Redundancy Handling

Guidance for Colleges

May 2015
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1. Introduction

Redundancy can be a challenging time for all involved. For the employer it can be a daunting prospect, and of course for the employee it is a sensitive and uncertain time. These guidelines aim to help colleges to alleviate the disruption of a redundancy process through careful preparation and a sympathetic approach.

A redundancy amounts to a dismissal in law and it is unlawful for an employer to discriminate against or victimise a worker in a redundancy situation. These guidelines seek to assist colleges to follow good practice, in light of colleges’ legal obligations. Examples of case law are given to highlight specific difficulties that colleges may encounter and to assist colleges avoid pitfalls when planning and implementing their redundancy process.
2. What is a redundancy?

A redundancy situation arises when there is a reduction or cessation in the requirement for work of a particular kind. This can be because of a reduced need for employees to do the work, or because of a reduction in the work itself.

**Legal Definition of Redundancy**

Redundancy is defined under S.139(1) Employment Rights Act 1996:

“For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease –

i. to carry on the business for the purposes of which the employee was employed by him, or

ii. to carry on that business in the place where the employee was so employed, or

the fact that the requirements of that business –

i. for the employees to carry out work of a particular kind, or

ii. for employees to carry out work of a particular kind in the place where the employee was employed by the employer

have ceased or diminished or are expected to cease or diminish.”

It is important to note that it is the “post” that is being made redundant and not the individual.

Examples of a potential redundancy situation:

- Closure of the college;
- A diminishing need for employees to do the available work e.g:
  - A reduction in student intake for a course resulting in a decision to reduce lecturing staff for the course;
  - A re-organisation of a department resulting in the deletion of posts and introduction of new posts; and
  - Non-renewal of funding for a project resulting in the non-renewal of a fixed term contract.
2.1. When is a dismissal not a redundancy

When considering dismissals by reason of redundancy it is important to be clear about whether the circumstances fit the definition of redundancy. In many cases, it will be very clear but other cases will be more difficult, particularly where there is an element of restructuring. It is important to compare carefully the new jobs with the old and decide whether the work is of the same kind or a different kind.

It is also important to recognise that redundancies should not be used as an alternative to taking action for poor performance or misconduct. Any ‘disguised’ dismissals which are labelled as redundancies are likely to result in a finding of unfair dismissal at an employment tribunal. In any restructuring, it will therefore be important to compare carefully the new jobs with the old and to decide whether the work is of the same kind or a different kind. Even if the work is of a different kind, the college should consider whether, after appropriate re-training or other measures, the otherwise redundant employee could undertake the new role.

2.2. Avoiding redundancies

Trade unions will put pressure on colleges to avoid making compulsory redundancies and to consult with them on avoiding dismissals. It is a legal requirement under the Trade Union and Labour Relations (Consolidation) Act 1992 to consider ways to avoid redundancies.

A fair redundancy process will show that thought has been given to alternatives – and an employment tribunal will expect colleges to mitigate the effect of dismissals. Therefore, when considering how best to deal with economic, technical or organisational issues that seem to make redundancies appear inevitable, it is essential to consider alternative ways of managing resources before resorting to redundancies.

Alternatives that may be considered include:

- Trying to make financial savings in other areas.
- Reduction of staff levels by natural wastage.
- Redeployment (including, where necessary, retraining) to other parts of the organisation.
- Reduction of elimination of overtime working.
- Restricting external recruitment.
- Restricting the engagement of external contractors and agency staff.
- Reducing working hours (by agreement with staff).
- Considering volunteers for job sharing.
- Sabbaticals and unpaid leave, or secondments.
• Seeking alternative funding, e.g. where funding for a particular project or course has been cut or reduced.
• Seeking applications for early retirement (note the risks explained below).
• Seeking applications for voluntary redundancy.
• Temporary or permanent change to terms and conditions (by agreement with staff).
• Revised pay arrangements.

Colleges will want to consider the appropriateness of each measure as there are potential issues arising from each option.

2.3. Restricting recruitment

Trade unions will expect recruitment to be restricted and it is helpful to preserve existing employee morale. However, it is unrealistic for a college to place an absolute freeze on recruitment as there may be circumstances where a specific skills set is needed and is not available internally. Colleges are allowed to restrict advertising of vacancies to just those that are at risk of redundancy; there is no requirement to advertise externally in these circumstances. It is important that managers in other departments are aware that they must consider employees that are at risk of redundancy for vacancies that they are trying to recruit to.

2.4. Retraining and redeployment

Retraining staff that are potentially going to be made redundant can allow colleges to retain loyal staff that are able to learn other skills; have hidden skills; or be ready for or capable of more challenging work, allowing them the opportunity to be redeployed into another role within the college. This also gives the college the flexibility to fill essential vacant roles whilst reducing the headcount in specific departments. Colleges should invite applications for key vacancies from all staff at risk of redundancy, with the proviso that re-training will be provided to any employee who, following an objective assessment, can demonstrate that he or she is potentially suitable for the type of work in question. A four-week statutory trial period¹ allows the college or the employee that is redeployed, into a role that is not the same as the old one, the opportunity to assess if the role is suitable. Either party has the right to end the trial period and therefore the redundancy payment would still apply if the role is not deemed to be a suitable alternative. The redundancy payment will not apply if the employee unreasonably refuses a suitable alternative role. Please see section on Trial Periods for further details.

¹ S.138 Employment Rights Act 1996
2.5. Announcement of proposed redundancies

Communication is a key requirement during the entire redundancy process. It is important that, as far as possible, staff hear about the redundancy situation at the appropriate time and in the right way; through appropriate internal channels rather than through external sources.

Given the sensitivity of the issue and the personal impact on employees, careful preparation is necessary when making the announcement. It is recommended that, where possible, colleges provide training to help managers cope with handling this potentially traumatic situation. It is never easy to tell a colleague or a friend that they are at risk or have been selected for redundancy, especially when the manager may have played a part in the selection process.

Points to consider before announcing proposed redundancies:

- Drawing up a detailed plan can often help identify the process that will be followed and the timing of events.
- Who will deliver the message? This will depend on the personalities and departments involved.
- What time of day is best? It is not advisable to break the news just before an individual is scheduled to teach.
- Training for managers will help to ensure that the message is delivered in a consistent and sensitive way.
- Management briefing packs which stress the importance of using the documentation as directed can also help to ensure a consistent message is delivered to all employees affected.
- Are there any staff who are absent or on leave? Appropriate steps should be taken to inform and consult them about proposals.
3. Consultation

A fair consultation process needs to be timely and meaningful and requires colleges to consult with employees when proposals are still being formulated. Colleges also need to provide adequate information, allow adequate time for responses and provide due consideration to any proposals raised by employees. Moreover, colleges must comply with the legal requirements on consultations.

3.1. What is consultation?

‘Consultation’ is defined in Reg.2 Information and Consultation of Employees Regulations 2004 as the exchange of views and establishment of a dialogue’ between the employer and representatives of employees. Colleges’ obligations under these Regulations to inform and consult stop once the college comes under a duty to consult under Section 188 of TULR(C)A (or TUPE)².

4. Collective consultation

The statutory duty to consult is prescribed in S.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (hereinafter ‘TULR(C)A’), as amended. A key change to s.188 of TULR(C)A, effective from 6 April 2013, is as follows:

1. Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.

2. The consultation shall begin in good time and in any event –

a. where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least 45 days, and
b. otherwise, at least 30 days, before the first of the dismissals takes effect

Colleges proposing to make collective redundancies must first consult appropriate representatives of any employees who may be affected by the dismissals. Where affected employees are represented by an independent trade union recognised for collective bargaining purposes, the employer must inform and consult an authorised official of that union.

4.1. What does ‘proposing to dismiss’ mean?

There is scant case law guidance for colleges on when a decision amounts to ‘proposing to dismiss’. The case law on this point suggests that a college would be held to be ‘proposing to dismiss’ where it is contemplating collective redundancies, even if this was only one of two possible courses of action and the other proposed course did not involve redundancies.

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3 TULR(C)A was amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995. More recently, Sections 188, 193 and 282 of TULR(C)A were amended by The Trade Union and Labour Relations (Consolidation) Act (Amendment) Order 2013. This Order became law effective from 6 April 2013 and the references to TULR(C)A in this guidance incorporates these legislative changes.

4 For collective consultation purposes, the definition of ‘redundancy’ differs from the definition under the Employment Rights Act 1996. It is defined as a dismissal for a reason ‘unrelated’ to the individual employee concerned or for a number of reasons all of which are not so related.

5 For additional guidance on managing collective consultations in a redundancy situation, Colleges can refer to the ACAS publication How to Manage Collective Redundancies, April 2013.
4.2. What is an ‘establishment’?

The European Court of Justice (‘ECJ’) ruled on the definition of ‘establishment’ on 30 April 2015 in USDAW, B.Wilson v WW Realisation 1 Ltd, in liquidation, Ethel Austin Ltd and Secretary of State for Business, Innovation and Skills (known as the Woolworths case).

The ECJ made two key findings in this ruling:

- the definition of ‘establishment’ in the collective redundancy context means ‘the entity to which the workers made redundant are assigned to carry out their duties’, i.e., a single location rather than across employers’ organisations as a whole; and

- employers are only required to engage in collective consultation if 20 or more redundancies are proposed at a particular establishment within a 90-day period.

The ECJ has formally referred the case back to the Court of Appeal and it is highly likely that the Court of Appeal with follow the ECJ’s ruling.

Therefore, colleges can now approach redundancy situations knowing that the requirement to carry out collective consultation is triggered when (and only when) 20 or more dismissals are proposed at one establishment in a 90 day period. Accordingly, colleges no longer need to aggregate the number of proposed redundancy dismissals across multiple college sites.

The impact of this ruling means that the legal position reverts to the position before the 2013 EAT ruling in the Woolworths case and it also means that colleges can revert to filing HR1 forms on a site by site basis.

4.3. Who are the ‘appropriate representatives’ to consult with?

A trade union might be recognised for one group of employees e.g. academic staff whereas another trade union is recognised for another group of employees, such as support staff. It should be the recognised union that is most appropriate to the staff affected by the proposed redundancies which should be consulted. If the proposed redundancies will indirectly affect more than one group of employees, more than one union may constitute ‘appropriate representatives’ for consultation purposes.

Where employees who may be affected by the proposed redundancies are not represented by a recognised trade union, the employer must inform and consult other appropriate representatives of those employees. These may be either existing representatives or new ones specially elected for the purpose. It is the college’s responsibility to ensure that consultation is offered to appropriate representatives.
If the employer does not recognise a trade union, and no employee representatives are already chosen, there is an obligation on the employer to promote the election of employee representatives so that there may be consultation with them, or, failing that, to inform and consult with individual employees (Howard v Millrise Limited and SG Printers [2005] IRLR 84).
4.4. What is meant by ‘affected’ employees?

‘Affected employees’ in the context of a collective redundancy situation means employees who may be affected by the actual proposed dismissals and employees who might be affected by measures to be taken in connection with the proposed redundancy dismissals. If a college is proposing to collectively dismiss 20 or more employees and redistribute some of their duties amongst retained employees, then those retained employees should also be included in the collective consultations (Hardy v Tourism South East [2005] IRLR 242).

When colleges are considering employees to be included in collective consultations, consideration should be given to the following points:

- Employees that volunteer for redundancy should be included in collective consultations.
- Employees that are already being consulted through collective consultation in respect of a separate redundancy situation within the college, do not need to be included.
- Fixed term employees whose contracts are due to expire within the consultation period (regardless of whether their contract will expire for reason of redundancy) do not need to be included in collective consultations unless they will be dismissed for reason of redundancy before the expiry date stated in their contract.6

4.5. What does ‘in good time’ mean?

The law requires that collective consultation must begin ‘in good time’ and, in any event, within the minimum timescales specified in Section 188 TULR(C)A as amended. The requirement to begin consultation ‘in good time’ derives from Article 2(1) of the EU Collective Redundancies Directive (No 98/59) which does not otherwise set out any specific time limits.

Guidance from case law shows that consultation can be ‘in good time’ where the consultation process is expedited, as long as the proposals are still at a formative stage and there is sufficient time for the appropriate representatives to respond; as well as for the college to consider those responses.

In Amicus v Nissan Motor Manufacturing (UK) Limited UKEAT 0184/05, the Employment Appeal Tribunal (EAT) accepted that ‘in good time’ means no more or less than time sufficient for fair consultation to take place, working back from the

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6 See amendments to § 282 of TULR(C)A brought into effect by The Trade Union and Labour Relations (Consolidation) Act (Amendment) Order 2013.
first date of dismissal. What is ‘in good time’ depends on many factors, including
the number of staff and trade unions involved and the key issue is whether the
consultation is genuine and meaningful.

However, colleges should note that an employment tribunal could still decide that
consultation did not occur ‘in good time’ even when the minimum timescales in
Section 188 TULR(C)A as amended were complied with (GKN Sankey Ltd v

To ensure a fair consultation process, the consultation must also be undertaken
‘with a view to reaching agreement with the appropriate representatives’. This
does not necessarily mean that actual agreement has to be reached but
representatives should be given enough information to be able to take a useful
and constructive part in the discussions.

Points to consider when determining ‘in good time’;

- To start consultations ‘in good time’ colleges should ensure they start with
  enough time for the consultations to be meaningful;
- This duty to begin consultations ‘in good time’ trumps colleges' obligations to
  comply with statutory minimum periods of consultation stipulated in TULR(C)A;
- Starting consultations in a timely way means that colleges can adjust the
timetable for consultation in light of proposals raised by trade union
representatives and employees;
- Colleges can plan the start date of consultations by working backwards from
  when the first dismissal takes effect and in light of the academic calendar;
- Colleges may need to balance starting consultations ‘in good time’ against the
detrimental effect on employees' and morale and productivity that might be
caused by ‘pre-warnings' about redundancy;
- Colleges need to plan the start date of consultations in light of term-time only
  employees' working patterns.

4.6. Timely consultations

The timescales for consultation depend on the number of employees a college
proposes to make redundant. Following amendments to the minimum periods of
consultation stipulated in Section 188 TULR(C)A, the minimum periods are now as
follows

- Where 20 to 99 redundancies are proposed, colleges must consult for at least
  30 days before the first dismissal takes effect; and
- Where 100 or more redundancies are proposed, the consultation period must
  not be less than 45 days.
Under the transitional arrangements to implement the legislative changes of 6 April 2013 to TULR(C) A:

- where the redundancy proposal for 100 or more employees at one establishment over a period of 90 days was made before 6 April 2013, consultation must begin at least 90 days before the first dismissal takes effect; and
- where the redundancy proposal for 100 or more employees at one establishment over a period of 90 days was made on or after 6 April 2013, consultation must begin at least 45 days before the first dismissal takes effect.

4.7. Notification to the Secretary of State

Under S.193 TULR(C)A as amended, colleges have a legal duty to notify the Secretary of State for Business, Innovation and Skills (BIS) of their proposal to dismiss employees as redundant before giving employees notice to terminate their contract in the following circumstances:

- where the proposal is to make 100 or more employees redundant at one establishment, at least 45 days before any of these redundancy dismissals takes effect;
- where the proposal is to make 20 or more employees redundant at one establishment, at least 30 days before any of these redundancy dismissals take effect.

Colleges can comply with this notification requirement by completing Form HR1. A copy of any notification sent to the Secretary of State must also be provided to trade union representatives being consulted in accordance with TULR(C)A.

4.8. Meaningful and genuine consultation

For a consultation process to be fair it must be genuine and not a ‘sham’. In Middlesbrough Borough Council v TGWU [2002] IRLR 332 the EAT held that issuing written redundancy notices to employees half an hour after a meeting with the trade unions suggested that the consultation was not meaningful.

AoC has published a Joint Agreement on the Guidance for the Avoidance and Handling of Redundancies in Further Education which can be used as a framework for colleges to establish a locally agreed policy with recognised trade unions.

Checklist of legal requirements for colleges proposing to make 20 or more employees redundant:

- Consult with the appropriate, recognised trade unions, or elected employee
representatives if there are no recognised trade unions.

- Make consultations timely – at least 30 or 45 days before the first dismissal takes effect depending on the number of proposed redundancies.
- Consult on ways of avoiding redundancies and mitigating the impact of redundancies on employees.
- Disclose the required information in writing to the appropriate trade union representatives/employee representatives.
- Notify the Secretary of State for Business, Innovation and Skills at least 30 or 45 days in advance of the first dismissal taking effect, depending on the number of proposed redundancies.
- Give employees as much warning as possible of the likely redundancy situation; the reasons for the redundancy situation and the selection criteria to be used in the redundancy process.
- The business case should be communicated to workplace/trade union representatives as soon as is reasonably practicable and before the start of the consultation process.
- Provide the opportunity for employees to make suggestions and representations to avoid the redundancy situation.
- Notes from any consultation meetings should be made available to appropriate representatives, as well as the individuals concerned.
- Ensure that all consultations are done on the basis of proposed redundancies making it clear that any firm decisions will not be made until after the meaningful consultation has been completed.

4.9. Disclosure of information to appropriate representatives

Section 188 TULR(C)A as amended also states that for the purposes of consultation, College must disclose in writing:

- The reasons for the proposals;
- The numbers and descriptions of employees it is proposed are made redundant;
- The total number of employees of that description employed at the establishment in question;
- The proposed method of selecting the employees who may be dismissed;
- The proposed method of carrying out the dismissals, including the period over which the dismissals are to take effect; and
- The proposed method of calculating the amount of any redundancy payments to be made (other than the statutory redundancy pay) to employees who may be dismissed.
Colleges must also provide information on:

- The number of agency workers working temporarily for and under their supervision and direction;
- The parts of the undertaking in which they are working; and
- The type of work they are carrying out.

In *Unison v London Borough of Barnet and NSL Ltd ET/3302128/2012*, the employment tribunal considered to what extent the employer had failed to comply with the requirement to provide information relating to agency workers. The Tribunal made a protective award against the employer and when calculating the award took into account that this information was relatively easy to produce; that the trade union requested this information; and the information was central to the consultation process.

### 4.10. Non-compliance with duty to consult

Any failure by colleges to comply with the collective consultation procedures may result in an employee bringing an employment tribunal claim for a protective award. A protective award is effectively an order that the employer shall pay remuneration to employees for a ‘protected period’. An employment tribunal can extend this award to affected employees in respect of whom the employer has failed to comply with any requirement of TULR(C)A (instead of limiting it to the complainant bringing the claim).

The amount of the award is based on what the employment tribunal believes is just and equitable and can be up to 90 days’ pay per employee affected. Therefore, despite legislative changes to the minimum timeframe for large scale collective redundancies, there has been no change to the maximum amount of a protective award.

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7 This is a legal duty on employers effective from 1 October 2011, when the [Agency Workers Regulations 2010](https://www.legislation.gov.uk/uksi/2010/846) entered into force. S.188(4) (g) TULR(C)A was amended by [Schedule 2, Agency Workers Regulations 2010](https://www.legislation.gov.uk/uksi/2010/846/schedule/2).

8 A complaint that a College has failed to comply with their duties under Section 188 of TULR(C)A must be brought under S.189 TULR(C)A. Whether or not an individual, such as an employee or employee representative can bring a claim depends on the type of failure alleged against a College.
5. Individual Consultations

Where colleges propose to make less than 20 employees redundant, there is no legal requirement to undertake collective consultation. In the vast majority of cases, individual consultation will be the key consideration to ensuring a fair redundancy dismissal.

Recent case law has considered the degree of individual consultation required where there has also been a collective consultation process.

In *Dabson v David Cover & Sons Ltd (2011) UKEAT/0374/10* the employee brought a claim for unfair dismissal. The employee claimed that, because there had not been a valid election of employee representatives under S.188 TULR(C)A, the employer was required to but failed to individually consult with each affected employee. The EAT held that the overall consultation was fair because the employer had addressed preliminary consultation issues in negotiations with the employee representative and then held two individual consultation meetings with the employee.

This EAT ruling is helpful to colleges because it sets quite a low bar as to what a fair consultation is. The case confirms that the content of matters discussed during a collective consultation will go some way towards meeting colleges' obligations for individual consultation.

An earlier case of *Alstom Traction Limited v Birkenhead & Others (2002) UKEAT/1131/00*, provides a reminder to colleges of the need for individual consultation when making redundancy dismissals. The employer was planning to make large scale redundancies and focused heavily on its requirements for collective consultation, ensuring there were considerable resources and effort put into planning the redundancies. However, the individual consultation meetings were flawed and did not allow for any meaningful consultation, or allow the employees any real opportunity to contest the reason for the dismissal, or the assessment scores. The result was that the employer had not fulfilled its duty to consult and the employees were deemed to have been unfairly dismissed.

Where a college is undertaking collective consultations, it does not need to wait until the end of the collective consultation process before starting individual consultation meetings with employees in the selection pool.

The following steps would be taken in a fair individual consultation process:

- Employees would be given as much warning as possible of the likely redundancy situation;
• Individuals must be informed of any opportunities to avoid compulsory redundancies and any available options for redeployment, including any retraining that may be appropriate;

• Consultation with employees on maternity leave can proceed during this leave period but consultation should be carried out in a way which is manageable for the employee, with an option of attending the workplace or scheduling meetings by telephone. Employees should also be mindful of the employee’s health and childcare responsibilities.

• Inform the appropriate trade union/employee representative of individual consultations taking place;

• After employees have been notified that they are at risk of redundancy, schedule face-to-face meetings between those employees, HR and the relevant line manager;

• Ideally, consultation should take place over at least two meetings, before any decision is taken to dismiss and the employee should be free to take away a copy of their score sheet (but is not normally entitled to see other employees’ score sheets);

• Minutes of individual consultation meetings would be produced; and

• Notify employees of their right to be accompanied at meetings by a trade union representative or colleague and after each stage of the consultation process, send out letters or memos to each individual employee so that they are kept informed at all stages of the redundancy process.
6. Equality and diversity considerations

In light of the legal duties imposed on colleges under the Equality Act 2010, managers involved in college redundancy procedures should be appropriately trained, including equality and diversity awareness training. It is important that the college is adequately prepared to defend itself against potential discrimination claims that may arise from any redundancy dismissals. A fair redundancy process would consider the impact of redundancies on employees on the grounds of any ‘protected characteristics’ as defined in the Equality Act 2010.

6.1. Public sector equality duty

S.149 Equality Act 2010 imposes a duty, known as the public sector equality duty, on colleges to have due regard to three specified matters when exercising their functions. The three matters are:

1. Eliminating conduct that is prohibited by the Act, including breaches of non-discrimination rules in occupational pension schemes and equality clauses or rules which are read into a person’s terms of work and into occupational pension schemes;
2. advancing equality of opportunity between people who share a protected characteristic and people who do not share it; and
3. fostering good relations between people who share a protected characteristic and people who do not share it.

The second and third aims apply to the protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. They do not apply to the protected characteristic of marriage and civil partnership.

Having due regard to the need to advance equality of opportunity and foster good relations means, in particular, having due regard to advancing equality of opportunity between disabled people and non-disabled people and implementing steps that take peoples’ disabilities into account. For colleges complying with this duty, it might mean treating some people more favourably than others, where doing so is allowed by the Equality Act 2010.

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9 On 15 May 2012, the Home Secretary announced a review of the ‘public sector equality duty’ and the outcome of this review is expected to be published in summer 2013.
6.2. Equality impact assessments

The Equality Act 2010 (and the Equality Act 2010 (Specific Duties) Regulations 2011) do not legally require colleges to undertake an Equality Impact Assessment to fulfil their ‘public sector equality duties’\textsuperscript{10}.

In the context of proposed redundancies, the purpose of the Equality Impact Assessment would be to assess the impact of colleges' redundancy policy and procedures (including consultation proposals and proposed selection criteria) in light of the three aims of the 'public sector equality duty'. Analysing proposed restructuring or redundancies should also help to identify whether it will contribute to good relations between different groups of people employed by the college and promote equality of opportunity.

For further information on how to complete an impact assessment, colleges can refer to the AoC Equality Impact Assessment Guide.

If a college fails to comply with their ‘public sector equality duties’ (including in the context of proposed redundancies) the Equality and Human Rights Commission can issue a compliance notice and apply to a civil court for an order requiring compliance by a college.

\textsuperscript{10} The ‘public sector equality duty’ is supported by ‘specific duties’ set out in the Equality Act 2010 (Specific Duties) Regulations 2011, which came into force on 10 September 2011.
7. Fixed term employees, part time employees and agency workers

Colleges should also give consideration to how best to manage employees on different types of contracts, such as employees on fixed term contracts, part-time employees and agency workers within the redundancy process.

7.1. Fixed term employees

Fixed term contracts will usually terminate on a specified date, or on the occurrence of a specified event, such as the completion of a funded project.

The question of how to terminate a fixed term contract creates considerable confusion amongst employers. In law, a termination of this type of contract is likely to be considered a dismissal and that is why colleges need to follow a fair procedure for termination of the contract, including consulting with an employee before the expiry of the fixed term contract.\(^{11}\)

A review of case authorities shows that colleges need to consider the reason for the non-renewal of the fixed term contract, which will depend on the specific factual circumstances. The reason for non-renewal of a fixed term contract could amount to a dismissal for reason of redundancy.

**Points to consider before terminating a fixed term contract:**

- The reason why the college is not planning to renew an employee's fixed term contract;
- Whether or not the reason for termination is clearly not redundancy, such as due to the conduct or capability of the employee;
- Where the reason may fall within the definition of redundancy, whether the employee would qualify for a redundancy payment; and
- Whether the appropriate procedure to follow is the disciplinary or redundancy procedure to ensure procedural fairness and avoid the risk of an unfair dismissal claim from the employee.

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\(^{11}\) The expiry of any fixed term employment contract would be deemed to be a dismissal under ERA 1996 Section 95(1)(b) unless the reason for non-renewal of the contract is by mutual consent.
Circumstances where expiration of a fixed term contract would not be a redundancy dismissal:

- Where the fixed term contract is an apprenticeship contract and cannot be renewed at the end of the apprenticeship.
- Where the employee does not successfully meet the requirements of their probationary period.
- Where the employee is dismissed for a conduct or capability-related reasons.
- Where the employee is recruited to cover a permanent employee's sickness absence or other type or temporary absence.

Circumstances where expiration of a fixed term contract could be a redundancy dismissal:

- Where employees are employed on a term-time only basis, on a series of fixed term contracts.
- Where employees are employed on an open-ended contract with a funding or project-end date.

When dealing with the termination of a fixed term contract colleges should also ensure that they comply with the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

Colleges should consider the termination of a fixed-term contract on a case-by-case basis and if a particular case raises doubts about the process to be followed, colleges are encouraged to call AoC's Employment Helpline.

If employees on fixed-term contracts are made redundant and have two years' service, they will be entitled to a statutory redundancy payment; however, the college should firstly consider redeployment options for the employee.

7.2. Part-time employees

Part-time employees should not be selected for redundancy purely because they are employed on part-time contracts, unless there is an objective justification. It would be a breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 to select employees for redundancy or treat them any differently in the redundancy process by virtue of their status as part time workers.

Less favorable treatment can only be justified on objective grounds if it can be demonstrated that it is a proportionate means of achieving a legitimate objective. This means that for a college to justify less favourable treatment, the following criteria would need to be satisfied:
• That such treatment is to achieve a legitimate objective, such as a genuine business or operational need;
• That this treatment is necessary to achieve that objective; and
• That it is a proportionate way to achieve that objective.

7.3. Agency workers

Under S.41 Equality Act 2010 it is unlawful for a college to discriminate against, harass or victimise contract workers, such as agency workers.

7.4. Volunteers for redundancy

Where the headcount has to be reduced it should be the aim to avoid compulsory redundancies whenever possible. To achieve this, colleges may invite applications for voluntary redundancy from a wider pool than those directly affected by the proposed redundancy situation. Their departure can free up opportunities for other employees who are under notice of redundancy and is an acceptable method of selection.

Points to consider when asking for volunteers:

There should be a commonality of approach across all areas/departments of the college in accepting or rejecting volunteers.

• Given the fact that colleges are publicly accountable for the handling of their finances it is inadvisable to offer the types of large redundancy packages that are much publicised in some parts of the private sector. This can limit the number of volunteers as some staff simply may not be able to afford to leave.

• Colleges should think carefully about which roles or teams they are not prepared to lose employees from and should think as to whether it is wise to open the voluntary redundancy scheme up to these staff. Allowing applications from teams or departments that the college have no intention of accepting could potentially result in affected staff becoming disengaged and demoralised.

• Carefully define the package that is on offer to avoid any confusion at a later date. Ensure redundancy packages are consistent across the college to avoid feelings of demotivation and inequality among staff.

• Colleges should make it clear to employees that an application for voluntary redundancy is an application only and there is no guarantee that it will be accepted. The college will want to reserve the right to refuse an application where appropriate.

• When an employee has accepted voluntary redundancy, their post can only be directly replaced by an employee that is at risk of redundancy and is redeployed into the post or in a case of bumping. The college should not look to use voluntary redundancy as a substitute for performance management or as a ‘quick fix’ to dismiss employees with performance issues.
7.5. Voluntary redundancy is not termination of employment by mutual consent

Colleges should remember that employees that decide to take voluntary redundancy are still considered in law as being dismissed by reason of redundancy; their contract is not terminated by mutual consent. The employee’s right to bring a claim of unfair dismissal still exists and therefore colleges should ensure that they follow a fair redundancy process.

7.6. Voluntary redundancy is not ‘voluntary severance’

If a college faced a claim for unfair dismissal and was scrutinised by an employment tribunal, a college would need to demonstrate that employees genuinely volunteered for redundancy.

A voluntary redundancy situation can be distinguished from a ‘voluntary severance’ situation which can be characterised as where a college is not seeking to terminate employees’ contracts of employment for other reasons that do not fall within the definition of a redundancy. In this situation employees would be electing to leave the college voluntarily, for reasons unrelated to a redundancy situation and any voluntary redundancy scheme.
8. Identifying the selection pool and selection criteria

8.1. Fair selection pool

Colleges should fully consider the pool for selection, even where it initially appears that it is only a matter of one role being made redundant and that there should be a selection pool of one.

Where only one job role is being made redundant it will only be the case that a selection pool of one is appropriate where the job role is unique in the business. If there are other roles that are similar, or that require similar skills and qualifications, college should at least consider whether to include the employees in those other roles in the selection pool.

In the case of Fulcrum Pharma (Europe) Limited v Bonassera UKEAT/0198/10 an employee successfully claimed unfair dismissal because the employer had failed to consider whether the one remaining, more junior employee in the department should be included in the pool for selection. The EAT set out factors that should be included when considering if subordinate employees should be included in the selection pool:

- How different the two jobs are;
- The difference in remuneration between the subordinate's role and the role of the employee in danger of redundancy;
- The relative length of service between the employees; and
- The qualifications of the employee in danger of redundancy.

In Halpin v Sandpiper Books UKEAT/0171/11 the EAT upheld the employer's decision to create a selection pool of one employee. The approach of the EAT was that the decision of an employer to create a pool of one cannot be easily overturned. It held that selection only operates where there is a number of similarly qualified possible targets for redundancy, which is a management decision.

Other case law guidance demonstrates that employment tribunals would scrutinise Colleges’ reasons for selecting a particular pool and that such scrutiny will be more stringent when the size of the pool corresponds to the number of redundancies that the employer is proposing to make.
In *Flintshire County Council and ors v Moore (deceased) and anor UKEAT/0379/11* a small primary school undertook a redundancy process because of falling pupil numbers. The school decided that the selection pool would be comprised of all the teachers in the school save for the head, deputy head and a teacher who taught in the special needs unit. The EAT held that the school had wrongly failed to include the teacher who taught in the special needs unit in the selection pool (his position being one for which another teacher in the pool was properly qualified and experienced to do).

Another tribunal case demonstrates that college should be careful when selecting who will be in the redundancy pool and should avoid making the pool too narrow.

In the case of *Highland Fish Farmers v Thorburn (1994) UKEAT/1094/94*, the employer only selected staff from one of the sites for the redundancy pool and ultimately for redundancy, and so was seen to have acted unreasonably in treating two of its sites separately for the purposes of redundancy selection. The two sites were in close geographical proximity and there were close links between the sites. The tribunal ordered that the two employees be re-engaged. This scenario should be given consideration by colleges that are based on multiple sites.

In *Capita Hartshead Ltd v Byard UKEAT/0445/11*, the EAT reviewed the case authorities on the issue of the selection pool and set out the following principles:

- There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for an employee to challenge it where the employer has genuinely applied their mind to the issue;
- An employment tribunal is entitled to carefully scrutinise whether the employer has ‘genuinely applied’ their mind to the issue; and
- Even if the employer has genuinely applied their mind to the issue it would be possible for an employee to challenge the reasoning.

### 8.2. Selection Criteria

Using selection criteria allows colleges to identify the skills they need to retain, to measure employees in the selection pool against the same skills and to provide a framework for objective decisions to be made.
Points to consider in adopting selection criteria or selection matrix:

- Choose objective and reasonable criteria that are appropriate to the particular job roles that are at risk of redundancy, rather than specifying criteria that are applicable to all potential redundancy situations.

- Adopt a selection matrix containing a number of selection criteria to reduce the risk of any possible indirect or direct discriminatory impact from one criterion.

- It is unlikely that the union(s) will agree with the selection criteria but they should still engage in the consultation process.

- Have due regard to the impact of the selection pool and the selection criteria on the grounds of any of the ‘protected characteristics’ defined in the Equality Act 2010. For example, including attendance record in the selection criteria is potentially discriminatory against a disabled employee or a pregnant employee who might have a high level of absence related to their disability or pregnancy. Any disability or pregnancy related absence should not be taken into account in this situation.

- Using the ‘last in first out’ method as the only or determinant selection criterion for selection of potentially redundant employees is likely to result in:
  - indirect age discrimination because it is likely to put younger employees at a particular disadvantage;
  - indirect sex discrimination against women who may have shorter service due to time out for raising children; and
  - indirect race discrimination where an employer may have only recently adopted policies that have had the effect of increasing the proportion of employees from ethnic minority backgrounds.

However, ‘LIFO’ can be used as one criterion among many within a fair selection procedure if it is a proportionate means of achieving the legitimate aim of rewarding loyalty and creating a stable workforce.

The case of Rolls Royce Plc v Unite [2009] EWCA Civ 387 demonstrated this point:

Rolls Royce had a collective agreement on redundancy that included selection criteria. There were five criteria, plus the employees in the selection pool were awarded one point per year of continuous service. Following the Employment Equality (Age) Regulations 2006 coming into force, Rolls Royce considered the age criteria to be unlawful. Unite disagreed and claimed that the criteria could be lawful under the age regulations because, although it may be indirectly discriminatory, it could be objectively justified.

In 2009, the Court of Appeal (CA) agreed that it did fall within the length of service exception. The Regulations allow for an exception of service-related benefits that reward length of service of up to five years, if it fulfils a business need and can be objectively justified. The CA said it could be objectively justified because the legitimate aim was to reward loyalty and
the overall desirability of achieving a stable workforce. The proportionate means of achieving a legitimate aim was due to the fact that it was only one of a set of criteria. Colleges should bear in mind that employees will still be able to challenge selection for redundancy on the grounds of length of service. It will be up to employment tribunals to consider whether the use of these criteria is justified in the particular circumstances of the case.

- Colleges should take care to disregard pregnancy-related sickness if measuring sickness absence as a criterion.
- Caution should be exercised if assessing 'soft skills' such as motivation or team fit, because they are more difficult to assess objectively and could give rise to discrimination claims. For example, 'versatility and adaptability' such as a willingness to relocate or work unsociable hours, may amount to discrimination because of (or arising from) disability.
- Attendance record is potentially discriminatory against a disabled employee who might have a high level of absence related to their disability. If a proposed criterion would adversely impact upon a disabled employee, the college will need to consider what reasonable adjustments will be necessary to avoid such discriminatory impact. It is likely to be a reasonable adjustment to discount some disability-related sickness absence when assessing attendance.
- Include competencies under the headings of 'technical skills' or 'knowledge and skills'.
- Examples of competencies would be 'computer literacy' or 'typing'. They should be made as specific as possible to avoid criticisms of being vague and hard to measure.
- If a competency assessment is used as a method of selection, this should not be a determining factor in selection and employees' prior performance should also be taken into account.

In the case of Mental Health Care (UK) Ltd v Biluan & Anor UKEAT/0248/12 the employer scored employees using a competency assessment carried out by an external provider. It also scored against internal absence and disciplinary records. By using such objective criteria, the employer hoped to avoid any arguments of bias; however, in the majority of cases the assessment centre scores were 'decisive' in selecting employees for redundancy. Although the EAT accepted that the employer had taken care over the redundancy selection process, relying on competency assessments – without taking into account prior performance – had led the employer to relying on an 'elaborate and HR driven method'. Using competency scores provided from an external provider did not take into account the views of managers or others who knew the employees in question.
In the case of **Howard v Siemens Energy Services (2008) ET/2324423/08**, the employment tribunal ruled that although the inclusion of ‘values’ as a selection criteria was not itself unreasonable, the way in which it was assessed lacked objectivity and transparency, particularly as evidence showed the values had not been universally adopted within the company. Not all staff had received training on the values and the employee concerned had received a booklet but had received no training other than attendance at a presentation.

The tribunal concluded that the assessment of the values was not dealt with fairly and transparently. The line manager’s assessment of the employee was ‘unprofessional, derogatory and contradictory’ of the employee’s appraisals; something that the reviewing manager did not query when weighing up the marks scored against the various selection criteria.

Furthermore, there was no method of cross-checking or benchmarking different managers’ assessments of the values, resulting in there being no way of ensuring all managers had applied the criteria in the same way. This resulted in the employee’s selection for redundancy being procedurally unfair and the claim succeeded. If colleges are considering including organisational values in their redundancy selection criteria, then colleges will need to ensure that they have provided training to all staff on what the values mean and that the values are universally adopted.

**Typical Redundancy Selection Criteria**

Employers are increasingly looking to a combination of factors to help them make the decision. These may include:

- Attendance records (discounting any disability or pregnancy-related absence)
- Disciplinary records
- Performance and quality of work
- Conduct and attitude
- Relevant skills and competencies
- Versatility and adaptability
- Qualifications and experience
- Customer focus and quality
- Performance at the interview (if applicable)

**Points to consider when applying selection criteria:**

- It is recommended that two or more managers carry out the selection process to avoid claims of unfairness. The managers should do their scoring independently and then agree on a final score together. At least one of the managers should have direct knowledge of the employee being scored. If not, it...
is useful to have a second manager to review the score and to act as a ‘critical reviewer,’ looking out for any scores marked out of place.

- Use a matrix with scores and weightings for each criterion. For example, the weightings should multiply the criteria by a factor of 2 or 3. The weightings used should be easy to explain and should not render the other criteria in the assessment worthless. Moderating scores to ensure that the matrix is being applied fairly is key to ensuring a fair selection procedure.

- Selection criteria should contain a mixture of objective and subjective (but measureable) criteria and colleges will be expected to provide evidence as to why they have chosen the criteria they have and whether the selection process has been well thought out prior to scoring being carried out.

In *Eversheds Legal Services Limited v de Belin [2011] IRLR 448* the firm made the mistake of upgrading the score of a woman on maternity leave against one of the selection criteria when grading her against the man in her team who was the only other person in the pool for redundancy. Overall her score was higher and he successfully claimed sex discrimination.

It was held in this case that any adjustment to scores would have to be reasonable and proportionate to be permissible.

- Avoid double-counting selection criteria. This could occur if there is criterion such as time-keeping and also disciplinary records. For example, if an employee has received a disciplinary warning for poor time-keeping this should not be counted twice. Doing so is likely to render the dismissal selection unfair, as the employee has been penalised twice for the one issue;

- Include written comments on employees’ scoring sheets, so that employees are given an explanation of their scoring, especially in respect of subjective criteria included in the redundancy matrix/selection criteria. The need for sufficient information on scoring sheets is even more important where this information has not been included in previous appraisals;

- It is preferable for HR to complete matrices such as attendance separately, as this will help prevent the college being challenged that the outcome was pre-determined;

- When assessing scores against selection criteria, colleges should not assume that those on maternity leave should be afforded special treatment when assessing these scores. Steps should be taken to ensure that the selection criteria are not skewed unfairly towards an employee who has not taken maternity leave;

- When all the scores have been worked out, those employees with the lowest scores will normally be the individuals provisionally selected for redundancy. In an unfair dismissal case before an employment tribunal, the employment tribunal may scrutinise the college’s scoring of those that have been dismissed for reason of redundancy as well as the scoring of retained employees, to discover any evidence to substantiate an employee’s claim; and
• When deciding who is selected for redundancy based on the selection criteria, colleges should be careful not to select employees because they are viewed as ‘difficult’ or not a ‘team player’. This is particularly the case where such an employee has for example, supported another employee in a grievance. In such cases, the college risks a challenge that the redundancy amounts to unlawful victimisation under the Equality Act 2010 (and a claim of unfair dismissal)12.

8.3. Consultation about redundancy scoring

In a recent case, the EAT considered whether an employer had failed to conduct fair consultation in a redundancy exercise because it had failed to provide the redundant employee with sufficient explanation of why he had received lower scored than the two other people in the selection pool.

In Pinewood Repro Ltd (t/a County Print) v Page [2010] UKEAT/0028/10, the employee at risk of redundancy was scored using a redundancy matrix agreed by a union and was then invited to a consultation meeting. Before this meeting, the employee asked the employer why he had been chosen from the selection pool and asked to see his scores. The employee was given a copy of the scores at the meeting but did not have much time to consider this document.

At a second consultation meeting, the employee gave the employer a list of queries about the scores and the employer provided responses at a third meeting. The employee claimed unfair dismissal and argued that he should have been able to understand the basis on which the decision to select him for redundancy is taken and, in particular, should be given sufficient information to be able to challenge the scores given to him. The EAT held that the employee should have had the opportunity to challenge the scoring, particularly in relation to more subjective criterion such as ‘flexibility’.

However, it was also recognised by the EAT in this case that further explanation of scoring may not be necessary in every case, particularly where scores relate to more objective issues, such as attendance, timekeeping, conduct and productivity.

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12 ‘Victimisation’ is defined in S.27 of the Equality Act 2010.
9. Suitable alternative work

9.1. Duty to consider alternative work

Employment legislation encourages employers to offer alternative jobs to employees during a redundancy situation. A failure to do so when suitable alternative work is available within the college may convert a fair dismissal for redundancy into an unfair dismissal. This is because an employee may allege that there has been an unfair selection where the employer has failed to undertake a reasonable search for alternative work throughout the college. Therefore, if alternative vacancies exist within the college or an associated employer, these should be offered to potentially redundant employees using criteria which do not lawfully discriminate.

However, colleges are not obliged to create alternative employment for redundant employees where none exists.

Redeployment should be explored for those at risk of redundancy with the intention of making the best use of all the resources the college has available. This may include:

- Priority consideration for internal vacancies;
- Re-training staff;
- Job matching; and
- Considering opportunities for ‘bumping’ - where employees across the college not at risk of redundancy express an interest in voluntary redundancy, creating an opportunity for a colleague not wishing to be made redundant to fill their position.

Colleges should keep evidence that a thorough search for alternative employment was undertaken up until the date of any redundancy dismissals. Ensure that all employees at risk of redundancy are made aware of any vacancies, including employees that are out of the workplace (e.g. on maternity, paternity leave, sickness absence or annual leave).

Once the employee is given notice of dismissal because of redundancy, any offer of re-employment in an alternative post must be made before the old employment ends. The new job must also start either immediately after the old job ends or within four weeks. If the employee accepts the offer he or she will not be dismissed and there will be no redundancy payment.
9.2. What is suitable alternative work?

Is the alternative work suitable?

Colleges should be aware of the following factors which may influence whether or not an employee will find an offer of alternative employment suitable:

- **Pay** – any significant drop in earnings is likely to make the job unsuitable. Colleges may consider whether earnings may be protected.
- **Job content and status** – a drop in status is likely to make the job unsuitable.
- **Job prospects** – e.g. an offer of a temporary post with no guarantee for the future may make it unsuitable, even if the terms and conditions are otherwise identical.
- **Hours of work** – a change in an employee's hours may be considered unsuitable depending on the employee's personal circumstances.
- **Location of the workplace** – has this changed and what degree of disruption is this likely to cause the employee?
- **Working environment** – may be important e.g. if the employee has a disability or medical condition.

In the employment tribunal case of Sturdy v Leeds Teaching Hospitals NHS (2008) ET 1803960/2007, when carrying out redundancies, the Trust failed to offer the employee suitable alternative employment. Instead they tried to pressurise the employee into taking a less suitable, lower paid alternative role, which the employment tribunal deemed to be unlawful discrimination. The Trust was also found guilty of victimising the employee for complaining about her treatment and refusing to take up the post, which was at a significantly lower level.

It was believed that she was not offered the role she was suitable for due to her age, as she was near retirement.

When it comes to deciding which employee to award an alternative role to, colleges do not need to take such a rigorous approach as required when planning and implementing the selection pool and criteria. If there are other vacancies, Colleges can undertake a competitive interview process and simply act reasonably and fairly.

9.3 Trial periods

The employee has a statutory right to a trial period of four weeks when the alternative job is different to the old one. College and the employee can use the trial period to assess whether the job is in fact suitable. This can be extended for retraining purposes by an agreement in writing, specifying the date on which the trial period ends. It is also possible for an employee to have more than one trial period, for example, if it is found that first role was not a suitable alternative but
another potentially suitable alternative role is available, then the employee can start another four week trial period in this role.

**S.138(3)** Employment Rights Act 1996 states that the trial period begins when the employee's employment under the old contract ends and the trial period will end four weeks after the date on which the employee starts work under the new contract. This is subject to the general proviso that the new contract must take effect not more than four weeks after the old one ends.

If during the trial period the employee decides the new job is not suitable, or the college decides the employee is not suitable for the new job, he or she will still be considered to be redundant. However, unreasonable refusal of suitable alternative work can mean that no redundancy payment is due. Colleges are advised to seek legal advice in these circumstances.

If an employee terminates the contract during the trial period, or gives notice during the trial period to terminate the contract, he or she will be treated as having been dismissed when the original contract came to an end. The termination will be for reason of redundancy and the employee will be treated as having refused the offer of a new job. If the new job was suitable in relation to the employee and the employee acted unreasonably in leaving it, he or she will not be entitled to a redundancy payment. If the new job was not suitable or, even if it was suitable but the employee was not unreasonable in leaving it, the employee will be entitled to a redundancy payment.
10. Employees on maternity leave, paternity leave, adoption leave and parental leave

This section addresses the heightened legal protection available to employees on maternity, paternity, adoption or parental leave in a redundancy situation.

10.1. Maternity leave

Under the law, a redundancy situation is treated as an exception to an employee's statutory right to return to exactly the same job she left before taking ordinary maternity leave (OML) or additional maternity leave (AML). Where a redundancy situation arises, it may not be practicable to continue to employ the employee under her existing contract.

An employee is entitled to be offered suitable alternative employment before their existing contract ends in preference to employees who are not absent on such types of leave. The new alternative employment must take effect immediately on the ending of the employee's employment under their previous contract.

The new alternative role must comply with the requirements of Reg.10 of The Maternity and Parental Leave etc 1999. The Regulations state:

1. This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.

2. Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) (and takes effect immediately on the ending of her employment under the previous contract).

3. The new contract of employment must be such that –

   a. The work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and

   b. Its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had continued to be employed under the previous contact.

In the case of Simpson v Endsleigh Insurance Services Ltd and ors 2011 ICR 75, the EAT considered Reg.10 of The Maternity and Parental Leave etc Regulations 1999. This case made it clear that the requirement to offer an employee a suitable available vacancy under Reg.10(2) is contingent upon the new terms and conditions not being 'substantially less favourable' to the employee. If any of the terms and conditions associated with the vacancy are substantially less favourable, the employee is not then entitled to be offered the position. The employee may wish
to be consulted in the process of determining a suitable vacancy and it would be prudent for colleges to consult with the employee about what might be suitable for her, as well as make notes about such communication with the employee.

Even where an employee returning from OML or AML is offered suitable alternative employment under this ‘preferential right’ but then subsequently made redundant, a college must be careful to avoid an employee claiming automatic unfair dismissal where the reason or principal reason for selecting an employee was a pregnancy, birth or maternity-related reason. Such a reason is an ‘inadmissible’ reason under the law and gives rise to a claim of automatically unfair dismissal.13

Where there is no suitable alternative vacancy available for an employee returning from OML or AML and the employee is made redundant, where the reason or principal reason for selecting an employee was a pregnancy, birth or maternity-related reason the employee could claim automatically unfair dismissal. The employee may also be able to bring claims of unlawful sex/maternity discrimination against a college.

10.2. Paternity leave

The law treats the situation differently where there is a redundancy situation whilst an employee is on ordinary paternity leave (OPL) or additional paternity leave (APL).

Additional to the protection available to all employees against an unfair redundancy dismissal, an employee on OPL may have a potential claim for automatically unfair dismissal where the reason or principal reason for selecting them for redundancy was a pregnancy, birth or maternity-related reason.14

If a redundancy situation arises when an employee is on APL, the employee has a ‘preferential right’ to be offered any suitable alternative vacancy under Reg.28 of The Additional Paternity Leave Regulations 2010.

The duty on Colleges to consider this preferential right for employees on APL is identical to their duty where an employee is on maternity leave. Accordingly, it follows that Colleges can follow the guidance given in Simpson v Endsleigh Insurance Services Ltd and ors [2011] ICR 75 when implementing this duty.

13 A redundancy dismissal where the reason or principal reason for selecting an employee was a pregnancy, birth or maternity-related reason would be an automatically unfair dismissal under s.592 of the Employment Rights Act 1996 and Reg. 29(2) of The Maternity and Parental Leave etc Regulations 1999. This is the case subject to the condition in s.593 of the Employment Rights Act 1996 that “the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer”.

14 A redundancy dismissal where the reason or principal reason for selecting an employee was a pregnancy, birth or maternity-related reason would be an automatically unfair dismissal under Section 99 Employment Rights Act 1996 and Regulation 29(2) of The Maternity and Adoption Leave Regulations 2002.
10.3. Adoption leave

If a redundancy situation arises when an employee is on (ordinary or additional) adoption leave, the employee has a ‘preferential right’ to be offered any suitable alternative vacancy under Reg.23 of The Paternity and Adoption Leave Regulations 2002. Where a college fails to consider an employee on adoption leave for a suitable alternative vacancy and the employee is subsequently made redundant, the redundancy dismissal would be automatically unfair under s.99 Employment Rights Act 1996 and Reg.29(1)(b) of The Paternity and Adoption Leave Regulations 2002.

There is a separate situation where a redundancy dismissal will be automatically unfair in respect of an employee on adoption leave under Reg.29(2) of The Paternity and Adoption Leave Regulations 2002:

- where the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who had positions similar to that held by the employee and who have not been dismissed by the employer, and
- the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one of the reasons listed in Reg.29(3).

In this situation, an employee could claim automatic unfair dismissal if they can show that they were selected for redundancy on grounds relating to adoption leave in preference to comparable employees. This heightened legal protection would apply before or after adoption leave (as long as the reason for selection relates to the adoption leave).\(^\text{15}\)

10.4. Parental leave

If a redundancy situation arises when an employee is on parental leave, the employee does not have any ‘preferential right’ to be offered a suitable alternative vacancy unlike employees on maternity, additional paternity leave or adoption leave.

However, in addition to the protection available to all employees under against an unfair redundancy dismissal, an employee may have a potential claim for automatic unfair dismissal where the reason or principal reason for selecting them for redundancy was a pregnancy, birth or maternity-related reason.\(^\text{16}\)

\(^{15}\) Colleges can refer to the AoC Parental Leave Joint Agreement on Guidance for further information.

\(^{16}\) A redundancy dismissal where the reason or principal reason for selecting an employee was a pregnancy, birth or maternity-related reason would be automatically unfair dismissal under Section 99 Employment Rights Act 1996 and Regulation 20(2) of The Maternity and Parental Leave etc Regulations 1999, or Regulation 29(2) of The Paternity and Adoption Leave Regulations 2002.
11. Acceptance and refusal of suitable alternative work

Where an employee accepts an alternative post which is a lower graded post than the post from which the employee is being made redundant, the college can decide to preserve the employee's salary for a set period if it is financially viable to do so. Where a senior employee is at risk of redundancy, during the consultation process, it should be determined whether the more senior employee would consider a more junior role at the reduced salary.

The question of whether an employee is eligible for a redundancy payment turns on whether the employee acted reasonably in their refusal of the offer. This, in turn, involves consideration of whether the reason constituted a sound and justifiable reason for turning down the offer.

The rules concerning trial periods apply to roles that are considered ‘suitable’ alternative roles as well as lower-graded roles that are unlikely to be considered ‘suitable’ alternative posts. Where an employee accepts a lower-graded role, the employee would not be entitled to a redundancy payment in respect of their former post which was made redundant.
12. Bumped redundancies

In redundancy situations, ‘bumping’ involves offering an ‘at risk’ employee somebody else's job and making that other person redundant instead.

It is not necessarily the case that bumping must always be considered for a redundancy dismissal to be fair. However, in certain circumstances it may be appropriate and an employment tribunal may consider this in their findings. Therefore, colleges are advised to assess whether it is appropriate to consider bumping in a particular case. Points to consider when making this assessment are:

- Are there any vacancies, even if in less senior positions?
- How different are the roles?
- What is the difference in remuneration?
- What are the respective lengths of service of the two employees?
- What qualifications does the ‘at risk’ employee have?
- Would the other employee take voluntary redundancy?

In most circumstances, it would be appropriate for an employer to ask employees at risk of redundancy whether they wished to be considered for bumping. If the answer is yes, the employer could consider offering voluntary redundancy to those not at risk of redundancy in roles suitable for bumping, in case an appropriate volunteer came forward. The employer would not have to accept the offer if it decided not to pursue it. This procedure should, of course, be properly documented for audit purposes.

It is important in cases of bumping that the employee is willing and agrees to take voluntary redundancy; an employer cannot pressurise staff into being ‘bumped’ out of their job or do this without their consent.

The employee at risk of redundancy that bumps another employee out of their role is not made redundant and the employee that is bumped out of his or her role is dismissed by reason of redundancy. This is illustrated in the case of [Gimber & Sons Ltd v Spurrett [1967] EWHC QB 2](#), where a warehouse manager was dismissed and replaced by a sales representative who was being made redundant, i.e. he was bumped from his role. The Divisional Court endorsed the tribunal's view that if an employee's role is being made redundant but he replaces another member of staff in a different role, the member of staff who is displaced is then dismissed by reason of redundancy instead.
The case of **Lionel Leventhal Limited v North (2004) UKEAT/0265/04** demonstrated that a College should consider bumping as an alternative to an employee being made redundant. An employee who worked for publishing business, Lionel Leventhal Limited, faced being made redundant because he was on a high salary and in a role that the company could manage without and so was the obvious choice. During the redundancy consultation, the employee brought 11 cost saving suggestions to the meeting however, none of them were deemed to produce the required savings quickly enough. The employer had not considered making any other employees redundant and had not considered making another employee on a lower grade redundant and then offering the other role to the claimant at risk of redundancy on the lower salary, i.e. bumping.

The employee did not suggest bumping as an alternative either. The EAT held that the redundancy dismissal was unfair because the employer had failed to consider bumping as an option to making the claimant redundant. This highlights the importance to college that they should always at least assess whether bumping is appropriate and if they should allow the employee at risk of redundancy the opportunity to consider if they would be willing to accept a lower level role.
13. Notice of redundancy dismissal

Following the consideration of alternatives to redundancy and the conclusion of all consultations, a list of the posts selected for redundancy should be prepared. A copy of the list should be sent to the appropriate trade unions/representatives for information purposes.

The question of whether colleges can give employees their notice of redundancy dismissal during collective consultations was considered by the European Court of Justice in Junk v Kuhnel [2005] IRLR 310. It is possible for colleges to give notice to employees at some point during the collective consultation period and for employees’ notice periods to run concurrently with the consultation period provided that the employees’ notice periods expire after the 30 or 45 day minimum consultation period; and the substance of the consultations is completed.

After affected employees are notified that their post will be made redundant by HR, the employee should be invited to attend a consultation meeting. The employee should be notified that they have the right to be accompanied at this meeting by a colleague or trade union representative. At this meeting the reasons why their post has been made redundant should be explained to the employee.

After the meeting, if the employee's post is still to be made redundant, the employee should be informed in writing of the termination of their employment and their contractual entitlements, including entitlement to contractual notice and any redundancy payments (if applicable). The employee should also be notified of their right to appeal against the redundancy dismissal.

When a college is considering who is responsible for taking the decision to dismiss an employee, the college is bound by the provisions of their Instrument and Articles of Government. Colleges’ Instrument and Articles of Government must comply with the requirements of Schedule 4 of the Further and Higher Education Act 1992 in this regard. Accordingly, colleges must identify who is the post-holder with responsibility for dismissing staff within their Instrument and Articles of Government.

Additionally, the Corporation cannot delegate responsibility for the dismissal of the Principal, Clerk or senior post-holder to anyone other than to a committee of members of the Corporation. However, the Corporation does have the power to delegate the responsibility for taking the decision to dismiss all other employees of the college.
Points to consider:

- Notice of dismissal due to redundancy cannot be issued until the substance of collective and individual consultations have been fully completed;
- Colleges must comply with at least the statutory minimum notice periods;\(^\text{17}\)
- A dismissal cannot take place until the minimum periods for consultation or contractual notice periods have expired, whichever is the greater.

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\(^{17}\) The minimum period of notice required under Section 5 of the Employment Rights Act 1996 for employees with continuous employment of at least one month but less than two years are entitled to at least one week’s notice from the employer. Employees with two years’ continuous employment or more are entitled to one week’s notice for each complete year, up to a maximum of 12 weeks’ notice.
14. Assistance and support for employees

14.1. Statutory right to time off to look for work

After employees have been given notice that their role will be made redundant, all employees who have been continuously employed for at least two years, have a statutory right to take reasonable paid time off during working hours to look for work outside of the college and arrange for re-training.

14.2. Other types of assistance

Where appropriate and financially viable to do so, it is good practice to give employees additional assistance to help them cope with the prospect of redundancy and looking for new employment. Colleges should utilise any existing resources such as counselling, as well as consider establishing an employee advice line with an external provider.

Colleges can consider what information could be distributed to employees, such as guidance on job hunting and CV preparation. Furthermore, employees at risk of redundancy should be made aware of current vacancies within the college and advised of the appropriate ways to apply for roles.
15. Redundancy payments

15.1 Statutory redundancy payments

In addition to the period of notice, or payment in lieu of notice, which the employee is entitled to under statute and their contract of employment, the employee may qualify for a statutory redundancy payment. This applies to both permanent and fixed-term employees who have at least two years continuous employment service. The entitlement in this case would be:

- One and a half week’s pay for each year of employment in which the employee was aged 41 or over;
- One week’s pay for each year of employment in which the employee was aged between 22 and 40; and
- Half a week’s pay for each year of employment in which the employee was aged under 22.

**Important points to note are:**

- The maximum length of service which may be taken into account in a redundancy payment is 20 years, this is used to reward past loyalty from employees.
- In accordance with the Employment Equality (Age) Regulations 2006, there is no upper age limit on entitlement to statutory redundancy pay.
- There is no longer a tapering down rule. This rule used to exist where an employee's redundancy payment was reduced by 1/12th for every month of service he or she had over the age of 64.
- Years of service under the age of 18 are counted.

To calculate redundancy payments for employees, there is a limit of a week’s pay therefore colleges will need to calculate the employee’s gross weekly pay. Where the employee earns more than the limit, the limit should be used in the calculation. Where the employee earns less than the limit, their actual weekly pay should be used. The current statutory maximum gross weekly pay is £450 (as at 1 February 2013) for employees.

If an employee’s earnings regularly change, for example, they are on a variable hours contract, the college would need to multiply the number of hours actually worked in a week by the average hourly earnings over the 12 complete weeks

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18 The entitlement to a statutory redundancy payment is stipulated in Section 162 Employment Rights Act 1996.
19 The limit on the statutory maximum gross weekly pay for redundancy pay calculations is usually revised annually. Colleges can check the current limit on the [www.gov.uk](http://www.gov.uk) website
before the calculation date. Any week for which no pay was due should be replaced by the last previous week for which pay was due so as to bring the number of weeks to be averaged up to 12 weeks. A useful tool that colleges can use to help calculate redundancy payments can be found on the gov.uk website.

15.2. Enhances redundancy payments

When colleges are considering the issue of enhanced redundancy payments, they can take into account the cautionary approach adopted in the Financial Memorandum Part 1 published by the Skills Funding Agency, dated March 2012 which states:

‘The Corporation shall only make payments to employees on the termination of their employment for the purpose of meeting contractual obligations. The Corporation shall demonstrate that payments in respect of termination are regular and secure value for money and avoid spending funds on settlements where disciplinary action would have been more appropriate.’

15.3. Term-time only employees and redundancy payments

It is common practice in the FE sector to employ staff to work on a term-time only basis, meaning they work only during term times and take their holidays outside of term. Term-time only staff are often paid an equated salary even if they are only contracted to work, for example, 46 weeks of the year. This group of staff are effectively part-time workers and as such are covered by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, which make it unlawful to treat part-time staff less favourably than comparable full-time staff in their terms and conditions of employment. Therefore, it is important to ensure that term-time only staff receive a redundancy payment that is not less favourable than comparable full-time staff.

The case of Gilbert & others v Barnsley MBC UKEAT demonstrated the need to ensure redundancy payments are correctly calculated. This case concerned term-time only employees who were all employed to work for 43 or 44 weeks (including holidays) during the year but their pay was paid in twelve equal monthly installments. When the employees were made redundant, their redundancy pay ‘a week’s pay’ was based on 1/52 of their annual salary. The employees argued that their redundancy pay should in fact be based on the weeks they actually worked i.e. on 1/43 or 1/44. Sections 221-229 of the Employment Rights Act 1996 dictate how a week’s pay for the purposes of a redundancy payment should be calculated, with different provisions depending on whether or not the employee has normal working hours or not. The term-time only employees were contracted to work normal hours.

The EAT decided that the division of pay into 12 equal installments was simply for administrative convenience and it seemed just that the redundancy payments should be calculated on the basis of weeks actually worked and not on the basis

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of a notional 52 week calculation which takes into account weeks they did not work and for which they were not paid to work.

15.4. The Redundancy Payments (Continuity of Employment in Local Government, etc.) (Modification) Order 1999

The Redundancy Payments (Continuity of Employment in Local Government etc.) (Modification) Order 1999 provides that colleges may have an obligation to count prior service with an associated employer towards the service requirement for a redundancy payment. If an employee is made redundant from their local government employer (including FE Colleges) and begins working for an alternative local government or FE employer within four weeks of the termination date, he will retain continuity of service with his previous local government or FE employer for the purposes of redundancy. This ensures that, should that employee be made redundant from the new employer at a later date, his continuous service with both the current and previous employer will be counted towards his total qualifying service for calculating his redundancy payment. This applies to voluntary redundancy situations as well as compulsory redundancies.

Further guidance on the Modification Order can be found in AoC factsheet – The Redundancy Payments (Continuity of Employment in a local Government, etc).

Information can also be found on the Local Government Employers website. The list of Bodies on the Modification Order can also be viewed on this website.
16. Multiple contracts

Some employees are employed on multiple contracts; this is where the same college employs them under more than one contract of employment at the same time. An example of this would be a cleaner who is also employed as a catering assistant during lunch breaks, the employee is employed under two separate contracts of employment for each position. Another example would be a lecturer that holds lecturing posts with two separate contracts in two separate departments.

For the purposes of redundancy, the two contracts should be treated entirely separately, so that any redundancy calculation should be based on the length of service of the contract from which the employee is being made redundant from only. However, if at the time of redundancy the employee is employed under only one contract but in the past there have been two or more overlapping contracts, the length of service should be counted back to the start of the first contract if service has been continuous.

It is important to note that the Redundancy Modification Order, referred to above, has no relevance to a redundancy payment made to an employee that is being made redundant from one of his multiple contracts. The Modification Order only operates to aggregate service under successive contracts, it will therefore not apply when contracts run, or have run, concurrently with different Modification Order bodies. The effect of this is that when an employee is made redundant, the College has no need to consider any other contracts that are currently running with other Modification Order bodies.
17. Health and Safety Risk Assessments

According to Reg.3 of the Management of Health and Safety at Work Regulations 1999, colleges are obligated to carry out a ‘suitable and sufficient assessment of the risks to the health and safety of his employees to which they are exposed whilst they are at work’. This will be of particular importance during redundancy situations, which is likely to involve employees going through a stressful process. The health and safety risk assessment should include the risks to both employees and non-employees that may arise in connection with proposed redundancy situations. In doing so the college should be able to identify ‘the measures he needs to take to comply with the requirements and prohibitions imposed upon him’.

Reg.3 asks managers to assess areas such as manual handling, driving for work and dealing with dangerous substances, etc. However, less obvious but just as important, especially in a redundancy situation, are for managers to assess employee workloads and their working hours. Once a manager has completed the risk assessment, the college should look to remove or lessen the risks to a satisfactory level. Further information on working hours can be found in the AoC Joint Agreement Guidance for Regulating Working Hours in Further Education colleges.

Risk assessments should be done as and when they are required and should always be reviewed and kept up-to-date. This is especially important if there have been considerable changes or it is deemed to be no longer applicable. Failure to comply with the Regulations when required will be a breach of health and safety law and could result in hefty penalties and ‘unlimited’ fines for very serious health and safety breaches.

If a college carries out risk assessments prior to a redundancy situation arising, the college will potentially need to carry out a further risk assessment based on the new structure e.g. less staff working in the same size of department, a different split of workloads, etc. This is likely to differ depending on the number or types of redundancies that are being made; a change in the number of employees working in an office based environment is less likely to amount to a significant change or to give the college reason to believe that the current risk assessment is no longer valid.

Office based roles are viewed as ‘safer’ environments to work in because there are fewer risks and less health and safety training involved, however, these types of roles are potentially prone to issues such as work-related stress. This could occur, for example, due to staff being overloaded with work following a redundancy exercise. AoC has also published Work Related Stress Joint Guidance for Colleges, which Colleges can refer to for further information.
18. Further guidance

These guidelines seek to assist colleges to follow good practice, in light of colleges’ legal obligations regarding redundancy handling. Examples of case law are given to highlight specific difficulties that colleges may encounter and to assist colleges avoid pitfalls when planning and implementing their redundancy process.

This document is also available in other formats, please request by emailing employment@aoc.co.uk

AoC Employment Helpline

Colleges can contact the AoC Employment Team for further information and advice on this or any other employment related matter by telephone on 020 7034 9900 or by email employment@aoc.co.uk