



## The Governance Project

### Briefing No. 5 – April 2009

#### Redundancies – what do Trustees need to do?

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##### **Introduction**

In Briefing No. 4 we examined the role of Trustees in the disciplinary and grievance process. In this Briefing we will be taking a look in much greater depth at the involvement of Trustees where an agency has to make a member of staff redundant.

We are all only too well aware of the current downturn in the economy, the credit crunch and that government figures in January 09 confirmed that the UK is officially in recession for the first time since the early 1990s. Nearly 260,000 people were made redundant in the last three months of 2008 and the jobless figure released in February 2009 rose to just short of two million.

While the need for advice usually increases in times of a recession the advice sector is far from immune to cuts in spending by funders such as local authorities or other funding bodies. One large national charity has already announced significant job cuts related to a fall in income whereas many small organisations have been forced to close altogether. Therefore Trustees will need to be prepared should the possibility of redundancy arise in their organisation.

This briefing is not intended to be a definitive guide to the law on redundancy rather it aims to raise awareness among Trustees of what is good practice when it comes to a redundancy situation. Trustees will need to be aware of their duties and responsibilities if their agency is not to fall foul of the legislation on redundancy.

##### **What is a redundancy?**

A redundancy is defined in s139 of the Employment Rights Act 1996 as occurring when one of the following situations takes place:

- the employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was so employed
- the employer has ceased, or intends to cease, to carry on the business in the place where the employee was so employed
- the requirements of the business for employees to carry out work of a particular kind has ceased or diminished or are expected to cease or diminish

- the requirements of the business for the employees to carry out work of a particular kind, in the place where they were so employed, has ceased or diminished or are expected to cease or diminish

### **A business case for redundancy**

Trustees will have to have a good business case if they decide to make redundancies. Put in simple terms this means that if, having carefully scrutinised the financial situation of their organisation, the Trustees decide that there is no alternative but to close down then all the employees will be made redundant. This is a difficult but fairly straightforward decision.

A more difficult scenario is where the Trustees decide that they can keep their organisation open but only if they cut services and reduce the wage bill by losing one or more members of staff. Here the decision involves making choices or selecting who will be made redundant – a much more complicated and sensitive matter to deal with properly.

Another situation that is common in the sector is for a funding stream or project to come to an end. If the funding is not renewed or replaced then, with no funding for the job, an employee (though not necessarily the one whose funding stream has come to an end) will have to be made redundant.

### **Deciding that there is a redundancy situation**

There is a very fine line between Trustees deciding they are in a potential situation where redundancies are likely or in certain cases inevitable and having reached a firm decision on the numbers of staff to be made redundant, the actual individuals or to close the organisation down. This distinction is fundamental as there is a duty on the employer to consult on potential redundancies, how any selection process will work etc (see below). Flaws in the consultation process could lead to conflict or to affected employees taking claims to an employment tribunal.

Redundancy must not be used as a means of covering up the real reason for dismissal or for getting rid of 'selected' members of staff. Trustees must, therefore, be certain that at least one of the situations listed above applies otherwise they could be leaving themselves open to claims of unfair dismissal.

In many situations staff will be only too well aware that funding for a project is coming to an end or that the organisation is in financial difficulties and that redundancies are likely. However, Trustees should be careful not to allow rumours about possible redundancies to leak out and circulate around the organisation before any firm decision (to go out to consultation on potential redundancies) has been reached. This can have a demoralising effect on staff, creating a sense of fear and uncertainty which could lead to valued staff looking for alternative employment.

The timing of when staff should be informed about redundancies can be a delicate one. If staff are informed before a definite decision has been reached it can cause alarm or resentment especially if the Trustees manage to avoid making any redundancies. Once a decision has been made it is important that all staff are informed at the earliest possible opportunity. This is because there

is a formal procedure that must be followed (the process described here applies where less than 20 employees are being made redundant).

- Employees should be notified and consulted about the redundancy
- The selection of employees should be fair
- Trustees should take reasonable steps to redeploy affected employees
- Affected employees should get any redundancy pay they are due, and be given the correct amount of notice
- Trustees should consider any alternatives to redundancy

### **Consultation**

Consultation must be meaningful – there should be a genuine chance to feed back to the Trustees with suggestions or alternatives to redundancies and Trustees should be prepared to consider them seriously and take on board any that they deem reasonable or possible. It follows that any proposals should still be at a formative stage rather than being a 'done deal'. Trustees may well ask at this stage if any staff are willing to take voluntary redundancy (see Alternatives to Redundancy below).

### **Selection and selecting selection criteria**

The first stage is to choose the pool from which redundant employees will be selected. In broad terms the pool should consist of all employees doing similar work. It is *not* correct to automatically assume that when a funding stream ends the person who is employed under that stream should be the one to be made redundant.

Consider a situation where there are three generalist advisers all employed under different funding streams? One source of funding comes to an end and is not replaced. What if the adviser whose funding is coming to an end has longer service, meets all their targets, has a better sickness record and so on than the other two advisers? Who should Trustees select? It is important that Trustees seriously consider this issue before reaching a decision. One solution may be for Trustees to interview all three advisers for the two remaining posts with the one that performs worst being made redundant. If this is the case it is important to ensure that all staff are treated the same or there will be claims of bias, different treatment, unfair selection or discrimination.

Selection must be based on objective criteria that can be measured effectively. Traditional methods for selection such as Last in First out (LIFO) have fallen into disuse as they may fall foul of the Age Discrimination regulations. Trustees may wish to take a number of factors into account such as skills and/or qualifications appropriate for the job, timekeeping, number of sick days, length of service or disciplinary warnings. Such a system gives a better overall and generally fairer assessment of individual members of staff. Length of service could then be used as a final means to separate two employees - in effect as a tie-breaker.

### **Redeployment**

Where a suitable vacancy exists within an organisation Trustees must offer it to an employee who would otherwise be made redundant. Case law has now

established that any alternative role need not be equivalent and Trustees should also offer jobs of a lower status. An employee may prefer to take a lower paid/status post rather than be made redundant and should be given that option. Where the role on offer is different the employee should be offered training to enable them to do the job. If the only vacancy is of a significantly higher level Trustees may wish to interview the employee to assess their suitability for the post before offering redeployment.

### **What are the costs?**

Clearly when making any staff redundant Trustees will need to take into account the cost of making staff redundant as part of their budgetary considerations. Will the number of proposed redundancies meet the budgetary shortfall once the costs of redundancy are taken into account?

The actual cost will depend on whether the organisation's redundancy policy states that redundancy payments will be at the statutory level or a contractual level or even enhanced. Statutory redundancy pay is calculated on a formula based on age bands and length of service and even where the organisation's policy is to offer enhanced payments these must use the same age bands with a multiplier to maintain their proportionality. Failure to do this could lead to disproportionate payments being made to one age group which in turn could lead to claims of age discrimination.

### **Calculating Redundancy payments**

For each completed year of service:

1. Staff aged 18 to 21 get half a week's pay
2. Staff aged 22 to 40 get one week's pay and
3. Staff aged 41 or over get one and a half week's pay

In the statutory situation a week's pay is capped at £350.00\* with a maximum of 20 years' service being taken into account. (See important update page 6)

The difference in cost between a policy that pays statutory redundancy rather than one based on contractual rates can be significant. An adviser earning £25k per annum has a weekly rate of nearly £481 compared to the statutory rate which is currently capped at £350\*. For an employee with 10 years' service aged under 41 the difference would amount to £1310, a considerable amount especially in a situation where an organisation is having to make cuts because of a loss of income. This becomes even more crucial where more than one member of staff is being made redundant.

An on-line ready reckoner for calculating individual redundancy payments can be found at <http://www.berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page33157.html>

### **Reserves**

Trustees should consider the cost of potential redundancies as part of their risk assessment and reserves policy. When developing a reserves policy and ensuring that there is adequate contingency to run the organisation for three months, for example, in the event of a loss or gap in funding, Trustees should also consider factoring in the cost of making staff redundant. Whether Trustees decide to try and build up a reserve that includes the cost of making

all staff redundant or one that covers just a proportion of staff is a matter of judgement – so long as Trustees can show that they made an informed decision.

### **Alternatives to redundancy**

Trustees may wish to offer voluntary redundancy to avoid or reduce the number of compulsory redundancies. However, where Trustees do offer voluntary redundancy it is important that they make it clear that volunteers will not automatically be accepted as Trustees will need to ensure that they can retain those staff essential to the running of the organisation or the continuation of its services.

Trustees cannot impose lay-offs, wage cuts or short time working (even for a limited period) without being in breach of the contract of employment (unless in the unlikely situation those contracts include a clause permitting such action) and leaving the organisation open to claims of constructive dismissal and or breach of contract. However there is nothing to stop such a suggestion coming from staff in response to the consultation.

See also the above section on redeployment.

### **Do you have a redundancy policy?**

Trustees should check, as a matter of priority, whether or not they have a redundancy policy and procedure in place for their organisation. A policy may include the steps that must be taken before compulsory redundancies are made such as making use of natural wastage, an embargo on any recruitment, letting agency staff go, or offering voluntary redundancy.

The policy should also set out the consultation process that will normally be followed and crucially whether redundancy pay will be based on the statutory rate, the contractual rate or an enhanced rate. If Trustees are happy to offer contractual or enhanced redundancy rates they must ensure that they have sufficient in the reserves to cover such an eventuality.

### **Notice**

Do not forget that any member of staff being made redundant is entitled to be given notice in the normal way – either contractual or statutory whichever is the greater. Trustees should consider whether they wish staff to work out their notice or whether to tell them to leave straight away and instead be paid for the notice period. Trustees should be mindful not to let some employees leave straight away and make others work out all or part of their notice – they could be accused of unequal treatment or this could be used as part of a discrimination claim.

### **Trade Union input**

Does your organisation have a trade union agreement? If it does Trustees should check the arrangements for consultation in a redundancy situation. While most trade union agreements are not legally enforceable it is nonetheless wise to abide by it where one exists as it shows that the Trustees have acted reasonably and followed good practice and procedure. Ignoring a trade union agreement will almost certainly lead to conflict, lengthy arguments

and entrenched positions that make any chance of reaching an amicable settlement almost impossible.

**Is there a duty to re-employ an employee if new funding becomes available?**

A common scenario in the voluntary advice sector is for a funding stream to come to an end followed by the employee being made redundant. A few months later the organisation is successful in obtaining a grant from another source to do the same or very similar work. Is there any requirement to offer the former employee their job back?

If the employee was genuinely made redundant and Trustees can show that a genuine redundancy situation existed at the time of dismissal then there is no requirement to offer the former employee their job back if new funding becomes available (i.e. there is a change in the economic situation) and the organisation needs to take on another member of staff.

Equally there is nothing to stop Trustees from offering the former employee their job back if they so wish. Trustees should note that continuity of service is broken once a redundancy payment has been made and the employee is re-engaged under a new contract, unless there is express agreement by both parties to preserve continuity. This is to prevent an employee's service counting twice for redundancy purposes.

Some organisations have included a section in their redundancy policy that states a former employee will be offered their job back if new funding becomes available within a stated number of months. It is down to individual boards of Trustees to decide whether or not they feel such a policy is either beneficial or desirable.

**Always take professional advice**

The advice in this briefing is a very general overview of the issues that Trustees should consider before making any decisions regarding redundancy. Trustees should always ensure that there is a written record of their deliberations and should always seek professional advice before making any member of staff redundant.

**\* Important update**

The Chancellor of the Exchequer announced an increase in the statutory rate of redundancy pay from the current cap of £350 per week to £380 per week. However at the time of writing the implementation date for this increase is still to be announced.

See the Directgov website on redundancy for further details:

<http://www.direct.gov.uk/en/Employment/RedundancyAndLeavingYourJob/Redundancy/index.htm>

## **SUMMARY OF SUGGESTED REDUNDANCY PROCEDURE**

### **Stage 1**

#### **(Action to be taken by employer before announcing redundancies)**

The employer should consider the business reasons for making redundancies. The employer should also consider whether it is necessary to identify a pool for selection and, if so, what the selection criteria are to be. If appropriate, carry out a provisional selection exercise.



### **Stage 2**

Write to affected employees warning them that they are at risk of redundancy, which could result in their dismissal. Inform them of the circumstances which have led to their being provisionally selected and invite them to a consultation meeting. Advise employees of their right to be accompanied at meetings. Provide the employees with details of any selection criteria used and their scoring against them. This should comply with Step 1 of the Statutory Dismissal and Disciplinary Procedure ('SDDP') if applicable.



### **Stage 3a**

The employer should hold individual consultation meetings with the affected employees. The meetings will be an opportunity for the employees to make representations about selection criteria and scoring, raise any questions they may have and put forward suggestions as to how their redundancies might be avoided.



### **Stage 3b\***

If the employer decides to proceed with the redundancies there should be further individual meetings to confirm decision to dismiss on the grounds of redundancy. Employer should provide termination letter, which sets out the employee's right of appeal.



#### Stage 4



Possible appeal hearings, (complying with Step 3 of the SDDP). Appeal hearings should, where possible, be dealt with by a more senior manager than the one who dealt with the first meeting.

\* Stages 3a and 3b combined comply with Step 2 of the SDDP. (The SDDP were repealed as of 06 April 2009 but must still be used where the above procedure began prior to that date)

Please note that the employer should consider, throughout all stages of the procedure, whether there might be any suitable alternative roles which could be offered to the affected employees.

*(Summary of Suggested Redundancy Procedure reproduced with kind permission from Jane Klauber, Russell-Cooke Solicitors)*

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