

Redundancy Talk – 27 January 2009

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The purpose of my talk today is to explore ways of advising clients on how to reduce the workforce in times of economic downturn.

In an ideal world a client would come for advice before deciding on who they want to make redundant. I appreciate that many of you will have to advise once the deed is done and in that case you will have to make the most of what may be a bad job.

If however your client is sensible and wants to ensure that any redundancy exercise is carried out fairly then I would suggest that the first place to start would be to discuss with them whether there are any options short of redundancy that could be used.

For example it may be possible to agree:

- a variation in working terms and conditions to avoid the need for redundancy
- working shorter hours
- 4 or 3 day week
- Home working

But if they do not agree it may be that the employer can impose a variation – in such cases it would be necessary to dismiss the employees and offer re-employment on different terms and conditions.

Transfer employees or offer alternative employment as instead of redundancy

- Exercise a mobility clause in the contract to move an employee to another office but if that is to happen then the employer has to be clear that he intends to invoke the mobility clause rather than apply redundancy procedures.

Home Office v Evans 2008 IRLR 59

- Offer alternative employment (4 week trial period) – if they refuse unreasonably then may not be entitled to redundancy payment

Voluntary Redundancy

It may be that some employees would take voluntary redundancy if it were offered. The difficulty of course is that your client may then lose some employees they would rather keep.

Employers also have to guard against voluntary redundancy schemes that are potentially discriminatory. For example if employees are paid higher severance payments because they have longer service that may be discriminatory if it cannot be justified.

Recent case of *McCulloch v ICI* [2008] ICR 1334 -

looked at the lawfulness of a severance payment agreement which gave more to members of staff with longer service. It was conceded by ICI that the scheme was discriminatory on grounds of age but that it was justified. The EAT held that in order to prove the usual test i.e. that the justification had to be a proportionate means to achieve a legitimate aim there had to be a balancing exercise done by the tribunal to weigh up the needs of the company against the discriminatory effect. The tribunal had not done this and the EAT held that it could not be assumed that because the scheme achieved certain business objectives that that necessarily justified the very significant differentials in pay.

Redundancy

In some ways a redundancy exercise can be an opportunity to rid an organisation of poorly performing employees which in normal circumstances is always very difficult without following rigorous capability procedures.

In what circumstances can a redundancy take place?:

S139 Employment Rights Act 1996

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

- (a) the fact that his employer has ceased or intends to cease—
 - (i) to carry on the business for the purposes of which the employee was employed by him, or
 - (ii) to carry on that business in the place where the employee was so employed, or
- (b) the fact that the requirements of that business—
 - (i) for employees to carry out work of a particular kind, or
 - (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,have ceased or diminished or are expected to cease or diminish.

In essence a redundancy situation will arise in the following circumstances:

- The actual or anticipated closure of the whole business
- The actual or anticipated closure of the employee's workplace
- The actual or anticipated reduction in the need for employees to carry out work of a particular type.

Associated Companies

A group of companies may, if it so chooses, select employees for redundancy from any part of the group, whether or not there is a redundancy situation in each individual company. In other words the group can be looked at as a whole when applying a redundancy selection procedure.

Closure of whole business – fairly obvious

Closure of employee's workplace – may be TUPE transfer or may be a closure of that particular workplace – but usually no difficulty in establishing where employees are employed to work. A temporary change in workplace will not change an employee's original place of work.

Where there is a mobility clause there was some confusion as to place of work but it is now clear that it will be where factually the person works.

Diminishing need for employees

This poses the greatest difficulty and it is essential to concentrate on the need for employees to carry out work

For example work may have increased but because of better technology there is a diminished need for employees to carry out that work

Or the work is still needed but has been contracted out – diminished need for employees

Reorganisation of the workplace resulting in a more efficient use of labour – diminishing need for employees

Do not focus on the individual – look at whether there is a need for employees to carry out that type of work. Ask first whether the requirements of the business for employees to carry out work of a particular kind have ceased or diminished. If so was the dismissal mainly or wholly attributable to that state of affairs.

Allows a business to look at its requirements as a whole and not look at individuals within an organisation.

Can also lead to what is known as Bumping - take a law firm – the property department is suffering due to a lack of transactions taking place. There is a diminished need for employees to carry out that work. The firm may take the view that they need to make savings as there are too many employees and not enough work coming in, they don't want to rid themselves of only one type of employee so they move some of the property people to other jobs e.g. from residential property to commercial property, they then decide to make someone in the commercial property department redundant.

The danger is that the tribunal will look much more closely at whether the dismissal of an employee where there is no diminution in work is in fact for reason of redundancy rather than some other reason that maybe put forward by the employee.

MOVING ON TO HOW TO CARRY OUT A REDUNDANCY DISMISSAL

How to ensure that a redundancy exercise is carried out fairly?

If you are clear that a redundancy situation exists how do you ensure that the employer carries out a fair procedure so that the employee cannot successfully challenge the dismissal at tribunal?

An employer is unlikely to be challenged on the grounds that there was no redundancy situation if he can show that there were sound economic reasons for reducing the workforce on the basis of one of the grounds above.

The tribunal are unlikely to look behind what on the face of it appears to be a redundancy situation. They will however scrutinise the procedure used to select individuals for redundancy and may view the dismissal as either automatically unfair or unfair depending on the circumstances.

Automatic Unfair Dismissal

There are a host of reasons that can render a redundancy dismissal automatically unfair if it is found that the principal reason for dismissal was not redundancy:

- for example the employee made a protected disclosure or
- the employee was engaged in trade union activities or
- it was due to a TUPE transfer or
- importantly there was a failure to apply the statutory dismissal procedures.

In terms of the Disciplinary and Dismissal Procedures you need to make sure the employer:

- writes to all affected employees warning them of a redundancy situation, why such a situation has arisen and invite them to a meeting
- Hold a meeting where employers engage in genuine consultation – make the employee aware of the selection criterion, discuss their scores against those criterion, if they want to know other scores explain why they have fared worse than others – good practice to give other scores but not essential.
- Offer appeal procedure

In the case of *Davies v Farnborough College of Technology* 2008 IRLR 14 Mr Davies a lecturer was told at Step 1 letter that he was at risk of redundancy and the selection criterion used. At Step 2 meeting told that he had lowest score but not given an opportunity to challenge the scoring process until the appeal stage. Held that the employer was in breach of Step 2. They should have given him the basis of his score and it would have been sensible to give him his score in this case. Further it was held that a defect in Step 2 cannot be cured at appeal.

Unfair Dismissal

On what grounds might an employee challenge his or her selection for redundancy?

1. Procedural fairness

I have already indicated that the statutory procedure must be followed. Assuming that that has been followed it is also necessary to ensure that fair procedures are carried out.

Such things as consultation are important. Where the employer is proposing making 20 or more staff redundant within a period of 90 days or less then collective consultation procedures apply. Not going to go into detail here but the key number is 20. If the proposal is to make over 100 redundancies then the requirements are stricter.

It should be noted however that if the tribunal find that there is a failure in procedures other than statutory ones, then the employer can still argue under s98A(2) that the 'procedural' failure made no difference and the dismissals were nevertheless fair. The difficulty is that there is likely to be an overlap between procedural failings and substantive failings for example if the employer fails to consult over alternative employment and the tribunal find that there was suitable alternative employment then that is likely to be a substantive failing and cannot be cured by s98A(2).

2. Pool for selection

An employer needs to show that they have applied their minds to the problem of the correct pool. However as long as they can show this then the employer can define the pool in a flexible way.

The tribunal is likely to take into account the following factors when deciding how reasonably the employer has acted:

- Whether other groups of employees are doing similar work to the group from which selections were made
- Whether employees' jobs are interchangeable – warehouseman/drivers
- Whether different sites should be included in the pool
- Whether the selection unit was agreed with the union

Going back to law firm example, it may be all solicitors doing a certain type of transaction. But if others were interchangeable and could do that type of work and vice versa then it may be that the pool should be wider and those employees also included. For example all solicitors who undertake commercial transactions in Edinburgh and Glasgow.

A thorny problem is that of only including one level of seniority within a group of employees who undertake similar roles. For example if senior employees are placed in the pool should they be offered the more junior role before being placed in the pool?

Not necessarily as there is no obligation to consider bumping the junior employee in favour of the senior employee but care has to be taken to consider how different the senior employee's job is to the junior one, to look at the difference in remuneration, the relative length of service and to ensure that placing only one grade in the pool is justified.

3. Selection criterion

The criterion must be objective and verifiable by reference to data. Often employers are keen to use a redundancy exercise to weed out those who are least capable. However if they are to do this successfully they must have objective criterion upon which to base their assessment.

For example you could ask those in a pool to undertake a skills based test which is then measurable.

The employer could look at performance as long as it was objectively measured.

An organisation that does not measure performance should not rely on subjective assessments by the managers.

Disciplinary records can be used as can attendance records although with caution.

However, if any of the absences are attributable to the employee's disability under the DDA it might be considered that a reasonable adjustment would be to discount all of those absences from the selection criterion.

NB the consequences of allowing a discrimination claim to creep in through discriminatory conduct during the dismissal process can be expensive as it is likely that not only will the employer be unfairly dismissing an employee if a reasonable adjustment would have been to exclude the discriminatory selection criterion but also the compensation for discrimination is unlimited.

Length of Service criterion – *Rolls Royce PLC v Unite* [2008] EWHC 2420 (QB) – The union had agreed that as part of the matrix of selection criterion length of service should provide extra points to those with long service on the basis that loyalty was a justifiable business need. Rolls Royce argued that length of service was discriminatory.

It was held that it was justifiable in that length of service respects the loyalty and experience of the older workforce and protects the older employees from

being put onto the labour market at a time when they are particularly likely to find alternative employment hard to find.

Employers should be warned however that what is proportionate and what is a legitimate aim are largely questions of fact for the tribunal and therefore care should be taken when including such a criterion.

On a more positive note, once it is established that the criterion are objective then the tribunal will not subject them to minute scrutiny.