

Ten tips for reducing the salary bill

A Guest Article by Gary Freer and Helen Webb
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Cutting costs successfully

The current economic climate means that many businesses are considering how to reduce their costs, which often means a change to working hours or a reduction in head count. If changes are carried out well, a business can reduce its costs and retain the loyalty and engagement of its employees. However, a failure to follow certain steps could create not only a risk of litigation but a workforce perception of unfairness, both of which could be extremely costly.

To help businesses successfully reduce their salary bill we set out below our top ten practical tips.

1. Take steps to avoid the need for redundancies

The coverage given to the credit crunch means that most employees are aware that businesses may need to make redundancies to reduce costs. As a result, we have found among our clients that very few employees dispute that there is a need for redundancies, but rather the fairness of a particular employee's selection or the process that the business has followed.

To ensure that your head count reduction is acknowledged by your workforce as a genuine redundancy situation, you should take all possible steps to prevent the need for redundancies. Simple steps to consider include:

- freezing recruitment, and if this is not possible, being able to show employees that the skills required are not available among the existing workforce
- not renewing fixed-term contracts, or reducing the number of agency staff used
- redeploying employees to other more successful sites or areas within the business
- seconding employees at cost to a client
- a lay-off, i.e. temporarily closing the site and providing no work for a full week
- short-time working, i.e. reducing the number of hours worked per day or per week.

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2. Consider lay-off and short-time working

Lay-off or short-time working may enable you to reduce your salary bill and avoid the need to make compulsory redundancies.

However, before commencing a lay-off or short-time working you must check whether the business has a right to withhold payment to employees for any time not worked by reviewing the terms of your employment contracts. If there is no right to withhold pay then you should obtain the written consent of the affected employees to reduce their pay.

If you do not have the right to withhold pay and do not obtain employee consent, any failure to provide pay during lay-off or short time working periods could result in a costly claim for unlawful deduction from wages or unfair dismissal.

Also carefully consider the length and terms of any lay-off or short-time working period. If employees are laid off with no pay, or are put on short-time working where they receive half pay or less per week either for 4 consecutive weeks or for 6 weeks or more in a 13 week period, then the employee will have the right to claim a statutory redundancy payment.

However, to receive a redundancy payment the employee must serve a written notice of intention to claim. If the employer serves a counter-notice on the basis that there is a reasonable expectation of a return to normal working, the employee will have to resign and bring a tribunal claim to obtain the redundancy payment.

3. Get the pooling and selection criteria right

Fair selection involves the fair application of selection criteria to a correctly identified pool of employees. The starting point is to identify a group or pool of employees who perform similar roles from which redundancies can be made. Taking a shop as an example, shop assistants may form one pool, managers another pool, cleaners another, and so on.

In considering which employees should be included in any pool, think about whether any employee roles overlap, even if they are not the same. For example, a business that has a secretary and a personal assistant may wish to put them together in one pool if the employees carry out similar activities and cover for each other's absences. However, if there is only one person performing a specific role that is disappearing, e.g. you only have one training co-ordinator, you can have a pool of one.

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When you have to make a number of employees redundant from a large pool, it is important to use appropriate selection criteria. The general rule of thumb is that the more objective the selection criteria, the better – for example, attendance record, disciplinary record, qualifications.

Remember that when considering attendance records, any absence for maternity leave or pregnancy-related illness should be discounted, or you may find a sex discrimination claim against you. It is also advisable to discount disability-related absence.

What about Last In First Out (LIFO)? LIFO has generally been regarded as an unacceptable selection method for redundancy since the introduction of regulations preventing age discrimination.

However, a recent case in the High Court ruled that while using LIFO alone “might be objectionable”, using LIFO as one criterion among many was not unlawful age discrimination and could be justified as it was part of a wider scheme of criteria that measured performance and had been negotiated with the relevant trade union.

Nonetheless, we suggest that you approach any use of LIFO in your selection criteria with caution.

Inevitably, subjective criteria such as performance and skills will also have to be used. For good employee relations, we suggest that before applying subjective criteria the business sets out and explains to employees the methodology that will be used. Wherever possible, it is best to refer to prior performance ratings.

4. Cover the right things during consultation

Whether consultation is being conducted with an individual or as part of a collective exercise, the legislation provides that it should be about ways of:

- avoiding the dismissals
- reducing the number of employees to be dismissed
- mitigating the consequences of the dismissals.

Note that case law provides that there is an obligation to consult over the actual reasons for a workplace closure where that closure will inevitably result in redundancy dismissals.

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Consultation must be undertaken with a view to reaching agreement with the employees. However, while the consultation needs to be meaningful, it is not a requirement that the employees should be able, through consultation, to prevent redundancies, or even to succeed in changing the employer's plans. Accordingly, agreement need not necessarily be reached.

5. Get the timing right in collective consultations

Collective consultation requirements with "appropriate representatives" and within a specified timeframe apply where there is a proposal to dismiss more than 20 employees at one establishment within a 90-day period. There are three different categories of representatives:

- trade union representatives
- already elected employee representatives (e.g. employee or works councils)
- employee representatives elected specifically for the purposes of consulting about the proposed redundancies.

Consultation must take place in good time. Where the employer is proposing to dismiss 100+ employees, it must take place for at least 90 days before the first of the dismissals is proposed to take effect. Where the employer proposes to dismiss from 20 to 99 employees, it must take place for at least 30 days before the first dismissal is proposed to take effect.

It is expensive not to comply with your collective consultation obligations. Employees can make a claim for that failure and a tribunal may award each affected employee one week's wages (uncapped) for a period of up to 90 days.

Remember also that the Form HR1 must be sent to the Department for Business Enterprise and Regulatory Reform no later than 30 days before the first dismissal takes effect. Not sending the form is a criminal offence and could result in a fine.

6. Consider alternative employment

Alternative employment for potentially redundant employees must be considered to ensure a fair and reasonable redundancy procedure. This includes considering alternative employment in any associated companies, as well as the employing company.

If an employee unreasonably refuses an offer of suitable alternative employment made before the date on which the redundancy dismissal takes

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effect, they will lose their entitlement to a redundancy payment. However, an employee can refuse a suitable job provided they are not acting unreasonably.

The refusal of an offer of alternative employment, e.g. a role that is not similar to the employee's existing role, will not affect the employee's entitlement to a redundancy payment.

7. Think about bumping

Before making an employee redundant you should also consider whether it is appropriate to "bump" another employee from their position and make them redundant instead. For example, while a senior role may be disappearing you may wish to keep the skills of the employee within the business by offering them a more junior role and making the employee currently fulfilling that role redundant. While it is fairly unusual for bumping to occur, employers should consider it as a possibility, particularly if an employee suggests it.

8. Be aware of maternity issues

It is automatically unfair to dismiss a woman for redundancy when the reason or principal reason for the dismissal is connected to her pregnancy or statutory maternity leave.

However, provided the employee's selection is not so connected, it is possible to conduct a redundancy process with an employee on maternity leave. You should ensure that maternity leave employees are included in the consultation process by writing to them at home and inviting them to meetings, and consider offering consultation meetings by telephone.

There are two points to note when conducting a redundancy exercise that involves an employee on maternity leave:

- The employee is entitled to be offered a suitable alternative vacancy (where one is available) before it is offered to any other employee and before the end of her employment under her existing contract.
- If the employee is made redundant during Ordinary Maternity Leave or Additional Maternity Leave, she is entitled to redundancy pay as if she were not on maternity leave.

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9. Be flexible with sick and disabled employees

Unless an employee is disabled, employees on sick leave are not entitled to any special protection during a redundancy exercise. However, in practical terms it can be difficult to consult with employees who are on sick leave, so be flexible with the conduct of consultation meetings. For example, consider consultation over the phone, in writing or with a representative on the employee's behalf. If an employee repeatedly refuses to attend consultation meetings, ask for information from their doctor as to their capability.

If you are including a disabled employee within a redundancy exercise, ensure that you make reasonable adjustments to the redundancy selection criteria – e.g. to disregard periods of disability-related absence. In addition, consider whether any reasonable adjustments should be made in relation to the offer of alternative employment.

10. Know your redundancy pay obligations

Any employee with more than two years' continuous service will be entitled to a statutory redundancy payment.

Whether you are required to pay a sum in addition to this statutory minimum will depend upon whether your business provides its employees with a contractual right to an enhanced redundancy payment. We frequently find that businesses do not provide an express contractual right to enhanced redundancy payments but have a policy to pay them or have paid them in the past. Employees often believe that such practices mean that payments have become a contractual right through custom and practice.

However, for a policy or a practice to become a contractual term it must have been applied by the parties out of a sense of legal obligation to do so. Factors to take into account include:

- whether a decision is made by the business on each occasion whether to provide an enhanced payment
- whether the practice is "reasonable, notorious and certain"
- whether it has been drawn to the attention of employees and whether this supports the inference that it is being applied as a contractual right
- whether it has been followed without exception for a substantial period
- whether the payment is made automatically
- whether the payment is said to apply for a particular occasion.

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Finally, if you are offering enhanced redundancy payments you may wish to consider offering them subject to the dismissed employee signing a compromise agreement.

This approach is likely to incur additional up-front costs, as you will need to offer a contribution to your employee's legal fees (compromise agreements have to be reviewed by a solicitor on behalf of the employee to be binding). However, it will ensure that your business will not be facing the cost of defending an unfair dismissal claim or other type of claim.

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If you would like more information on any of the points covered in this Guest Article, please contact **TCii** on **020 7099 2621**.