# COMPARATIVE LABOR LAW DOSSIER
# DISMISSAL DUE TO BUSINESS REASONS IN THE UK

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## Introduction

Dismissals due to economic reasons in the UK is effectively considered under two different systems, depending on the number of dismissals taking place; however, it must be noted that one system does not automatically mean compliance with the other, and as such where there are in excess of 20 dismissals it is probably better viewed as an additional element of obligation rather than two distinct and mutually exclusive systems.

Between January 2013 and March 2014, according to Office for National Statistics, there have been 624,000 dismissals in the UK for redundancy reasons.

## 1. How does the legislation or the judicial bodies define the causes that allow for a dismissal due to business reasons?

The UK legal system allows dismissals due to business reasons in two different contexts. Where the dismissal forms part of a collective set of dismissals a wide definition contained in s.195(1) of the Trade Union Labour Relation (Consolodation) Act 1992 (TULRCA, hereinafter) is applied, which covers 'references to dismissal as redundant are references to dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related'. Where the dismissal is individual (or less than 20) rather than the collective (more than 20) there is a requirement that any such dismissal is fair in accordance with the law relating to unfair dismissal pursuant to Part X of the Employment Rights Act 1996 (ERA, hereinafter). Such dismissals are defined at s.139 ERA, which considers them through three distinct sub-categories:

- When the employer is ceasing business

Falling within this sub-category is relatively easy to determine. It simply requires looking at whether a business which was previously in operation has shut down. However, this category does not just cover permanent cessations of business but also covers temporary

cessations, and thus if a business closes down for renovation purposes for a matter of months this might also fall within this category.

- When the employer is moving his place of business

It is clear from case law, including *Managers (Holborn) Ltd v. Hohne* [1977] IRLR 230, that not all business premises moves could justify dismissal, but only moves that were deemed to be substantial. Thus determining the employee's place of work was important in order to determine how substantial such a move of premises was. Judicial confusion surrounding the correct test for determining an employee's place of work was brought to an end by the Court of Appeal in *Bass Leisure Ltd v. Thomas* [1997] IRLR 513. The Court of Appeal held that the correct approach was a factual approach, which looked at where in fact the employee actually worked on a daily basis, rather than a contractual approach, which took into account contractual provisions such as mobility clauses which may have provided alternative places of work for an employee.

- When the employer is reducing his workforce number

This is quite a wide category, and covers a number of different situations including where there is less work available for the workforce, or where the work is being rationalized or where more efficient practices are being adopted. The question to be asked is whether requirement of the employer for employees to do work of a particular kind has ceased or diminished? The employer is free to adopt the most efficient practices, and it is difficult to question such managerial decisions.

**2. Do the business reasons that justifying the dismissal must concur in the whole company or can they only concur in the workplace where dismissal occurs?**

In the UK legal system, where the dismissals are affecting more than 20 workers then the focus will be on the single establishment (the workplace) at which the worker is employed. This is in line with the jurisprudence of the Court of Justice of the European Union (CJEU, hereinafter); however, the Court of Appeal in the recent *Woolworths* litigation has referred this matter to the CJEU, asking the question whether such dismissals ought to be viewed across the whole company or individual workplaces. Thus the current position may alter depending on that ruling, which is expected in early 2015.

Whereas, according to s.139(2) ERA, where the dismissal for business reasons is impacting upon individuals then the focus is on the entire company, along with the business of any associated employer that is considered, rather than just the workplace where the the dismissal will occur.

**3. What is the procedure that the company must follow to conduct a dismissal for business reasons? Are there specialties in such procedure in relation to the number of workers affected?**

In the UK legal system, the procedure to follow in cases for dismissal for business reasons varies depending on whether the dismissal is collective or not.

- Non-collective Redundancies

If an employer can show that dismissal was for a redundancy reason, then unless the employer has acted with clear unfairness then that dismissal will generally be deemed to be a fair one. There are two central obligations placed on an employer under these circumstances: make reasonable efforts to find suitable alternative employment, and to undertake consultation on an individual basis.

The obligation on an employer is to take reasonable steps to find alternative employment for an employee facing redundancy. In deciding whether a position is suitable for an individual an objective assessment of the role and the skill set of the individual concerned should be undertaken.

In terms of consultancy case law has held that a reasonable employer will hold individual consultation with those facing the prospect of dismissal by reason of redundancy. The principles that underpin the content of the consultation can be read in *R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price & Others* [1994] IRLR 72, which stated that a fair consultation ought to involve:

a) Consultation when proposals are still at a formative stage;
b) Adequate information on which to respond;
c) Adequate time in which to respond;
d) Conscientious consideration by an authority of the response to consultation.

Consultation in this context is about giving the individual affected a fair and proper opportunity to understand fully the matters being consulted, and to have their views considered properly.

There are no set procedures or time frames for such consultation, just that sufficient consultation has taken place.

- Collective Redundancies

The UK transposed their obligations under the Council Directive 98/59/EC using the second Option available to them which did not link the number of redundancies to the size of the establishment, but instead merely focused on the number of redundancies. To qualify as a collective redundancy there must be, over a reference period of 90 days, a proposal to make at least 20 workers redundant.

Where there is 20 redundancies proposed the company must consult with worker representatives at least 30 days before making any redundancies. Consultation is to take place with trade union representatives, where the workforce is represented by a trade union, or with elected employee representatives (the procedure for selection is contained at 118A and 118B TULRCA) where there is no trade union representatives, or if the employer does not recognize the trade union.

The period of consultation is increased to 45 days before any redundancies can be effected where there are 100 or more employees affected by the proposed redundancies. Reference to a period of consultation lays down the minimum period of consultation.

The aim of the consultation is to negotiate measures so as to avoid or reduce the number of redundancies and to mitigate the consequences for affected workers with social measures, such as relocation or training measures so as to increase theses worker's employability. This is in line with the ECJ case of *Junk v Kuhnel*. The key is negotiation, as it is expressed at s.188(2) TULRCA that consultation has to be 'undertaken by the employer with a view to reaching agreement with the appropriate representatives'.

The employer, in complying with their consultation obligation, has to disclose certain information in writing to the appropriate employee representatives, which includes:

a) The reason for the proposed redundancies

b) The numbers and descriptions of employees whom it is proposed will be dismissed by reason of redundancy
c) The total number of employees of that same description employed at the establishment in question
d) The method that eill be adopted to select employees to be made redundant
e) The proposed method of carrying out the redundancies
f) The proposed method of calculating the amount of redundancy payments

Pursuant to regulation 3 of the Collective Redundancies (Amendment) Regulations 2006, an employer is also obliged to inform the Secretary of State about any pending collective redundancies either 30 days or 45 days (depending on the number of redundancies) before any notice of dismissal has been issued. This notice must identify the representatives that are being consulted, when consultation began, along with any further information the Secretary of State may require. A copy of this notice must be sent to the representatives. Failure to give this notice may result in a fine.

One of the more controversial aspects of TULRCA is that it introduces an exception to the need for consultation where it was not reasonably practicable to comply with the requirements to provide information or consult, but where they have taken all such steps to try and comply as is reasonably practicable in the circumstances. This defence is considered on a case by case basis; however, it appears to be only available in the most exceptional of circumstances, such as where there is a loss of a key work contract which requires instant closure of a business, or part therof.

It should be noted that consultation of the collective does not release the employer from the obligation to consider individual consultation (noted above).

**4. In the UK legal system, are there groups of workers who have retention priority in a dismissal for business reasons and/or existe criteria for determining the workers affected by such a redundancy?**

The UK legal system does not give retention priority in dismissal for business reasons to any particular group of workers, nor is there a list of criteria that ought to be applied in determining who is to be selected for redundancy purposes. The employer is free to determine the criteria which will be used in selecting employees to be dismissed by reason of redundancy. The key requirement, developed through case law, is that the employer establishes criteria for selecting employees which do not rely solely on the subjective views

of the person making the selection, but which can be objectively scored, for example attendance records, disciplinary records and length of service.

In determining appropriate criteria the employer must ensure that none of the criteria creates a discriminatory effect. For instance, where attendance is used as a criterion, absences through, for example, maternity leave must obviously be discounted. This is of paramount importance given that any such concurrent claim for discrimination as a result of discriminatory criterion which ahs led to a redundancy dismissal will not be subject to a statutory cap on the compensation that can be awarded.

The employer must then ensure objective application of the criteria in a fair manner. In determining the fairness of the application the standard to be achieved is to be measured against how a reasonable employer would have applied those criteria. Consistency is clearly a key requirement in application.

**5. Does the dismissal for business reasons that is declared correct/legal generate the worker's right to obtain an economic compensation?**

Workers that are dismissed due to business reasons declared fair in the UK have the right to economic compensation, which is linked to their age, length of service and weekly wage. However, this right is only available to employees who have worked for their employer for at least two years continuously.

For every year that a worker has worked continuously for a business up to the age of 22 they will receive half a weeks pay, for years service, between 22 and 41 they receive one week’s pay, and for years service whislt aged over 41 they receive one and a half weeks pay. However, this is capped in two ways:

1. The calculation is capped at 20 years. As such the employees best 20 years are taken into account (so usually their final 20 years of service due to the age criterion);
2. A week’s pay is capped at a statutory maximum, which currently stands at £464. As such the calculation uses the lower of the workers weekly pay or £464.

Redundancy payments are protected against corporate insolvency by being deemed a guaranteed paymentunder Part VI ERA. Payment pursuant to s.167 ERA will be made by the Secretary of State out of the National Insurance Fund where insolvency prevents such

payment being made by the employer. This will reflect the outstanding balance due to the employee.

**6. In addition to, when applicable, the worker's right to an economic compensation, what other company obligations derive from a dismissal due to business reasons?**

There is very few additional company obligations aside from economic compensation placed on an employer where the dismissal is due to business reasons.

However, before the expiration of an employees notice period, pursuant to s.52 ERA, an employee, if they have been continuously employed for more than two years, will be entitled to reasonable time off to look for new employment or to make arrangments for retraining. This time of is to be paid at an appropriate hourly rate.

Although not explicit, an employer may read the obligations under the collective redundancies scheme, that of mitigating the consequences of any compulsory redundancies, as including initiatives such as redlopoying or retraining the redundant employees. However, such will be dependent on the employer.

**7. What are the consequences that arise from breach or non-compliance with the legal procedure regarding redundancies due to business reasons?**

In the UK legal system the consequences for non-compliance with the appropriate legal procedures again must be looked at depending on whether the dismissal was a collective redundancy or an individual redundancy.

- Collective redundancy

Where there has been a failure by the business to either inform or consult with the affected workforce, pursuant to s.188 TULRCA, or a failure with respect electing employee representatives for the purpose of receiving information and consulting, pursuant to s.188A TULRCA, a complaint may be presented to an employment tribunal on that ground. This can be made by:

1. Any of the employees affected by the failure to elect employee representatives, or any of the employees dismissed following such a failure;

2. Where there has been a failure to inform or consult, a complaint on this ground can be made by either any of the employee representatives, trade union representatives, or affected employees.

Failure to comply with the collective redundancy system results in the award of a protective award, pursuant to s.189(2) TULRCA. This covers the pay which an employee would have received during the protected consultation period, and as such will be subject to a maximum of 45 days. Unlike the calculation for a redundancy payment there is no statutory maximum pay adopted. The tribunal generally commences their consideration of the protective award from the top down. It initially applies the maximum of 45 days, with the burden being on the employer to make submissions as to why a lesser figure ought to be awarded.

Similar to that above for redundancy payments, in the event of insolvency resulting in an employer not being able to pay then a protective award is treated as wages and as such is considered a guaranteed payment under Part VI ERA, and will be paid out of the National Insurance Fund.

- Non-collective redundancy

Non compliance with either substantive fairness or procedural fairness will see the whole dismissal be deemed an unfair dismissal under Part X ERA. Normally this would result in economic compensation being awarded by a tribunal.

Alongside economic compensation for unfair dismissals the tribunal has the more powerful remedies of reinstatement or reengagement available to them. These two remedies are the primary remedies for unfair dismissal, and must be considered by the tribunal first. Although these do not void or nullify the dismissal as such, in practical terms the effect is the same:

1. Reinstatement. Where a reinstatement order is considered relevant by the employment tribunal then this will have the effect of reinstating the employee in to their old position and treating them as if the dismissal had not taken place. According to s.116(1) ERA, in making a decision whether this order is appropriate the tribunal will take into account the employee's wishes, the practicability for the employer to comply with the order, and whether it would be just to order reinstatement.

2. Reengagement. Where reinstatement is not considered appropriate the tribunal will consider whether the employee can be engaged with a successor of the employer or an associated employer in a comparable position to that previously occupied. The same three factors will be considered in determining whether such an order is appropriate in the circumstances.

There are also common law remedies that would have the same effect of nullifying or voiding the dismissal. These are available where there has been a wrongful dismissal (or a dismissal in repudiatory breach of the employment contract). Such remedies are discretionary and require evidence that trust and confidence between the employee and employer can be maintained, and that damages would be an inadequate remedy. The two common law remedies available are:

1. Specific performance.
2. Injunction.

**8. Are there specialties in the dismissal due to business reasons for microcompanies and/or small and medium enterprises?**

In the UK legal system there are no general specialties in the process of dismissal depending on the size of the enterprise, other than it is a factor that the tribunal may take into account in determining the fairness of the dismissal, pursuant to s.98(4) ERA.

**9. What consequences exist regarding the legal regime of dismissal due to business reasons when the dismissal takes place within the framework of a company that is part of a holding or a business group?**

Where an employing company forms part of a holding or business group it is the individual company, rather than the wider business group that remains the employer for the purposes of the dismissal. Being such does not alter the legal obligations of that subsidiary company. Consultation must still take place even where decisions have been taken by the parent company, for example about staffing levels, and about which the necessary information has not been received from the parent company. If there is a failure to comply with the consultation requirements as a result of such lack of information then it is the subsidiarty that bears the consequences. As such, the obligation to provide sufficient comnsultation does not change, but the burden on gaining access and providing such information can clearly be higher in such circumstances.

**10. Is it possible to conduct a dismissal due to business reasons in a public administration? In this case, what specialities exist in regard to the definition of the business causes?**

Generally speaking there is no distinction between private and public employment, as such being an employee in a public administration does not alter the approach to dismissals due to business reasons, and employees dismissed for such reasons are subject to the same procedures and have the same rights as listed above; this is further confirmed in the case of *USA v Nolan* [2009 IRLR 923, where the employer was the US Government. However, pursuant to s.159 ERA any employee who is treated as a civil servant for pension purposes is excluded from the individual redundancy scheme, which does remove civil servants from the right to a redundancy payment system. However, such workers usually have a term in their contract providing for such payment, in which contractual compliance is required.