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Focus on Redundancy Rights

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As further lockdown measures begin to bite hard, Jo Seery looks at the obligations on employers to act fairly and reasonably when dismissing employees for redundancy

Dismissal because of redundancy

> *Even where an employer has collectively consulted with the union, they must still consult with the employee*

WHEN EXAMINING whether there has been a redundancy, tribunals will not consider the business reasons given by the employer but only whether the redundancy falls within one of the legal definitions set out below.

Nor will they take the employer's motive into account, following the decision of the EAT in **Berkeley Catering Ltd -v- Jackson** (weekly LELR 706).

There is a genuine redundancy situation when:

- An employer closes the business or part of it
- An employer closes the workplace where the employee works
- The employer's need for employees to carry out work of a particular kind has either ceased or diminished. This applies, for example, where fewer employees are needed to do the available work because of a reorganisation.

Where there is a genuine redundancy situation, it is likely to be unfair to dismiss employees who have two years' continuous service if the employer has failed to:

- Warn and consult employees about proposed redundancies
- Adopt fair selection criteria that are reasonably and fairly applied
- Consider suitable alternative employment.

Warn and consult

In general, it is unreasonable for an employer not to warn and consult their employees before making them redundant. For instance, in the case of **Mugford -v- Midland bank Plc**, the EAT made clear that, if an employer fails to consult with either the trade union or the individual employee/s, then the dismissals will normally be unfair. That is, unless the tribunal decides that consultation would have been futile, but this is very rare.

Even where an employer has collectively consulted with the union, they must still consult with the employee.

Individual consultation

The purpose of individual consultation is to inform the employee that they are at risk of redundancy, allow them the chance to challenge their selection and highlight any flaws in the process.

The duty to consult also applies in a redundancy situation where the employer dismisses all employees and invites them to apply for the available jobs. In **Gwynedd County Council -v- Barrett** (weekly LELR 688) the EAT held that in these circumstances the employer has to consult on the procedure to be adopted as well as the process of recruitment.

Employers must also give their employees sufficient information so that they are aware of any alternatives to redundancy. In the current climate, Thompsons believe this means that employers need to explain and provide evidence of why they have not made use of the Coronavirus Job Retention Scheme (CJRS) to furlough an employee as an alternative to redundancy.

Fair selection:

1. Identifying the pool of employees

Employers must first consider the pool of employees from which they are going to select people for redundancy. If there is an agreed procedure in place that specifies a particular pool, the employer should follow it.

However, where there is no agreed procedure, employers have greater scope to define the pool, with the result that in some cases it may be narrowly drawn while in others it may include a greater range of employees.

While there are no fixed rules about how the pool should be defined, employers should act reasonably and from genuine motives. The following factors may be relevant when determining who should be included:

- Job descriptions
- The extent to which employees' jobs are interchangeable
- Whether other employees are doing the same or similar 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 the pool was a sham and defined purely to weed out a particular employee (such as a union rep).

- How 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, only those employees are going to be at risk. However, this may be unfair if there are other workers on a different shift doing the same job.

Once the pool has been decided, the employer must adopt a fair method of selecting the employees to be made redundant.

2. Selection criteria

Selection criteria must be clear, objective, transparent and fairly applied. 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".

"Criteria such as attendance and flexibility may be discriminatory if they harm women with caring responsibilities or because of disability and age"

However, that does not mean that subjective criteria cannot be used where they can be assessed objectively. For example, by reference to performance assessments.

Criteria such as attendance and flexibility may be discriminatory if they harm women with caring responsibilities or because of disability and age. Similarly, employers who select those who have been furloughed may be at risk of not only facing claims of unfair dismissal but also claims for discrimination, depending on the reason given when the employees were furloughed.

Employers usually score employees against a range of different criteria, but there is no rule requiring them to do so. If they choose to select based on only one or two criteria, they just need to be able to justify that decision.

Where the employer has put in place a good system of selection, which has been fairly applied, it can be hard to challenge the criteria since tribunals do not carry out a detailed examination of the ways in which the employer applied them.

Tribunals can only interfere with the employer's choice of criteria if they did not fall within the range a reasonable employer could have adopted.

Bumping

In some cases, the employer may consider "bumping". This is when an employee whose job is redundant is redeployed into the job of another employee. That other employee is then made redundant even though their job is still required.

However, there is no obligation on an employer to consider bumping someone. Whether a dismissal is unfair if the employer does not consider the possibility of bumping will depend on the particular facts and circumstances of the case.

Suitable alternative employment

Employers must do all they reasonably can to look for suitable alternative employment. If they fail to do that, the dismissal is likely to be unfair.

When trying to find suitable alternative work for their employee, employers should:

- Search beyond the area of the business where the employee worked. In the case of group companies, employers may be required to consider if there is suitable alternative employment within the group where they are closely integrated. For instance, when they have the same policies and involve the same individuals.
- Consider posts that are already filled even if that means "bumping" the person in that post.
- Consult employees about alternative jobs even if it amounts to a demotion. It is up to the employee to decide whether to accept.
- Provide the employee with enough information, for example about the financial prospects of any vacant positions and any eligibility criteria.
- Identify transferable skills.

The dismissal is likely to be unfair if the employer fails to consult or consider the possibility of alternative employment. As the CJRS is arguably a form of alternative employment, employers who fail to give reasonable consideration to the assistance available under the scheme or who fail to take reasonable steps to access the scheme may be at risk of a claim for unfair dismissal if they make an employee redundant. However, this is only a potential, and so far untested, argument.

Time off during the notice period

Employees who have two years' continuous service with their employer and who are under notice of redundancy have the right to reasonable time off with pay during working hours to either look for work or to make arrangements for future training for employment. The employee must, however, actually request the time off before they become entitled to it.

Collective Consultation

When an employer plans to dismiss 20 or more employees as redundant at one establishment within a 90-day period, they are required to consult collectively with appropriate representatives under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992. Where the union is recognised, this will be with the union.

For more details on collective consultation, please see the article by Rachel Halliday on pages 6 to 8.

Conclusion

The prospect of redundancies looms large as a result of the coronavirus pandemic but the obligations on employers, particularly to consult either on individual or large-scale redundancies, are significant. It will fall to union representatives to remind employers of these obligations.

Rachel Halliday explores the duty on employers to consult collectively with employees who they propose to dismiss because of redundancy

Duty to consult collectively

SECTION 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) says employers, who are proposing to dismiss as redundant at least 20 employees "at an establishment" within 90 days or less, have a legal duty to inform and consult the appropriate representatives of the affected employees about the dismissals.

> *"While it is possible for individuals to claim unfair dismissal and seek reinstatement on their old terms of employment, the success rate is patchy"*

Meaning of "establishment"

The term "establishment" means the local unit or entity to which workers are assigned to carry out their duties. However, following a reference to the Court of Justice of the European Union, the Court of Appeal concluded in **USDAW -v- WW Realisation 1 Ltd** that, as each Woolworths shop was a separate establishment, the duty to consult only applied to those shops where at least 20 employees were going to be made redundant.

New terms and conditions

As it is not lawful for an employer to just impose new terms and conditions on employees, they may give notice of termination of current terms together with an offer of new employment on revised terms. In this way, the employer may succeed in imposing the new terms on their workforce.

While it is possible for individuals to claim unfair dismissal and seek reinstatement on their old terms of employment, the success rate is patchy.

However, for consultation rights to apply, it is not necessary for there to be lost jobs or workers since section 195 of TULRCA states that the reason for the dismissal does not relate to the individual employee concerned.

In **GMB -v- MAN Truck and Bus UK**, for instance, the EAT held that the right to trade union consultation in collective redundancies applied whenever an employer intended to impose measures on part of the workforce, rather than individuals, which involved terminating their existing contracts.

As such, the duty to inform and consult applies where the dismissals arise because the employer has imposed contractual changes on the workforce.

Duty to inform

The employer is required to inform the appropriate representatives in writing of:

- The reasons for the proposals
- The numbers and descriptions of employees proposed to be dismissed as redundant
- The total number of employees at the establishment in question
- The proposed method of selection
- The proposed method of carrying out the selection with due regard to agreed procedures and the period over which the dismissals are to take effect
- The proposed method of calculating redundancy payments
- The number of agency workers employed temporarily, the part of the employer's undertaking in which they work and the type of work they are carrying out.

Appropriate representatives

If the union is recognised and the affected employees are in the bargaining unit that the union represents, then the employer must consult with the union. If some affected employees are outside the unit, then the employer must also consult with the elected representatives for those employees.

If there is no recognised union, the employer should consult with elected representatives for the affected employees. If there are no elected representatives, the employer must invite the affected employees to elect them.

Formal recognition agreement

Recognition, defined in section 178(3) of TULRCA, means the recognition of the union by an employer, to any extent, for the purpose of collective bargaining. Although a written recognition agreement is the best way of establishing that the union is recognised by the employer it is not essential.

Collective bargaining means any negotiations between a trade union and an employer relating to one or more of the following:

- Terms and conditions of employment or the physical conditions in which any workers are required to work
- Engagement or non-engagement, or termination or suspension of employment or the duties of employment of one or more workers
- Allocation of work or duties between workers or groups of workers
- Matters of discipline
- A worker's membership or non-membership of a trade union
- Facilities for trade union officials
- Machinery for negotiation or consultation, and other procedures, relating to any of the above, including recognition by employers of the right of a union to represent workers.

Negotiation means more than consultation. It means bargaining with a view to reaching an agreement. So, for example, evidence that the employer held pay negotiations with the union would be sufficient to establish that the union was recognised for those employees in the pay bargaining unit.

> *"Negotiation means more than consultation. It means bargaining with a view to reaching an agreement."*

Consultation with employees

Consultation with employees must start "in good time" (that is, early enough to allow sufficient time for it to take place) and in any event:

- Where 100 or more redundancies are proposed at one establishment at least 45 days before the first notice of dismissal
- Where between 20 and 100 redundancies are proposed at one establishment at least 30 days before the first notice of dismissal.

Consultation must take place while the employer's proposals are still at a formative stage and must be undertaken with a view to reaching agreement about:

- Avoiding the dismissals
- Reducing the numbers of employees to be dismissed
- Mitigating the consequences of the dismissals.

The employer is not required to reach agreement with the appropriate representatives but consultation should be meaningful, which means that they should:

- Enter the consultation with an open mind
- Provide adequate information for the appropriate representatives to fully understand what they are being consulted about and to express their views
- Provide adequate time for the appropriate representatives to respond ➲

- Give proper consideration to the views of the appropriate representatives.

The ACAS guidance on Managing Staff Redundancies says that, as there is no legal requirement to consult face to face, employers may need to consult remotely during the coronavirus pandemic.

Employers are not allowed to issue notices of termination until the consultation process has concluded. If the employer has allowed enough time for the consultation process and meaningful consultation has taken place but the two sides have not been able to reach agreement, the employer can go ahead and issue notices of termination.

> *"If an employer fails to comply with any of the statutory requirements for consultation, the union can lodge a claim at an employment tribunal"*

Facilities for union representatives

Section 188(5A) of TULRCA says that employers must afford representatives whatever accommodation and other facilities may be appropriate in the circumstances. They must also allow them access to the affected employees.

The ACAS guidance on Trade Union Representation in the Workplace includes examples of the sorts of facilities that might be appropriate, such as: office space and accommodation for meetings, noticeboards, telephones and use of electronic media like email, intranet and internet.

It also points out that providing fully equipped temporary office space is particularly beneficial in helping union representatives discharge their duties, especially where a large number of employees are affected both directly and indirectly.

Bringing a claim

If an employer fails to comply with any of the statutory requirements for consultation, the union can lodge a claim at an employment tribunal under section 189 of TULRCA.

The complaint must be presented within three months less one day from the date of the last of the dismissals to which the complaint relates.

If the union is not recognised (and in the case of any affected employees who are not in the bargaining unit), the claimant will be:

- Employee representatives, where they were elected and consultation should have been with them
- Any of the affected employees, where employee representatives should have been elected but were not.

Remedies

If the tribunal agrees that the employer failed to comply with the statutory duty to consult, it can issue a declaration and/or make a protective award.

A protective award can only be made in favour of employees who have been dismissed as redundant and does not cover employees whom the employer originally proposed to dismiss but then decided to keep on.

In deciding the amount of the protective award, the tribunal will consider what is just and equitable in the circumstances, considering the seriousness of the employer's failure to consult. But it can be up to 90 days' pay for each employee who is dismissed.

The purpose of the award is to impose a sanction on the employer for breach of their obligations under section 188; it is not to compensate the employees for loss which they have suffered in consequence of the breach.

Employment tribunals have a wide discretion to do what is just and equitable in all circumstances, but the focus should be on the seriousness of the employer's default. The default may vary from a technical failure to provide some of the required information to a complete failure to consult.

How the employment tribunal assesses the amount of the protective award is a matter for the tribunal itself, but a proper approach in a case where there has been no consultation is to start with the maximum period and reduce it only if mitigating circumstances justify a reduction to an extent that it considers appropriate.

Neil Guss explains the rules for calculating statutory redundancy pay and sets out what happens if the employer becomes insolvent

Redundancy pay and insolvency

To decide how much someone should be paid when they have been made redundant, various factors are set out in section 162 of the Employment Rights Act 1996 (ERA).

These factors are:

- The age of the employee
- Their total number of completed years' service with the employer
- Their weekly (gross) rate of pay.

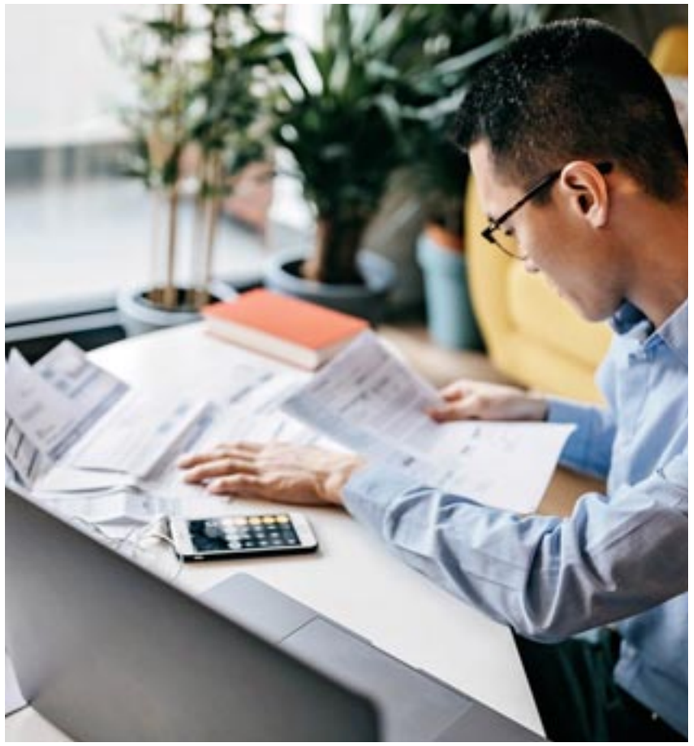
It is worth remembering that these rules only apply to statutory redundancy payments. Some employees may also be entitled to contractual payments governed by their contract of employment, as opposed to the law.

Service at dismissal

There are several steps that trade union reps need to follow to calculate a statutory redundancy payment. Firstly, they have to start with the date that the employment ended. This is called the "relevant date" in the legislation. They then need to work backwards to calculate the total number of complete years that the employee has worked.

The relevant date for the purpose of the redundancy calculation is:

- The date that notice expires (assuming that notice of termination was given)
- The date that the employee was told that they were being dismissed if they were dismissed without notice, or
- The date that a fixed-term contract ended if relevant.



Working backwards from the relevant date will give the number of years that can be included in the calculation. It is important to note that:

- Only complete years count towards the calculation, so any year that was not a complete year of service has to be rounded down
- Only a maximum of 20 years can be counted.

Entitlement to the appropriate amount

Employees are entitled to what is referred to as an "appropriate amount" in section 162 ERA for each completed year of service working backwards from the date of dismissal.

The appropriate amount is calculated according to the age of the employee at the date of dismissal – again working backwards from the date of dismissal.

The appropriate amount is:

- One and a half weeks' pay for a year of employment in which the employee was not below the age of 41
- One week's pay for a year of employment in which the employee was not below the age of 22, and
- Half a week's pay for each year of employment when the employee was under the age of 22.

Amount of payment

The legislation states that statutory redundancy payments are based on a "week's pay" at the "calculation date". Contrary to what reps might think, the calculation date is not actually the date that the employment ended. Instead, it is the date, working backwards from the date the employment did end, that the employer would have had to have given notice to comply with the minimum statutory notice requirements.

"Employees with normal working hours, whose pay does not vary with the amount of work they do, are entitled to the amount payable under their contract assuming that they worked their normal weekly working hours"

The legislation stipulates that employers must give, at a minimum, one week's notice for each completed year of service by the employee. So, for example, if an employer was required to give 12 weeks' notice, the calculation date would be the amount of a week's pay 12 weeks before the contract ended and not what the employee was paid in the last week of their employment.

A week's pay is the gross weekly pay of an employee subject to a cap, which usually changes in April each year. The current maximum amount for a week's pay is £538. At the time of writing the maximum statutory redundancy payment would therefore be:

£538 x 1.5 x 20 years = £16,140.

A week's pay is the pay received by an employee at the calculation date although this can vary depending on whether the employee works normal working hours.

Employees with normal working hours, whose pay does not vary with the amount of work they do, are entitled to the amount payable under their contract assuming that they worked their normal weekly working hours. In this scenario, a week's pay is effectively the employee's basic weekly pay and usually excludes overtime.

If the employee has normal working hours but their pay varies according to the amount of work they do, their week's pay is based on their average pay during those normal working hours over the previous 12 working weeks.

If the employee does not have normal working hours, a week's pay is calculated as an average of everything they earned in the previous 12 weeks and would therefore include any overtime and/or commission thus earned.

The effect of furlough

Any employee made redundant while on furlough whose calculation date was on or before 31 March 2021 is entitled to a payment based on a week's pay immediately before they were furloughed.

As such, any reduction made to their pay because they had been furloughed must be ignored. Please note that these are the rules at the time of publication, but they are subject to change.

Employer insolvency

There are, however, circumstances in which an employer may fail to pay their employee a statutory redundancy payment. This usually happens when they have become insolvent, although there have been instances where the employer simply refused or was unable to pay.

In these circumstances, the redundant employee can apply to the Secretary of State for the payment to be made out of the National Insurance Fund. However, they can only do this if:

- The employer has not paid, or has only partially made a statutory redundancy payment, and the employee has taken all reasonable steps other than legal proceedings to recover the payment, or
- The employer is insolvent and the payment, or part of the payment, remains unpaid.

It is not therefore necessary for the employer to have gone into insolvency for the employee to make a claim. In other words, employees can still make a claim against the fund if their employer is still trading or has ceased trading but is not insolvent and has not given them a redundancy payment.

If the employer is trading as a limited company, they will be deemed to have gone into insolvency if:

- A winding-up order has been made or a resolution for voluntary winding up has been passed
- The company is in administration for the purposes of the Insolvency Act 1986
- A receiver or (in England and Wales only) a manager of the company's undertaking has been appointed, or (in England and Wales only) possession has been taken by or on behalf of the holders of any debentures secured by a floating charge of any property of the company comprised in or subject to the charge, or
- A voluntary arrangement proposed in the case of the company for the purposes of Part I of the Insolvency Act 1986 has been approved.

If, however, the employer was trading as an individual (as opposed to a limited company), they will be deemed to have gone into insolvency if they have been adjudged bankrupt or have died and their estate is being administered under the Insolvency Act. These cases are rare, however, as most employers trade as limited companies.

In situations where an employer has gone insolvent and administrators have been appointed, they will generally help employees to make a claim to the National Insurance Fund by ensuring they complete the correct form (an RP1) and by giving general advice and support on how to make a claim.

However, this is unlikely to happen with small employers. It is therefore important for members to ask their trade union for guidance on how to recover any payment owing to them.

Making a claim

Employees have to fill out an RP1 form which they then send to the Secretary of State who has to be satisfied that:

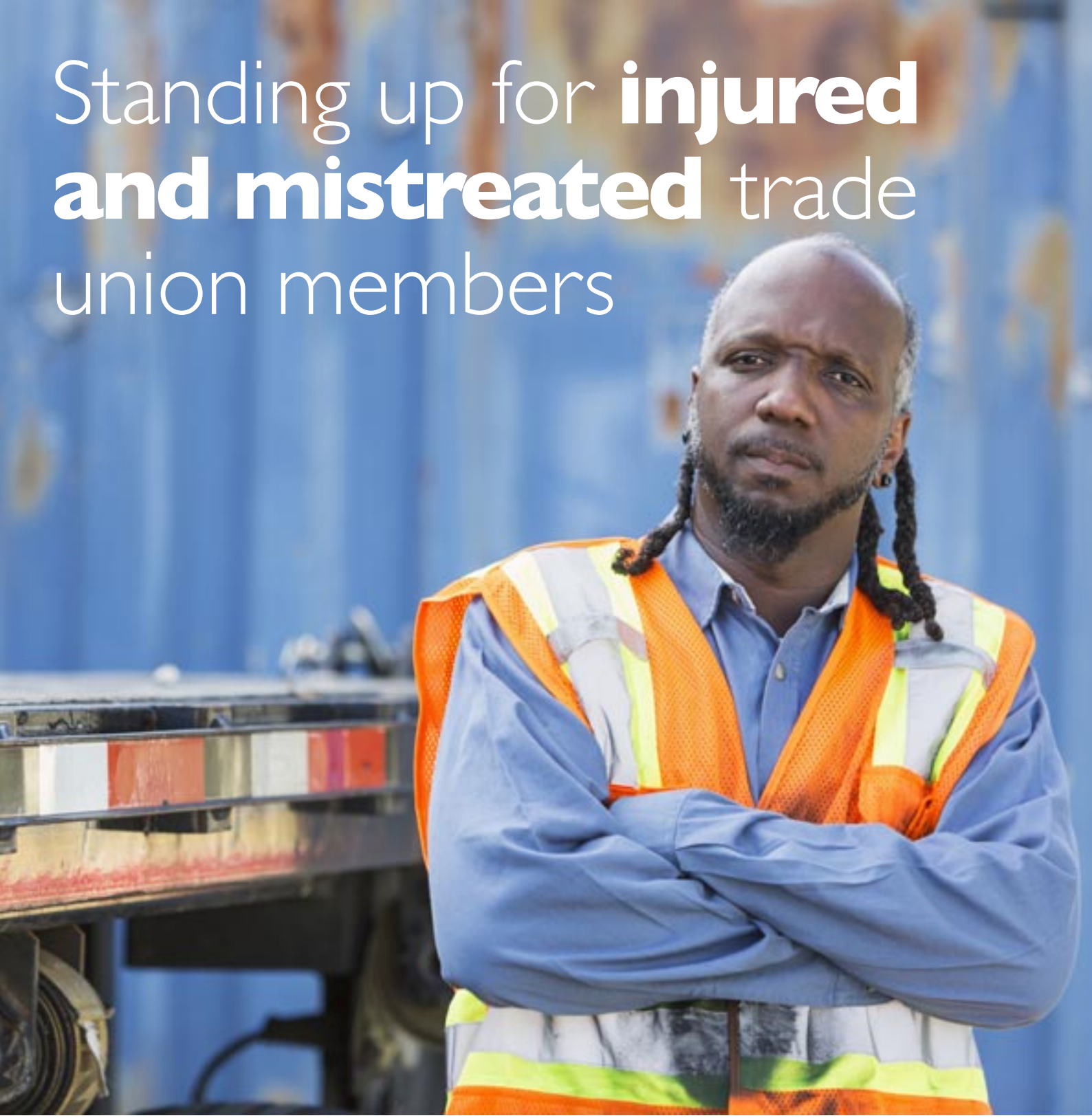
- The employee is entitled to the payment
- The payment remains outstanding either because of non-payment or because the employer has become insolvent.

If the Secretary of State is satisfied that the employee is entitled to the payment, it will then be made. If, however, they refuse the claim, the employee should lodge a tribunal claim to determine whether the employer was liable to pay and if so, how much they should pay.

It is worth repeating that members should seek immediate advice from their union if they are being threatened with redundancy or have been made redundant but have not been paid and are not clear how to ensure they receive their statutory redundancy payment.

Useful Links

ACAS redundancy guidance
Gov.uk redundancy guidance
Online redundancy calculator



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