SQUIRE SANDERS

# REDUNDANCY: NO REDUCTION IN HEADCOUNT IS REQUIRED

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As a result of a downturn in business, an employer no longer has a need for a full-time bookkeeper. It seeks to persuade the employee to reduce her hours, but she refuses and so the employer gives her notice of dismissal. Is this a redundancy dismissal, entitling the employee to claim a statutory redundancy payment or (since the employer still needs a bookkeeper) a termination for some other substantial reason not giving her that entitlement?

Redundancy, according to the EAT in ***Packman (t/a Packman Lucas Associates) v Fauchon.*** The fact there has been no reduction in the overall number of employees does not in itself prevent this from being a redundancy dismissal.

The starting point for any discussion about whether a dismissal is by reason of redundancy is the wording of the statute. Section 139(1)(b)(i) of the Employment Rights Act 1996 states that an employee will be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

In a typical redundancy situation, e.g. where an employer needs fewer employees because there is less work to do, it will be easy to satisfy this test. But things can become more complicated if an employer needs the same number of employees, but has less work for them each to do. There is existing EAT authority (***Aylward*** from 2003) which says that a dismissal in this situation would not count as a redundancy because there has to be a reduction in the number of employees performing work of a particular kind in order to satisfy the statutory definition. But the EAT in ***Packman*** has now concluded that ***Aylward*** was wrong because it focused on only one aspect of the statutory definition, namely whether the requirements of the business for employees had ceased or diminished, without focusing on all of the words of the statute. It said: "We cannot properly apply the statute without taking what, for want of a better word, might be described as an holistic view of it. It looks at two variables that are linked: the employees and the work".

In the EAT's view it is possible to satisfy the statutory test without there being a reduction in the bald number of employees, provided there is a dismissal and the reason for the dismissal is because there is less work available. Furthermore, it said this approach was consistent with industry practice which is to consider the question of hours and numbers of employees by adopting an "FTE (a full-time equivalent) approach". So, for example, if the hours of two-full time employees are reduced by 50%, this is treated as a headcount reduction in FTE terms, even if the total number of employees remains the same.

This decision may come as a surprise to some employers. On a practical level it means they should take care when seeking to reduce employees' hours of work in response to a slowdown in business, as this may trigger the right to a statutory redundancy payment in certain circumstances, and with it, any enhanced arrangements the employer has agreed for its staff in such circumstances. This is not to say that all attempts to reduce hours of work will constitute a redundancy situation. For starters, there has to be a dismissal. So, for example, the employer would have to dismiss the employees for refusing to agree to a reduction in their hours.

Furthermore, a Tribunal would still have to be satisfied that the dismissal was caused by a redundancy situation, i.e. because there was a reduction in the needs of the business for employees to carry out work of a particular kind. This may be more tricky to establish where you are talking about reducing hours rather than dispensing with a role altogether.

On the face of it this dismissal could be constructive also so if the employer unilaterally imposes a shorter working week and the employee resigns in protest at the breach of contract, that "dismissal" could be found to be for redundancy. In a way that might benefit the employer by creating a potentially fair reason for the termination, but equally it would leave the employer with little or no defence to a claim under its enhanced redundancy payment scheme.

But that is not quite the end of the story. Only a month after this decision the Scottish EAT has suggested there must indeed be a reduction in actual employee numbers for there to be a statutory redundancy situation. In ***Welch v The Taxi Owners Association*** W was a radio control operator for a taxi company. She resigned in response to her employer's proposal to reduce her hours due to a downturn in business (so far, pretty similar to ***Packman***, save that the employee resigned rather than waiting to be dismissed).

W presented a claim for unfair constructive dismissal and not a claim for a statutory redundancy payment. The Tribunal dealt fairly robustly with discussion of redundancy: "With the greatest of respect [this is legal shorthand for "almost none"] to both solicitors and to any of the agencies which gave the claimant advice that she was in a redundancy situation, the Tribunal says that they are all plain wrong".

Upholding this view in similarly brusque tones, the EAT said there was no question of a redundancy situation here, since there was no reduction in the need for employees to work as radio control operators – the diametric opposite of what was said in ***Packman***. The Scottish EAT had clearly not had the benefit of seeing the ***Packman*** decision and in the circumstances we think the latter is likely to be preferred by Tribunals.

Employers should therefore proceed with care, especially those who are contemplating reducing hours of work as an alternative to redundancies, as they may face claims for statutory and enhanced redundancy payments where they were not expecting them.