'Five common ways to foul-up a redundancy process'

British businesses are bracing themselves for yet another economic storm, which will bring a flurry of redundancy instructions for employment lawyers as businesses seek costs savings.

The last thing businesses will want to do is to compound their financial problems with avoidable errors in the redundancy process that render cost-saving dismissals unfair. That would merely store up further financial liabilities for another day -of up to 52 weeks' gross pay or, if lower, £93,878.

This article highlights, with examples, those areas of an 'ordinary' redundancy process[1] which if poorly planned or executed can lead to findings of unfair dismissal.

1. Calling it redundancy when it isn't

Redundancy has a specific legal meaning and arises when there is either a business closure, a workplace closure or the employer's diminished or diminishing requirements for employees to do work of a particular kind[2]. When companies are focused on costs savings, that definition is sometimes overlooked. Take the example of Bob, a car mechanic with 15 year's experience. Bob's employer is considering making him redundant for financial reasons because they have found someone else with 5 year's experience who can do Bob's work for 20% less pay. That is not a redundancy situation. There may be a pressing business need for to make those savings which Bob's employer *might* be able to justify as an SOSR reason. However, the business requirements for employees to do the work that Bob is employed to do have not diminished. So dismissing Bob <u>for redundancy</u> is unfair.

2. Late or Inadequate consultation

The fundamental obligation on employers in redundancy situations is always to consult with employees about key aspects of the redundancy decision making process when those questions are still in their "formative stages"[3], i.e., before the 'big decisions' are made and when the employees still have an opportunity to influence those decisions. Those big decisions generally relate to how the employer will choose the pool at risk, the selection criteria to be used and the steps they will take to avoid or minimize the impact of redundancies across the workforce.

The recent EAT decision in Mogane v Bradford Teaching Hospitals NHS Foundation Trust [2022] EAT 139 is a classic example of a needless employer blunder which meant that Nurse Mogane's redundancy dismissal was always going to be legally unfair: The Trust needed to make redundancies within Nurse Mogane's unit for "financial reasons". Nurse Mogane and one other colleague were employed on fixed term contracts. Without consulting Nurse

[1] Limited in scope, I do not deal with the additional layer of the statutory collective consultation processes, triggered when employers plan to make 20 or more employees redundant at one establishment within a 90-day period. Those rules can be found at s.188 -198 of the Trade Union and Labour Relations Act 1992 and carry sanctions for breaches which include protective awards, acting as penalties, which can be as much as 90 days' gross actual pay for each affected employee.

[2] section 139 of the Employment Rights Act 1996.

[3] R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price [1994] IRLR 72.

Mogane or her colleague, the Trust decided it would select on the basis of which employee's fixed term contract was due to expire the soonest. The decision simultaneously determined both that Nurse Mogane was in a pool of one and that she would be dismissed. This, the EAT held, was unfair: "Whilst a pool of one can be fair in appropriate circumstances, it should not be considered, without prior consultation, where there is more than one employee."

3. Unfair selection criteria

No issue is more important to the fairness of a redundancy than the criteria used to select from the pool of affected employees. Selection criteria should avoid subjectivity, not unlawfully discriminate and be capable of objective measurement[4]. Examples of subjective criteria torpedoed by previous Employment Tribunal decisions include: "*Attitude*" (Graham v ABF Ltd [1986] IRLR 90); "*Buy-in to company values*" (Howard v Siemens Energy Services ET/2324423/08); "*Someone who, in the opinion of the manager concerned, would keep the company viable*" (Williams).

Redundancy selection criteria which offend equality law will almost certainly render dismissals unfair. A recent example of unlawfully discriminatory redundancy criteria, which were not found to be justified, is Ms. A Willis v National Westminster Bank plc ET/2205821/2020. Here, the London Central Employment Tribunal found direct evidence of a decision by NatWest Bank plc to take action against Ms. Willis, who had bowel cancer, because she was due to take time off for cancer treatment. It then found her subsequent dismissal on the purported grounds of redundancy was tainted with discrimination.

4. Unfair selection

Having a robust and objective set of redundancy selection criteria will not save the employer who fails to apply the criteria fairly. For example, an employer who used a verbal warning for unacceptable performance to mark down an employee's scores under more than one of the five criteria in use, was held by the EAT to be a "fundamental and obvious error in the application of the procedure"[5].

A lack of transparency and good faith when applying criteria is also a no-no. Take, the case of Mr. Lovell who was selected for redundancy by Northampton College when he was given a low score for "performance" about concerns that had never been addressed with him and which were not reflected in his appraisals[6].

5. Failure to consider alternatives to dismissal

Employers are expected to consult affected employees about the availability of any reasonable alternatives to dismissal. Where relevant, that can also include vacancies across the wider group. It will seldom be a 'good look', in the context of an unfair dismissal case, if

[4] Williams v Compair Maxam UKEAT/372/81
[5] Carclo Technical Plastics Ltd v Jeyanthikumar EAT 0129/10
[6] Lovell v Northampton College ET Case No.1201910/10

a claimant shows that other parts of the business were inviting applications for suitable positions without considering whether they were suitable alternatives to redundancy[7].

Employers are therefore well advised to alert all departments (and, where practicable, group businesses) when redundancies are being considered.

About the author: Will Clayton is a specialist employment lawyer with over 25 years' experience. A partner-consultant with Constantine Law, Will also successfully represented the claimant in the above-mentioned case of Ms. A Willis v National Westminster Bank plc ET/2205821/2020.

[7] : Ralph Martindale & Co Ltd v Harris [2007] 12 WLUK 606