EMPLOYMENT LAW UPDATE FOR CHARITIES SEMINAR

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Restructuring and Redundancy
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The purpose of this paper is to provide both an overview and a step by step guide to effecting staff changes through redundancy and contract variations. With the economy in recession employers have been looking at ways in which they can cut their costs. Charities and voluntary community and faith organisations are not immune, although as in the commercial sector there are many organisations which are able to thrive in these difficult times.

Cutting staff is one way of cutting costs, but redundancy does carry a cost, one which goes far beyond any redundancy payment. Managing redundancy takes a great deal of time and effort; redundancy also has a significant emotional cost across the organisation which is not limited to those selected for redundancy but extends to anyone involved in the process and to colleagues who are left to carry on the work once redundancy takes effect. From the employers' perspective there is a significant cost to losing trained and experienced staff and the additional cost of trying to replace them once the economy begins to improve.

Many employers have learned these lessons from the last significant downturn in the late 1980s and are looking to avoid redundancies by introducing a range of flexible policies, restructuring and other contract variations.

Whilst redundancy and restructuring are two distinct processes they share a great deal in common. One of the dangers for employers is to concentrate on one, usually redundancy, and ignore the other.

An employer who purports to dismiss an employee on grounds of redundancy may have followed all of the proper redundancy procedures, but if the narrow statutory definition of redundancy is not satisfied, a Tribunal may determine that the employee was not dismissed on grounds of redundancy at all. Unless the employer has argued that there was some other substantial reason for dismissal (i.e. that the dismissal arises as part of a restructuring) then the dismissal may be found to have been unfair and the employer will be liable to pay compensation.

As part of looking at how to remove this risk, I will be highlighting the consultation obligations that exist as part of any redundancy situation and as part of a restructuring.

Identifying Redundancy Situations

The dictionary definition of redundancy talks about a person being superfluous or surplus to requirements but the statutory definition of redundancy is much narrower.

According to s139(1) of the Employment Rights Act 1996, an employee is to be taken to be dismissed by reason of redundancy if his 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 purpose 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 so employed by the employer,

have ceased or diminished or are expected to cease or diminish.

This covers three principal areas:

1. the employer is closing (business disappears);
2. the employer is closing in the place where the employee worked (possibly involving a relocation) (workplace disappears);
3. fewer employees are needed to do work of a particular kind (work disappears).

A 'business' is widely defined and will include non-commercial activity and the work of charities, and other not for profit organisations.

Is there a potentially fair reason for Dismissal?

All employees have a statutory right not to be unfairly dismissed. To present a claim to the Employment Tribunal, an employee must have completed at least one year's continuous employment with her employer (unless one of the ever-growing exemptions to this rule, such as one of the discrimination heads, applies).

The Tribunal will apply a two stage test in determining whether or not a dismissal is fair:

- Firstly, was there a potentially fair reason for dismissal?

(The potentially fair reasons are: conduct; capability; redundancy; contravention of statute; some other substantial reason; and retirement).

- Secondly, was that reason sufficient in all the circumstances to justify that dismissal?

There is actually a presumption (imposed by s 163(2) Employment Rights Act 1996) that any employee who has been dismissed has been dismissed for redundancy, unless the contrary is proved. This presumption favours the employee and means that, in practice, an employer who wants to resist making a redundancy payment must prove, on the balance of probabilities, that the reason for dismissal was something else, such as misconduct.

Redundancy Pay

An employee who is found to have been dismissed on grounds of redundancy is entitled to receive a redundancy payment provided that he has completed at least two years' continuous employment.

A redundancy payment is calculated on the basis of a statutory formula, which is the same as the calculation used for determining the basic award for unfair dismissal. It takes account of age (although the upper and lower limits have now been removed), length of service (up to a maximum of 20 years) and wage (subject to a statutory maximum week's pay of £350 (from 1 February 2009)).

An employee who is found to have been dismissed for any reason other than redundancy is not entitled to a redundancy payment. This is particularly significant where dismissal is successfully argued to have been 'for some other substantial reason' e.g. due to a restructuring (discussed in more detail below). Whilst such a dismissal may have many of the hallmarks of a redundancy, it may fail to satisfy the statutory definition.

Here however, it is important to bear in mind the presumption of redundancy which the employer would have to displace. An employer should consider carefully the merits of pursuing this type of argument (and the cost of doing so) as a refusal to pay redundancy may trigger a claim to the employment tribunal on the grounds that a redundancy entitlement has been improperly withheld. Defending such a claim would only be cost effective for an employer where there had been a number of dismissals for some other substantial reason and the employer was seeking to avoid paying redundancy for all of those dismissals.

Justifying Redundancies

Employers are not required to justify a declaration of redundancy, but that does not mean that a tribunal can not question whether:

- there has been a dismissal;

- the statutory definition of redundancy is satisfied;
- redundancy is the real reason for dismissal; and
- the employer has acted reasonably in treating that as a sufficient reason.

Employers should note that if an employee's job becomes redundant while the employee is on maternity or adoption leave, it will be treated as an automatically unfairly dismissal if the employer had a suitable available vacancy but failed to offer it.

The difficulty of Disappearing Work

It will often be easier to recognise where redundancy arises because the business closes (employer closes) or because the workplace closes (employer moves). It is less easy to recognise whether the statutory definition is satisfied where the employer claims that work of a particular kind is disappearing. Much of the early case law focused on the question of disappearing work but it is now relatively settled law that the question is not whether that particular employee is required, but rather whether the business has less need for employees to do work of the particular kind that that employee does. The test focuses more on the work or skills required, and less on the individual or the job that they perform.

This paper discusses the distinction between redundancy and re-structuring in more detail below, but a good illustrative example which appears in the text books [Harvey - E/843] is of a business that employs a dedicated driver and a dedicated warehouseman. The warehouseman cannot drive and the decision is taken to employ dual skilled workers who can cover for each other. Each are dismissed and replaced. There is no redundancy and no entitlement to a redundancy payment since there is still as much need for a driver and for a warehouseman as before.

Cases have sought to highlight that different skills may create work of a particular kind which can therefore be distinguished from other work. Qualifications may provide evidence of special skills, attributes or knowledge. The work of a senior employee may therefore be of a particular kind, different from that of a more junior employee such that downgrading a post may require significant de-skilling (reducing the need for the higher level work) whilst upgrading a post may be viewed as a reduction in the need for lower level work; hence a redundancy is created because the work of that particular kind has disappeared or diminished.

There will be a need for the employer to demonstrate that there is sufficient difference in the new and old roles based on skills required and not just on some qualification or desired level of staffing. What a Tribunal is required to do is to analyse the facts and match those facts to the statutory wording. Often there may appear to be little difference in the before and after roles. In the example I give above, it would be possible to argue that driving requires special skills and the foreman's role was upgraded. It is easier to run this argument where there are clear specialist skills involved, although the focus remains

on the needs of the business rather than the ability of the individual to respond to those needs. If the statutory definition is satisfied, then redundancy is made out.

Bumping

Bumping is sometimes known as a transferred redundancy. This is where an employer, having gone through the redundancy process, identifies a particular individual as being redundant, within the statutory definition. In considering alternatives the employer may redeploy the selected employee (subject to that individual having the appropriate qualification or capability) into another role and make the person already in that role redundant instead. This last person is dismissed (or "bumped") as a result.

There was a period during which it was thought that bumping could not be a redundancy but may fall under some other substantial reason. However it is now relatively settled law that transferred redundancy or bumping is a valid redundancy. The case of **Murray & Anor v Foyle Meats Limited 1999 IRLR** established that an employee who has been dismissed as a result of "bumping" will have been dismissed by redundancy and will be entitled to a redundancy payment if his dismissal is attributable to the diminished need of the business for employees.

Why Consult?

Once an employer has identified a potential redundancy situation, a general legal duty arises to provide affected employees with information about the proposed changes and give them an opportunity to contribute to the decision-making process.

In a collective redundancy situation, where an employer proposes to dismiss as redundant 20 or more employees in a 30 day period at a single establishment an employer is under a statutory duty to consult with employee representatives and to follow a strict consultation timetable., This does not mean that where fewer employees are affected, employers have no obligations or concerns. Case law has established that a need for consultation arises whenever an employer contemplates dismissing an employee for reasons associated with redundancy, or for reasons relating to the variation of the terms of the employee's contract of employment.

The case of **R v Gwent County Council 1986 LGR 168** established (and a number of subsequent cases have since confirmed) that, , where dismissals relating to redundancy, or dismissals relating to variation of the terms of the contract of employment, are being considered, employers should consult with employees as a matter of fairness.

In the case of **R v British Coal Corporation 1994 IRLR 71**, the Tribunal, following **Gwent**, formulated a four-stage test by which it could be determined whether an employer had complied with its obligation to consult. For an employer to satisfy that test, employees must have:

1. been consulted with while proposals were still at a formative stage;

2. received adequate information on which to respond;

3. been given adequate time in which to respond; and

4. have had their response conscientiously considered by an authority.

In the 1994 case of **Poat v Holiday Inn Worldwide EAT**, the Employment Appeal Tribunal commented that "leaving aside everything else, it is courteous and humane to consult people when you are thinking of making them redundant" and observed that the employee may himself have ideas for ways in which redundancy could be avoided.

In the subsequent 1997 case of **Mugford v Midland Bank Plc 1997 IRLR 208**, the Employment Tribunal ruled that where no consultation has taken place with either the Trade Union or the employee, the dismissal will normally be unfair unless a reasonable employer would have concluded that consultation would be utterly futile, and that it will be a question of fact and degree for the Tribunal to consider whether consultation has been so inadequate as to render the dismissal unfair.

Employers may also find that their employee's contracts of employment, or their policies and procedures, place them under a contractual obligation to undertake consultation when contemplating redundancies or contractual variations.

In summary, consulting with employees has the following benefits:

1. It satisfies any statutory and contractual duty to consult;

2. It will help to satisfy the common law duty to act in good faith towards employees and to maintain a relationship of trust and confidence with them. In unfair dismissal terms it demonstrates that the employer is seeking to act in a reasonable or fair manner;

3. Because it helps to maintain staff morale, prevent uncertainty, and reduce distress and resentment, it may elicit a more cooperative response from the workforce, generally making them more receptive to proposed changes, and more willing to co-operate; and

4. It may solicit sensible suggestions from the workforce, sometimes amounting to a commercially viable alternative to the changes the employer has proposed.

Employers should note that where employees do give their agreement to change, it is essential to update the terms of their employment contracts, and obtain their signatures.

Statutory Dismissal Requirements

Employers should not forget that, although the statutory dismissal, discipline and grievance procedures ("the Statutory Procedures") have been repealed (from April 2009), general principles of fairness still apply to all dismissals. In the context of redundancy,

this will include the employer meeting with affected employees and considering the availability of alternative employment. In practical terms, meeting with an employee as part of a fair dismissal procedure will involve many of the same considerations as undertaking consultation and disseminating information.

The new ACAS Code of Practice on handling discipline and grievances, which replaced the Statutory Procedures on 6 April 2009, states that it does not apply to redundancy dismissals or to the non-renewal of fixed term contracts on their expiry. There is currently no alternative guidance of a statutory nature that deals with redundancy dismissals, and so the best advice available at the moment is for employers to continue to implement the policies and procedures they developed to comply with the Statutory Procedures and to observe the guidance given by the former President of the Employment Appeal Tribunal, Mr Justice Elias in the case of **Alexander and Hatherley v Bridgen Enterprises 2006 IRLR 422**.

The guidance offered by Mr Justice Elias is as follows:

- In a redundancy situation, before making the decision to dismiss an employee (while the employer is still only contemplating dismissing the employee for redundancy), the employer must consult with the employee on three things:

  (i) **The reasons for the redundancy**

  This should include consultation about ways of avoiding the proposed dismissals in the first place, and therefore the starting point for consultation should be the circumstances which have given rise to the possibility of redundancies in the first place. Employees should be given the opportunity to consider those circumstances and put forward any alternatives or solutions to those.

  (ii) **Any selection criteria which is being proposed for use in the redundancy exercise, including the selection of the redundancy pool**

  The main objective here for the employer is to seek to establish what the objectives of selection are. Should the redundancy pool be restricted to the individuals working on the project for which funding has ceased (for example), or should it be wider, if other staff within the organisation perform the same or similar work? What should the relevant selection criteria be, and by what process should the criteria be tested? Agreeing such matters during consultation can avoid problems further down the line.

  (iii) **Where a matrix system is used, employees should be told their individual score.**

  The threshold or 'break' score below which an employee has been selected for redundancy need not be disclosed and, except in limited circumstances,

an employee is not entitled to be provided with the scores of other employees.

- Failure to provide these three pieces of information will render the dismissal unfair.

Statutory Consultation and Information Rights

The statutory duty to consult about potential redundancies with relevant recognised trade unions or elected employee representatives where redundancies of a certain size are involved arose in 1975, when the European Union issued the Collective Redundancies Directive ("the Directive"), requiring member states to introduce legislation imposing a duty on employers to inform and consult employees about proposed redundancies.

Since the Directive was first implemented in the UK, the legislation has been through several revisions, largely in response to a decision of the European Court of Justice, which criticised the provisions the UK had introduced. The obligation to consult is now contained in s188 Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A").

According to this, employers are required to inform and consult "appropriate representatives" of employees who may be affected by proposed collective redundancy dismissals, or measures taken in connection with them.

A collective redundancy situation arises where the employer proposes to dismiss as redundant at least twenty employees at one establishment within a 90 day period. The duty is to consult about those dismissals with all the persons who are the "appropriate representatives" of any of the employees who *may be affected* by the dismissals.

It is very important to note that for the purposes of TULR(C)A, the definition of "redundancy" is not the same as under s139 of the Employment Rights Act 1996. S.195(1) TULR(C)A defines redundancy as "dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related". This is much wider than the definition used as a potentially fair reason for dismissal.

Meanwhile, s. 298 of TULR(C)A provides that the terms “dismissed”, "dismiss" and "dismissal" are to be construed in accordance with Part X of the Employment Rights Act 1996. The meaning of this was considered by the Employment Appeal Tribunal, in the case of **Hardy v Tourism South East 2005 IRLR 242, EAT**, which gave the view that an employer proposes to "dismiss" an employee if, on an objective consideration of what the employer says or writes, the employer is proposing to withdraw the existing contract from the employee, or to depart so substantially from it that it amounts to a withdrawal of the whole contract.

Voluntary redundancies will also amount to "dismissals" for collective consultation purposes where the employees concerned have volunteered to be dismissed as redundant (as opposed to in circumstances where there is a consensual termination of employment).

Where there is a collective redundancy situation there is also, since October 2006, an obligation to notify the Department for Trade and Industry in advance before any redundancy notice takes effect. The notice period matches the consultation period.

When should the process begin?

The Directive does not impose any time limits, but states (at Article 2.1) that consultation should begin "in good time" and that the trigger for consultation is "where an employer is *contemplating* collective redundancies" (our italics).

Confusingly, s188 of TULR(C)A does not reproduce the wording from the Directive, but states instead that the trigger for consultation is where an employer is '*proposing* to dismiss' (again our italics) for redundancy.

There has been much discussion over the years about the significance of these two phrases. *'Proposing'* has been described as "going beyond the mere contemplation of a possible event" (**APMAC -v- Kirvin 1978 EAT**) and relating to a state of mind which is "much more certain and further along the decision making process than the word "contemplate" (**R -v- British Coal Corporation and Secretary of State for Trade and Industry, ex parte VARDY 1993, CA**). In 2002 the Employment Appeal Tribunal ruled in the case of **MSF v Refuge Assurance plc and anor 2002 ICR 1365**, that the difference in wording makes TULR(C)A more restrictive than the Directive requires.

It seems that the European Directive envisaged consultation at an earlier stage. But many UK businesses take the view that there is no need for consultation to start until they have produced a business plan which makes it clear that redundancies are needed.

In any event, employers must begin the process of consultation:

- where 20-99 redundancy dismissals are proposed at one establishment within a 90 day period, at least 30 days before the first of the dismissals takes effect; or

- where 100 or more redundancy dismissals are proposed at one establishment within a 90 day period, at least 90 days before the first of the dismissals takes effect.

Unfortunately there is no statutory definition of the phrase "establishment" and Tribunals make a finding of fact based on the particular circumstances of each case. In the case of **Rockfon A/S vSpecialarbejderforbundet I Danmark, acting for Nielsen & ors [1996] IRLR 168 ECJ,** the European Court of Justice held that in defining the term ‘establishment’ the overriding factor should be the purpose of the EU Collective Redundancies Directive, namely to protect workers. The ECJ gave further guidance in

the case of **Athinaiki Chartopoiia AE vPanagiuotidis & Others [2007] IRLR 284**, advising that an establishment may consist of:

- A distinct entity;
- With a certain degree of permanence and stability;
- Assigned to perform one or more given tasks;
- which has a workforce, technical means and an organisational structure allowing for the accomplishment of those tasks

It need not have:

- Legal autonomy;
- Economic, financial, administrative or technological autonomy;
- Management that can independently effect collective redundancies; or
- Geographical separation from other parts of the undertaking.

There is no minimum consultation period. Consultation need not last for the whole of the 30 or 90 day period, provided that it is started at the relevant time. Equally there is no maximum consultation period. Where consultation has not been completed by the end of the 30 or 90 day period, employers should allow consultation to continue. However, no redundancy notices may be issued until consultation has been completed.

Who must be informed and consulted under the present regime?

If there is a trade union recognised for collective bargaining purposes then the employer must inform and consult an authorised official of that union. In this case there is no requirement to inform and consult any other employee representatives, although this may be done voluntarily by the employer.

If the trade union is recognised for one group of employees but not another then the employer must inform and consult appropriate representatives of those other employees, whether this be existing representatives or new ones specially elected for the purpose. If there are existing employee representatives, they must have suitable authority from the employees concerned to deal with redundancies (i.e. they should not have been elected for a different representative purpose).

If there is a general committee of employees fairly elected for general personnel matters then it would be appropriate to inform and consult with that committee. If there are no employee representatives at all, then the employer should give the employees a genuine opportunity to elect representatives and, if they should fail to do so, the employer must

provide relevant information to the employees direct. Employees who are not to be dismissed but who may be affected by the proposed measures (e.g. through some form of restructuring) should be informed and consulted with as well.

Where employee representatives are to be specially elected the employer should make reasonably practical arrangements to ensure that the election is fair and determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all the affected employees, having regard to the number and classes of those employees. The employer can determine whether the employees should be represented as a whole or whether representatives of particular classes ought to be elected . Before the election the employer must determine a sufficient term of office to enable information and consultations to be completed.

What must be disclosed?

In the case of redundancies, employee representatives will need to be given enough information about the proposals to be able to take a useful and constructive part in the process of consultation. The employer must disclose in writing and hand to each of the appropriate representatives or send by post to an address notified to the employer, or the Union's Head Office or main address, the following:

- The reasons for the proposals;
- The numbers and descriptions of employees it is proposed to dismiss as redundant;
- The total number of employees of such description by the employer at the establishment in question;
- The proposed method of selection;
- The proposed method of carrying out the dismissals (taking into account agreed procedure);
- The period over which the dismissals are to take effect; and
- The proposed method of calculating any non-statutory redundancy payments proposed.

Meaningful Consultation

S188(2) TULR(C)A states that consultation must be undertaken "with a view to reaching agreement with the appropriate representatives" and it must address particular issues which are:

1. Ways of avoiding the dismissals;

2. Ways of reducing the numbers of employees to be dismissed; and

3. Any way in which the consequences of dismissals might be mitigated.

While the objective of the parties must be agreement, this does not extend to a duty to actually reach agreement, the final decision on redundancies is still for the employer to take. It does mean, however, that the employer's obligations extend further than merely telling employees about the redundancies and listening to what they have to say. Consultation should include ways of avoiding the redundancy situation or dismissals, or of reducing the number of dismissals involved and mitigating the effects of the dismissals. A safer approach would be a genuine attempt to reach some form of accommodation or understanding on the issues raised. This may involve consultation before the formal information giving.

Ultimately the question 'why consult?' is answered by the fact that if you fail to consult when and in the manner required then, in addition to any compensation based upon the failure to consult, there is a great risk that the dismissal that follows would be held to be unfair.

Consultation Process

In any redundancy situation, consultation with employees will take place over the course of at least two meetings. It is nearly always appropriate to commence a redundancy consultation with a group meeting of all affected staff, at which the proposals will be outlined. Note that one of the first points for consultation will usually be how the consultation process itself will be structured and conducted, unless there is already a redundancy or consultation procedure in palce (for example as part of the staff handbook).

To satisfy the requirements of fair consultation, following the first meeting, employees must be given a reasonable opportunity and reasonable time to consider any information that has been given to them; to formulate their response; and to feed back to the employer before a second meeting is held. How long the employer should allow for this will depend on a number of factors, including the number of employees affected, the number of issues being considered and the amount of information that has been given out. Except in the case of a collective redundancy, there is no fixed period for consultation, it is a question of what is reasonable. Often one week will suffice. Feedback having been received, the employer must give "conscientious consideration" to it before reaching a decision.

Before it is possible to identify which employees are potentially liable to be dismissed on grounds of redundancy, there could easily be a whole series of preliminary meetings to discuss the reasons for redundancy, the selection of the appropriate pool, and the relevance of various selection criteria and its application.

There is no absolute requirement for individual consultation, either in a collective redundancy situation or otherwise, but it is difficult to see how effective consultation about the application of selection criteria to particular individuals can take place with anyone other than the individual concerned. In addition, employers should bear in mind that employees may have questions that they do not wish to raise publicly. At the very least, employees should be told the results of any individual assessments and given an opportunity to consider and challenge the results.

The question of whether there has been adequate consultation in any given situation is ultimately one for the Employment Tribunal, but generally speaking, the more employees are made to feel that they have been included in the decision making process and the more consultation that is undertaken, the less likely it is that any employees will bring a claim in the first place, and the more likely it is that such a claim would be dismissed.

Ensuring Fair Selection

Employees may make a claim for unfair dismissal if they feel that they have been unfairly selected for redundancy. The basis of such a claim would be likely to be that the employer did not use a fair procedure to select the employee for dismissal.

The Employment Tribunal, in investigating such a claim would consider the following:

1. How the employer selected the pool of employees from which the redundancies were made. In this respect, employers have a lot of flexibility, and need only demonstrate that the pool was not selected without consideration.

2. What selection criteria it applied to those in the pool. Again, as long as the criteria applied is genuinely objective, employers have a lot of flexibility in determining it.

3. How the criteria were applied. It is usual for employers to award a number of points under each of the criteria against which employees are being measured. These scores must have been allocated in a reasonable, fair and objective manner.

The question for the Employment Tribunal in each case would be whether the employer's choice of selection criteria, or the manner in which it applied it, fell within the range of reasonable responses available to a reasonable employer in all the circumstances.

Just as employers may find that they are contractually bound to go about consultation in some specified manner, equally they may find there are pre-agreed and/or established selection criteria which must be applied. It is generally unwise to agree such things in advance, as the needs of the organisation may change over time, and the agreed procedure may become unsuitable. Ignoring an agreed redundancy procedure will not necessarily be unfair, but it could give rise to a claim for wrongful dismissal for breach of contract.

Implementation

Once the consultation process, be it collective or otherwise, is complete, the employer must consider all the feedback and information that it has received and then must reach its decision. It need not take a lot of time to deliberate, but it should take at least some time.

Where employees have been measured against a matrix, their individual scores will determine which of them are redundant. It is only at this stage that the employer may actually be said to be "contemplating dismissing the employee".

Individual employees should be advised of the decision to make them redundant at a brief meeting, which decision should then be confirmed in writing. Employers should ensure that redundant employees receive their full contractual notice (or, in the absence of contractual notice, their statutory notice) or an appropriate payment in lieu. Employees who are required to work during their notice period are entitled to reasonable time off with pay to look for another job.

Alternative employment

In any redundancy situation, employers must try to offer redundant employees suitable alternative employment where possible. This should be discussed in the individual consultation meetings with employees as well as, where relevant, in any collective consultative meetings with the Appropriate Representatives. The offer and acceptance of alternative employment should ideally be recorded in writing and signed by both employer and employee, but in the absence of a written agreement, intention may be inferred from the parties' behaviour.

Employees have a right to a trial period in the new position. This gives them an opportunity to decide whether the new job is suitable. The trial period is fixed by statute at four weeks and it may only be extended where the employee needs training for a new role. Any extension of the trial period must be agreed in advance in writing.

Employees who unreasonably refuse an offer of suitable alternative employment, or who accept an offer of alternative employment (even if unsuitable) after the mandatory trial period will not qualify as redundant and will have no right to receive a redundancy payment.

Redundancy, or 'Some other Substantial Reason'?

The sixth potentially fair reason for dismissal: "some other substantial reason of the kind such as to justify the dismissal of an employee holding the position which the employee held" is a general catch-all category. An example of this is where employees refuse to go along with a business reorganisation.

Although this category is potentially open-ended, most of the cases that have been

decided under this heading have been concerned with situations where an employer has taken action to protect their legitimate business interest. The employer must establish a **'sound, good business reason'** for reorganisation. It should be able to produce some evidence to show that there was a reorganisation, or some need to economise.

Additionally, employment legislation may deem a dismissal to have been for some other substantial reason (see below).

Varying Terms and Conditions

Employment law does not prevent an employer from seeking to change terms and conditions of employment.

In certain cases this might be restricted, for example following a transfer of undertaking subject to the transfer of Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). More information about varying terms and conditions following a TUPE transfer follows below.

Where fundamental changes to employees' contracts of employment are proposed, that will, in law, amount to a dismissal with an offer of alternative employment on the amended terms. Like any other dismissal, it must not be unfair and it must not be without notice. If the change is effected by agreement between the employer and the employee, it may take effect immediately, but where the employee does not agree to accept the change, and the employer seeks to impose it by dismissing for 'Some Other Substantial Reason' and then offering re-engagement on new terms, the employee must be given the relevant period of notice. Statutory notice is one week for every complete year of employment up to 12 weeks notice after 12 years. To avoid different dates for implementation it is easier to give everyone the same notice period, which is determined by the person who is entitled to the longest notice period.

It is not enough that an employer wishes to reorganise its business in a manner which the employer considers advantageous. Rather the employer must demonstrate that there are discernible advantages. There must be a sound, good business reason for reorganisation. This is consistent both with the burden of proof being on the employer to show that the reason for dismissal falls within this potentially fair category and with the reason being 'substantial' in terms of having some basis other than the uninformed opinion of the employer or worse, being based on some subjective prejudice.

This demand on the employer to substantiate his claims is reflected in other areas of employment protection. For example, the rules around flexible working require that an employee's request for altered hours or other changes must be subjected to a proper consideration by the employer of matters such as cost, ability to meet customer demand and impact on quality and performance.

Whilst the Tribunals will accept arguments about what is in the employer's interests, the interests of the employee cannot be ignored. Whether the employer acts properly in all

the circumstances will depend at least in part on whether the employee has acted reasonably in refusing the change.

Just as the Tribunal cannot impose its own view as to whether the circumstances justify redundancy, a Tribunal may not impose its own view as to what it thinks may be necessary or what steps an employer should take to deal with a redundancy. However a Tribunal does still have considerable scope to permit its own view of the reasonableness of an employer's actions to hold sway. An employer may have a good business reason for seeking to cut pay or increase over time, but in practice if this is merely to make a profitable business more profitable, Tribunals are likely to view such changes with disapproval. If a pay cut may mean the difference between survival of the business and its failure, then the employer will have a greater likelihood of satisfying a tribunal that the reason is substantial.

Where employees are adversely affected, particular financially, a Tribunal will need to be persuaded that it is reasonable for the employer to impose that burden on its employees. There is a great deal of grey area between the position where an employer claims that changes will improve its business and that where the very survival of the business is threatened.

Where a proposed change does not directly affect the financial well-being of an employee, it is likely to be easier for an employer to justify the change as fair. It is also less likely that such change will find its way before a Tribunal.

Two important factors that will influence a Tribunal are whether an individual employee is the only objector to the changes that the employer seeks to impose, and whether the changes are in fact being introduced following a lengthy period of consultation with unions, employee representatives or the individual employees themselves.

It is not true to say that where an employee is acting reasonably in refusing to accept a change the employer must be acting unreasonably by imposing it. Both may be acting perfectly reasonably.

It is important to note that a dismissal for some other substantial reason is not automatically fair. Just as with any of the other potentially fair reasons (capability, conduct, redundancy, contravention of statute and retirement), once the potentially fair reason has been established, consideration must be given to the second stage of the test: whether or not the employer acted reasonably in treating that reason as sufficient to justify dismissal. This requires consideration of alternatives as well as a requirement to ensure that a fair or reasonable procedure has been followed.

Statutory 'other substantial reasons'

Statute identifies two circumstances where a dismissal will fall under the category of some other substantial reason. First is the dismissal of a replacement covering the role of an employee who has been medically suspended or is on maternity leave, provided that the

replacement was informed in writing at the time of engagement that their employment was temporary and would be terminated.

This demonstrates that the dismissal of any fixed term or temporary employee at the end of the fixed term may fall under this category, and this is confirmed by the case of **Terry -v- East Sussex County Council [1997] 1 ALL ER 567, [1976] ILR 536**. Again it is important to note that dismissal is not automatically fair and that the employer must still show that they have acted reasonably including consideration of alternative employment. There are however also practical implications in terms of a dismissed employee being able to establish that they have the requisite qualifying period to be eligible to present a claim as well as consideration of unfair or detrimental treatment under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

The second scenario where statute provides that a dismissal is for some other substantial reason is in the context of a transfer of an undertaking. An employee who is dismissed for an economic, technical or organisational reason entailing a change in the workforce is considered to have been dismissed for some other substantial reason.

Transfer Of Undertaking Protection of Employment Regulations 2006 (TUPE)

Subject to certain qualifying conditions, the TUPE Regulations apply whenever there is a relevant transfer of a business or undertaking (or part of one) to a new employer, or whenever a service provision change takes place, for example where an organisation takes over a service contract from a competitor, or brings a service (such as office cleaning) in-house, or out-sources a service.

Broadly speaking the effect of the TUPE Regulations is to preserve the continuity of employment and the terms and conditions of those employees who are transferred to the new employer when a relevant transfer takes place. They contain specific provisions to protect employees from dismissal before and after the transfer takes place.

One consequence of the TUPE Regulations is that a dismissal for redundancy which takes place either before or after a relevant transfer will be deemed to be automatically unfair if the reason for the dismissal, or the primary reason for it, is the transfer, or is connected with the transfer. The exception to this rule is where the reason or principal reason for either dismissing an employee, or fundamentally changing his or her terms and conditions, is "an economic, technical or organisational reason entailing changes in the workforce". This is commonly known as the "ETO defence".

If an employer is unable to point to a valid ETO reason for making redundancies, any dismissals will be automatically unfair. If there is an ETO reason, dismissals could still be unfair if the employer failed to follow the appropriate redundancy consultation procedures, perhaps failing to ensure that the required period for consultation with employees' representatives is allowed; or acted unreasonably in the circumstances in treating the ETO reason as sufficient to justify dismissal.

Of course, even if the dismissal is considered fair, the employee may still be entitled to a redundancy payment.

Standardisation or harmonisation of terms and conditions, to bring transferees into line with existing employees, is considered to be a transfer related change and is therefore not permissible under TUPE. There is no time limit on this. If an employer wishes to update contracts for staff who transferred to its employment under TUPE, it must "break the link" to the TUPE transfer, i.e. show that there has been some intervening event which has nothing to do with the original transfer.

A restructuring exercise will often fit the bill, as long as the staff who transferred to the employer under a TUPE transfer are part of the restructuring consultation exercise and there is some demonstrable restructuring of their roles, however slight. A change of job title would be very unlikely to suffice; the employer should be looking to update the employees' roles and responsibilities too.

In the case of an insolvent employer company, where insolvency proceedings have been commenced, the application of TUPE is slightly different. If the employer's business is unable to continue and is wound up, the employment of all the employees in that business will be terminated and there is no question of TUPE applying. However, if the business or a part of it is viable, continues and is subsequently sold, TUPE may apply.

Prior to the 2006 Regulations, transfers in an insolvency situation were not in any material sense different from transfers in the absence of insolvency. The 2006 Regulations changed that, and introduced new powers for insolvency practitioners.

The key factor is the reason for the appointment of the insolvency practitioner. Essentially, if the proceedings were commenced with the intention of liquidating the assets of the company, the material provisions of TUPE will simply not apply. If however the appointment was made with a view to transferring all or part of the business as a going concern, TUPE will still apply. Even in those circumstances however, the insolvency practitioner has some enhanced rights, and may be able to effect changes to terms and conditions where a solvent employer may not..

Other papers available on our website provide more detail about TUPE and how it works. Please visit our website at www.wrigleys.co.uk and in particular 'Transfer of Undertakings' from our June 2006 Employment Update Seminar.

Summary

The danger is that if an employer dismisses an employee on grounds of redundancy it may make little difference that they have followed all of the proper redundancy procedures. If you do not satisfy the narrow statutory definition of redundancy you will not have dismissed them for redundancy and, unless you have argued that there was

some other substantial reason for dismissal then you will be found to have dismissed unfairly and will be liable to pay compensation.

The key is to ensure that you do not try to hide the reason for dismissal. If you are cutting costs be clear that is what you are doing. If you need to shift job functions around because this may provide operational efficiencies then do so. Employment law does not prevent you from making changes, but do not simply assume that if change involves potential dismissal that it must be due to redundancy. There is nothing to be lost by complying with the collective redundancy consultation obligations, but much to be lost by claiming you are creating a redundancy when you are not.

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