

REDUNDANCY ISSUES

What is Redundancy?

“The definition of redundancy is simplicity itself and asks two questions of fact. The first is whether one or other of various states of economic affairs exists, in this case whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the applicant’s dismissal was attributable, wholly or mainly, to that state of affairs. This is a question of causation and is for the tribunal to determine.”

1. This quote from Lord Irvine in Murray v Foyle Meats [1999] IRLR 562 finally marked the end of over two decades of debate over whether the appropriate test for redundancy was the contract or the function test?
2. Since 1999 there has been the occasional resurfacing of issues in relation to reorganisation Shawkat v Nottingham City Hospital NHS Trust [2001] IRLR 555 (Shawkat), changing terms and conditions Land Securities Trillium Ltd v Thornley. [2005] IRLR 765 (Thornley) and more recently in respect of mobility clauses Home Office v Evans [2008] IRLR 59 (Evans).

3. In general what is and is not a redundancy presents few problems for the practitioner. Nonetheless it is important to appreciate that issues do arise and a short trip through these three authorities is instructive.
4. Shawkat concerned a thoracic surgeon who did not wish to change from being purely a thoracic surgeon to carrying out cardiac work as well. The Court held that the needs of the business for employees to carry out thoracic surgery had not changed (ceased or diminished) and so the surgeon had not been dismissed for redundancy.
5. This result was fact sensitive (see Murphy v Epsom College [1984] IRLR 271) for a different result in relation to a change in requirements for plumbers and heating engineers. What is important to note from this case is that simply because a reorganisation has taken place it does not follow that any dismissals will be for redundancy. The Tribunal will be looking at causation (see Murray above).
6. Thornley involved changes to an employee's job as a result of a reorganisation. It is noteworthy as it demonstrates the limits to which flexibility clauses can be used to avoid dismissals.

7. The employee had a standard flexibility clause found in many employment contracts in relation to performing 'any other duties which may reasonably be required of you'. The change of role from hands-on to managerial was found to go beyond the following. The clause did not extend to the unreasonable imposition of a new management position.

8. It was also noted that reference to 'any other post you may subsequently hold' could not include a post that the employee was being forced to take against her will.

9. Evans involved the use of an express mobility clause to avoid making the employee redundant. This clause permitted the Home Office to transfer the employee to any civil service post whether in the UK or abroad. This case involved the proposed redeployment of immigration officers from Waterloo to Heathrow when the international station closed.

10. The question for the Court of Appeal was how redundancy interacts with a mobility clause. The Court took a practical approach and found that where such a clause existed, the activation of the clause to avoid redundancy was permissible.

11. This decision appears to be an unwelcome return to the contract test. After all there was no longer a requirement for immigration officers at Waterloo as the terminal had closed.

12. Added to this is the Court of Appeals apparent failure to take account of High Table Ltd v Horst [1997] IRLR 513 a case where the employer was not permitted to use a mobility clause to avoid paying a redundancy payment to an employee who had always worked at the site which was being closed.

13. As Lord Justice Peter Gibson remarked at paragraph 22:

"It would be unfortunate if the law were to encourage the inclusion of mobility clauses in contracts of employment to defeat genuine redundancy claims."

14. Evans may best be explained on its particular facts nevertheless this case does raise the obvious question. If the definition is so simple why did the Court of Appeal find it so hard to apply it properly?

How Many?

15. This seminar does not cover large scale redundancies and collective consultation in any detail although many of the problems

areas covered in these notes will apply equally to large scale redundancies.

16. Do not forget the following things:

- If you are dismissing 20 people or more then the rules in relation to consultation are triggered (see S 188 Trade Union and Labour Relations (Consolidation) Act 1992 (TULRA))
- The requirement for contacting the Insolvency Service is also triggered (HR1 Form)
- Consultation must be in 'good time' (see S 188(1A) TULRA).
- You may need to consider those employees who are taking voluntary redundancy in the total numbers (Optare Group Limited v TGWU [2007] IRLR 931).
- Do any changes to the remaining employees' terms and conditions amount to a dismissal and reemployment (Hardy v Tourism South East EAT/0631/04).
- If you get it wrong there is no ceiling on a week's pay.
- The Tribunal will start from the 90 day maximum and work back (see Susie Radin Limited v GMB [2004] IRLR 400).

Consultation

“1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

These principles should be departed from only where some good reason is shown to justify such departure.

17. So said Browne-Wilkinson J in Williams and others v Compair-Maxim Limited [1982] IRLR 83 at paragraph 19.

18. The employer needs to warn and inform all individuals who are likely to be affected of the steps that the employer will be taking. There must be individual meetings. The alternatives should be discussed during these 'at risk meetings.

19. I have set out some of the things that ought to be investigated.

- Short time working (S 147 Employment Rights Act 1996 - ERA)
- Lay off (S 147 ERA)
- Early retirement
- Voluntary redundancy
- Job share
- Cut overtime
- Salary reduction

20. This is not the place to make a business or social case for any or all of the above. The lawyer's job is to help the employer through the legal minefield and make sure that he can demonstrate that he

actually looked at alternatives and listened to what his employees' said.

21. I feel a very brief word on layoffs and short term working would however be useful. The use of layoff and short time working needs to be approached with care. The statutory right is restricted to situations where the employer actually has an express or implied contractual right to withhold remuneration if there is no work available. In short unless there is an express right to layoff or short time working this option should not be used.

22. It may be possible during the consultation period to agree a layoff or a period of short time working. Again this should be approached with care as the statutory regime only allows a limited period of lay off or short-term working (4 or more consecutive weeks or 6 weeks in any 13 week period – S 148(2)(a) + (b) ERA). There are also notice (employee) and counter notice (employer) provisions (S 148 & 150 ERA).

Alternative Employment

23. This is a topic which would have been equally at home being dealt with at the end of the notes however the reality is that alternative positions can arise at anytime during the redundancy process.

24. It may be desirable to move employees to avoid the redundancy altogether. Is the employer going to try to activate a mobility clause (see Evans & Horst above) or simply agree a contractual variation to allow the move (beware dismissal as in Hardy)?
25. It may well be necessary to ring fence certain vacancies during the redundancy process and only permit displaced employees to apply for the positions.
26. It may be that there are more employees than there are alternative jobs. In these circumstances it may be necessary to interview.
27. The scenario which seems to cause the most problems is the offer of suitable alternative employment as an alternative to a redundancy payment.
28. The statutory protocols are to be found in S 138 & 141 ERA. In outline the employer makes an offer to the employee prior to the ending of the contract of employment and the employee accepts and continues working.
29. The offer must inform the employee of the material terms of the new position although it need not be in writing. Writing is always desirable in these situations!
30. The employee then has to accept the offer. Again this does not need to be in writing but good practice dictates that it should be.

31. The employee is entitled to a trial period of four weeks. If the alternative employment turns out to be unsuitable; then the employee simply leaves before the 4 weeks has expired and claims the redundancy payment. Note that the dismissal then takes effect from the date of the original dismissal.
32. Overstaying has grave consequences for the employee who will lose their entitlement to any redundancy payment under the statutory regime.
33. It had been thought there was a co-existing common law right to a reasonable trial period which in some circumstances could be tacked on to the end of the 4 week trial period. This idea was rejected by the EAT in Optical Express Limited v Williams [2007] IRLR 936.
34. There is nothing to stop an employer and employee agreeing their own trial period. The advantages are clear. A properly agreed way forward with a review meeting so that both parties understand the position and their options.
35. When an employee has rejected the alternative employment either before taking up the offer or after the trial period; an employer may refuse to pay a redundancy payment because the offer was suitable.

36. The important point to note about 'reasonably suitable' in this context is that the employer's offer may be 'suitable' but not 'reasonable'.
37. There is a two stage test of reasonable suitability. First the Tribunal must analyse the job's suitability objectively looking at the terms and conditions. It must be similar in terms and conditions.
38. There is then a second subjective analysis of the offer which takes account of the particular circumstances of the employee to whom the job is being offered.
39. An example of this is travel time (although this does come into suitability as well). Two people are offered the same alternative positions. One lives equidistant from the old and the new site and has a car. The other does not drive, lives next to the old site and would have to get two buses every morning.
40. The job is the same for both of them. It may be objectively suitable for both but only subjectively so for one of the employees.

Selection Criteria

'... there are only two relevant principles of law arising from that subsection [now S 98(4)]. First, that it is not the function of the industrial tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The second point of law, particularly relevant in the field of dismissal for redundancy, is that the tribunal must be satisfied that it was reasonable to dismiss each of the applicants on the ground of redundancy. It is not enough to show simply that it was reasonable to dismiss an employee; it must be shown that the employer acted reasonably in treating redundancy "as a sufficient reason for dismissing the employee", i.e. the employee complaining of dismissal. Therefore, if the circumstances of the employer make it inevitable that some employee must be dismissed, it is still necessary to consider the means whereby the applicant was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the applicant, rather than some other employee, for dismissal.'

41. This quote again comes from the Compair-Maxim case at paragraph 18.

42. This was summarised more succinctly by Waite LJ in British Aerospace v Green [1995] IRLR 433 at paragraph 25 :

"I would endorse the observations of the Employment Appeal Tribunal in Eaton Ltd v King & Others [1995] IRLR 75 that it is sufficient for the employer to show that he had set up a good system of selection, that it was fairly administered and that ordinarily there was no need for the employer to justify all the assessments on which the selection for redundancy was based."

43. If possible agree the criteria and approach with the workforce. This can be done during formal collective consultation or during initial consultation with the individuals that are affected. The pre-agreement of the approach and criteria goes a long way to demonstrating at any subsequent appeal or at tribunal that the criteria are fair and reasonable.

44. The commercial purpose of the selection process is to try to ensure that the employer retains the workforce with the necessary skills and application to be able to keep the business going. It is the lawyer's job to help the employer arrive at criteria that work fairly and enable the employer to retain the right employees.

45. The law tells us that the criteria should be objective and measurable. The criteria should avoid being subjective.

46. Length of service is one of the best known redundancy criteria. In fact in years gone by 'last in first out' LIFO was the unsophisticated

answer to most redundancy situations. It led to ageing and poorly structured workforces.

47. The modern challenge to LIFO comes from groups of workers who have less year's service due to sex or age or disability. Thus the employer should bear in mind that a score based on years served may need to be justified at a later date.

48. Wilson v Health and Safety Executive EAT/0050/08 brought under the sex discrimination legislation challenged pay awards based on length of service. The EAT held that such a challenge is possible where an employee has raised serious doubts over the appropriateness of the criteria.

49. This is not an easy hurdle for the employee as it is well settled law that experience usually improves performance (see Danfoss [1989] IRLR 532 and more recently Cadman v Health & Safety Executive [2006] IRLR 969). For an employee to succeed the employee must show that the employer has stepped beyond the margins that are afforded employers when applying such a criteria. The test is as set out in this quote from paragraph 44 of the Judgment:

"We think that the tribunal would have to be satisfied that in the light of the evidence adduced by the claimant there is real reason to suspect that the employer has stepped beyond the margins which can properly

be afforded to employers when considering whether added experience typically improves job performance.”

50. The matter has also been looked at recently in respect of the Employment Equality (Age) Regulations 2006, SI 2006/1031 (ADR) age discrimination in the case of Rolls Royce plc v Unite the Union 2008 EWHC 2420. This case gives very good, clear guidance on how Courts should approach justification under the Age Discrimination Regulations.

51. This case looked at the use of length of service as one of a number of criteria used for selecting employees for redundancy. The guidance from the court is helpful and I have tried to incorporate the important points into these notes.

52. It should be noted that length of service has been exempted by the government for any benefit based on 5 years or less (see ADR Reg 32(2)). The government has made it clear that length of service does fulfill a legitimate business need as it rewards loyalty and experience. There are clear obiter comments about not using LIFO as the sole criteria in any redundancy selection exercise (see Rolls Royce at paragraph 15).

53. Thus a criteria such as length of service is relevant today. The degree to which this plays a part will depend on what the job is.

54. The operation of a simple widget producer is going to be unlikely to need more than a few years experience whilst a sophisticated process requiring the knowledge of many processes will obviously require more time served.

55. Time served also measures loyalty to the business. It is legitimate to measure loyalty but again this should not be so heavily weighted so that the application of 'time served' simply works as LIFO in disguise.

56. To recap briefly on length of service:

- 5 years is OK under the ADR and would I think present view problems.
- Any higher than 5 years then there is a possibility of a challenge but the hurdle is a high one.
- Length of service should not be the sole selection criteria.
- Proper weighting of experience is important

57. Attendance is another well known criteria. This should of course be applied with caution. Due regard should be had to the reasons and length of absences. As with length of service it is not the criteria itself that is the problem but how it is applied. Allowances for career breaks, disability related absences and carer obligations are just a few of the circumstances that should be considered when using this criteria.

58. One can immediately see that pre-agreed criteria, with clearly defined exemptions will make this task much easier.

59. Disciplinary warnings are usually an uncontroversial criteria. Nevertheless it is worth noting the following important points:

- whether the warning has been the subject of challenge. This may affect whether it is reasonable to mark the employee down.
- whether the warning has expired may also be relevant. This can be allowed for by having clearly defined what will count.

60. Time keeping as opposed to attendance is also an appropriate criteria although it is likely that any persistent lateness will have been dealt with through the disciplinary process.

61. Qualifications are again a useful criteria if the employer has the necessary records and can identify what the appropriate qualifications are. The fact that you can swim 1000 metres is useful if you are a pool attendant but not if you are in tele-sales!

62. Productivity is another useful criteria but it must be measurable. Shifts that produce the most widgets or tele-sales operators who sell the most product.

63. Quality again is another acceptable criteria but this must be measurable. A quality system with clear records of non-conformity and recorded defects is fine. No subjective judgments please.
64. A marginal call would be a manager who had to judge whose typing was better by asking himself who made more mistakes. The manager would have to be able to demonstrate to the employee why his work was less accurate than his co-worker.
65. Perhaps the most problematic criteria is skill. The rating of skill is always likely to be tainted by subjectivity. If you can avoid using skill then do so.
66. In the perfect world skills would have been addressed and measured in annual appraisals allowing the employer to use the scores in the appraisal as a means of identifying the staff that should be retained. In the real world the appraisal is usually either not properly completed or all the employees' scores are at a stratospheric level.
67. This is perhaps the area of greatest tension between the lawyer and the employer. The employer is sure that he can identify the employees with the skills he needs to go forward. When asked how, he will simply say "well I know". This is not enough.