

## **Axing the redundancy procedures together with the employees**

**Advocate Tom Crawford of Ashton Barnes Tee examines whether employers who are in dire financial straits are able to bypass the required fair procedures before making redundancies, in the face of apparently conflicting Tribunal decisions in the area.**

Traditionally, when considering the fairness of a redundancy dismissal, the Employment and Discrimination Tribunal, and the adjudicators before it, have been sticklers for following closely the recommended fair procedure contained in the Department of Commerce and Employment's redundancy Code of Practice.

The principal elements of the fair procedures expected from employers (and on a lesser scale for smaller employers) before confirming redundancies are fair selection, prior warning, detailed reasoning, meaningful consultation, and consideration of alternatives to redundancy. In fact, many Tribunal and adjudicator decisions have gone further than this by requiring employers to provide a right of appeal.

These procedures are all very well, it may seem. But what happens if an employer is in such financial difficulty that the procedures will not make any difference to what will be an inevitable redundancy, or that it simply cannot afford to go through all the procedures?

In the last year there has been a spate of redundancy cases before the Tribunal where this has been the common theme.

In one group of cases against the same employer, the entire workforce of 25 employees was made redundant following a single meeting at which they were informed that it was unviable for the Company to continue operating its business. The Company was heavily in debt and could not afford to pay the employees their monthly salary payments that were due, let alone any payments in lieu of their notice periods.

Regardless of the employer being faced with no option but to make the employees redundant, the Tribunal found the dismissal unfair on the basis that multiple elements of the fair procedures were not followed, most notably there not having been any consultation or advance warning. The Tribunal reiterated that the principal elements of the fair procedures should always be complied with in a redundancy situation.

In reaching its decision, the Tribunal also made reference to a previous adjudication decision in which it was stated that an objective of the Code of Practice is to ensure that redundancy situations are dealt with in a dignified manner and that concern is shown towards the affected employees.

In another case, a motor cycle business with a workforce of four employees was making a trading loss and, not being able to make savings any other way, had to make a mechanic redundant. The employer identified the selection pool as being two mechanics, adopted selection criteria relating to reliability and record attendance, consulted informally with the selected employee, and confirmed the redundancy in a face-to-face meeting.

The Tribunal was satisfied that the employer had correctly identified the selection pool, applied the selection criteria to the pool appropriately, and consulted with the employee earmarked for redundancy, albeit at an informal level. However, because the employer did not communicate which employees were identified as being in the pool, did not communicate the selection criteria, and did not make the consultation process more thorough and meaningful, the redundancy was rendered an unfair dismissal.

These cases can be contrasted sharply with the case of a grocery business, which also had a workforce of four employees and was in severe cash flow difficulties. The employer casually mentioned to its employees that it had financial problems and that redundancies may have to take place. Two months later the employer chose to make the manageress redundant as she had applied for jobs elsewhere and was the highest-paid employee, and she was then informed of her fate.

Although the employer did not comply with the principle elements of the fair procedures, and was not even aware of them, the Tribunal found the dismissal fair, on the basis that there was no alternative to dismissing the manageress and there had been some consultation, despite it having been "rather inept".

So does this mean that employers, particularly small ones, can after all bypass the fair procedures in making redundancies if they are in dire financial straits?

The answer lies in treating the Tribunal's decision in the grocery case with caution. Perhaps it viewed the financial circumstances of the employer with unusual sympathy on the day.

Employers are therefore recommended to follow at least the principle elements of the fair procedures traditionally advocated by the Tribunal. If nothing else, the redundancies should be carried out with dignity and concern even if they are inevitable.

Ends.