**Redundancy FAQs**

**Have the rules around redundancy changed during the pandemic?**

No. They are exactly the same. However, redundancy can still be a fair reason for dismissal but whilst the legal rules have not changed, organisations such as the Chartered Institute for Personnel and Development are reporting that employers are starting to apply them in new ways. The Institute says employers need to think carefully during the pandemic about ensuring their redundancy pooling and selection criteria are fair. It also urges employers to think about how they communicate with staff working remotely, or who have been furloughed.

**Can a member be selected for redundancy while on furlough?**

Yes. but it is important to remember that the underlying purpose of the Coronavirus Job Retention Scheme is to allow employers to maintain their workforce, greater scrutiny is likely where employers immediately move to make employees redundant whilst on furlough, the question arises whether they intended to do this all along, using the scheme for convenience whilst carrying out consultations rather than for its intended purpose. [note the grant should not be used to make redundancy payments].

**Can an employer make an employee redundant simply because they are on furlough?**

No. There must still be a fair selection process. If an NUJ member is selected for redundancy purely because they are furloughed, it is likely that this will amount to an unfair dismissal, or where the selection is based on a ‘protected characteristic’ for example sex, race, age, disability, sexual orientation etc under the Equality Act 2010, this could give rise to a discrimination claim. We are still awaiting a test case. But it should be remembered that a claim arises usually from the date the act complained of, seek advice from the NUJ.

**Does it make any difference legally whether a member is being made compulsorily or voluntarily redundant?**

No. The law makes no distinction between voluntary and compulsory redundancy. In practical terms, members are often able to secure better terms under a voluntary redundancy scheme, especially if the NUJ is recognised in their workplace. Companies increasingly require a legal contract to be signed containing a number of clauses, which remove rights to make claims and often include other onerous clauses such as confidentiality clauses, known as Settlement Agreement, there is a requirement under s.203 Employment Rights Act 1996 to obtain advice before signing this can be arranged through the NUJ. You should not be asked to sign an Agreement of this nature if you are not receiving more than you are already contractually entitled.

**Am I entitled to a redundancy payment?**

Only employees dismissed ‘wholly or mainly’ because of redundancy are entitled to a redundancy payment. Section 139 Employment Rights Act 1996 says an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a)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

(b)the fact that the requirements of that business—

(i)for 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.

**A member feels their employer wants to get rid of them because they are pregnant. What legal protections are there?**

A pregnant woman is not protected from redundancy in all situations. However, as well as being automatically unfair, it is sex discrimination for an employer to select a woman for redundancy for a reason connected with pregnancy or maternity leave. If an employer dismisses a woman while she is on maternity leave because it finds it can ‘manage without’ her, by sharing her work among colleagues, this is likely to be automatically unfair.

There is an additional protection for any employee on maternity, adoption or shared parental leave who is at risk of redundancy. They must be offered a ‘suitable available vacancy’ if they would otherwise be made redundant. If they are not offered one, and they are dismissed, this will automatically be regarded as unfair. If there is only one such vacancy, it must be offered to the employee on maternity, adoption or shared parental leave, even if they are not the best candidate. Note the Company are not under an obligation to create a post.

**A member believes they have been selected for redundancy because they are an NUJ rep. Do they have any legal protection?**

It is automatically unfair to select individuals for redundancy because they are (or are not) trade union members. Section 153 of the Trade Union and Labour Relations (Consolidation)Act 1992 says that if the reason or main reason for selecting an employee is actual or proposed trade union membership or activities, accessing trade union services, or ‘refusing an inducement’ relating to trade union membership or collective bargaining, then that selection will be unfair. The key here is for the employee to collect evidence which suggests they are being targeted. For example, employers have attempted to discipline reps for raising legitimate health and safety concerns around covid-19. They may target reps for carrying out their legitimate duties.

**Who has the right to be consulted over redundancy?**

If the NUJ is recognised in a workplace where the employer is proposing redundancies, it should be consulted. It does not matter whether the employees at risk are NUJ members or not. If the employer recognises other unions, these should also be consulted.

Where the NUJ is not recognised, employees are entitled to elect their own ‘appropriate representatives’. Such an ‘appropriate representative’ could be an existing member of a staff association or standing representative body, or someone elected by the affected employees purely for the redundancy consultation.

**When does an employer have to carry out a collective redundancy consultation?**

Collective consultation comes into play when an employer proposes to make redundant 20 or more employees at one ‘establishment’ within 90 days. The employer must inform and consult the recognised union at least 30 days before notice is given of any [dismissals](https://worksmart.org.uk/jargon-buster/dismissal). This rises to at least 45 days consultation where 100 or more redundancies are involved. If there is no recognised union, the employer must make arrangements for the election of employee representatives with whom consultation will then take place within the same minimum timeframe.

The problem comes in the definition of ‘establishment’. An employer with more than one site might argue that if it is making 20 or more redundancies across its business as a whole, each site should be considered as a separate ‘establishment’. The point here is that the employer could then argue the number of redundancies at each single site is less than 20, and it therefore does not need to engage in a collective consultation.

If your employer makes this argument, and you want to decide whether it is fair or not by analysing information about the employer’s business, you can look up the records of a UK company at Companies House. There is a small charge to download an annual return from a company. See  <https://www.gov.uk/get-information-about-a-company>

Some employers have proposed contractual changes during the pandemic - for example, a pay cut for a specified duration. If employees do not agree to this, the employer is able to dismiss them and re-engage them after a consultation period. If the number of potential dismissals is 20 or more, as above, then the same rules around consultation apply, even though this is not a redundancy situation.

Some employers have proposed ‘temporary’ pay cuts which they then seek to make permanent through contractual changes. This is best resisted by members acting collectively. It is much easier for an employer to ‘pick off’ individual employees when attempting to introduce such changes.

**What happens to the consultation process if fewer than 20 employees are involved?**

Regardless of whether an employer has a duty to enter into collective consultation, they must consult individual employees who are at risk of redundancy. They must write to them, warning of the risk of redundancy, and invite them to an individual consultation meeting. Before the meeting takes place, the employer must provide details of the selection criteria, the person’s scores (if used) often referred to as a ‘matrix’ containing criteria than can be objectively measured and an explanation of the scoring methods, to give the employee a genuine opportunity to challenge any decision.

**How do I know the consultation is fair?**

Fair consultation means the employer and their representatives must explain the proposed changes and give the person being consulted a proper opportunity to fully understand the issues and to express views and provide input into the process.. Consultation must be ‘meaningful’ this means the employer must give genuine consideration to those views. There should be consultation with the individual employee at every stage of the redundancy process, once they have been provisionally identified as being at risk.

**What about employees on fixed-term or part-time contracts?**

Employers are obliged by the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 to treat temporary employees as favourably as equivalent permanent staff. This includes redundancy rights. The regulations stipulate that an employee on a fixed-term contract should have the same opportunity to apply for a permanent, alternative job as any permanent employee at risk.

Fixed-term contract employees should be included in any collective consultation if the proposed redundancies would end their contract early. Anyone who’s worked continually for the same employer for 2 years or more has the same [redundancy rights](https://www.gov.uk/redundant-your-rights) as a permanent employee.

**What should consultation cover?**

Your employer has a statutory obligation under section 188 (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 to consult ‘in good time’ about ways of:

* avoiding dismissals – are there any alternative measures? For example agree flexible working, temporarily reduced hours, limit or stop overtime, not hire new employees;
* reducing the number of employees to be dismissed – for example, are there volunteers for redundancy, early retirement?;
* mitigating the consequences of the dismissals – what happens to those who are left behind?

Meaningful consultation means exploring and responding effectively to all ideas reasonably suggested by the union or staff representatives to avoid redundancies, reduce their number and mitigate their effects. Failing to explore all these suggestions in circumstances where there is a minimum number of days that the employer is required to consult risks a ‘protective award’, which is explained later.

**What right do I have to be accompanied to my redundancy meetings?**

You have no absolute legal right to be accompanied to all your redundancy consultation meetings. The right to be accompanied applies only to a disciplinary or grievance hearing. Despite that, the Chartered Institute for Personnel and Development recommends that employers ‘allow the request for a companion for those employees who wish to be accompanied’. During the coronavirus pandemic, it’s likely that your employer will consult with you remotely, for example over the phone or using video or conference-calling technology. They must meet you at least once. They might need to hold further meetings with you to make sure they can respond to your suggestions or requests.

**What if the employer fails to abide by the rules around redundancy?**

A TUC solicitor has made clear that there are very limited circumstances in which an employer can argue it was not practicable to comply with all their obligations around redundancy during the pandemic. If an employer claims it was not practicable to carry out a normal consultation process, for example, it must provide evidence. Employers might use the fact that employees are working remotely, or have unreliable broadband connections, as an excuse for failing to carry out a proper consultation. The circumstances must be ‘exceptional’ and ‘out of the ordinary’. An employer claiming that an employee’s broadband connection keeps dropping out, or that is does not have sufficient time because it is engaged in Zoom meetings all day, would not likely meet the ‘exceptional’ requirement.

**Can my employer calculate my redundancy pay on my temporarily reduced salary?**

The Chartered Institute for Personnel and Development suggests redundancy pay should be based on full salary, not furlough pay. Employers may attempt to calculate redundancy payments using a worker’s temporarily reduced salary. This may depend on the agreements covering how workers were put on furlough. Particularly in workplaces where the NUJ is recognised, and has negotiated agreements where furlough is allowed to take place, or pay may be cut temporarily, any documentation should specify that pay cuts are temporary and would not impact redundancy calculations. They should also have an end date or review date, to emphasise the contractual changes are not permanent. Where this has not happened, employers may feel more empowered to base their redundancy payments on the new, reduced salary.

Any outstanding annual leave should be paid at the full rate of pay.

**I’m concerned that an employer is using redundancy during the pandemic to settle scores, and get rid of individual employees for personal reasons rather than for any business rationale. Can an employer make an employee redundant, then take on someone else to do the same role six months later?**

Yes. The limit for taking a claim for unfair dismissal to a tribunal is three months less one day. If a redundant member goes beyond this limit and later sees that the employer has taken on someone else to fulfil a similar role, they have no legal redress. It may also be lawful for an employer to make an employee redundant, then take on a freelance worker to perform the role. The employer must demonstrate there is a business need to do so – for example, that the work comes in peaks and troughs rather than at a constant level.

**My member has a disability. They feel they may be singled out for redundancy during the pandemic. What legal protections do they have?**

Disabled employees must not be treated unfavourably because of something connected to their disability, where an employer cannot show that it’s objectively justified.  This includes an employer making redundancies influenced by discriminatory assumptions, for example the employer deciding that all of its disabled workers are best protected from the pandemic if they were not to return to work but instead selected for redundancy. In any redundancy exercise, an employer should carry out an equality impact assessment to seek to ensure that its selection of an individual for redundancy is not discriminatory. While this is an important step, it is not enough in itself to ensure there is no discrimination. The employer is also under a duty to make reasonable adjustments to remove any disadvantage faced by disabled employees during the redundancy process (section 20, Equality Act 2010). What amounts to a “reasonable” adjustment depends on the employee.

**What happens if an employer refuses to comply with their legal obligations to consult properly for the requisite period during the redundancy process?**

It may have to pay a ‘protective award’. If your employer should be engaging in collective consultation, but fails to do so adequately or at all, then the Union would take a collective claim on behalf of those members affected. However, note if you have signed a Settlement Agreement there may be a clause which precludes an employee from benefiting from any award. . The claim has to be made within three months, less one day, of the final dismissal.

The tribunal can make a protective award for each employee who was not consulted. The award is calculated at 90 days’ pay, and is reduced only if there are mitigating circumstances.

In some cases, an employer which refuses to consult with a recognised union can be persuaded to do so by a reminder that it may end up having to pay protective awards.

**How much notice of redundancy should I be given?**

It depends on how long you’ve been in your job. You're entitled to statutory notice if you've been working for your employer for more than a month. Your employer can give you more than the statutory notice, but they cannot give you less.

If you've worked for your employer for 1 month to 2 years, the minimum notice is 1 week. If you’ve been there from 2 to 12 years, the minimum notice is 1 week for each year you've worked. If you’ve been in the job for at least 12 years, the minimum notice is 12 weeks.

**When does the notice period start?**

This may be contained in your contract. If your employer gives you redundancy notice in person, your notice period should start from the following day. If you receive your notice by email or post, your notice period should start when you've had time to read it. For example, if you're told in a letter sent by registered post, your notice might start the day after you've received it, to allow you sufficient time to read it.

**What should I be paid during my notice period?**

You should receive the same pay you would normally get if you work your notice period.

Depending on your employer's notice period, you may not be entitled to full pay during your notice period if you are on holiday (annual leave), on sick leave, on maternity, paternity or adoption leave, or you are temporarily laid off or on short-time working.

You are entitled to full pay if your employer's notice period is the legal minimum, or if it is 1 to 6 days longer than the legal minimum.

You are not entitled to full pay if your employer's notice period is 1 or more weeks longer than the legal minimum.

**Payment in lieu of notice**

Your employer can give you 'payment in lieu of notice' if this is provided for in your contract. This means you get paid instead of working your redundancy notice period. If this applies to you, you should get full pay and any extras that are in your contract - for example, pension contributions. Your employer can offer you payment in lieu of notice even if it is not in your contract. If you accept, you should get full pay and anything else included in your contract.

**What areas could we negotiate on with the employer?**

Many house agreements include some reference to the idea that negotiations should be conducted in the right ‘spirit’. For negotiations to be meaningful, all sides should approach the table with a willingness to listen and share ideas, with the aim being to reach an agreement acceptable to all parties. This shared commitment ought to help develop a constructive culture in which discussions can take place. If you do not meet this attitude from managers, you may argue that they are not negotiating in the right ‘spirit’ stipulated in the house agreement.

The arbitration and conciliation service, ACAS, has guidelines on what employees should ask for:

* commitment to keep local trade unions and employee reps informed as fully as possible about staffing requirements and any need for redundancies;
* how long consultation is to last;
* who is to be consulted;
* what must be discussed;
* how consultation should be conducted, focusing on the ‘spirit of the consultation’ — with a view to reaching agreement and including a commitment to consider alternative proposals;
* what statutory information must be provided.

It would also be useful for employees to seek information on:

* the effect on earnings, where transfer or down-grading is accepted as an alternative to redundancy;
* arrangements for travel, removal and related expenses where a new role is on a different site;
* arrangements for reasonable time off with pay to look for jobs or arrange training;
* help with job hunting – is the employer willing to provide or pay for training to help employees secure another job, for example?;
* arrangements to transfer apprenticeships

**What areas might we negotiate on to try to reduce redundancies?**

* restricting recruitment of permanent staff;
* reduced use of agency workers;
* filling vacancies internally;
* cutting overtime;
* cutting hours e.g. short time working; and
* training, retraining and redeployment.

Ask management if they have considered any of these measures. What are their findings?

And finally, some …

**Top Tips**

* Keep membership lists up to date
* Conduct an audit / map your Chapel
* Identify the weaknesses in your Chapel in relation to redundancy. What are the levels of NUJ membership?
* Directly recruit non-members
* Set up means of communicating with your members
* Set up regular Zoom chapel meetings to keep in touch
* Ask members to become volunteers or NUJ contacts
* Have an NUJ contact in any department that is being targeted for redundancy
* Collect data on the department, job roles, hours worked etc.
* Encourage members to recruit new members
* Be pro-active
* Make sure the membership lists contain emails and contact details
* Keep lines of communication open
* Keep in regular contact with members, letting them know what is being done by using bulletins, Whatsapp messages or similar, and emails
* Furlough is not a direct line to redundancy – reassure members who are currently on furlough
* Know your company redundancy procedures, house agreements and other relevant policies such as Health and Safety and Equal Opportunity policies
* Become as informed and prepared as you can be
* Make sure you keep in contact with members who are off sick or on maternity leave
* Ask for copies of Risk Assessments
* Talk to members and find out they feel, and what their plans might be. There may be members who want to take redundancy, leading to a ‘bumping’ situation
* Information and knowledge will help you ask the right questions and challenge an employer on specific issues
* Don’t leave dealing with redundancy to one rep; try to build a committee of people who can share the job and become contacts
* Use the time to recruit as many members as you can
* Suggest alternative proposals like job freezes or voluntary trawls to identify people who want to go
* Make sure Equality Impact Assessments are carried out and are meaningful
* Look at the size of the redundancy pool to try to mitigate compulsory redundancies
* If they have been working for an employer for 2 years, people who are being made redundant can get time off for training and interviews. They are also entitled to try out working in an alternative position for a month without losing their right to redundancy pay. SEE the Labour Research Department (LRD) book on Redundancy Law (link at end)
* There may be legitimate reasons why someone at risk of redundancy has been furloughed (e.g. redundancy from within a department where everyone was furloughed). Placing a role at risk of redundancy should not be based on whether the individual performing that role is furloughed, not least because there is little transparency in most companies’ decision-making over furlough
* Don’t feel you have to deal with all the aspects of redundancy at once. Concentrate on working your way through each part of the process
* Make sure you have copies of people’s contracts
* Important to challenge employers, ask questions and scrutinise their answers
* Ask for financial information to ensure the company is being transparent about the necessity for redundancy (PLC companies only)
* If there is no recognition, get NUJ members as staff reps and on to employee boards and staff forums
* Ask managers how they are going to deal with the redundancy process
* Challenge any divisive behaviour by an employer, like paying different pay to workers doing the same job
* Develop relationships with reps from other unions

**Links**

<https://www.acas.org.uk/redundancy>

<https://www.lrdpublications.org.uk/publications.php?pub=BK&iss=1998>