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## Golden Rules for Redundancies

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Redundancy and consultation processes have made headlines this month after P&O Ferries made around 800 of its staff redundant with immediate effect via a pre-recorded video message.

P&O has been widely slammed for its treatment of its employees, who are being replaced with agency workers on cheaper contracts. Rather than consulting with unions and employees, staff were offered enhanced redundancy payments subject to signing a settlement agreement.

The decision to flout consultation has sparked public outrage (including protests at the ports) and put the topic of redundancies on the political agenda. This week, the UK's Transport Secretary wrote a public letter to P&O asking for a reversal of its decision and for fairness not to be "brazenly ignored". The Transport Secretary said he was reviewing the government's contracts with P&O and also planned to introduce measures to protect seafarers and block the outcome that P&O has pursued (i.e. paying agency workers less than the UK's minimum wage by registering vessels and companies in other countries).

Our March client alert looks at some key considerations for employers before embarking on any redundancy exercise, including some Golden Rules.

### ENSURE THAT THERE IS AN ACTUAL REDUNDANCY SITUATION

When implementing redundancies in the UK, an employer needs to meet two key limbs:

1. Substantive justification - there must be a genuine redundancy situation; and
2. Procedural fairness – a fair process must be followed which basically consists of the employee being consulted before any decisions are made, alternative employment within the company being considered and the right to appeal the decision. If collective consultation is triggered, employee reps will also need to be consulted.

The first issue to consider is always whether a redundancy situation actually exists. An employer will have to establish that the statutory



definition of redundancy is satisfied. That is, the closure of the business or workplace or a diminished need for employees to carry out work of a particular kind.

Redundancy must be the real reason for the dismissal(s). It must not be used as an excuse to get rid of unsatisfactory employees. The business rationale is usually obvious where a whole team or large number of staff are being made redundant but it is less clear where the roles of individual employees are being removed or replaced by similar roles.

The best way of demonstrating a genuine redundancy situation is to compile a business plan explaining the rationale behind the redundancies. The plan should be drafted as a proposal to enable consultation at a formative stage.

### CONSIDER OTHER OPTIONS

Where possible, employers should consider alternative measures to reduce costs. It is helpful to refer to these in the business plan and it generally enables a better consultation experience where staff can see that steps have been taken to minimise redundancies.

Alternative options include implementing a recruitment freeze, reducing or banning overtime, reducing agency workers and self-employed or casual staff, imposing short-time working or requesting volunteers for working reduced hours or sabbaticals. If collective consultation is triggered (see below), employers must collectively consult on how to avoid or reduce the redundancies.

### CHECK WHETHER COLLECTIVE CONSULTATION OBLIGATIONS WILL BE TRIGGERED

The next key consideration is whether or not collective consultation obligations will be triggered. Collective consultation is required if an employer is proposing to dismiss 20 or more employees as redundant at any one establishment within a rolling period of 90 days or less. Collective consultation requires consultation with any recognised trade union and a minimum timeframe of 30 days before any redundancies take effect, or 45 days if more than 100 redundancies are proposed. If there is no trade union, employers must consult employee representatives.

There is certain statutorily required information that must be provided to the employee representatives and the employer must consult “with a view to reaching agreement” on ways of avoiding or reducing redundancies and mitigating consequences before consulting with employees individually. There is a risk of claims for “protective awards” of up to a maximum of 90 days’ pay per affected employee if collective consultation is not correctly undertaken. The individual process still needs to be followed after consultation with the employee reps has concluded.

Remember always, advance planning is key in light of the minimum timeframes where collective consultation is required.

### NOTIFYING THE AUTHORITIES

UK employers have a statutory obligation to inform the Redundancy Payments Service (a government entity) if they are proposing to dismiss 20 or more employees as redundant at one establishment within a period of 90 days or less. This is done by submitting an HR1 Form at least 30 days before dismissals take effect (or at least 45 days if 100 or more redundancies are proposed). Failure to comply with this notification is a criminal offence and can lead to an unlimited fine.

It is understood that the staff dismissed by P&O were employed by a hiring agency in Jersey. P&O has claimed it was therefore not required to notify the UK Government (a point unions are contesting given the employees’ link with the UK). The Insolvency Service is said to be investigating this point.

### GET THE POOLS AND SELECTION CRITERIA RIGHT

Before consultation commences, an employer will have to decide on the relevant pools of at risk employees and the selection criteria to apply. The selection pool must relate to the reason for the potential redundancies and should not be



defined too narrowly. Consider which employees hold similar positions or have interchangeable skills. It is preferable to put the whole pool at risk and then consult them on the selection criteria. However, some employers prefer to apply selection criteria before commencing consultation, and put only those provisionally selected 'at risk'. If collective consultation applies, the employee reps should first be consulted on selection criteria.

Ensure the selection criteria are fair and objective. Avoid subjective criteria or any criteria which could be discriminatory. For example, risk can arise where sickness absences is included without any reasonable adjustments being made for pregnant or disabled employees. Standard criteria include skills, experience, qualifications, flexibility (in terms of ability to do more than one role) and disciplinary record. Length of service (including "last-in, first-out") may be used as part of a matrix but not on its own as it may be age discriminatory.

It is preferable if more than one person is responsible for scoring – for example, relevant managers in conjunction with HR.

### CONSULT MEANINGFULLY

When carrying out a collective consultation exercise, the employer must consult "with a view to reaching agreement" with employee reps. Consultation does not have to end in agreement, but any obvious unwillingness to seek agreement could lead to the making of a protective award.

Individual consultation must be "proper and meaningful". Consultation does not mean informing someone that they are going to be made redundant, even if the employer believes that this is inevitably going to be the outcome. Consultation must be a two way dialogue. Representatives and employees should be given the opportunity to respond to the redundancy proposals and any proposed selection criteria or scoring, which the employer must then consider.

The length of consultation and number of consultation meetings will vary depending on the number of employees potentially being made redundant.

### EXPLORE SUITABLE ALTERNATIVE EMPLOYMENT

During consultation, employees need to be consulted on alternatives to redundancy, for example, any potential redeployment opportunities which have been identified and the proposed selection process. "At risk" employees should be provided with the full details of vacancies and opportunities should be discussed with each employee individually.

### CONFIRMING THE REDUNDANCIES

Any redundancies should be confirmed at a dismissal meeting, ideally in person, at which the employee has been given the right to be accompanied. Although there is no statutory right for employees to be accompanied at meetings under a redundancy procedure, it is best practice and something an employment tribunal would take into account when considering whether the dismissal had been carried out fairly. The employees should be issued with letters confirming their redundancy and informing them of their right to appeal the decision.

### GOLDEN RULES

- Consider early on who will lead the consultation exercise and any appeals. Where possible, keep one or two members of senior staff out of the process, so that they are well placed to deal with any appeal impartially.
- Good communication is key. Do not inform employees that they are to be made redundant by text, email or video message. Regular communication is essential during any consultation process. It can be helpful to set out a planned timetable at the start so that individuals know what they can expect in terms of meetings and decisions.



- Watch your language – use the right terminology such as “proposal” and “considering” to show that nothing is set in stone. Avoid using language that gives the impression that a final decision about who has been selected for redundancy has already been made.
- Think carefully before asking for volunteers. You may get volunteers who you do not want to lose or who will be expensive in terms of notice and redundancy pay. It is important to make it clear that you reserve the right not to accept all applications and objective criteria will need to be applied in deciding which applications to accept.
- Where a settlement agreement has been proposed as an alternative to concluding consultation, make sure that it is clear that the company is more than happy to continue with a full and fair consultation process. Do not place undue pressure on the employee to enter into a settlement agreement.
- Follow your own policies and procedures. Any redundancy policy should be carefully followed by the employer. Check whether the policy provides employees with less than two years’ service with any contractual rights in terms of the redundancy procedure.
- Do not forget about absent employees. Employees who are on long-term sick leave or parental leave should be kept informed and afforded the opportunity to participate in consultation. Send them the same information as other employees and seek to consult them individually, making accommodation to their individual circumstances.
- Remember that special rules apply to employees on maternity leave. Employees on maternity leave who are selected for redundancy are afforded additional protections and are entitled to be offered any suitable alternative employment available (ahead of any other employees).
- Document your management of this process to protect the company from legal claims. Notes of meetings may be needed to justify the decisions taken if an employee appeals or subsequently brings a claim.
- Be mindful of potential disclosure. In the event an employee brings a claim, any business plans (including drafts) and relevant internal correspondence will be disclosable in any subsequent tribunal proceedings. This has been the undoing of many employers in front of the employment tribunal.

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