Can an employer require a potentially redundant employee to go through a competitive interview process for an alternative role?

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Can an employer require a potentially redundant employee to go through a competitive interview process for an alternative

role?

In the wake of the coronavirus pandemic, some employers will be facing the prospect of reorganising their businesses and making redundancies. Employers in this position should take note of this recent decision by the EAT which highlights the risks of getting the process wrong.

What does the law say?

In the case of **Williams v Compair Maxam**, the EAT laid down the general redundancy process to be followed by employers who recognised trade unions. In summary, such employers should:

- provide as much warning as possible of impending redundancies and consider alternative solutions such as alternative employment (either within the specific undertaking or elsewhere);
- consult with the trade union and agree the criteria to be applied for selecting which employees from a pool would be made redundant. The selection criteria should be objective, capable of independent verification and applied fairly; and
- consider offering alternative employment.

When it comes to selecting which employees from the pool should be offered alternative employment, subsequent cases have confirmed that a rigorously objective selection process is not required (in the way that it is required when selecting who to make redundant). A degree of subjectivity is permitted.

Where a brand new role has been created, the appointment to that role is likely to require something more like a competitive interview process, in order to test the skills and competencies of the employees against the requirements of the new role. Indeed, in the case of **Morgan v Welsh Rugby Union (Morgan)**, it was accepted that the approach of applying selection criteria to a pool of potentially redundant

employees will not necessarily be appropriate where a brand new role has been created.

What happened in this case?

The two Claimants were teachers who were employed by the Council to work at secondary school (**School 1**). Following a reorganisation of education provision in the area, the Council decided to close School 1 and replace it with a school for children aged between 3 to 18 years of age (**School 2**). School 1 was to close at the end of the Summer term in 2017 and the School 2 was due to open in September 2017.

The Council did not consult with the Claimants (or their trade union) about the redundancy procedure at School 1 or the recruitment procedure at School 2. Instead, it invited the Claimants to apply for new roles within School 2. However, the "new" roles were substantially similar to their old roles at School 1. The Claimants were interviewed for the positions but were unsuccessful. In May 2017, the Council gave them notice of dismissal by reason of redundancy, with a termination date of 31 August 2017. The Claimants were not offered the opportunity to appeal their dismissals.

The Claimants succeeded in their claims for unfair dismissal. The Employment Tribunal held that the Council's procedure had been unfair for a number of reasons, including the lack of consultation and appeal, but also the fact that the Claimants had been required to "apply for either an identical job or substantially similar job". In other words, this was not a Morgan-type situation and the use of a competitive interview process was unreasonable. The Council appealed.

What was decided?

The EAT dismissed the Council's appeal, holding that the Employment Tribunal had applied the law correctly. Notably, the EAT drew a distinction between the process to be used where:

- the previous role is no longer needed and a newly created alternative role available; and
- there has been a reduction in the overall number of roles needed but some roles (or substantially similar roles) remain available.

In the first scenario, which the EAT described as "forward looking", it would be reasonable to use a competitive interview process to identify the candidate best suited to fill the new post. However, in the second scenario, the right approach would be to place all of the "at risk" employees in a redundancy pool and score them according to objective criteria.

In this case, the roles in School 2 had been identical or substantially similar to the roles in School 1 and so a competitive interview process was not appropriate.

What are the learning points for employers?

It remains reasonable for employers to use a competitive interview process to decide who to appoint to a newly created role following a reorganisation. However, there are limitations on when this approach can be used. Where the alternative role is the same or very similar to one performed by the redundant employees, then the fair approach is to apply selection criteria to the employees in the pool. Employers should give careful thought to which approach is right for their situation before proceeding.

It's also important to remember that even where a competitive interview process is legitimate, this will not necessarily remove the need for consultation with the affected employees about the process. Indeed, in this case, the EAT noted that consultation "may remain relevant" depending on the facts of the particular case.

Gwynedd Council v Barrett

If you would like to discuss any of the issues raised in this article or how BDBF can help your business navigate a redundancy process, then please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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