinely paid enhanced redundancy payments to employees in previous redundancy exercises, it is arguable that such policies are implied contractual terms by reason of custom and practice, and are therefore payable when any employee is made redundant. This can significantly enhance the costs of redundancy exercises.

Further, failure to properly undertake any part of a redundancy processes could

potentially lead to the following additional consequences:

- *Claims for unfair dismissal.* In a saturated employment market employees will find it harder to mitigate their losses and if claims of unfair dismissal are brought, damages awarded could be significant, albeit capped at £66,200 for ordinary unfair dismissal cases.
- *Claims for discrimination or whistleblowing.* These often emanate out of the need for highly paid employees to find a route through to unlimited damages, rather than the capped damages applicable to ordinary unfair dismissal claims.
- *Claims for incomplete consultation.* Where collective consultation obligations are triggered but not properly undertaken, awards of 90 days' pay per affected employee.
- *Claims for not notifying the BIS.* Where collective consultation obligations are triggered but notification is not made to the BIS, a fine of up to £5,000, but more significantly a criminal penalty, for the directors of the company (s194 Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992).

In short, redundancy exercises are potentially expensive and time-consuming processes.

WHAT ARE THE ALTERNATIVES?

There are potentially beneficial measures that can be considered as alternatives to redundancy. Some will not suit all businesses. Some employers may only be able to consider one or two alternatives, while others may not be able to consider any and will be forced to continue making redundancies. Effective planning can, however, lead to better job security for employees and it can avoid short-term solutions that are not necessarily suited to the long-term needs of a business.

There has recently been heightened media interest in employers' attempts to avoid wasteful redundancies. Employers are seeking to reduce short-term costs while maintaining longer term

responsiveness. KPMG, British Airways (BA) and BT have all proposed alternative approaches to try and reduce costs while still retaining their workforce. For example, KPMG has offered employees the opportunity to work a four-day week. It is arguable that adopting alternative approaches not only benefits the employer and the workforce in the immediate short term, but if it works, could act as

employers do not have express contractual rights. In these circumstances, the employer will need to undertake a variation of contract exercise.

The cornerstone of a successful variation of contract exercise is consultation. The employer needs to be clear what the possible outcome of failing to agree the variation might be. In the event that the impact of

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a precedent for more flexible working patterns in the future to promote a better work/life balance.

An non-exhaustive list of alternatives to redundancies is contained in the box on p32. Some are assessed in more detail below.

WHAT DO EMPLOYERS NEED TO DO?

Making changes

Each alternative listed in this article has its own legal and/or commercial implications that will require consideration. However, in the current market where most employees recognise the pressures of the economic downturn, negotiations about changes to terms and conditions of employment as an alternative to redundancy are easier to undertake in boom times.

Changes to terms and conditions of employment

A reduction in pay or benefits, reducing working hours, redeployment to other business areas or enforcing holidays will all be likely to constitute a change to employees' terms and conditions of employment.

Sometimes employers will have contractual rights to, for example, relocate their employees or a change to a job description or role. Where such rights exist, the employer should consider whether it is possible to rely on such rights to enforce change. In most situations, however,

not varying terms and conditions will be that redundancies will need to be made, and that could affect 20 or more people, the employer will be obliged to follow the same collective consultation procedures as apply to mass redundancies (s188, TULRCA 1992). Equally, if the employer intends to take any steps to enforce the variation of contract if a consensual variation cannot be agreed, by ultimately dismissing employees on notice and offering the new varied contract of employment, the employer also needs to follow the same collective consultation procedure. This is because the definition of 'redundant' for the purposes of this part of TULRCA 1992, includes all dismissals that are not related to the individual concerned, which means that mass dismissals for the purpose of varying contracts falls within this definition (s195, TULRCA).

Stages of a variation of contract exercise

Stage one is to consult with employees who will be affected by the change. If collective consultation is being followed, consultation will be via elected representatives or trade union representatives. In the absence of a trade union, the employer may already have an elected works council who are able to immediately commence consultation. Failing that, employers will need to invite the employees to elect representatives. The process can take a few weeks, so planning early is important, particularly when you factor in a 30- or 90-day consultation period, depending on how many employees

may be affected, which can only commence once you have the representatives in place.

It is incumbent on the employer to provide full and complete information as part of a proper consultation process, which would usually include:

- The reasons why the employer is contemplating the change proposed.
- The manner in which the change will assist the employer in meeting its aims (in this case, avoiding redundancies).

THE ALTERNATIVES TO REDUNDANCY

- Sabbaticals (paid and unpaid)
- Flexible working
- Withdraw job offers
- Reduced working week
- Secondments or relocation (eg to emerging markets)
- Recruitment freeze
- Reduction in agency staff
- Ban on overtime
- Reduction in pay or benefits
- Freezing salaries
- Salary sacrifices
- Non payment of discretionary bonuses
- Retraining
- Deferral of guaranteed bonuses/ commission
- Early retirement
- Job-share arrangements
- Retraining
- Enforced holiday

- Who will be affected and for how long? For example, if a reduction in salary is proposed, will it be a short- or long-term measure? Will the pay cut arrangements be structured so that, over time, salary levels will recover? Will the employees be updated on the progress of the business?
- The path of the consultation process going forward, including what will happen if agreement cannot be reached.
- When considering proposed changes to terms and conditions of employment, discriminatory issues should always be borne in mind. Do the proposals potentially adversely affect those, for example, with childcare responsibilities? If so, can the proposed changes be justified if a claim was brought for indirect sex discrimination?
- If, following proper consultation and consideration of any options put to the company by the employee representatives, agreement is reached on the variation of contract, the employer can then go ahead and implement the change. Bear in mind that an individual who has not agreed to the variation personally might still allege breach of contract and/or constructive dismissal. The extent to which a breach of contract claim will be successful will depend on the nature of the alleged breach, but certainly an unfair dismissal claim should be defensible if the employer can show a good reason for taking the steps it has taken and a proper consultation resulting in an agreement for the variation to be made.
- If the employer does not collectively consult (because the provisions of s188, TULRCA 1992 do not apply), then consultation must be carried out individually. The reality is that unless only a handful of employees are affected, it is often easier to collectively consult.
- If, following consultation, no agreement can be reached on the variation to the employees' contracts, the employer

has two options: force the change through anyway or revert to making redundancies. To vary contracts compulsorily, the employer gives the employees their contractual (or, if longer, statutory) notice period and simultaneously offers the employee the new, varied contract of employment, to take effect from the date from which the old contract ends. If the employee accepts the change, the variation is made and the employee continues on the new terms. If they do not accept the new contract, their employment ends at the end of the notice period. The employee may still bring a claim for unfair dismissal, but the employer will be able to rely on the 'some other substantial reason justifying dismissal' defence (s98, ERA 1996). Provided it had a good reason for proposing the change and consulted properly about it, any dismissals should not fall foul of the unfair dismissal rules.

Enforced holiday

As an alternative to asking employees to take unpaid leave, an employer could require employees to take their annual holiday allowance at quiet times, if business fluctuation permits such an approach. Adequate advance notice should be given under Regulation 15 of the Working Time Regulations. This is twice as many days' notice as the length of holiday to be taken. So a holiday of ten working days would require 20 working days' notice to be given. Although employees are entitled to their salary during any period of holiday taken, by forward planning holiday allowance, an employer could 'write off' quiet periods of time and ensure that employees are available at busier times.

Flexible working and part-time working

Parents with children up to the age of 16 (or 18 if a child is disabled) and carers have the right to request flexible working arrangements once every 12 months (ss8, ERA 1996). Some employers may, however, derive benefit from offering such arrangements to all of their employees. Employees may be willing to consider participating if they know that the arrangements will not affect future training or promotion prospects, will be limited in time, and are not so dramatic

that their remuneration is severely affected. Several employers in the professional services field are putting their staff on a four-day week at 85% of pay, with the acknowledgement that these employees will still be picking up client e-mails and calls on the day a week when they are not working. When entering into these types of arrangements, employers need to retain the right to terminate the arrangements by notice, so as not to make the variation permanent.

CONCLUSION

The alternatives to redundancy are numerous and should be considered carefully by businesses and organisations. In the current economic climate it is critical to make appropriate commercial decisions that deal with more than the next quarter. Whatever steps an employer decides to take it is always advisable to be as open and as honest with employees as reasonably possible. Where practicable,

lead from the top. If an employer promotes salary cuts as an alternative to redundancies, does the chief executive

employers retain sufficient flexibility and control such that they can then reverse arrangements with relative ease when the

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officer take the first step in agreeing to be part of such a practice, as Willie Walsh did when BA proposed a suite of cost-saving measures to its work force? There is more chance of alternatives being accepted if there is a 'one-for-all' approach. The key is to ensure that whatever steps are taken,

economy improves and businesses begin to feel those improvements.

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