Employment Law Brief

with

Darren Newman

I have a bee in my bonnet about redundancy selection. When I started in employment law (back when there was a lot less of it and it was regarded as an easy subject to cover in a law degree) redundancy selection was straightforward. Either you just dismissed the people with the shortest service (Last in, First Out) or if you were really state-of-the-art you would use a matrix system. Redundancy criteria would be identified, and employees given a score under each of them. A league table would then be created with the number of redundancies required dictating the size of the relegation zone at the bottom. It was a bit rough and ready but there was a straightforward honesty about what the process was.

Nowadays it seems that organisations bend over backwards to treat redundancy selection as a recruitment exercise. Instead of deciding who to dismiss from their current role the question is who should be offered one of the new roles that have been created as a result of a restructuring exercise. Obviously, if that is what is really going on then that makes perfect sense. But my fear is that a lot of the time, the new roles that the organisation is recruiting for bear a striking similarity to the old roles that are being scrapped.

I have a number of problems with that approach. I'm not comfortable that someone should be dismissed on the basis of the answers they give in a job interview rather than an objective look at their performance in their current role. Some people are better at interviews that others and better at framing their skills and achievements in a way that scores points with an interview panel. Why would you focus entirely on the answers given and not look at the employee's actual record?

In the case of Mental Health Care (UK) Ltd v Biluan & anor (EAT 2013) the employer was so keen to ensure that their redundancy selection process was 'objective' that they had it conducted by the same assessment centre that they used in their recruitment exercises. All that mattered was how the employees performed in the assessment and no account was taken of what the employer knew about their performance in their current role. As a result there were some surprising selections - which should have rung some alarm bells - but the employer simply trusted that the assessment was robust and objective. Two employees successfully claimed unfair dismissal – it was unreasonable of the employer to exclude from consideration their knowledge of the employees' actual performance in favour of their performance at the assessment centre.

It is generally accepted that a recruitment-based selection for redundancy will be fair if the roles that are being selected for are genuinely new, and not just a tweaked version of existing jobs. In Morgan v Welsh Rugby Union (EAT, 2011) two departments were amalgamated and the role of the head of each was abolished. A new post was created heading up the new department and both of the old heads applied for it. Selection was based on an interview process and the deciding factor turned out to be that the panel thought that one candidate had a much clearer vision for the future direction of the new department. The unsuccessful candidate claimed unfair dismissal. The EAT upheld the Tribunals view that the dismissal was fair. In reaching its conclusion the EAT stressed that when a genuinely new post was being created, any selection of the most appropriate candidate would inevitably involve a degree of judgement rather than just an objective assessment of skills and experience.

The most recent case to deal with this issue is Gwynedd Council v Barratt and others

(Court of Appeal, 2 September 2021). This involved a school closure where most of the staff were redeployed to a new school – on the same site as the old one. All of the staff at

school 1 were told that they would be made redundant, but most of them were then recruited to equivalent roles in school 2 by the new board of governors. Two employees – both PE teachers – were not recruited however and successfully claimed unfair dismissal.

A crucial point in this case was that the jobs that the two PE teachers were applying for were not new roles – they were the essentially the jobs they were already employed to do – albeit under the aegis of a newly constituted school. The Council argued that when school 1 closed it was inevitable that the teachers would be made redundant and that it had no power to influence overrule the choice of school 2 as to who should be recruited. The Tribunal did not accept that and neither did the Court of Appeal. The local authority was the employer and it was up to the local authority to ensure that any dismissal was fair. The Tribunal found that it was unfair to make the employees in effect apply for their own jobs and the Court of Appeal upheld that finding.

The relationship between a community school and a local authority in the context of employment law is one of those topics that makes me feel slightly dizzy. It is far from straightforward, and the Tribunal EAT and Court of Appeal in this case have all decided to gloss over the difficulties and rely on the fact that the decision to close School 1 was taken by the local authority rather than by the board of governors. I'm not sure that quite covers the issue of whether the local authority had the power to direct the governors of School 2 to take on the staff from school 1. The point perhaps is that the local authority decided to reorganize its schools in this way and cannot rely on that reorganisation to avoid responsibility for two teachers being made redundant with no opportunity to challenge the basis on which they had been selected.

But leaving aside that complication, the Tribunal's approach to the selection for redundancy tells us something about makes for a fair selection. It isn't really about whether there is some sort of interview assessment. What matters is that there is clarity about the basis on which the selection is being made and some chance for the employees to challenge that. In the Gwynedd Council case there was a lot of focus placed on the lack of an appeal mechanism, but the Court of Appeal confirmed that a specific right to appeal against a redundancy selection is not always necessary.

There are very few hard and fast rules in unfair dismissal – it is a matter of the Tribunal making an overall assessment of how reasonable the employer has been. However, the more a selection process resembles a recruitment exercise the more work the employer will have to do to persuade the Tribunal that that is a fair approach. That will usually involve showing that the roles being selected for are genuinely different from the roles being made redundant - so that the employee's track record in the current role is not a reliable indicator of their likely performance in the new one.

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