Redundancy dismissal was unfair because employer failed to give meaningful consideration to alternatives to dismissal

In the recent case of *Lovingangels Care Ltd v Mhindurwa*, the EAT upheld a decision that a dismissal was unfair because the employer failed to give proper consideration to placing the employee on furlough as an alternative to redundancy.

What happened in this case?

The Claimant, Ms Mhindurwa, worked as a live-in carer for one of the Respondent's clients. In the early stages of the Covid-19 pandemic, the person she cared for went into hospital and then went to live in a care home. Ordinarily, the Claimant would have moved on to care for another client, however, this was not possible due to the pandemic restrictions.

The Coronavirus Job Retention Scheme – also known as the "furlough scheme" – came into force on 23 March 2020. This was a scheme whereby the Government paid a proportion of the wages of workers who could not work due to the pandemic restrictions. The intention was to enable employers to continue employing such workers and to avoid mass redundancies.

In May 2020, the Claimant asked the Respondent to place her on

furlough. The Respondent refused on the basis that there was no job role for her. After a brief redundancy consultation process, the Claimant was given notice of dismissal on 13 July 2020. The Claimant appealed. The appeal officer dismissed the appeal, having given no consideration to the possibility of furlough. The Claimant brought a claim of unfair dismissal.

The Employment Tribunal held that the dismissal was unfair on the basis that Respondent had failed to consider alternatives to a redundancy dismissal, namely, the possibility of placing the Claimant on furlough. The Tribunal said that in July 2020 a reasonable employer would have given consideration to whether the Claimant should be furloughed while it assessed whether the availability of work would change as the pandemic unfolded. The Tribunal also held the dismissal was procedurally unfair as the appeal was a "rubberstamp" exercise and not a proper appeal.

The Respondent appealed to the EAT.

What was decided?

The Respondent argued that the Claimant had not met the eligibility requirements of the first iteration of the furlough scheme, namely, she was not someone who had been instructed to cease work by them by reason of the circumstances arising as a result of Covid-19. The Respondent said the Claimant had not been instructed not to work, rather it was the case that there was no work available for her.

However, the EAT said it was *"strongly arguable"* that a proper consideration of the purpose of the scheme would have led to the conclusion that it applied to the claimant. In any

event, the Tribunal had not said that the dismissal was unfair because the Respondent *should* have furloughed her. Rather, the Respondent had acted unreasonably by not giving proper consideration to the possibility of furloughing her. The Tribunal Judge had been *"…entitled to apply the same approach to furlough as he would to any possible alternative to dismissal that an employer might…be expected the consider if acting reasonably".*

The Respondent also appealed on the ground that the Tribunal had been wrong to say that it had not considered the possibility of furlough. However, the EAT held that the finding was that only cursory consideration had been given to the issue. A reasonable employer would have given proper consideration of the possibility of furloughing the Claimant to allow some time for the situation in respect of the live-in carers to improve, and to obtain new clients.

The appeal was dismissed.

What does this mean for employers?

Although the furlough scheme is long gone, this case reminds employers of the need to give careful consideration to alternatives to redundancy before proceeding to dismiss. A failure to do so may mean the decision falls outside the range of reasonable responses, with the result that the dismissal is unfair.

It is well known that employers have a duty to consider whether there are any suitable alternative roles available for a potentially redundant employee. However, there are other alternatives to redundancy that should be considered including the following:

- **Reducing employee headcount:** there are various options for reducing employee costs including freezing recruitment, withdrawing job offers, deferring start dates, reducing agency or temporary staff, seconding staff to other organisations, redeployment into alternative roles or offering early retirement.

- **Temporary stoppage of work:** this could include things like offering sabbaticals or unpaid leave, requiring staff to take holiday or temporarily laying off staff on reduced pay.

- **Reducing working hours:** the reduction of working hours will, in turn, reduce employee costs. This could include things like short-time working, offering part-time working or banning overtime.

- **Reducing remuneration:** this could include things like introducing salary sacrifice arrangements (which may save the cost of employer National Insurance contributions), freezing pay, reducing pay and/or benefits, reducing or temporarily ceasing employer pension contributions, withdrawing discretionary bonus schemes or tightening up on expenses (e.g. introducing a maximum spending limit).

Not all of these options will be appropriate for all

organisations, but employers should be able to demonstrate that they have, at least, given reasonable consideration to whether such options would be achievable and help avoid the need to make redundancies. In this context, consulting with staff about the alternatives will go some way to help demonstrate this (and, indeed, may be required depending on the option under consideration).

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