

## **Don't dismiss redundancy**

When considering the fairness of a redundancy dismissal, the adjudicators, who used to hear unfair dismissal complaints before the Employment and Discrimination Tribunal came into existence, were traditionally meticulous about following closely the recommended fair procedure contained in the Department of Commerce and Employment's Code of Practice on redundancy.

The principal elements of the fair procedure recommended in this Code of Practice are fair selection, prior warning, detailed reasoning, meaningful consultation, and consideration of alternatives to redundancy. In fact, many adjudicator and Tribunal decisions have gone further than this by requiring employers to provide a right of appeal to redundant employees. The same principles apply to smaller employers but on a smaller scale (whatever that means in practice).

Since the Tribunal replaced the system of adjudicators in March 2006, there has been a spate of cases that has come before the Tribunal in which the employers were in such financial difficulties that the recommended redundancy procedure would not make any difference to what would be the inevitable outcome of redundancy, or they simply could not afford to go through all the procedural elements.

Has the Tribunal approached these cases more forgivingly?

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 salaries or 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 procedure were not followed, most notably there not having been any consultation or advance warning. The Tribunal reiterated that the principal elements of the fair procedure 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 motorcycle 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 of 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.

The Tribunal did, however, use its new discretion to reduce the award – in this case by half – on the basis that it was just and equitable to do so as the employer had taken mitigating actions to avoid the redundancy and had elements of a fair procedure in place.

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. The manageress was then informed of her fate.

Although the employer did not comply with the principle elements of the fair procedure, 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 procedure in making redundancies if they are in dire financial straits?

Probably not.

In a very recent case, a small employer employed an employee in a new role as a motorbike technician. In the first 15 months of the employment the employee rarely met the targets set for him to enable the employer merely to break even in employing him, which put a financial strain on the employer.

The employer therefore embarked on a redundancy process that consisted of giving advance warning to the motorbike technician and another technician that one of them may have to be made redundant if the targets were not met, provided them with regular figures as to their performance, considered all conceivable ways of avoiding having to make a redundancy, and keeping the employees on for as long as possible to see whether the situation could improve.

However, there was no improvement, and when the employer's finances spiralled further downwards and its directors had to take an 85% pay cut just so its employees could continue to be paid, it selected the motorbike technician for redundancy - some five months after the initial warning – and notified him in a face-to-face meeting.

The Tribunal found the dismissal to have been unfair on the basis that it was not clear what selection criteria were used and how these were applied, communication of the impending possibility of redundancy effectively ceased after the first warning (although the employer maintained it constantly wanted the two technicians) and there was no appeal process.

Anticipating that the Tribunal might find the redundancy to have been unfair, the employer requested that it reduce the award on the basis that, as in the previous case when the Tribunal reduced the award, the employer had taken mitigating actions and had partly followed a fair procedure.

Although the Tribunal accepted that there were similarities between the two cases, it declined to reduce the award on what would appear to be the misguided basis that the employer had submitted no evidence regarding issues of past reliability or conduct of the employee (even though, in fact, it had) as one of the factors in the determination of the selection for redundancy.

The lesson, therefore, is that even if an employer is in dire financial straits, with decisions of the Tribunal varying to such a degree the safest option is still to follow the principle elements of the fair redundancy procedure traditionally advocated, and not to expect that an award will be reduced if one element is missing.

Ends.