Employment Law Brief

with

Darren Newman

A standard feature of most redundancy procedures is the consideration of alternative work. It is generally believed that If the employer offers the employee a suitable alternative post then that will be subject to a four-week trial period. If the new position does not work out then the employee is free, within that trial period, to opt instead for a redundancy payment. The trouble is that the legislation is not quite so simple and many employers would be surprised to discover that their normal approach to redundancy and alternative work does not give rise to a trial period at all.

The decision of the EAT in East London NHS Foundation Trust v O'Connor shows what can go wrong. The employer was carrying out a major reorganisation and Mr O'Connor was told that his post was being deleted. He was offered another post – which he was not happy about – but he was willing to give it a go and began what the employer described as a statutory trial period. That period was extended to accommodate Mr O'Connor's holiday plans and when it eventually ended the employer invited him to agree to a permanent change in his terms and conditions. He raised a grievance at that stage and several months passed – for much of which he was signed off sick – before the employer eventually ran out of patience and dismissed him with 12 weeks' pay in lieu of notice.

The question for the Tribunal was whether or not Mr O'Connor was entitled to a redundancy payment. The employer argued that he wasn't because the 4-week trial period had expired and Mr O'Connor had remained in employment beyond that period.

The problem with the employer's position was that the statutory trial period they were relying on only applies to an employee who has been dismissed for redundancy but who then accepts an offer of suitable alternative work that starts after the dismissal has taken effect (if you're feeling keen, see S.138 of the Employment Rights Act 1996). But the employer had never dismissed Mr O'Connor. They had told him that his post was being deleted and they told him that he was at risk of redundancy – but neither of those are terms with a specific legal meaning. The employer had not taken formal steps to end his original contract, they had just moved him to the alternative work and then proposed a change in terms and conditions. That did not trigger the alternative work provisions of the Employment Rights Act. As a result, his case was sent back to the Tribunal to determine the reason for his eventual dismissal and whether that gave rise to an entitlement to a redundancy payment.

What strikes me as typical about this case is that the employer's procedure for offering alternative work really bears no relation to the statutory framework. Nowadays employers tend to integrate the search for alternative work with the original selection for redundancy. It is incredibly rare to give an employee notice of dismissal and only then offer an alternative role. That isn't a problem as long as the employer is happy to pay a statutory redundancy payment whatever the outcome. Indeed, the reason we haven't seen other cases on this topic in recent years is that statutory redundancy payments are so modest that there really isn't any point in contesting an employee's entitlement to them. By the time you have costed in the legal fees and the time a claim takes up, you really may as well have just paid the redundancy payment and avoided the hassle.

I suspect that lurking behind Mr O'Connor's claim for a statutory redundancy payment is a much more substantial claim for an enhanced contractual entitlement that depends on it. Of course, it is possible for a contract to specify its own terms as to when an enhanced redundancy payment will or will not get paid, but many contracts simply provide that the employer will make a payment based on the employee's statutory entitlement. The disadvantage of that is that the employer will be stuck with the technical requirements that the Employment Rights Act imposes on when a redundancy payment is due.

The risk to employees in such cases is that they will not have a clear right to resign in the first four weeks of the new appointment and claim a redundancy payment. If the employer has simply imposed the change – in breach of the employee's contract – then the Tribunal may find that there was a 'common law trial period' which allowed the employee to resign and claim a constructive redundancy dismissal. But this is not a very clear area of the law and if the employee agreed to the move – however reluctantly – there may be no trial period at all. A resignation from the new post would simply be a resignation, with no right to compensation. In Mr O'Connor's case of course, he had the presence of mind not to resign but to wait for the employer to dismiss him. Will that mean that he gets a redundancy payment?

I think he probably will. The question for the Tribunal will be whether his dismissal is wholly or mainly attributable to the fact that there was a redundancy situation – that is that the employer's requirements for employees to do a work of a particular kind had ceased or diminished. Although the process of his dismissal was long and drawn out – he was dismissed almost six months after his original role was deleted – it seems clear that it was the deletion of that role that led inexorably to his eventual dismissal. An employer in this situation might claim that the dismissal was based on the employee's poor performance in the new role or his refusal to carry out his duties. But in this case it seems that the employer expressly told the employee that he was being dismissed for redundancy – relying on the expiry of the trial period to deny him his redundancy payment. Now that it has been held that the trial period never even began, I don't think they will be able to argue that the dismissal was for anything other than redundancy.

The case highlights the need for clear thinking when it comes to redundancy and alternative work. Employers must not lose sight of what is actually happening to an employee's contract and whether it is being terminated and then renewed or merely varied. If the statutory trial period does not apply (and it usually won't) then the terms of the offer given to the employee should clearly set out what will happen if the employee does not think that the new post is working out. That way they can make an informed decision about accepting the offer and the chances of a costly dispute arising further down the road will be reduced.

Don't forget to check more about Darren Newman on his blog at A Range of Reasonable Responses or on twitter at @DazNewman