Equality Commission
FOR NORTHERN IRELAND

Advice note from the Equality Commission's Advisory Services Team

A sad reality – redundancy and the coronavirus

As the Government's Job Retention Scheme gradually tapers off and the return to work is underway, employers face real difficulty in an altered business environment. The economic downside of the coronavirus and the lockdown is making consideration of redundancies an unfortunate reality for many employers.

It is natural that when considering this dilemma employers will want to do the best for their business and for their employees, and that will entail, amongst many other things, avoiding unlawful discrimination.

The Commission deals with and advises on equality and discrimination law and helping employers to avoid unlawful discrimination and this advice note focuses on that. You should also be aware that redundancy is subject to a much wider body of law, particularly under the *Employment Rights (NI) Order 1996*, and you will need to have regard to that too.

Redundancy – where to start

Remember:

- All of the duties, procedures and rules that apply in "normal" times continue to apply now. As you would plan and prepare carefully when considering redundancies in normal times, you should do the same now.

- Employers will find that using their 'soft skills' in communicating, sharing, listening and explaining are crucial. Decisions and processes have to be explained and you should record them and keep track of them in case you are challenged.

Many of the employment law duties relating to redundancy are procedural and may involve requirements to consult employees or trade unions in advance, to provide adequate notice and information, to consider re-deployment where possible, to provide mechanisms for lodging appeals and to provide adequate compensation by way of statutory redundancy payments.

A good source of information for employers in Northern Ireland is provided by the Labour Relations Agency. The Agency recently produced a helpful webinar on the topic, which discusses some coronavirus-related issues, such as consulting with employees who are on furlough.

Some keywords that are frequently applied to the operation of redundancy procedures and which are at the heart of those that are lawful are: **fair**, **objective**, **unbiased** and **consistent**. These are important principles and making genuine efforts to ensure that they are met will help employers to comply with their duties under the *Employment Rights (NI) Order 1996* and the equality and discrimination laws.

For example, applying fair procedures **consistently** between employees of different sexes, religious beliefs, political opinions, racial groups, sexual orientations and ages is the best way to safeguard against allegations of direct discrimination on those particular grounds.

However, it is important to remember that you may need to use a more flexible approach on certain occasions, especially in the case of disabled employees, or those who are pregnant or on maternity leave.

Communications and consultations

For a redundancy procedure to be fair, good communications and a sharing of information between employers and their employees is needed. It is good practice, and in many situations there is a legal duty, to consult employees or their trade unions.

One aspect of ensuring fairness is the need to ensure that everyone is able to fully participate in these processes. For example, employees should not be disadvantaged because they have caring responsibilities, are pregnant or have a disability.

Employers should think about how they communicate with their staff and be prepared to adjust their communication methods to ensure employees understand what is happening.

> **Example:** Be prepared to conduct virtual meetings instead of physical ones, and be flexible when scheduling the times of these to suit employees' caring responsibilities.
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> **Example:** Don't communicate solely through normal communication channels, such as workplace emails, if some employees are at home and are unable to access their work emails.
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> **Example:** If there is an employee who has, for example, a learning disability, be prepared to take extra time and effort to explain the processes and options to them. Be prepared to visit their home to discuss such matters (subject to observing relevant social distancing rules and guidelines) if that would help.

Selection criteria

It is perhaps in the choice and application of selection criteria where the risk of unlawful discrimination in a redundancy exercise is greatest and where caution is most required.

Clearly statutory equality factors or grounds such as sex, gender reassignment, religious or similar philosophical belief, political opinion, race, disability, age or sexual orientation should usually be ignored, for doing otherwise may only be permitted in very rare and exceptional circumstances.

For example, it may sometimes be permissible for some employers to argue that a genuine occupational requirement exception applies which would allow them, for operational reasons and given the nature of the jobs in question, to retain a specified number of employees with certain characteristics; e.g. a particular religious belief or race or age. In the vast majority of cases such defences are unlikely to apply. It would be prudent to consult the Equality Commission when considering whether such an exception may apply in any particular case.

As the guidance from the Labour Relations Agency and other advisory sources affirm, employers may, and frequently do, use criteria that are based on factors such as attendance or absence levels, time-keeping, job performance and capability, skills, qualifications and experience, behaviour and discipline and length-of-service. The list of permissible factors is not necessarily exhaustive, but care is still needed when choosing or applying criteria such as these.

Evidence

Assessing employees against set redundancy criteria should, as far as possible, be done objectively and based on good evidence, such as accurate appraisal, time-keeping and attendance records, that are retained and can be scrutinised.

Assessment period

Care should be taken over the choice of assessment period e.g. the last 12 months, 24 months, etc. Particular dangers may arise in relation to employees who are, or have been, off work due to pregnancy, maternity leave or disability-related illness.

> **Example:** It would be unfair, and probably unlawful, to compare the job performances of a woman and a man in a particular time period when the man has been able to attend work regularly but when the woman has been off on maternity leave, or where a pregnant woman's job performance has been adversely affected by morning sickness or other pregnancy-related factors. If possible, assess the woman's job performance in relation to a time-period prior to her pregnancy and maternity leave.

Assessment period – coronavirus lockdown

A separate potential risk about the choice of assessment time period arises out of the coronavirus lockdown itself. In many workplaces, some employees have continued to work to the same or a lesser extent as before, whereas some of their co-workers have not been able to do so for coronavirus-related reasons (such as their need to comply with government health guidelines, or their need to look after children or other dependants).

This raises the prospect that some employers, as part of their redundancy selection criteria, may compare the job performances or attendance records of employees during this lockdown period, with the result that those who attended or carried out work may be rewarded, when their co-workers cannot be.

If this happens there is a danger of unlawful discrimination also occurring, particularly if those who are penalised as a result are off work for reasons over which they have no real control, e.g. pregnant women and disabled people. These would be an extension of the legal risks we have written about previously in relation to other aspects of the lockdown (see here, here and here).

To avoid these risks, it would be prudent for employers not to assess their selection criteria by reference to the coronavirus lockdown period, but to base their assessments on earlier periods, if possible.

Attendance or absence records
Although, as a general rule, the selection criteria should be applied consistently to all candidates in the pool of employees from which the selection will be made, there are certain situations when employers are permitted and, indeed, obliged to treat some employees differently, even more favourably, than others.

This is especially relevant where attendance or absence records are used as selection criteria and in those cases where an employee's absences were caused by or where related to pregnancy/maternity or disability.

- **Pregnant employees or those on maternity leave** - employers should always ignore any absences that occurred during a 'protected period'' and which are pregnancy-related (e.g. illness caused by pregnancy, or maternity leave absence). The 'protected period' includes the period when an employee becomes pregnant until the end of the statutory maternity leave period.

  Disability-related absences – Employers should always keep the *reasonable adjustment duty* in mind and be prepared to ignore disability-related absences for redundancy selection purposes where it is reasonable to do so. What is required by the duty depends largely on the facts of each individual case and what is reasonable in that context. For example, there are certain situations in which the reasonable adjustment duty might require all, or part, of a disabled employee's disability-related absence records to be ignored for the purposes of a redundancy selection exercise. For example, if the absences resulted from the employer's failure to comply with the reasonable adjustment duty (e.g. previously failed to provide suitable assistance or equipment that would have enabled the employee to avoid being absent in the first place), then those absences should probably be discounted. In other situations, it may also be reasonable to discount, or ignore, short-term absences which are infrequent or which are not likely to recur.

Length-of-service
Employers should take particular care when using length-of-service as a redundancy selection criterion. Such a criterion is potentially age discriminatory, especially if it is

used as the sole selection criterion (i.e. 'last in, first out'), because it may disproportionately benefit older staff members, who are likely to be the longest-serving employees. Its use will have to be objectively justified or otherwise it may be unlawful.

If, however, length-of-service is used in conjunction with several other selection criteria, then its potential age discriminatory impact (if any) will be diminished and is likely to be easier to justify.

A length-of-service selection criterion may also have a discriminatory impact on other equality grounds in workplaces where an employer has been taking lawful affirmative or positive action measures to successfully increase the level of representation in the workforce of groups who have been historically underrepresented. Where such a criterion is likely to have a disproportionate impact of this kind, then again it should be objectively justified, or should not be used.

Redeployment – rights of employees on maternity leave

Where posts are redundant employers are obliged to consider redeploying the affected employees to suitable alternative work, if it is available. Do not forget that employees who are on statutory maternity leave are entitled to be treated more favourably than others on those occasions. Employers are obliged to give those particular employees the first option on accepting any suitable alternative work that is available.

Calculating notice and redundancy pay

Many employers operate redundancy schemes under which notice periods and redundancy payments are calculated with reference to employees' ages and/or lengths-of-service. Although such schemes may have age discriminatory impacts, they are not necessarily unlawful so long as certain conditions are satisfied.

Firstly, a scheme will be lawful if it strictly follows the statutory redundancy scheme.

Secondly, an enhanced redundancy scheme which provides employees with greater notice periods or redundancy payments than those required by the statutory scheme, will be lawful if it satisfies the conditions laid down in *regulation 35 of the Employment Equality (Age) Regulations (NI) 2006*. For further information about the details of this, consult our specific guide for employers about the regulations (see page 29).

Thirdly, even if an enhanced redundancy scheme does not satisfy the conditions laid down in *regulation 35*, it may still be lawful so long as the employer can objectively justify it. To do this the employer will have to demonstrate that the scheme is a proportionate means of achieving a legitimate aim.

Further advice and information

Employment law
For advice on how to comply with statutory employment law, contact the Labour Relations Agency.

Equality and discrimination law
For advice on employers' obligations under equality and discrimination law, contact the Equality Commission's helpline on **028 90 500 600** and ask for our **Advisory Services Team**. Alternatively, you can email information@equalityni.org or edenquiries@equalityni.org and we will answer as soon as possible.