DechertOnPoint

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A legal update from Dechert's Employment Law Group

Redundancy: Guidance for Employers on Following a Fair Procedure

Continuing economic uncertainty presents employers with challenging employment decisions and on occasion the need to conduct redundancy exercises. A number of cases over the last couple of years have provided clarification in relation to a variety of issues relating to redundancy exercises. This *DechertOnPoint* provides a reminder of the basic procedure that an employer must follow to effect a fair redundancy, summarises recent cases on these procedures and highlights the key lessons to be drawn by employers in order to follow fair redundancy processes.

Effecting a Fair Dismissal by Reason of Redundancy

For a dismissal to be fair an employer must show that:

- the employee was dismissed for one of the five potentially fair reasons (redundancy, capability, conduct, illegality or some other substantial reason); and
- the employer acted reasonably in treating that reason as a sufficient reason for dismissing the employee.

For dismissals by way of redundancy, an employer will not normally act reasonably (and therefore satisfy the second limb of the test) unless it:

- warns and consults employees about the proposed redundancy;
- adopts a fair basis on which to select for redundancy (by identifying an appropriate pool of employees from which to select potentially redundant employees and selecting those employees against proper criteria); and
- searches for and offers any available suitable alternative employment.

The cases outlined below highlight some of the difficult decisions employers have to make when attempting to follow a fair procedure and shed light on the approach the tribunals will take when assessing whether an employer has fairly dismissed an employee on the grounds of redundancy.

Bumping and Consulting with Employees About Whom to Include in a Redundancy Pool

Fulcrum Pharma (Europe) Ltd v Bonassera and another provides a helpful reminder of the importance of consulting with affected employees about whom to include in a redundancy pool.

The employer's HR team comprised two employees: the claimant, who was the HR manager, and a more junior HR executive. The employer decided that there was a diminished need for the HR manager's role and made the claimant redundant. The claimant complained and told the employer that she thought the HR executive should also have been placed at risk of redundancy, but the employer refused to alter its decision. The Tribunal held that the claimant had been unfairly dismissed and the Employment Appeal Tribunal (EAT) agreed.

The EAT held that the employer was in error in determining that, because the manager's role had to go, the pool should only contain one employee without any further or meaningful consultation as to the size of the pool. The EAT held that when considering whether subordinate employees should be included in a pool, employers should consider the factors previously set out by the EAT in *Lionel Leventhal Ltd v North* in 2004, namely:

- whether or not there is a vacancy;
- how different the two jobs are;
- the difference in remuneration between them;
- the relative length of service of the two employees;
- the qualifications of the employee in danger of redundancy; and
- other factors that may apply in a particular case.

The EAT also added that as a starting point it may be appropriate to determine during the consultation process whether a more senior employee would be prepared to consider a more junior role at a reduced salary. Depending upon the particular circumstances it may not be enough for the employer to consider this issue internally – the employer must actually raise this issue with the employee.

A Pool of One Can Be Appropriate

Halpin v Sandpiper Books Ltd also considered when a pool of one may be appropriate. In this case the EAT followed *Fulcrum Pharma* in finding that an employer had correctly identified a pool of one for redundancy.

The claimant initially carried out administrative and analysis duties in the employer's London office but then moved to China to carry out sales work. The employer later decided to outsource the claimant's role to a locally known and trusted book agent and so placed the claimant, as its only employee in China, at risk of redundancy. Following a consultation process the claimant was dismissed. The claimant brought a claim for unfair dismissal on the grounds that the redundancy pool was unfairly limited to him, as the only employee whose work had diminished, even though he had interchangeable skills and had carried out administrative and analysis work, which was being carried on by other employees in the UK, earlier in his career.

The EAT agreed with the Tribunal's finding that the claimant had been fairly dismissed. The EAT held that the decision to limit the pool to one was logical (as he was the only employee in China) and was reasonably open to the employer. Following *Fulcrum Pharma* it held that the decision to limit the pool to one was a decision that a tribunal could not easily overturn.

Principles to Consider When Identifying a Pool of One (or a Pool That is the Same Size as the Number of Proposed Redundancies)

In *Capita Hartshead Ltd v Byard*, the claimant was one of four actuaries working in the employer's Holborn office. Each actuary was appointed personally to a client, as required by pensions legislation. Around May 2009 the number of the claimant's clients significantly diminished and the employer decided that the claimant did not have enough work to fill a full-time role. Accordingly, the employer placed the claimant in a redundancy pool of one and began a consultation process which concluded with her dismissal in December 2009. The claimant then brought a claim for unfair dismissal on the basis that other actuaries should also have been placed in the redundancy pool.

The employer argued that its decision to place the claimant in a pool of one was reasonable because the claimant's workload had reduced, its clients were required to appoint one actuary as their Scheme Actuary, only the claimant's workload had reduced, and team morale would have been affected if other actuaries were put in the pool — they might have protested that, because actuary appointments were personal, a redundancy situation did not exist for them as their billings/portfolios had not reduced.

The Tribunal held that the employer's decision to limit the size of the selection pool to the claimant alone was unfair for a number of reasons including the fact that all four members of the Holborn office were doing similar work — so there were other actuaries who could have been included in the pool. Also, it was not clear that the employer could reasonably have concluded that adopting a pool of three or more actuaries would have been utterly useless and that the dismissal of the claimant would almost certainly have followed.

On appeal the EAT upheld the Tribunal's decision and summarised the following principles to be used in assessing whether an employer has selected a correct pool of candidates for redundancy:

- It is not for the job of the Tribunal to decide whether it would have thought it fairer for the employer to have acted in another way. The question for the Tribunal is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted (the "range of reasonable responses test").

- The range of reasonable responses test also applies to the selection of the pool from which the redundancies were to be drawn.

- There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for an employee to challenge the employer's decision where the employer has genuinely applied its mind to the problem.

- The Tribunal should consider with care whether the employer has "genuinely applied" its mind to the issue of who should be in the pool for consideration for redundancy.

- If the employer has genuinely applied its mind to the issue of who should be in the pool, it will be difficult, but not impossible, for an employee to challenge the employer's decision.

The EAT held that the Tribunal had indeed followed this approach in concluding that the employer had unfairly limited the size of the pool to just the claimant. In particular, the EAT noted that the ET correctly held that the actuaries did similar work, the claimant's performance was praised not criticised and the employer had not genuinely applied its mind to the issue of who should be in the pool as, although it claimed that it would lose business if a Scheme Actuary were changed, the evidence showed that such a risk was slight.

The Right to See Redundancy Interview Notes

In *Camelot Group plc v Hogg* the EAT overturned a Tribunal's decision that an employee's dismissal had been procedurally unfair because the employer had failed to provide her with a copy of her redundancy interview notes.

The claimant had been selected for redundancy after coming sixth out of seven candidates in a scoring exercise, which included an interview assessment. The claimant told her employer that she did not accept that her scores fairly reflected her abilities and asked to see a copy of her interview notes, which were given to her at some point between 1 and 5 June 2009. She was told at a meeting on 5 June 2009 that she was to be made redundant, a decision which had been taken a few days earlier. The claimant did not challenge her interview scores either on 5 June or in her subsequent appeal. The Employment Tribunal had found that her dismissal was procedurally unfair because she had not been given a reasonable opportunity to challenge the application to her of the assessment criteria despite having indicated that she "*did not acquiesce in the manner in which the criteria had been applied to her*" and reserved her right to challenge it.

In overturning the Tribunal's decision the EAT held that the case of *John Brown Engineering Ltd v Brown and others*, a case upon which the Tribunal had relied, was not authority for the proposition that if an employee intimates a broad unspecific challenge to the application to him of redundancy assessment criteria, then the employee must be afforded the opportunity to see his interview notes (or other documents) prior to any decision to dismiss. Accordingly, the Tribunal had been wrong to infer that the claimant had reserved the right to challenge her scores by asking to see the interview notes. The EAT held that the tribunal had failed to stand back and ask whether, overall, there was a fair redundancy process.

The EAT also noted that the Tribunal was wrong to suggest that whenever an employee who is at risk of redundancy makes any request for information, an ensuing dismissal will be unfair if that request has not been acceded to. However, employers should not take this as a signal that they can refuse to comply with employees' requests for information without risk, as the EAT went on to note that employers would be "*well advised*" to provide information which has been specifically requested, even if employers are not required to comply with "*every unspecific request for documentation unaccompanied by reasoned justification*".

Risks of Sex Discrimination in Scoring

Scoring employees who have been placed in a redundancy pool can often lead to accusations of unfair treatment and discrimination. The EAT's decision in *Eversheds Legal Services Ltd v De Belin* (2011) provides some guidance on the effect of section 13(6)(b) Equality Act 2010 which provides that "*special treatment afforded to a woman in connection with pregnancy or childbirth*" must be disregarded for the purposes of direct sex discrimination allegations brought by a man.

In this case (which was decided under an equivalent provision of the Sex Discrimination Act 1975) the EAT held that this obligation does not extend to favouring pregnant employees or those on maternity leave beyond what is reasonably necessary (i.e. proportionate) to compensate them for the disadvantages occasioned by their condition.

The claimant in *Eversheds*, a male solicitor, was made redundant following a redundancy selection exercise in which he and a female colleague were pooled together. Following the application to both employees of objective selection criteria, the claimant was awarded a score of 27 and his female colleague was awarded a score of 27.5, with the effect that he was selected for redundancy.

However, at the time of scoring, the female colleague had been absent on maternity leave. It emerged that the employer had given her the maximum possible score for a "lock-up" criterion — which the employer applied — this measured the length of time between carrying out a piece of work and receiving payment for it — despite the fact she did not have any client files at the date on which she was scored. This score was decisive in meaning that the claimant was selected for redundancy rather than his female colleague.

Accordingly, the claimant brought claims for unfair dismissal and direct sex discrimination which were upheld by the EAT, who found that the favourable treatment given to the female employee was disproportionate. The EAT held that a more proportionate way of removing the maternity-related disadvantage would have been to measure the lock-up performance of both employees as at the last date that the female employee was at work.

Employers must therefore tread carefully when scoring employees who have taken maternity leave. Employers should ensure that they are confident that any special treatment afforded to a woman in connection with pregnancy or childbirth does not go beyond what is reasonably necessary to compensate them for any disadvantages arising out of childbirth or being pregnant.

Reasonably Refusing an Offer of Suitable Alternative Employment

If, after following a fair redundancy procedure, an employee is made redundant, the employee will be entitled to a statutory redundancy payment provided that the employee has acquired two years' continuous employment.

However, under section 141(2) of the Employment Rights Act 1996, an otherwise eligible employee will not be entitled to a statutory redundancy payment if the employee unreasonably refuses an offer of suitable alternative employment (provided that certain conditions regarding the offer are satisfied).

The case of *Readman v Devon Primary Care Trust* provides useful guidance on how the tribunals will assess whether an employee has unreasonably refused an offer of suitable alternative employment. In *Readman* the EAT held that it was possible for an employee to reasonably refuse a suitable offer of alternative employment, and therefore retain the entitlement to receive a statutory redundancy payment, even where the Employment Tribunal had correctly concluded that a reasonable employee would have accepted the employer's offer.

The claimant was placed at risk of redundancy and offered a post in a hospital setting. The claimant had not worked in a hospital setting since 1985 having transferred at that time to a community setting. The Tribunal and the EAT held that the offer constituted an offer of suitable alternative employment. However, the EAT held that the Tribunal had applied the wrong test when it concluded that the claimant should not be entitled to a statutory redundancy payment because a reasonable employee would have accepted the employer's offer. It held that the correct test was whether the employee in question, taking into account the individual's personal circumstances, had acted reasonably in refusing the offer or, in other words, whether the employee had sound and justifiable reasons for turning down the offer.

In the EAT's opinion, the claimant's reason for turning down the offer, namely that she had worked in a community setting for 23 years and had no desire to return to a hospital setting, constituted a sound and justifiable reason and accordingly it held that she was entitled to receive a statutory redundancy payment.

Applying Subjective Criteria When Selecting Candidates for Suitable Alternative Roles

In *Samsung Electronics (UK) Ltd v Monte-D'Cruz* the EAT overturned a Tribunal's finding that an employee had been unfairly dismissed (on grounds of redundancy) because there had been inadequate consultation and because the criteria applied in interviewing the employee for an alternative role were unsatisfactory because they were "*subjective*".

The claimant, who was the employer's Head of OA Reseller, reported to its Head of Print together with three other senior managers. In the autumn of 2009 the employer informed the claimant and other managers that in order to save costs it was commencing a reorganisation of its Print Division, which would involve combining these four senior roles into a single role of "Head of Sales – Print". The claimant applied for this role but was unsuccessful so then applied for a new, more junior role of "Business Region Team Leader". He was informed on 24 December 2009 that he had again been unsuccessful and that he was at risk of redundancy but was invited to apply for another available job. As he had not applied for another available job he was informed on 13 January 2010 that he would be dismissed for redundancy. The claimant brought a claim for unfair dismissal.

The EAT overturned the Tribunal's decision that his dismissal had been unfair because (a) the employer had failed to consult fairly or adequately with the claimant and (b) the selection process for the role of Business Region Team Leader had been flawed.

In particular, in relation to the selection process for alternative employment, the EAT noted its earlier decision in *Morgan v Welsh Rugby Union* (which had not been decided at the time of this case) in which it had held that a "*tribunal is entitled to consider, as part of its deliberations, how far an interview process was objective; but it should keep carefully in mind that an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgment*". In *Morgan* the EAT also held that guidance in the case-law about the correct procedure to be followed and criteria to be adopted in *selecting* an employee for redundancy "*cannot be transposed to the process for deciding whether a redundant employee should be offered an alternative position*".

In *Samsung* the EAT noted that "*subjectivity*" is often used in this context as a dirty word but that not all aspects of an employee's performance lend themselves to objective measurement and certainly not in the context of an interview for alternative employment.

The EAT held that the Tribunal had fallen into the wrong "*substitution*" mindset by focusing on aspects of the assessment process which the employer might have done better. Had it followed the approach set out in *Morgan* it would not have found the dismissal to be unfair on that basis. In the EAT's view, the employer had assessed the claimant's suitability to the role in a formal interview process conducted by two senior managers, applied identified criteria and made a systematic evaluation of his suitability in good faith. Any flaws in the process were insufficient to render the dismissal unfair.

Employers can take some comfort for the greater flexibility which this case demonstrates that they have in relation to selection for alternative employment as distinct from selection for redundancy.

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