(c) Where conduct is the main reason, the employer must show, on a balance of probabilities, that at the time of the dismissal he believed the employee was guilty of misconduct and that in all the circumstances of the case it was reasonable for him to do so.

(d) During the disciplinary hearings and the appeal process the employer must have been fair to the employee. In particular, the employee must have been heard and allowed to put his case properly or, if he was not at a certain stage of the procedures, this must have been corrected before dismissal.

Following parliamentary approval of a code of practice on disciplinary and grievance procedures issued by ACAS the government brought into force both the code and the new statutory right of a worker under ss 10–15 of the Employment Relations Act 1999 to be accompanied, if he or she so requests, by a fellow employee or a trade union representative at a disciplinary or grievance hearing. The code supplements the statutory provisions.

These rights allow a trade union official to enter the workplace to represent a trade union member if the member so requests, even though a trade union (or that particular union) is not recognised by the employer. Refusal to allow accompaniment will mean that a tribunal can make an award of up to two weeks' pay against the employer and a refusal of the right followed by a dismissal will result in the chances of a successful unfair dismissal claim being increased. The employer need not tell the worker of the right.

As regards the role of the companion at the hearing, the Employment Relations Act 2004 inserts provisions into the Employment Relations Act 1999 which deal with the rights of the companion.

The employer must permit the companion to put the worker's case on behalf of the worker, to sum up that case, respond on the worker's behalf to any view expressed at the hearing or meeting, and confer with the worker during the hearing.

The employer is not required to permit the companion to answer questions on behalf of the worker, address the hearing if the worker indicates that he or she does not wish the companion to do so, or use the powers given by the Act in any way that prevents the employer from explaining his or her case or prevents any other person at the hearing from making a contribution to it.

Statutory grievance and disciplinary procedures

The Employment Act 2002 in s 29 and Sch 2 provides statutory disciplinary and grievance procedures. These have already been considered earlier in this chapter. Section 30 of the Act of 2002 makes it an implied term of every contract of employment that the statutory procedures are to apply and employers and workers cannot contract out of them. Contractual procedures may continue so long as they are as protective as the statutory procedures and the latter are there anyway if the worker wishes to use them. Provided the statutory procedures are followed in a reasonable manner their fairness will not normally be challenged by the courts and the major case on the requirement for fair procedures – the House of Lords ruling in *Polkey* v *A E Dayton Services Ltd* [1988] ICR 564 – will not apply.

Employee's contributory fault

This can reduce the compensation payable to the employee by such percentage as the tribunal thinks fit. Suppose an employee is often late for work and one morning his employer, who can stand it no more, sacks him. The dismissal is likely to be unfair in view of the lack of warning but a tribunal would very probably reduce the worker's compensation to take account of the situation.

Principles of natural justice also apply; it is necessary to let the worker state his case before a decision to dismiss is taken. Furthermore, reasonable inquiry must be made to find the truth of the matter before reaching a decision. Failure to do this will tend to make the dismissal unfair.

Unacceptable reasons for dismissal

These are as follows.

(a) Dismissal in connection with trade unions. This has already been considered.

(b) Unfair selection for redundancy. An employee dismissed for redundancy may complain that he has been unfairly dismissed if he is of the opinion that he has been unfairly selected for redundancy, as where the employer has selected him because he is a member of a trade union or takes part in trade union activities, or where the employer has disregarded redundancy selection arrangements based, for example, on 'last in, first out'. Ideally, all employers should have proper redundancy agreements on the lines set out in the Department of Work and Pensions booklet, *Dealing with Redundancies*.

However, even though there is in existence an agreed redundancy procedure, the employer may defend himself by showing a 'special reason' for departing from that procedure, e.g. because the person selected for redundancy lacks the skill and versatility of a junior employee who is retained.

There is, since the decision of the EAT in *Williams* v *Compair Maxam* [1982] ICR 156, an overall standard of fairness also in redundancy arrangements. The standards laid down in the case require the giving of maximum notice; consultation with unions, if any; the taking of the views of more than one person as to who should be dismissed; a requirement to follow any laid down procedure, e.g. last in, first out; and finally, an effort to find the employees concerned alternative employment within the organisation. However, the EAT stated in *Meikle* v *McPhail* (*Charleston Arms*) (1983) (see Case **259**) that these guidelines would be applied less rigidly to the smaller business.

The statutory provisions relating to consultation on redundancy are considered later in this chapter.

(c) Industrial action. The position in this context has already been considered.

(d) Dismissals in connection with pregnancy, childbirth and parental and dependant leave. The relevant law has already been considered.

(e) Pressure on employer to dismiss unfairly. It is no defence for an employer to say that pressure was put upon him to dismiss an employee unfairly. So, if other workers put pressure on an employer to dismiss a non-union member so as, for example, to obtain a closed shop, the employer will have no defence to a claim for compensation for the dismissal if he gives in to that pressure. If an employer alleges that he was pressurised into dismissing an employee and that pressure was brought on him by a trade union or other person by the calling, organising, procuring or financing of industrial action, including a strike, or by the threat of such things, and the reason for the pressure was that the employee was not a member of the trade union, then the employer can join the trade union or other person as a party to the proceedings if he is sued by the dismissed worker for unfair dismissal. If the tribunal awards compensation, it can order that a person joined as a party to the proceedings pay such amount of it as is just and equitable, and if necessary this can be a complete indemnity so that the employer will recover all the damages awarded against him from the union.

(f) Transfer of business. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) apply. Under the Regulations if a business or part of it is transferred and an employee is dismissed because of this, the dismissal will be treated as automatically unfair. In this case the one-year service limit with the transferor employer applies.

If the old employer dismissed before transfer, or the new employer dismissed after the transfer, either will have a defence if he can prove that the dismissal was for 'economic, technical or organisational' reasons requiring a change in the workforce and that the dismissal was reasonable in all the circumstances of the case.

> *Meikle* v *McPhail (Charleston Arms)*, 1983 – A dismissal for economic reasons (**259**)

The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 (SI 1995/2587) as amended apply. These Regulations are dealt with more fully later in this chapter but they do require consultation on transfer of business. The provisions mirror those which relate to collective redundancies except that there is no limitation on the number of employees who have to be affected by the transfer before a duty to consult arises. The employer will have to consult relevant representatives as described later in this chapter even if only one person is to be transferred.

(g) Health and safety dismissals and detriments. Designated or acknowledged health and safety representatives must not be subjected to detriments, e.g. loss of overtime, for carrying out health and safety activities in the workplace. Dismissal for these reasons is automatically unfair and there is no service requirement. These provisions also apply to ordinary employees, regardless of service, who leave or refuse to return to the workplace because of a health hazard reasonably thought to exist.

The same is true under the Health and Safety (Consultation with Employees) Regulations 1996 (SI 1996/1513) where the dismissal is of a worker safety representative elected to take part in the health and safety consultation process where there is no recognised trade union.

(h) Dismissal for asserting statutory rights. This protects employees, regardless of service, against dismissal for trying to enforce employment rights under the ERA that can be brought before a tribunal, e.g. where the employee has asked for written particulars of the job. Dismissal will be unfair even if the worker does not in fact have the right, provided he has acted in good faith.

(i) Dismissal for performing the duties of a member-nominated trustee of an occupational pension scheme.

(j) Dismissal for performing the duties of an employee representative in redundancy consultation or putting up for election to be one.

Unfair dismissal and frustration of contract

In cases appearing before employment tribunals there is a certain interplay between the common-law rules of frustration of contract (see Chapter 17) and the statutory provisions relating to unfair dismissal. At common law a contract of service is frustrated by incapacity, e.g. sickness, if that incapacity makes the contract substantially impossible of performance at a particularly vital time, or by a term of imprisonment. If a contract has been so frustrated, a complaint of unfair dismissal is not available because the contract has been discharged on other grounds, i.e. by frustration. Thus, termination of a contract of service by frustration prevents a claim for unfair dismissal.

It is, of course, necessary now in terms of the sickness or incapacity of an employee for the employer to be alert to the rules about disability discrimination, particularly where an adjustment to working conditions might enable an employee to do the job satisfactorily.

Remedies for unfair dismissal

These are as follows.

Conciliation

An employment tribunal will not hear a complaint until a conciliation officer has had a chance to see whether he can help, provided that he or she has been *requested* so to do by a party to the potential complaint. A copy of the complaint made to the employment tribunal will in such a situation be sent to a conciliation officer of the Advisory, Conciliation and Arbitration Service (ACAS) and, if he is unable to settle the complaint, nothing said by the employer or employee during the process of conciliation will be admissible in evidence before the tribunal.

The reference of cases to a conciliation officer has led to the settlement of some one-third of them before the tribunal hearing, but the parties do not have to become involved in this procedure.

ACAS arbitration and compromise agreements

The following provisions of the Employment Rights (Dispute Resolution) Act 1998 should be noted.

Part II of the Act contains provisions to allow parties to opt for their dispute to be resolved by independent binding arbitration and gives ACAS powers to pay for and provide an arbitration service for claims of unfair dismissal and unlawful discrimination.

Part II also contains provisions making changes to the law relating to compromise agreements. The parties to an individual employment rights dispute may conclude that dispute by reaching, for example, a financial settlement. For such an agreement to be binding, the parties must have settled after an ACAS-appointed conciliation officer has taken action, or, alternatively, the terms of the settlement must be contained in a private compromise agreement. Formerly, a compromise agreement that had not involved ACAS had to be made in circumstances where the employee had received independent legal advice from a qualified lawyer. The 1998 Act changes this to advice from any independent adviser, provided that advice is covered by an insurance policy or an indemnity provision for members of a profession or professional body (ss 9 and 10). This will allow trade unions, advice agencies and others – in addition to lawyers – to give relevant advice.

Other provisions of Part II allow ACAS-appointed conciliation officers to conciliate in claims relating to statutory redundancy payments where before they had no duty to conciliate, as they have in almost all other individual employment rights disputes (s 11).

There are also provisions that clarify, streamline and make more flexible current legislation under which employers and employer-recognised trade unions can, by making a dismissal procedures agreement, opt out of the statutory rules on unfair dismissals (s 12).

Other remedies

An employee who has been dismissed may:

(*a*) seek reinstatement or re-engagement; or
(*b*) claim compensation.

The power to order (*a*) above is discretionary and in practice rarely exercised. However, reinstatement means taken back by the employer on exactly the same terms and seniority as before; re-engagement is being taken back but on different terms.

Calculation of compensation

Before proceeding further with a study of the calculations, it should be noted that the basic award is based on *gross* pay, but the compensatory award is based on *net* pay. A cap of £60,600 is placed on compensatory awards but this is removed for those who are unfairly dismissed for blowing the whistle on illegal practices or health and safety matters and who are protected against such dismissal by the Public Interest Disclosure Act 1998. There is no ceiling on such awards. This is because it was thought that some senior executives might have been deterred from whistle-blowing since they would have the most salary to lose. The basic award is calculated with reference to a week's pay that is currently £310, but is automatically increased annually to a figure that is index linked to the retail price index for September of each year. This is a maximum figure so gross pay is the starting point, but if this exceeds £310, the figure of £310 applies.

The compensation for unfair dismissal is in four parts as follows.

(a) The basic award (maximum: £8,700). This award is computed as a redundancy payment (see p 481 before reading on). There is a maximum of 20 years' employment counted (giving a maximum of 30 weeks' pay). Contributory misconduct or fault of the employee is taken into account.

Example

Fred, a 35-year-old lorry driver employed for 10 years earning £400 per week (take home £350) is unfairly dismissed. He did his best to get a comparable job but did not in fact obtain one until one week before the tribunal hearing to start two weeks after the tribunal hearing. Fred had a history of lateness for work and his contributory fault is assessed at 25 per cent.

Fred's basic award: Fred is in the category of 22 years of age or over but under 41 years of age for redundancy, which allows one week's gross pay for every year of service:

10 × £310	£3,100
Less: 25%	£ 775
	£2,325 = basic award

There is a minimum basic award of £4,200 (currently) where the dismissal is due to trade union membership or activities, duties of a health and safety representative, trustee of an occupational pension scheme or employee representative. This may be reduced for contributory fault. The amount of the basic award is only *two weeks'* pay where the tribunal finds that the reason or principal reason for the dismissal was that the employee was redundant and then:

- he unreasonably refused or left suitable alternative employment; or
- his employment was renewed or he was re-engaged and he was, therefore, not considered dismissed (s 121, ERA 1996).

(b) Compensatory award (maximum: £60,600). This consists of:

(i) estimated loss of wages, *net of tax and other deductions* to the date of the hearing less any money earned between date of dismissal and the hearing;
(ii) estimated future losses;
(iii) loss of any benefits such as pension rights and expenses;

(iv) loss of statutory rights. An award under this heading is given for loss of minimum notice entitlement. For example, Fred has been continuously employed for 10 years. He was entitled to 10 weeks' notice, which he did not get. He now has a new job but it will take him time to build up that entitlement again. A tribunal can award something for this. Once again, contributory fault is taken into account.

A compensatory award is not linked to a redundancy payment as a basic award is. The figure of one week's pay of £310 does not apply; the calculation is based on actual net pay and is designed to recompense the worker for the financial loss suffered as a result of being dismissed. The basic award is payable in all cases regardless of proved loss. The following example assumes that Fred had been out of work for 10 weeks before the tribunal hearing.

Fred's compensatory award:

		£
The loss up to the hearing	10 × £350	3,500
Loss up to time of getting new job	2 × £350	700
		4,200
Less: 25%		1,050
		3,150
	£	
Loss of statutory rights: a nominal figure of	100	
Less: 25%	25	75
		3,225

Fred's total award is therefore:

	£
Basic	2,325
Compensatory	3,225
	5,500

If Fred has lost anything else, e.g. use of firm's van at weekends and/or pension rights, these would be added to the compensatory award subject to 25 per cent discount for contributory fault.

Those on higher salaries may very well reach the maximum of £60,600. If the sum calculated in accordance with the above example exceeds the statutory ceiling, only £60,600 is awarded.

Additional award. This is payable in addition to the above where an employer fails to comply with an order for reinstatement or re-engagement unless it was not practicable for him to do so.

The amount of the additional award was varied by the Employment Relations Act 1999, s 33(2) and is now at one level, i.e. an amount not less than 26 weeks' nor more than 52 weeks' pay, subject to a weekly maximum of £310, i.e. £8,060 minimum and £16,120 maximum.

In all cases a deduction will be made for contributory fault, if any, of the employee.

Any unemployment or supplementary benefits received by the employee are deducted from any award made by a tribunal. However, the employer must pay the amount(s) in question direct to the DSS.

As regards *ex gratia* payments the general principle is that if the employer has made such a payment to the complainant in connection with the dismissal credit will be given for this in fixing the amount of compensation if and only if the dismissal is in the context of being unfairly chosen for redundancy. This results from the provisions of s 122 of the ERA as

interpreted in *Boorman* v *Allmakes Ltd* (1995) *The Times*, 21 April. If the dismissal is not in that context, the employee keeps the *ex gratia* payment in addition to any compensation.

(c) Time limits. A claim for compensation against an employer must reach the tribunal within three months of the date of termination of employment. The period in regard to dismissal in connection with a strike or other industrial action is six months. A worker can claim while working out his notice but no award can be made until employment ends.

A tribunal can hear a claim after three months if the employee can prove that:

(i) it was not reasonably practicable for him to claim within three months;
(ii) he did so as soon as he could in the circumstances.

Unfair dismissal: damages for injury to feelings not available

For many years the position regarding injury to feelings damages in unfair dismissal cases was clear. The judgment of the President of what was then the Industrial Relations Court in *Norton Tool Co* v *Tewson* [1972] IRLR 86 applied and was to the effect that no such damages were available. Loss in unfair dismissal claims was restricted to direct economic loss.

However, in *Johnson* v *Unisys Ltd* [2001] 2 All ER 801 Lord Hoffmann in remarks not essential to his judgment, i.e. *obiter* took the view that there was no reason why damages for injured feelings should not be awarded.

Since then some tribunals have gone along with Lord Hoffmann's remarks and made awards for injured feelings while others have refused to do so and have stood by the decision in *Norton Tool*.

The House of Lords has now ruled that damages for injury to feelings are not available in unfair dismissal claims. The legal position in these cases is thus clarified. The ruling was given in *Dunnachie* v *Kingston Upon Hull City Council* [2004] 3 All ER 1011.

Internal appeal procedures

The Employment Act 2002 procedures have already been considered earlier in this chapter along with the sanctions for failing to follow them.

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Discriminatory dismissal

In addition to legislation relating to unfair dismissal generally, the various discrimination regulations deal with complaints to employment tribunals for dismissal on the grounds of discrimination. The nature and scope of these provisions have already been considered and it is only necessary to add here that there are provisions in the ERA which prevent double compensation being paid, once under discrimination legislation, and once under the general unfair dismissal provisions of the ERA.

Redundancy

The ERA gives an employee a right to compensation by way of a redundancy payment if he is dismissed because of a redundancy.

Meaning of redundancy

Under the ERA redundancy is *presumed* to occur where the services of employees are dispensed with because the employer ceases, or intends to cease carrying on business, or to cease to carry on business at the place where the employee was employed, or does not require so many employees to do work of a certain kind as where the number of staff is to be reduced because of a fall in work. Employees who have been laid off or kept on short time without pay for four consecutive weeks (or for six weeks in a period of 13 weeks) are entitled to end their employment and to seek a redundancy payment if there is no reasonable prospect that normal working will be resumed.

Managing redundancies

After a number of conflicting decisions on what could amount to redundancy the matter was largely resolved by the House of Lords in *Murray* v *Foyle Meats Ltd* [1999] 3 All ER 769. In that case their Lordships ruled that for employees to be regarded as redundant two things had to be shown:

- that there is a state of affairs in the employer's business which meets the statutory definition of redundancy, e.g. less work; and
- that the employee's dismissal is wholly or mainly *attributable* to that state of affairs.

Thus employer A makes widgets. There is a loss of orders and a diminution in the requirements of production. Therefore, anyone dismissed by reason of the general reduction in orders is to be regarded as redundant because the redundancy is *attributable* to the loss of orders. So if the employer applies a first-in first-out policy across the workforce, the dismissals will be regarded as redundancy and not the more costly ground of unfair dismissal.

In addition, a redundancy may be 'bumped'. Thus if Jones is to be dismissed because the employer no longer needs anyone to do his job the employer may, instead of dismissing Jones, give Jones Green's job and dismiss Green, e.g. on a first-in last-out basis Jones having been employed by the firm for longer than Green. Green may well be found to have been dismissed on the ground of redundancy although he has been 'bumped' out of his job by Jones. The decision in *Murray* sanctions this.

It should however be said that although the House of Lords in *Murray* put it in terms that Green's dismissal was *attributable to redundancy* it does seem that his dismissal arises not so much out of the redundancy situation but rather out of the way it was *managed*. The flexibility that the *Murray* decision allows saves the employer money in that he will not face a claim for unfair dismissal where the compensation can be much higher, e.g. where the tribunal proceeds to make a compensatory award.

Eligibility

In general terms, all those employed under a contract of service as employees are entitled to redundancy pay, including a person employed by his/her spouse. Furthermore, a volunteer for redundancy is not debarred from claiming. However, certain persons are excluded by statute or circumstances. The main categories are listed below.

(a) A domestic servant in a private household who is a close relative of the employer. The definition of 'close relative' for this purpose is father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, or half-sister.

(b) An employee who has not completed at least two years of continuous service. There is now no minimum age for starting continuous service under the Age Regulations. Alternate week working does not break continuity (*Colley* v *Corkindale t/a Corker's Lounge Bar* (1996) IRLB 8).

These continuous service provisions remain unchanged under amendments made by the Unfair Dismissal Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 1999 that apply only to claims for unfair dismissal that can now be brought after one year's service.

(c) The right to claim a redundancy payment was lost by either sex at the age of 65 or the normal retiring age in the business for employees holding the position in question if earlier. Under the Age Regulations, employees who are dismissed for redundancy but who have attained the normal retiring age or 65 continue to be entitled to a redundancy payment.

(d) An employee who is *dismissed for misconduct* loses the right to a redundancy payment. In the circumstances of the *Boychuk* and *Kowalski* cases we can note that, although these cases were brought for unfair dismissal, they were also situations in which the employees concerned would have lost the right to a redundancy payment because the dismissal was not for redundancy. The only issue was whether there had been an unfair dismissal.

An employee who accepts an offer of suitable alternative employment with his employer is not entitled to a redundancy payment. Where a new offer is made, there is a trial period of four weeks following the making of the offer, during which the employer or the employee may end the contract while retaining all rights and liabilities under redundancy legislation.

Fuller v *Stephanie Bowman*, 1977 – Unreasonable refusal of alternative employment (**260**)

Time limits

The employee must make a written claim to the employer or to an employment tribunal within six months from the end of the employment. An employment tribunal may extend the time for a further six months making 12 months in all, provided that it can be shown that it is just and equitable having regard to the reasons put forward by the employee for late application.

Amount of redundancy payment

Those aged 41 or over receive one-and-a-half weeks' pay (*up to a maximum of £310 per week*) for each year of service up to a maximum of 20 years. This period is *not* changed by the Age Regulations. In other age groups the above provisions apply, except that the week's pay changes: i.e. for those aged 22 but under 41, it is one week's gross pay; and for those under 22, it is a half week's pay. Service before the eighteenth birthday now counts under the Age Regulations and there is no maximum age.

For example, a man of 52 who is made redundant having been continuously employed for 18 years and earning £340 per week as gross salary at the time of his redundancy would be entitled to a redundancy payment as follows:

34 to 41 years = 7 years at one week's pay	=	7 weeks
41 to 52 years = 11 years at one-and-a-half weeks' pay	=	$16^1/_2$ weeks
		$23^1/_2$ weeks

It follows, therefore, that the redundancy payment would be $23^1/_2$ weeks × £310 = £7,285.

Complaints by employees in respect of the right to a redundancy payment or questions as to its amount may, as we have seen, be made to an employment tribunal which will make a declaration as to the employee's rights which form the basis on which payment can be recovered from the employer.

Procedure for handling redundancies

Any agreed formula must be followed, e.g. last-in, first-out. Selection procedures may also be based on poor work performance or attendance record and there is no requirement on the employer to determine reasons for this (*Dooley* v *Leyland Vehicles Ltd* [1986] IRLR 36). In *Byrne* v *Castrol (UK) Ltd* (1997) 568 IRLB 12, the EAT decided that where selection for redundancy was based on absence records there was no need to go into the reasons for the absences since this failure to enquire made the selection more objective. If there is no agreed procedure the employer must decide after considering the pros and cons in each case.

It should be noted that the dismissal may well be unfair if some reasonable system of selection is not followed. In this connection the EAT decided in *Rogers* v *Vosper Thorneycroft (UK) Ltd* [1988] IRLR 22 that last-in, first-out is a relevant system but merely asking for volunteers is not. There must be some criteria, though calling for volunteers is acceptable as a preliminary step in the matter of eventual selection. The decision was affirmed by the Court of Appeal (see *The Times*, 27 October 1988). Everyone should, as far as possible, be allowed to express his or her views, e.g. through elected representatives, if any. An attempt to relocate a redundant worker should be considered. Failure to do so can result in a finding of unfair dismissal unless, of course, there was no chance of finding suitable alternative work. Fairness in the search for alternative work involves looking at other companies within a group (EAT decision in *Euroguard Ltd* v *Rycroft* (1993) 477 IRLB 5).

Selecting, say, a white single woman or a West Indian single man to go, rather than a married white man with two children and a mortgage, might appear to be humane. However, unless the decision is made on the basis of competence, experience, reliability and so on, the dismissal is likely to be unfair and also a breach of the SDA and/or the RRA. Selection on the grounds of gender reassignment, sexual orientation, religion or belief and disability would also be unfair.

Consultation on redundancies

The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999 (SI 1999/1925) apply. The Regulations substantially amend s 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 as follows:

- the obligation to consult about redundancies now arises where the employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. This change will remove the need to consult from some 96 per cent of UK businesses;
- where consultation is required the employer must consult all those who are 'appropriate representatives';
- appropriate representatives of employees are:
  (1) employee representatives elected by them; or
  (2) if an independent trade union is recognised by the employer, representatives of the union.

Where the employees elect representatives and belong to a recognised union, the employer has a choice whether to consult the union or the elected representatives. It will be noted that

the Regulations extend the requirement to consult to non-union workplaces. They further provide that:

- Employee representatives may be elected by the employees for the specific purpose of consultation or while not having been specifically elected it is appropriate to consult them as where they are members of an existing works council or joint consultative committee. In all cases the employee representatives must be employed by the employer. No method is stipulated in the Regulations which means that *ad hoc* procedures as and when a redundancy situation will arise are acceptable.
- Consultation must begin in good time as distinct from the earliest opportunity as was formerly required and before reaching final conclusions, and in any case.
- Where the employer is proposing to dismiss 100 or more employees at one establishment within 90 days or less, consultation must begin, as before, 90 days *before any notice of dismissal is served*. In cases involving less than 100 but at least 20 employees, consultation must begin at least 30 days before that date. This means that the employer must wait the full 30- or 90-day period before serving notice and not, as before, when the first redundancies took effect. Thus the employee gets the full consultation period plus pay for the notice period plus any redundancy package (see the Collective Redundancies (Amendment) Regulations 2006).
- Appropriate representatives must be given access to employees who are to be made redundant and facilities, e.g. an office and a telephone must be made available to them.

It should of course be borne in mind that fairness towards employees in a redundancy situation is always paramount if the matter goes to a tribunal asserting unfair dismissal. Therefore, individual consultation may be required even where the numbers involved are less than 20 and even though, the numbers being more, there has been consultation with representatives. Thus, in *Mugford* v *Midland Bank plc* [1997] IRLR 208 the EAT, in confirming that a particular employee had not in the circumstances been subject to unfairness, commented that if a person is selected for redundancy, individual consultation may become important in the circumstances of the case, even if the employer (as he had in this case) has conducted detailed consultation with what were in this case union representatives.

It should be noted:

- that consultation must cover employees who have volunteered for redundancy; and
- although consultation does not have to end in agreement, it must always be properly conducted.

It is, perhaps rather obviously, direct discrimination not to consult an employee about redundancy because she is on maternity leave (see *McGuigan* v *T&G Baynes* (1999) 622 IRLB 11), and employees who are on parental leave, paternity leave and adoption leave.

Notice

The employer must start the consultation process by giving written notice to the appropriate representatives stating:

(*a*) the reasons for the proposals;
(*b*) the numbers and descriptions of employees whom it proposes to dismiss as redundant;
(*c*) the total number of employees of that description. In *MSF* v *GEC Ferranti (Defence Systems) Ltd* (1994) 491 IRLB 12 the EAT held that the statutory period for consulting with a trade union over proposed redundancies did not begin when the employer gave the union a notice which contained only a 'best estimate' of the redundancies;