THOMPSONS SOLICITORS
THE MOST EXPERIENCED TRADE UNION FIRM IN THE UK

SPRING 2009
Issue 123

Labour & European Law Review

Focus on redundancy

Shut down and shut out

In the current economic climate it' s important to know the law on redundancy and rights to alternative employment

Pg 2

Unnatural selection

Employers' obligations when selecting workers for redundancy

Pg 6

Workers' rights on insolvency

Employees' rights when employers go bust

Pg 9

www.thompsons.law.co.uk

Shut down and shut out

In the current economic climate, thousands of employees have been made redundant. And many more face losing their jobs. Richard Arthur gives advice on checking whether the redundancies are genuine, what rights employees have to alternative employment and what compensation might be available

THE LAW says there is only a genuine redundancy situation when:

- an employer closes the business or part of it
- an employer closes the location at which the employee works
- the employer's need for employees to perform the work has diminished.

This definition allows a group of companies to select employees for redundancy from any part of the group, whether or not there is a redundancy situation in each individual company.

If an employer closes the business and then reopens as something completely different, that would also count as a genuine redundancy. In **Whitbread plc t/a Whitbread Berni Inns -v- Flattery and ors**, however, the court said that changing the business from a Berni Inn to a brasserie four weeks later was not a closure of the old business.

But even if someone's workplace is actually closing down, employees can sometimes be found work elsewhere, depending on what their contract of employment says. In **Home Office -v- Evans and another**, the employer closed the immigration control facility at Waterloo International Terminal, but then invoked the mobility clauses that required the employees to work elsewhere.

What if the employer just needs fewer people to do the work? The law says that this covers situations where:

- the need to do work of a particular kind has diminished; or
- the actual workload has not decreased, but fewer employees are needed to do it (for example because of the introduction of new technology or because of a reorganisation).

There has been some debate in the past as to whether the "diminishing need" should be assessed by reference to the work the employees actually did, or by reference to the work that they could be required to do under their contracts. This was resolved in **Murray and anor -v- Foyle Meats Ltd**, in which the House of Lords ruled that the test was whether the dismissal was wholly or mainly "attributable" to one of the definitions of a genuine redundancy.

However, there is no redundancy when the work remains the same, although the employer has made changes to employees' terms and conditions. For instance, in **Chapman and ors -v- Goonvean and Rostowrack China Clay Co Ltd**, the employer withdrew free transport to work because it was uneconomic. Some employees lost their jobs because they could no longer get to work but the Court of Appeal ruled that this was not a redundancy situation.

> Employers are required by law to look for suitable alternative employment for their redundant employees

But when employers are consulting over collective redundancies, the definition of redundancy is wider and covers "any dismissal for a reason not related to the individual concerned..." This would cover, for example, dismissals for the purpose of implementing changes to terms and conditions of employment.

In each case, it is important to assess whether there is a redundancy situation, and if there is, whether the dismissal was caused by it. Redundancy is often used by employers as a veil for a dismissal which would otherwise amount to discrimination or victimisation, such as selecting trade union activists for redundancy.

Suitable alternative employment

Employers are required by law to look for suitable alternative employment for their redundant employees. If they don't, the dismissal is likely to be unfair.

When looking for alternative work, employers should:

- ensure they do not limit their search to the same section of the business that the employee worked in although it may be going too far to require them to search among associated companies/employers
- consider posts that are already filled, even if that means "bumping" the person in that post
- consider giving preference to long-standing employees ahead of newly recruited employees (although this may now be discriminatory on grounds of age)
- consider actually offering the job (not just looking for it) to an employee, even if it constitutes a demotion. It is up to the employee to decide whether they are prepared to accept it or not

Photo: Jess Hurd (reportdigital.co.uk)

Employees with more than two years' service have the right to time off with pay to look for work

- identify transferable skills as part of the consultation process
- give sufficient information to the employee (including financial prospects)
- consider retraining the employee if that would be reasonable.

Employers are not expected to make an offer of suitable, alternative employment if that would contradict an agreement made with the union.

A redundant employee who refuses a suitable offer of alternative employment will lose their entitlement to a redundancy payment if:

- the offer was made after they were given their notice
- the offer was made before their notice ended
- the new role took effect within four weeks of the end of the old job
- they were unreasonable in refusing the offer.

It is up to a tribunal to decide if the alternative job is suitable by looking at what the whole job entails, not just the tasks to be performed. It also looks at the terms and conditions (especially hours and wages) and the responsibility and status involved. Location may also be relevant. As a tribunal said in one case "Commuting is not generally regarded as a joy".

Time off during the notice period

Employees with more than two years' service who are under notice of redundancy have the right to reasonable time off with pay during working hours either to look for work or to make arrangements for future training for employment. An employee must actually request the time off in order to be entitled to it.

Tribunals will consider a number of factors when deciding whether the employer was unreasonable in refusing the request. These include:

- the length of the notice period
- when the employee put in the request
- local difficulties in obtaining employment
- the provisions of any redundancy procedures agreement
- the effect of the employee's absence on health and safety and
- the effect of the employee's absence on the running of the business.

If someone is unreasonably refused time off during the notice period, they can complain to a tribunal within three months of the day on which the time off should have been allowed.

Redundancy payments

Employees with two years' continuous employment at the date of termination of employment who have been dismissed by reason of redundancy are also entitled to a statutory redundancy payment.

The amount depends on age, length of service and pay, as follows:

- one and a half weeks' pay for each complete year of service after reaching the age of 41
- one week's pay for each complete year of service between the ages of 22 and 40 inclusive
- half a week's pay for each complete year of service below the age of 22.

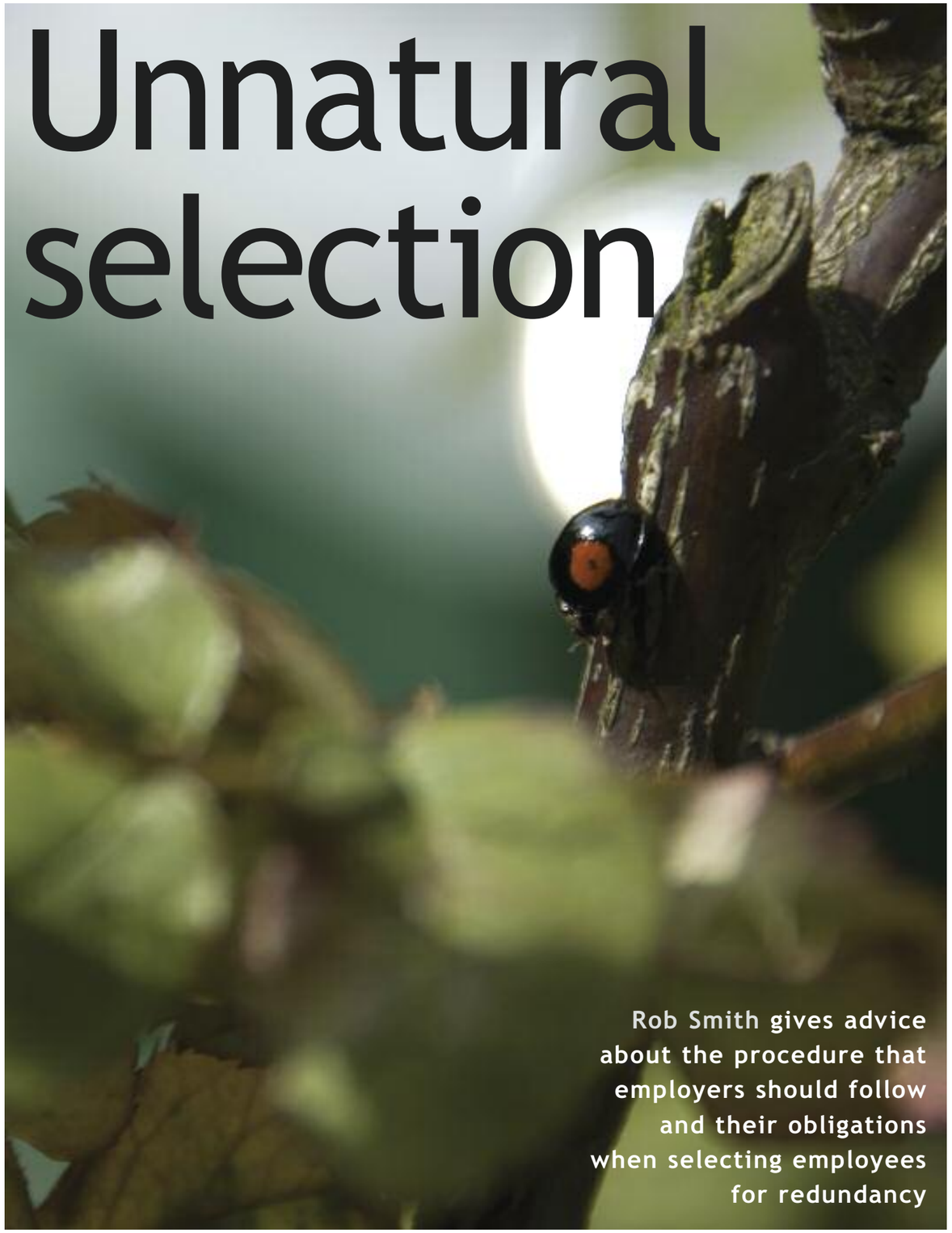
The maximum length of service that may be taken into account is 20 years and a week's pay is limited to £350 per week.

Some employees are contractually entitled to an enhanced redundancy payment, details of which may be set out in a staff handbook or collective agreement in which case they would have to prove that the term was incorporated into their contract of employment.

If the employer fails to make the payment, employees can complain to a tribunal within six months of the date of termination of employment (or within such time as the tribunal considers just and equitable). The statutory grievance procedure only applies until this April, after which it will no longer be necessary to lodge a grievance.

Anyone entitled to a contractual enhanced redundancy payment should complain to a tribunal within three months of the termination of employment, (the maximum award is £25,000). The statutory grievance procedures do not apply, but a failure to file a grievance may lead to a decrease in the award.

Unnatural selection



Rob Smith gives advice about the procedure that employers should follow and their obligations when selecting employees for redundancy

EVEN IF an employer can show that the redundancy was genuine (as Richard Arthur explained in the previous feature), the dismissal will still be unfair unless they can also show that they followed a fair selection procedure.

Warning and consultation

Although it is just common sense for employers to notify their workforce and their representatives that they intend to make redundancies, the courts have had to repeatedly make clear that it is also a legal obligation.

The House of Lords spelt out those responsibilities in **Polkey -v- A E Dayton Services Ltd** when it said that: "in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair decision which [employees] to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organization."

In **Mugford -v- Midland Bank** the Employment Appeal Tribunal (EAT) said that, if the employer has not consulted with either the trade union or the employee, the dismissal will normally be unfair unless the tribunal decides that consultation would have been a futile exercise.

When employers are planning to dismiss 20 or more employees they are also required to consult collectively under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.

The pool of employees

Employers must also ensure that the pool of employees to whom the selection criteria apply is fairly defined. If the wrong group is selected, the dismissals may be unfair even if the selection criteria used are fair. Tribunals usually consider the following factors:

- job descriptions
- the extent to which employees' jobs are interchangeable
- whether other employees are doing the same work on different shifts or in other parts of the business
- whether the union (or employee representatives) agreed the selection pool
- any evidence that suggests that a pool was a sham and defined purely for the purposes of weeding out a particular employee (such as a union rep).

The way in which the pool is defined can make a significant difference to the employees who may be selected for redundancy. For example, if the pool is restricted to one particular shift or part of the business, then only those employees will be at risk. However, this may be unfair if there are other workers on a different shift doing the same job.

The selection criteria

Once the pool has been decided, the employer must adopt a fair method of selecting the employees to be made redundant. Traditionally, many used the "Last in First Out" approach but are now much more likely to use a range of selection criteria.

In some cases the employer may have agreed the selection criteria with the union or workforce representatives, although a failure to do so will not render the dismissals unfair. However, the employer would still have to show that there was a logical basis for using a particular criteria and that they have consulted properly in the event of a dispute.

In **Williams -v- Compair Maxam Ltd** the EAT stated that the employer should "seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience or length of service." In reality it can often be difficult for unions to challenge even quite subjective criteria.

Common criteria include:

Performance and ability – An assessment of an employee's performance, skills, quality, flexibility and other similar categories are potentially fair provided that the criteria are clearly and reasonably defined and the assessment has been objective. Criteria based on "attitude" or the extent to which the employee is a "team player" are too subjective and could render the criteria unfair if the employer puts a lot of store by them or fails to consult fully on their use.

Absence record – Although a seemingly objective criterion, employers should investigate the reasons for any poor attendance and ensure that their records are accurately and fairly maintained. The period over which they assess attendance records should also be reasonable. Employees may also be able to make a DDA claim if they have a disability that resulted in their being off work a lot, as a result of which they were disadvantaged by the redundancy selection criteria.

Disciplinary Record – Employers can include employees' disciplinary records in the selection criteria, as long as the period of time they rely on is representative of all affected employees.

Length of Service – Following the introduction of the 2006 age discrimination regulations many employers have stopped using length of service as a criterion. However, in the recent case of **Rolls Royce -v- UNITE** (weekly LELR 94) the court ruled that it was not unlawful in those particular circumstances.

Applying the criteria

Having decided on the pool of employees and the selection criteria, employers then have to apply the criteria fairly, although tribunals are often reluctant to overturn the employer's decision in the absence of persuasive evidence that the process was flawed.

Although it is just common sense for employers to notify their workforce that they intend to make redundancies, the courts have had to repeatedly make clear that it is also a legal obligation

In particular, tribunals will not examine in detail the way in which the employer applied the criteria. In **Eaton Ltd -v- King**, the Scottish EAT stated that it was sufficient for the employer to have set up a good system for selection and to have administered it fairly. It

also confirmed that the tribunal did not require the managers who conducted the assessment to give evidence at the tribunal hearing.

Nor can employees just disagree with their score under a particular criterion. Tribunals will not re-score employees for the simple reason that their supervisors and managers are better placed to do this. Tribunals will therefore only "look behind the scores" if the employee can establish evidence of bias, manipulation or some other fundamental flaw that rendered the entire selection unfair.

Individual consultation

To apply the criteria fairly, employers must consult with their employees individually about their selection. In **Mugford** the EAT confirmed that collective consultation with the union does not mean that employers can avoid individual consultation. Employees should also be consulted to inform them that they are at risk of redundancy, allow them the chance to challenge their selection and highlight any flaws in the process.

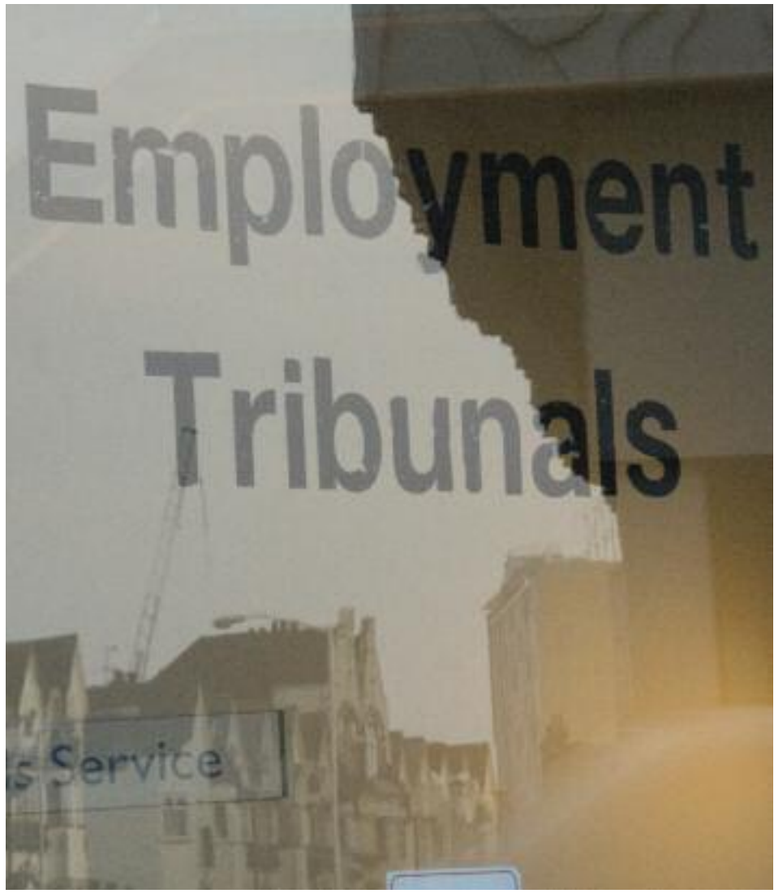
There has been debate about what information employees should be given and, in particular, whether they have the right to see the scores of other employees. In **Alexander -v- Brigden Enterprises Ltd** the EAT confirmed that under the statutory disputes resolution procedures, employers must:

- comply with step 2 of the procedure
- set out why there is a redundancy situation and why the employee is being selected
- provide the selection criteria and any assessment of the employee but not the assessments of other employees.

Employers must also allow employees to appeal against dismissal due to selection for redundancy. Despite the repeal of the statutory disputes resolution procedures in April 2009, this process is unlikely to change..

Pursuing a tribunal claim

If someone thinks they have been unfairly selected for redundancy they can lodge a tribunal claim within three months of the date the redundancy took effect.



With the number of redundancies continuing to increase, there is likely to be a rise in the number of claims to employment tribunals

If successful, they may be awarded compensation but if they have already received a redundancy payment, they will not receive a basic award. In addition, the tribunal will offset any contractual redundancy pay in excess of the statutory minimum against any loss of earnings.

If the tribunal decides that the dismissal was unfair on procedural grounds then, unless the employer can show that the error would have made no difference to the outcome, they will make an award of compensation. However, it will then make an assessment of the percentage chance that the employee would not have been dismissed had a fair procedure been followed (a **Polkey** deduction) and reduce the compensation accordingly.

It is worth noting, though, that in **Evans -v- Capio Healthcare (UK) Ltd** the EAT confirmed that major procedural defects are likely to render the dismissal "substantively unfair", in which case no **Polkey** deduction will be made.

Conclusion

With the number of redundancies continuing to increase, there is likely to be a rise in the number of claims to employment tribunals. Unfair selection for redundancy cases are not easy to win and much will depend on identifying a flaw in the procedures adopted by the employer. More than ever, it is vital for union representatives to insist on proper consultation over those procedures and ensure that employers apply the procedure fairly.

Workers' rights on insolvency

Iain Birrell explains the rights of employees and what they should do if their employer goes into insolvency

When an employer proposes to dismiss as redundant 20 or more staff within 90 days, they are under a duty to consult with them

INSOLVENCY COMES suddenly and unannounced. All too frequently the first that employees know is when the gates are locked against them, or the administrator starts handing out paperwork. So what, if anything, can workers do about it?

Limitations of insolvency law

In the UK the purpose behind insolvency arrangements is to free the indebted from debt, not to ensure that creditors are paid. Companies and partnerships with limited liability can cap pay-outs (precisely because their liability is limited), leaving staff and other creditors to fight over any money that is left after the government and the liquidator have been paid. Even the Transfer of Undertakings (Protection of Employment) Regulations 2006 free the transferee from the wound-up company's liabilities.

Although individuals and groups of employees have certain rights, these are frozen on insolvency and workers cannot issue proceedings without the consent of either the court or the administrator. This measure, known as the 'moratorium', is designed to give debtors some breathing space, but is an additional impediment for staff with bills to pay and mouths to feed.

Employees can make a claim to the Redundancy Payments Office (RPO), but payments are limited in nature and employees have to recoup any outstanding balance through the insolvency process (which involves filling in the RP1 form, sending it to the RPO and then waiting). Creditors can also go after partners who have unlimited liability and that includes personal assets such as their house and car.

Wages

Employees who are owed wages by their employer have to make a claim through the courts as a breach of contract, or the tribunal system as a breach of contract or unlawful deduction from wages claim. Getting a judgement in their favour is just the first step, however, as it still has to be enforced.

Employees can also recover maternity and sick pay from their employer or Her Majesty's Revenue and Customs or the Department for Work and Pensions respectively.

Statutory redundancy payment

Shutting a workplace down automatically creates a redundancy situation, although to qualify for redundancy pay, employees need two years' service. If the dismissal occurs out of the blue and without due process, it will also be unfair. The employee is likely to be owed holiday, wages, notice pay and other sums (which require one year's service).

Notice pay

Employees have a minimum statutory notice entitlement of one week's pay for every complete year worked, up to a maximum of 12, although sometimes contracts allow for a longer notice period. Since employees are frequently dismissed without full notice on insolvency, this entitlement may need to be enforced as a wrongful dismissal (breach of contract) claim. The statutory element can be claimed from the RPO but any contractual excess must be claimed through the insolvency process itself.

Holiday pay

Under the 1998 Working Time Regulations, workers are entitled to a lump sum payment for holiday accrued until their dismissal, but which they did not take. There is no equivalent right for holiday that accrues outside that regime, unless the contract of employment allows for it.

Failure to consult (the protective award)

When an employer proposes to dismiss as redundant 20 or more staff within 90 days they are under a duty to consult with them or their representatives. They cannot get round this even if the insolvency is very sudden. If they don't consult, the employer will be liable to pay each affected employee compensation of up to 90 days' pay.

If there is a recognised union at the workplace, then the employer also has to consult with the trade union. If they don't, then the union can bring a claim for a protective award. Once an award has been made, the individual employee has to lodge a tribunal claim in their own name in order to enforce it. Payment can then be claimed through the RPO and the insolvency arrangements.

If there is no recognised trade union, however, the employer has to set up representative bodies and then consult with them.

The RPO

The statutory safety-net operated by the RPO is perhaps the most immediately useful procedure available to an employee. Funded by National Insurance contributions, this is a no-fault compensation system that is accessed by completing a form called the RP1.

The RPO's regime is however limited in scope, and does not provide a complete solution. Firstly the company must actually be in a recognised insolvency situation which the RPO defines as being one where:

- there is a court winding-up order
- there is an administration order
- a resolution has been passed for its voluntary winding up due to insolvency
- a voluntary arrangement has been made with creditors
- a receiver or manager has been appointed over the company's undertaking, or has taken possession of property secured by a floating charge under a debenture (England and Wales only).

For employers who are individuals the RPO requires:

- bankruptcy
- a voluntary arrangement with creditors, or
- the death of the employer and the administration of their estate under the Insolvency Act 1986.

The second major restriction is that the RPO caps the amounts that it pays out, as follows:

- wages: up to eight weeks
- holiday pay: up to six weeks
- statutory notice: in full
- statutory redundancy payment: in full
- unfair dismissal basic award: in full
- protective award: treated as wages

The RPO also places a maximum amount on the weekly sum that it will pay out, and deducts notional amounts for tax and National Insurance. The current maximum weekly rate (as of 1 February 2009) is £350. As more than half the working population earn more than the weekly maximum, most lose out.

Since the RPO treats the protective award as wages, two key consequences follow: firstly only the first 56 days of any award can ever be paid out; and secondly any payout will be further reduced by the amount of any wages already paid out under the scheme.

Phoenix companies and continuous employment

Some directors escape their debts by placing the company into insolvency, buying the business back from the receivers and then setting up shop again. Often this is in the same place, with the same assets and the same staff. These are known as phoenix companies as they rise from the ashes to operate "business as usual". Unscrupulous employers can (and do) do this repeatedly.

When looking at entitlement to claim unfair dismissal, or a statutory redundancy payment in these circumstances, the issue of continuous employment is key. Most breaks from employment will be fatal to this concept but where there is a "temporary cessation of work" the gap does not count.

In the recent EAT decision of **Da Silva -v- Composite Mouldings and Design Ltd** (see weekly LELR 100) the claimant was employed by a company that became insolvent, entered liquidation, and then rose again as a phoenix company. He was then rehired by the director who was the majority shareholder and therefore had control of both companies. Some months down the line he was dismissed but the Employment Appeal Tribunal held that his continuous employment was preserved and that he had been employed long enough to bring various claims to an employment tribunal.

Wrongful trading

If a company has limited liability, employees are very unlikely to recover everything that is owed to them. They can try claiming the money from the directors themselves but this only applies if they have traded fraudulently, or in full knowledge that they could not pay their debts (also known as wrongful trading).

In those circumstances the courts might be persuaded to allow creditors to seek payment from the directors. This though is a difficult, expensive and slow process and one that is rarely recommended as a viable route to redress.

Sources of information

Trade union members can ask their union for information about whether their employer is insolvent. They can also find out about who the liquidator is from the Companies House website (wck2.companieshouse.gov.uk). The liquidators themselves may also be a good source of information, as is BERR's website (www.berr.gov.uk).

Thompsons is the most experienced trade union firm in the UK with an unrivalled network of offices and formidable resources.

HEAD OFFICE
Congress House,
Great Russell Street,
LONDON WC1B 3LW
020 7290 0000

BELFAST
028 9089 0400

BIRMINGHAM
0121 262 1200

BRISTOL
0117 304 2400

CARDIFF
029 2044 5300

CHELMSFORD
01245 228 800

DAGENHAM
0208 596 7700

EDINBURGH
0131 225 4297

GLASGOW
0141 221 8840

HARROW
020 8872 8600

LEEDS
0113 205 6300

LIVERPOOL
0151 2241 600

MANCHESTER
0161 819 3500

MIDDLESBROUGH
01642 554 162

NEWCASTLE UPON TYNE
0191 269 0400

NOTTINGHAM
0115 989 7200

PLYMOUTH
01752 675810

SHEFFIELD
0114 270 3300

SOUTHAMPTON
023 8021 2040

SOUTH SHIELDS
0191 4974 440

STOKE-ON-TRENT
01782 406 200

SUTTON COLDFIELD
0121 308 1331

SWANSEA
01792 484 920

Visit us at www.thompsons.law.co.uk
Email us at lelrch@thompsons.law.co.uk

LELR aims to give news and views on employment law developments as they affect trade unions and their members.

This publication is not intended as legal advice on particular cases.

Download this issue at www.thompsons.law.co.uk

To receive regular copies of LELR email: lelrch@thompsons.law.co.uk

Contributors to this edition:
Richard Arthur, Iain Birrell, Rob Smith

Editor: Alison Clarke
Design & production: www.rexclusive.co.uk
Print: www.dsigroup.com/talisman
Front cover photo: Rex Anderson

THOMPSONS SOLICITORS

THE MOST EXPERIENCED TRADE UNION FIRM IN THE UK