UNITED KINGDOM

Prepared by Pili Fernandez Huelamo
Weightmans

1. Are there any laws that govern a layoff of employees? If so, what do the laws require?

The main piece of legislation governing dismissals is the Employment Rights Act 1996 ("ERA"). The term "lay-off" is commonly used to describe the dismissal by way of redundancy of an employee.[1] The term "redundancy" is defined in the ERA and a dismissal by reason of redundancy arises when employment is terminated, that is when the employee is "dismissed", in circumstances attributable wholly or mainly to the fact that either the employer has ceased, or intends to cease, to carry out the business for the purposes of which the employee is employed, or the requirement for the employees to carry out work of a particular kind have ceased or diminished (or are expected to do so). For the purposes of this questionnaire, we will answer the questions based on the assumption that they relate to redundancy dismissals, rather than "lay-off".

2. Are there any formal requirements for terminating an employee or groups of employees?

The employer must terminate the contract of employment by giving the employee the requisite notice in accordance with the contract or, in the event that the contract is silent or where such periods are greater, according to statutory notice periods. Failure to do this will mean the employer has breached the terms of the employment contract. Consequently the employee may claim for breach of the contract (also known as "wrongful dismissal"). Secondly a claim for unfair dismissal may be made (see below for more detail) if the dismissal has not been carried out fairly and the decision to dismiss was not within the range of reasonable responses.

3. Are there special legal requirements for a layoff caused by redundancy in the workforce?

There is a duty on the employer to inform and consult. In terms of the dismissal of a group of employees in a redundancy situation, where the employer proposes to dismiss 20 or more employees at the same establishment within a 90 day period, the employer must consult with representatives of affected employees for a minimum period. This period is 30 days where the

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[1] It should be noted that the term "laid off" has a particular meaning under UK employment law, which is not the same as redundancy. An employee can only be laid off lawfully if the terms of his contract, whether implied or express, afford the employer the right to do so. Only employees whose remuneration depends on being given work to do can be "laid-off". This is a temporary measure, with the expectation that a return to the normal working pattern will resume. Employees who have been laid-off are given the protection of being able to claim a statutory redundancy payment on the basis that they have in effect been dismissed by way of redundancy, rather than temporarily laid off. In order to claim the employee must have two years length of service and have been laid-off for the required length of time as specified by the ERA. The employee must serve the employer with a notice of intention to claim. An employer can serve a counter-notice to contest the claim, citing the fact that there is a reasonable expectation of a return to normal working hours, and that therefore there is no dismissal (by reason of "redundancy").

number of employees is between 20 and 99, and 90 days for 100 or more employees. This is called collective consultation and is governed by the Trade Union and Labour Relations (Consolidation) Act 1992. If the duty to collectively consult applies then the employer must also notify the Secretary of State, giving information about the reasons for the redundancies, the numbers involved and the process to be followed.

Employees must be allowed to work or be paid for their notice periods. In addition, employees with more than two years' service are entitled to a statutory redundancy payment calculated with reference to length of service, age and weekly pay (subject to a cap).

4. Are there employment laws that laid-off employees can use to challenge their inclusion in the layoff?

In addition to claiming unfair dismissal, employees may challenge their selection for redundancy if they believe that they have been selected on discriminatory grounds. These include sex, pregnancy or maternity leave, age, race, religious/philosophical beliefs, disability, sexual orientation and, to some extent, part-time or fixed-term status. Employees may also challenge selection if they believe they have been selected for being a whistleblower.

5. What sanctions or penalties may be imposed against employers for violating any of the requirements mentioned in Nos. 1-4 above?

An employer who has failed to collectively consult on redundancies when ordered to do so may be ordered by an Employment Tribunal to pay a so-called "protective award" of up to 90 days' pay for each affected employee. A failure to notify the Secretary of State may lead to the Secretary of State instituting legal proceedings which could lead to a summary conviction and a fine up to £5000. This upper limit is subject to review from time to time.

An employer must ensure that where employees are being terminated by reason of redundancy, that they have followed a fair procedure and have consulted properly in order to avoid claims for unfair dismissal. If not, an employee may claim he has been unfairly dismissed, subject to the individual having one year's continuous service (but see below). In order for a dismissal to be fair, it must be for a potentially fair reason (this includes redundancy, i.e. a business closure or a reduction in the need for employees to carry out certain work). In assessing whether a dismissal was fair, an employment tribunal will normally apply a general test of fairness set out in the ERA. The employer must also show that it acted reasonably in dismissing the employee for that reason. In a redundancy situation this includes carrying out fair selection, consulting with the employee and considering alternative employment. There are certain circumstances where a dismissal will be automatically unfair and in these situations there is no qualifying period of employment necessary and there is no cap on the amount that may be awarded.

If an employment tribunal finds that a dismissal is unfair, the employee will be entitled to an unfair dismissal award made up of a basic award subject to a cap (currently £10,500) and a compensatory award, (largely) based on compensating the employee for as much as an employment tribunal thinks is just and equitable to award in all the circumstances, having regard to the financial loss suffered by the employee as a result of the dismissal and the employers actions. The award is also subject to a cap (currently £66,200).

A tribunal can also order reinstatement of an employee (as if the employee has never been dismissed) or re-engagement (on terms as favourable or in suitable alternative employment). It is suffice to say this is not common. In the event either is ordered and the employer does not comply with the order, an additional unfair dismissal award can be made of between 26 weeks minimum and 52 weeks maximum pay. A weeks pay is subject to a cap giving an employee a possible £9,100-£18,200 payment.

Lastly, an employee who is found to have been discriminated against or who has been dismissed for being a whistleblower will be entitled to damages, also based on financial loss but uncapped, together with an award for injury to feelings. There is no qualifying service needed.

6. What are the one or two most common mistakes that employers make that lead to liability for a layoff?

Employers can lack transparency in the selection process which leads to claims for unfair dismissal and/or discrimination. Additionally, employers can fail to collectively consult "in good time" before redundancies are implemented.

7. What other employment issues are likely to arise from a layoff in your jurisdiction that you have not addressed in your answers to the previous questions?

If there is a subsequent transfer of the business or part of the business then the purchaser will be liable for any claims in relation to the redundancies under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") (which gives effect to the Acquired Rights Directive (2001/23/EC, formerly 77(1871 EC). Under TUPE when there is a "relevant transfer" of an "undertaking" (or part) the employees will automatically transfer from the transferor to the transferee. The employees transfer under their existing terms of employment and retain their continuity of employment. All of the transferor's rights, obligations and importantly liabilities connected with the transferring employees also transfer. Therefore any claims pre-transfer, such as unfair dismissal and breach of contract, will transfer to the purchaser. The purchaser will normally seek to protect itself against such liabilities through appropriate indemnities in the sale and purchase agreement. TUPE applies to business transfers and service provision changes, and does not apply to share sales.