



# HR Briefing October 2008

## REDUNDANCY – LEGAL IMPLICATIONS & HR BEST PRACTICE

With warnings of a global credit crunch and experts forecasting a continuing decline in the economy, the issue of redundancy is of particular significance. This month we consider recent case law developments impacting on redundancy and methods of best practice, to reduce the likelihood of claims by affected employees.

We recommend that employers obtain legal advice well in advance of implementing a redundancy programme, given that redundancy is only a permitted reason for termination of an employee's contract of employment in defined circumstances and prescribed procedures must be adhered to.

### Fair Selection Procedure

First of all, an employer needs to produce fair and objective selection criteria to avoid potential discrimination claims.

The High Court has decided in the recent case of *Rolls Royce v Unite the Union EWHC 2420 (QB)* that the use of length of service criterion in a redundancy selection policy does not constitute unlawful age discrimination, as long as it fulfils a legitimate business aim and is a proportionate means of achieving that aim. The criterion used took account of loyalty and experience amongst staff, as well as protecting older staff members from being made redundant. Furthermore, giving points for length of service in a redundancy selection procedure conferred a benefit on the employee concerned (to remain in employment and not lose his/her job).

Whilst this case demonstrates that it may well still be possible to use length of service as a criterion for selecting employees for redundancy, an employer will still need to justify its use and this may be difficult where an employer relies solely on a 'last in, first out' approach.

### The requirement to consult

It is also important that an employer should have consulted the "at risk" employee about the choice of redundancy selection criteria, as well as his/her scores against such criteria.

### Key Recommendations

- Obtain legal advice well in advance of implementing a redundancy programme
- Make sure any dismissal is for a genuine redundancy reason
- Use objective selection criteria
- Apply the criteria fairly and consistently

The consultation must be meaningful if an employer is to avoid a finding of unfair dismissal. In particular, employees must be able to understand why they have been selected for redundancy, and be given the opportunity to challenge their selection. This will mean giving them details of the redundancy selection criteria and how they have scored against it. In some circumstances it may also be reasonable for employees to be consulted on the drawing up of the selection criteria. However, advice should be sought in this respect, given that it will very much depend on the facts of each case.

### Enhanced Redundancy Payments

Under the statutory redundancy pay scheme there are 3 "age bands" (half a week's pay for age 18-21, one week's pay for age 22-41 and 1½ weeks' pay for every year over 41).

If an employer enhances their redundancy pay packages beyond the statutory rates they should consider whether this is discriminatory on the grounds of age. Under the Age Regulations there is a specific exemption for any schemes calculated on the same basis as the statutory regime.

Where an enhanced redundancy pay scheme does not fall into this category, it may still not amount to age discrimination if the employer can show it is a proper means to achieve a legitimate aim.

In *Galt v National Starch & Chemical Limited ET/2101804/07* an employment tribunal accepted that awarding higher payments to older workers was a legitimate aim given that they might find it harder to find work, however the particular scheme utilised was found not to amount to a proportionate means of achieving it.

In planning any enhanced redundancy package it is therefore necessary to consider carefully the formulae to be offered where it differs from the statutory scheme. Employers will have to be prepared to justify their enhancement where it is age related and be prepared to produce evidence to support their position. Extensive consultation with the workforce on the detail and reasons for the scheme will also strengthen the employer's position.

### Conclusion

Thus, although "redundancy" is a potentially fair reason for dismissal, the above cases demonstrate just some of the areas where a fair reason alone is not sufficient, and the manner of dismissal (i.e. the procedure followed) is such as to make the overall dismissal unfair and, in some cases, also discriminatory.

If you have any queries on any of the above please contact **Alison Loveday** at [alisonl@berg.co.uk](mailto:alisonl@berg.co.uk) to discuss further issues. Alternatively you contact **Alison** on **0161 833 9211**. If you do not wish to receive further mailings please email [alisonl@berg.co.uk](mailto:alisonl@berg.co.uk) with the words "unsubscribe" in the heading.

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- Employers should consult the "at risk" employee about the choice of redundancy selection criteria, as well as his scores against such criteria.
- Bear in mind the age discrimination legislation.
- Consider carefully the formulae of any redundancy package to be offered where it differs from the statutory scheme
- Be prepared to provide evidence to support your position
- Employers should undertake impact assessments and consultation exercises



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