Selection for Redundancy – 4

This issue was address in case ADJ-00019921 where the Adjudication Officer helpfully set out the case of Williams –v- Comps Air 1982 1 ICR156 where Browne Wilkinson J in considering the issue of fair selection identified the following general accepted principles governing how reasonable employers will typically act namely;

The employer will seek to give as must warning as possible of impending redundancies so as to enable the Union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions, and, if necessary, find alternative employment in the undertaking or elsewhere.

The employer will consult the Union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the Union the criteria to be applied in selecting the employees to be made redundant. Where a selection has been made, the employer will consider with the Union whether the selection has been made in accordance with those criteria.

Whether or not an agreement as to the criteria to be adopted has been agreed with the Union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance records, efficiency at the job, experience or length or service.

The employer will seek to ensure that the selection is made fairly and in accordance with these criteria and will consider the representations the Union may make as to such selection.

The employer will seek to see whether instead of dismissing an employee he could offer alternative employment.

The Adjudication Officer pointed out the case of Boucher –v- Irish Productivity Centre 1994 ELR205 as an illustration of an unfair selection process where no agreement was reached as to the selection and the selection process was carried out without any consultation or interviews.

In Mulligan –v- J2 Global (Ireland) Limited UD/993/2009 in respect of redundancy the EAT stated;

"In cases of Redundancy best practice is to carry out a genuine consultation process prior to reaching a decision as to redundancy. While in some cases there may be no viable alternative to the making of one or more jobs redundant, whatever consultation processes it carried out, the employer who fails to carry out a consultation process risk being found in breach of the Unfair Dismissal Act as such a lack of procedure may lead to the conclusion that an unfair selection for redundancy has taken place".

The Adjudication Officer also pointed out the case of JBC Europe –v- The Panasi 2011 IEHC279 where Charleton J stated;

"It is made abundantly clear by the legislation that redundancy, while it is a dismissal, is not unfair. A dismissal however can be distinguished as a redundancy that is not lawful. Upon dismissal an employee can simply say that the employer was not dismissed for reasons specific to that person but that, instead, his/her service were no longer required, pointing to apparently genuine reasons for dispensing with the services of the employee. In all cases of dismissal, whether by reason of redundancy or for substantial grounds justifying dismissal, the burden of proof rests on the employer to demonstrate that the termination of the employment came within a lawful reason".

The Adjudication Officer also quoted the case of Sty. Ledger –v- Front Line Distribution Ireland Limited 1995 ELR160 where the EAT stated;

"Impersonality runs through the five definitions in the Act. Redundancy impacts on the job as only as a consequence of the redundancy does the person involved loose his job".

It is worthy to note that the EC Directive on Collective Redundancies uses a shorter and simpler definition. "One or more reasons not relating to the individual worker concerned".

The Adjudication Officer also pointed out that Mr. Justice Charleton had remarked;

"It may be prudent, as a mark of a genuine redundancy, that alternative to letting an employee go should be examined".

The case of Williams –v- Coms Air referred to above, is one where there is an issue with the tests as regards the third one namely the issue of matters such as attendance records, efficiency at the job. These are personal rather than issues relating to the job itself. It is important, in our view, that when determining whether or not there is a redundancy that any issue which is personal to the employee should not be part of the process.

In this case the Unfair Dismissal claim was lost. However it is very useful that the Adjudication Officer has taken the time to set out the Legislation in such depth. It is not clear whether the employer was represented or not. What is interesting is that again in this case the employer raised the issue that the employee had failed to use the internal grievance procedures. While it is not specifically covered in the decision, the issue of raising internal grievance procedures is not necessary. The issue of using internal grievance procedures is an issue which we have covered previously. It is surprising that this issue is continuing to arise with such regularity.