

Getting a Redundancy Wrong Can Result in an Unfair Dismissal Case

This arose in case ADJ-00018737 involving a branch manager and a vehicle servicing organisation.

The Adjudication Officer in this case looked at Section 6 and 7 of the Unfair Dismissal legislation.

The Adjudication Officer set out in circumstances where redundancy is unavoidable there is an onus on the employer to establish reasonable and objective criteria for selection and must apply this criteria fairly. The case of Mulcahy –v– Kelly 1993 ELR35 being a case where the EAT held:

“It is well established that there is an obligation on an employer to look for an alternative to redundancy.”

In that case it was held:

“Having heard the evidence presented the Tribunal is satisfied that a redundancy situation existed...when the decision was made to terminate the claimant’s employment.”

It is our opinion that the claimants dismissal resulted wholly or mainly from reasons of redundancy. Notwithstanding that the claimant’s selection for redundancy was not in contravention of a procedure or an established custom and practice of the employment relating to redundancy, there is an obligation on an employer to look at all employees as possible candidates for redundancy.

The Adjudication Officer set out that this duty may involve locating alternative work within the organisation even if this involves dismissing another employee with shorter service. The Adjudication Officer set out that the two locations were within reasonably close proximity to each other and there had been a regular occurrence to move employees from one side to the other. The Adjudication Officer set out that in Thomas and Beets Manufacturing Limited –v– Harding 1980 IRLR255 the English EAT found that the dismissal was unfair because she could have found work as a packer even though this would have meant dismissing a recently employed packer. In the case of Gillian Free –v– Oxygen Environmental UD2006/2011 the Employment Appeals Tribunal noted that:

“When an employer is making an employee redundant while retaining other employees, the selection criteria being used should be objectively applied in a fair manner. While there are no hard and fast rules as to what constitutes the criteria to be adopted nevertheless the criteria adopted will come under close scrutiny if an employee claims that he/she was unfairly selected for redundancy... Where there is no agreed procedure in relation to selection for redundancy... Then the employer must act fairly and reasonably”.

The relevant legislation is Section 6 and 7 of the Unfair Dismissal legislation.

This is a useful decision for reminding employers about the importance of the selection procedure. The fact that an employer may determine that the role of a particular employee is going to be made redundant it does not mean that the employer must just finish there. The employer then has to look at the entire organisation to see is it possible for that employee to be retained within the organisation sometimes in a different role even to the extent that an employee with lesser service would be dismissed.

By this we mean that if you had a business that had two shops in a country town. They are at different ends of the town. It is a relatively short distance apart. There are two people who work on checkouts one in each location. The employee working in rotation A has five years' service. The employee working in location B has three years' service. The employer decides to close location A. In those circumstances the employer has to look at whether the employee in location A should actually transfer to location B and that the employee working there who has lesser service should be made redundant.

Of course this is going to create, in any organisation, huge upset. You will have an employee who sees their job been taken by an employee from a different shop. That is unfortunately an issue which employers will need to address in the current environment.

The example that we are giving is a very simple example. There is of course going to be more complex issues where you will have an issue of an employee performing one job but who is capable of performing a different job.

It is vitally important that employers in putting in place the selection process are aware of their obligation to look at retaining an employee and finding them a different position if that is possible even to the extent that an employee with lesser service performing a particular function might be let go to accommodate that individual. These cases will invariably result in an unfair dismissal case one way or the other and therefore legal advice is always required.