

Redundancy Selection Pools Revisited



In July's Brief we reported on redundancy selection and two cases which looked at whether employers are able to run a redundancy procedure with only one employee in the redundancy selection pool.

In that article we pointed out that employers should proceed with care when singling out just one employee, and suggested that employers should be able demonstrate that they gave due consideration as to which employees are selected for the redundancy pool.

Since reporting on those cases, the Employment Appeal Tribunal (EAT) has looked at the issue again in *Wrexham Golf Club Co v Ingham*. In this case, the EAT reversed an Employment Tribunal's (ET) decision which found that an employee had been unfairly dismissed because the employer had not considered the possibility of establishing a wider redundancy selection pool when planning the redundancy.

There are no fixed rules about who should be included in a selection pool, but when looking at the pool, the ET will look at whether it was within the range of reasonable responses that the employer could have taken. Provided the employer has genuinely applied its mind to the decision, it will be difficult for an employee to challenge the choice of pool.

In the *Wrexham* case, the employee in question was a steward, and one of 11 employees. His main role was managing the bar, but he also looked after the clubhouse at weekends. Mr Ingham was the only steward and to cut costs the employer intended to cut his role and have his duties carried

out by others. Mr Ingham was duly put at risk of redundancy and after a consultation and appeal was made redundant.

The ET found that he had been unfairly dismissed because the club had not considered the possibility of establishing a selection pool and had not allowed for the fact that there was overlap between Mr Ingham's duties and those of other bar staff. However, this was reversed by the EAT, applying the principles set out in *Capita Hartshead v Byard* (one of the cases we reported on in July).

The EAT found that the ET should have considered whether the decision to place Mr Ingham in a selection pool of one was within the range of responses. The ET should have looked at whether given the nature of Mr Ingham's work, it was reasonable for the club not to have considered developing a wider pool. The EAT's view was that there will be cases where it is reasonable to focus on a single employee without establishing a pool or even considering whether one should be established. The case has been referred back to the ET for a fresh hearing.

Employers are likely to be relieved with the finding that in some straightforward redundancy situations where just one role is being cut, a dismissal may be fair even if it does not apply its mind to the question of the selection pool. However, our advice would still be that other than in exceptional cases, it is preferable to give consideration as to whether a wider selection pool is appropriate and to be able to show that this was considered in the event that evidence to this effect is ever required before a Tribunal.

NEWS IN BRIEF

What's new for autumn

Consultations are expected shortly on the proposals to rewrite the employment tribunal rules and the government's plans to change the use and format of settlement agreements.

The government is due to issue its response to the Modern Workplace Consultation, which will include proposals for introducing a new system of flexible parental leave and flexible working.

Seminar

In conjunction with All Health Matters and H & K Safety Service Ltd, the employment team are presenting a morning seminar in July 2013 on a range of topical issues. In a departure from the usual this will involve real life case studies where you can decide what you would have done! Those receiving the Employment brief by email will get an electronic invite nearer the time.

National Minimum Wage

Although some of the rates stay the same this year the rate payable to adults of 21 or over increases this October to £6.19. The other notable change is the increase of the rate payable to apprentices which will increase to £2.65.

Enterprise and Regulatory Reform Bill

A nondescript title covering a range of proposed reforms for employment claims, including mandatory pre claim ACAS conciliation; financial penalties to be imposed on employers who are found to have breached employment rights and amendments to compensatory awards at tribunals.

QUICK REFERENCE SECTION

Statutory minimum notice periods
An employer must give at least:

- One week's notice to an employee who has been employed for one month or more but less than 2 years.
- One week's notice for each complete year of service for those employed for more than 2 years.
- Once an employee has more than 12 years service the notice period does not extend beyond 12 weeks.

National Minimum Wage

(From October 2012)

16 – 17	£3.68
18 – 20	£4.98
21+	£6.19
Apprentices	£2.65

Statutory Sick Pay

(from April 2012)

£85.85 per week

Statutory Maternity/Paternity/Adoption Pay

(basic rate) (from April 2012)

£135.45

Statutory Holiday

5.6 weeks for a full time employee.

This can include bank and public holidays.

Redundancy Calculation

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 week's pay for each full year of service where age during year is 41 and over.

The calculation is capped at 20 years. Maximum week's pay is capped under the Statutory Scheme at £400 for dismissals prior to 1.2.12 and £430 for those after.



Hiring an employee: The key legal issues

Before advertising

- Make sure all staff involved in the recruitment process have had equal opportunities training and that they continue to receive it while working for your business.
- Draw-up the following documents:
 - a **job description** which sets out the title and main purpose of the job, the place of the job holder within your business and the main tasks or responsibilities of the post.
 - a **person specification** which details the experience, know-how and qualifications, skills and abilities necessary for the job in question. The requirements can be split between those that are "essential" for the job and those that are merely "desirable".
- Ensure that none of the requirements in either document discriminates against any groups of employees. In particular, consider whether any requirements for specific qualifications, working hours or times, travel, age ranges or dress are necessary for the job in question.
- Consider whether the job needs to be full-time or whether it is open to part-time, home working, flexible working or job sharing. If you specify that the job is full-time, you may need to be able to justify your decision.

The advert

- Decide whether you want the job to be advertised internally, externally or both.
- Consider using specialist publications, websites and agencies to target different communities, ages and sexes.
- Think carefully when writing the advert. Protection from discrimination because of a protected characteristic (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race religion or belief, sex or sexual orientation) covers all areas of employment, including job adverts. Avoid using language that might imply only someone of a certain age would be suitable, such as "mature", "experienced" or "young".
- Ensure any employees absent from work, including women on maternity leave or those on long-term sick leave, are informed of the vacancy to enable them to apply. Failure to do so could amount to discrimination.

The application

- Using a standard application form will allow your business to directly compare individual applicants' answers against the selection criteria more easily and help avoid potential unlawful discrimination claims.
- Draw up a shortlist using the same criteria used in the job description and person specification. Every applicant should be marked against the same criteria to help avoid any potential unlawful discrimination claims.
- If your business is making redundancies you must consider applications for suitable vacancies from employees selected for redundancy ahead of external applicants. Women selected for redundancy while on maternity leave are entitled to be offered a suitable alternative vacancy (where one is available) in priority to other potentially redundant employees.

Pre-employment health questions

- In most cases your business is prohibited from asking potential recruits questions about their health and you should avoid asking questions about an applicant's sickness record.



- However, there are some circumstances where you are entitled to ask health-related questions. For example, asking an applicant for a job in a warehouse whether they have any health problems that may prevent them from lifting or handling heavy items. You can also check whether an applicant has any special requirements you need to take into account when making the arrangements for interview, such as wheelchair access.

The interview

- Think when and where the interview should take place. For example:
 - check whether the interview venue has access for disabled candidates;
 - holding an interview during a religious holiday could discriminate against applicants from that particular religion; or
 - candidates with children may require the interview to be conducted at a particular time.
- Ideally, all shortlisted candidates should be asked the same or similar questions to allow you to compare their answers and avoid the possibility of a discrimination claim.
- You should not ask any questions about the candidates' personal life unless they are directly relevant to the requirements of the job. For example it is unacceptable to ask a female candidate whether she plans to have children.

- Keep a paper trail throughout the process to demonstrate how your business reached its decision to select the successful candidate. This should include:
 - selection criteria;
 - notes on the short listing process;
 - interview questions;
 - notes of panellists' assessments of the interviewees.
- It is good practice to provide feedback to unsuccessful candidates if it is requested. A failure to do so could indicate your decision was based on discriminatory grounds.

The offer

- Make a written offer to the successful candidate. Consider whether to set a time limit for acceptance and specify that acceptance should be in writing.
- Your business can make the offer conditional on a range of criteria, provided they are not discriminatory. For example:
 - providing satisfactory references; or
 - confirmation that the employee is free to work in the UK or has an appropriate work permit or immigration approval to work.
- Before making a job offer, make sure the applicant confirms they are not bound by any restrictive covenants from their previous job; otherwise your business could be sued by

their former employer. Restrictive covenants are used in employment contracts to protect an employer's business by restricting the activities of an employee, generally after employment has ended.

The contract

- Consider whether the contract should be permanent or for a fixed term. If you decide a fixed-term contract is appropriate, you may need to justify why your business reached that decision.
- Remember that an employee on a fixed-term or part-time contract should not be treated any less favourably than a permanent employee. For example, they should be allowed access to a company bonus scheme or instead receive an equivalent benefit.

Probationary periods

- Your business can include a probationary period in the contract. This will enable you to assess the employee and vice versa. It also gives you the flexibility to dismiss someone using a shorter notice period of at least one week.
- Probationary periods typically last between three to six months and can be extended with the consent of the employee at the end of the term. For example, if the employee was sick and your business was unable to adequately assess their performance, you may want to extend the period.

When age discrimination may be lawful

Businesses are generally prohibited from discriminating against an employee on the basis of their age. This will include choosing not to interview a candidate because their application suggests they are nearing retirement age. However, unlike other forms of discrimination, in certain circumstances, your business may be able to justify treating employees differently because of their age. Below are some of the most common exceptions.

Service-related benefits

Your business is allowed to provide benefits which reward long service. For example, service-based rewards such as:

- Extra days' holiday
- Incremental pay
- Share options.

However, if the benefit is affected by length of service of over five years, you will need to be able to show that it fulfils a business need, such as encouraging loyalty.

National minimum wage

Your business is entitled to follow the national minimum wage rates that exist for different categories of worker.

Redundancy pay

- Redundancy pay is potentially discriminatory as it is often calculated based on age or length of service. However, a redundancy scheme that is similar to the statutory redundancy pay will not be regarded as discriminatory. A statutory redundancy payment is calculated using a multiplier based on age and length of service.
- A redundancy scheme that aims to cushion older workers and reward loyalty, particularly where the scheme has the support of the workforce, will not be discriminatory.

Insurance benefits

Your business is entitled to provide employees with access to insurance or a related financial service up to the age of 65.

Provision of childcare facilities

Your business can provide childcare facilities for employees caring for children in a particular age group (for example, a crèche). You can also help employees with:



- The payment of some or all of the cost of child care
- Identifying a suitable person to provide child care.

Retirement

There is no longer a default retirement age allowing you to automatically retire all employees when they reach age 65. Although your business can still have a retirement age that applies to all employees, you will need to be able to show that the compulsory retirement of an employee achieves a previously identified legitimate aim, or the retirement will amount to age discrimination. Legitimate aims can include:

- Promoting access to employment for younger people
- Efficient planning of the departure and recruitment of staff
- Sharing employment opportunities fairly between the generations.

Occupational requirements

In limited circumstances, your business can stipulate that, because of the nature of the job in question, only people in a particular age group can do the job.

Positive action

Your business can take positive action if you think any of your employees are disadvantaged or under-represented because of their age. For example, if the majority of your employees are under the age of 40, you could place a job advert encouraging applications from all age groups, especially applicants over the age of 40.

It pays to look after your people

Gill Monk, All Health Matters

Just what is the most valuable asset your company has? Is it the vehicle fleet, latest piece of plant and machinery, the IT system, the order book?

I would argue that while these things are essential to your business, it is the people who work for you who are your greatest asset, for without them there is no one to make your product, sell it, pack it, distribute it, invoice it, and collect payment for it.

So what happens when a machine breaks down, or the server crashes? You immediately call in someone to fix it so the business can carry on doing what it does. But when a member of staff goes off sick, what do you do? Accept a medical certificate and set about covering the absence as best you can?

There can be no doubt that sick staff can seriously damage a business, not only financially, but also because of the effect it has on the morale of the workers left behind who can become resentful and feel 'put upon'.

It makes perfect sense then to maintain this asset just as you would any other doesn't it?

- Ensure the people you employ are medically fit enough to do the job expected of them and if they have any underlying existing health conditions, you are fully informed of any adjustments you will be required to make to accommodate them
- Have an appropriate health surveillance programme running, designed to identify potential problems very early
- Adopt robust absence management processes entitling you to expect the member of staff to attend an independent health assessment with an Occupational Health professional in the event of long term or repeated short term absences.

This is what Occupational Health is all about. We help employers manage the health of their greatest asset to keep Britain working.

Gill Monk is Managing Director at All Health Matters Limited. She can be reached by email: gill@allhealthmatters.co.uk. Visit www.allhealthmatters.co.uk for further information.

CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.



Amanda Finn
Tel: 01622 678341
Email: a.finn@gullands.com



Laura Claridge
Tel: 01622 678341
Email: l.claridge@gullands.com

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