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Review

Employment

Employers have flexibility when selecting potentially redundant employees for alternative employment, says EAT in *Morgan v The Welsh Rugby Union.*

Picture the scene – an employer decides to restructure its business, as a result of which two roles are identified as redundant. Both employees are put at risk of redundancy and given the opportunity to apply for the one role that will be created in the new structure. Both are quite capable of carrying out the new role. Who should the employer pick and what process is it required to follow in making that decision (bearing in mind that the unsuccessful applicant will lose his job)?

This issue faced the Welsh Rugby Union after it restructured its Coaching Department and created the single post of National Coach Development Manager. It put together a job description and interview plan for the new role and invited Mr Morgan and two other candidates to interview. When Mr Morgan was turned down for it and then made redundant he brought an unfair dismissal complaint, claiming that the decision-making process lacked the objectivity and fairness appropriate to a redundancy dismissal. He pointed out in particular that the successful candidate had not satisfied the criteria set out in the job description for the new role and that the interview panel had dropped the ball in not sticking to the job description or the agreed format for the interview. The WRU accepted that it had not done either of these things, but maintained that it had nonetheless followed a fair procedure. Whilst both main candidates were capable of doing the new role, Mr Morgan was simply not the better of the two.

> "The normal rules on selecting employees for redundancy do not apply when selecting potentially redundant employees for alternative employment."

The EAT upheld the Tribunal's decision that Mr Morgan's dismissal was fair. It said the normal rules on selecting employees for redundancy do not apply when selecting potentially redundant employees for alternative employment. In its view, the latter is more akin to a recruitment process and, as such, employers have much more flexibility as to how and whom they pick. The EAT pointed out that if the WRU had been recruiting externally for the new role, it would not (absent a claim of discrimination at least) have been bound by a job description or a person specification. Further, if an outstanding candidate had emerged who did not meet some aspect of the person specification, it would still have been entitled to appoint him.

The EAT's observations give employers a clearer idea of what they are able to do when selecting employees for alternative roles. It means that employers are not bound by objective selection criteria as they would be if selecting which of two or more employees to make redundant. This is not to say that employers can adopt an entirely subjective approach. Previous case law makes it clear that the selection process must meet some criteria of fairness, as ultimately the selection for alternative employment is determinative of who is made redundant. Any appointment process should be sufficiently objective to avoid a decision which might be seen as capricious, discriminatory or arising out of favouritism and that makes it advisable to try and stick to any job description as much as possible. To do otherwise is simply inviting any unsuccessful candidates to challenge the fairness of the decision or to argue that the decision was discriminatory. The case also begs the question – if two or more otherwise redundant employees are in competition for a smaller number of new roles, can you or should you take advantage of the positive action provisions in the Equality Act to retain the one who best helps your EO statistics? In theory yes, but in practice a categorical no – unless you can prove that the candidates are of "equal merit" (not the case for Mr Morgan, however close) then you will simply have dismissed the unsuccessful applicant on (freely admitted) race or sex, etc., grounds and will swiftly be punted into touch in the Tribunal.

Could employers use this decision to give them greater flexibility in other redundancy situations? If an employer wished to reduce the employees carrying out a particular role from 5 to 2, could it sidestep the normal selection process, put them all at risk and then get them to reapply for their old jobs, albeit fewer of them? Also no. This case will only apply where new or different roles are being created, where the employer can legitimately argue that it is entitled to take a more forward-looking approach, focusing upon the candidate's ability to perform the new role.

When it comes to finding alternative employment, it is important to remember that an employer's obligations are more onerous for employees made redundant whilst on maternity or adoption leave – and, shortly, paternity leave. When the Additional Paternity Leave provisions come into force in April 2011, fathers who are made redundant whilst on Additional Paternity Leave will also be entitled to jump to the top of the queue for alternative employment purposes. Quite what happens when more than one candidate for that vacancy has that right of priority remains to be seen – back to the good old days of picking the best candidate, one presumes!

A refusal to respond to a settlement offer can constitute "unreasonable conduct"

In ***G4S Security Services (UK) v Rondeau*** the EAT held that a claimant was liable for costs after he refused his employer's offers to settle (and made no counter-offers), but then accepted them "at the door".

This case is not new – the decision was given back in 2009 – but has only very recently surfaced on the EAT's website. It is a useful reminder that, contrary to popular belief, there is scope under the existing Tribunal Rules for employers to pursue claimants for costs if they unreasonably reject settlement offers (and vice versa) by bringing this under the ordinary unreasonable conduct costs jurisdiction.

The Government is currently consulting on a number of proposals for Tribunal reform, including plans to encourage the parties to make or accept reasonable settlement offers. Either party could make a settlement offer as part of formal Tribunal proceedings, and there could be costs sanctions if such an offer was unreasonably turned down. There are numerous drafting and ET-cultural issues to be circumvented before any such plan becomes law but this case and others before it must be taken as already showing an increasing appetite in the Tribunals (even if born only of a dire need to cut both costs and listing delays) to enforce a commercial approach to settlement. We have not heard the last of this point.

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FURTHER INFORMATION

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