GETTING REDUNDANCY RIGHT

MODULE 8:
ALTERNATIVE EMPLOYMENT

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You are now at the stage where the decision has been made that somebody's role is redundant, and you're looking to see if you can find another role to slot them into, rather than dismissing them.

This is a nice, short, self-contained, module. Here's what you're going to learn:

- How close the fit must be: whether suitable alternative employment has to fit like a Savile Row suit or just like a Primark hoodie
- How hard you have to search, as an employer, for alternative employment
- Whether you need to offer a job which becomes available a few hours after the dismissal takes effect
- The tricky challenge of offering inferior roles
- Five top tips for dealing with offers of alternative employment
- Dealing with manager pushback when you tell them that a woman on maternity leave trumps other candidates for suitable alternative employment
- Competition under reg 10: what to do if you've got one role, but three women on maternity leave?
- About the statutory four-week trial period
- Unreasonable refusal: five reasons why an employee's refusal of a new job might be unreasonable, meaning you don't need to pay a statutory redundancy payment.

It's well-established that a dismissal for redundancy will probably be unfair if you don't make a reasonable search for suitable alternative employment. This is because without that search, the existence of a redundancy situation isn't regarded as sufficient reason to dismiss within s98 Employment Rights Act 1996. To be a sufficient reason, there's got to be a redundancy situation *and* an inability to redeploy the employee into something suitable elsewhere.

That means you need to be able to show that you've considered alternative employment (if appropriate, with associated employers) and discussed it with the employee. You should also ask your potentially redundant employee whether they know of any vacancies they'd like to be considered for. It may be that they're willing to take a substantial pay cut into a role that you hadn't thought about, or the employee may be aware a colleague is on the point of resigning (but the employer doesn't know that yet).

If you offer suitable alternative employment, but the employee unreasonably refuses, they lose entitlement to their statutory redundancy payment.

If they accept your offer of alternative employment, their employment will continue, unbroken. No redundancy payment is due at that point. They're then

entitled to a four-week trial period in the new role, if its terms are different to those they previously worked under. If the trial period is successful, the employment simply continues. But if the trial period does not work out, they normally retain entitlement to a redundancy payment and are taken to have been dismissed on the date the original contract ended, for the purposes of calculating redundancy pay.

WHAT IS A 'SUITABLE' JOB?

Whether a vacancy is suitable is a question of fact and degree (to use a horrible phrase that lawyers use all the time). The important thing to remember is always err on the side of caution by discussing potential vacancies with those at risk of redundancy.

To avoid a redundancy dismissal being unfair, you have to give priority to potentially redundant employees and appoint them to vacancies for which they are suited even if there are better external candidates (*Corus Hotels plc* v *Williams* (EAT/0014/06)). But they've got to be suitable: you don't have to appoint someone *unsuitable* into a role.

Just because you don't think it's suitable doesn't mean an employee might not want it, or be able to train, and it certainly doesn't mean a tribunal won't think it was suitable. Suitable means suitable — not a perfect fit.

It's got to fit the employee like clothes from Primark, not clothes from Savile Row.

You don't need to offer the role in writing (although it's sensible to do so, partly so the terms of the job offer are clear and partly so you can prove you made it). It should contain enough information for the employee to make a decision on whether or not to accept and should be made before the original employment ends.

You should also provide information about the job, including financial information about what they can expect to earn. If you don't, you run the risk of a tribunal saying you've not complied with your duty (*Fisher* v *Hoopoe Finance Ltd* (EAT/0043/05).

HOW THOROUGH DOES THE SEARCH HAVE TO BE?

You don't have to create a new job, but you do have to make a reasonable effort to identify existing opportunities — and the 'range of reasonable responses' applies here. Different employers might take different steps to search, and as long as a tribunal thinks what you've done falls within that 'reasonable' range, you'll be fine.

If you are a group company, you need to take reasonable steps to make inquiries within the group. If, for example, there is a joint HR function or a co-ordinated system of sharing information about vacancies within the group, it would usually be expected for you to call on that as part of your search. But if the companies within the group operate autonomously, or the company making the redundancies has no power or influence over appointments made by a parent company, then you're unlikely to face difficulties if you don't do what you can't do (*Parfums Givenchy Ltd* v *Finch* (EAT/0517/09)).

The search should continue up to the point of dismissal, because sometimes a suitable vacancy might become available at the eleventh hour. You should act on that. Don't kick it into the long grass because you think it has come to light too late in the day. Perhaps extend the notice period, with the employee's agreement. That would allow time for the application for the alternative employment to be processed. But you don't need to offer an alternative job which appears after the employee has been dismissed. In *Octavius Atkinson and Sons Ltd* v *Morris 1989 ICR 431, CA*, work became available a few hours after the employee was dismissed on grounds of redundancy. The Court of Appeal held that the dismissal wasn't unfair, because the employer couldn't offer what it didn't know about when the dismissal happened. But if an employer knows that work will become available in a short time, it may be unreasonable to dismiss an employee for redundancy.

Employers sometimes make the mistake of not discussing alternative roles with employees because they believe they will not be interested. They may be lower paid or less senior roles than the one the employee currently has. On the whole, however, it is better to present all the possible alternatives and have a genuine discussion about which of them might be appropriate.

The duty on an employer is only to take reasonable steps, not to take every conceivable step to find alternative employment. So employers are not generally expected to investigate significantly lower paid roles. In *Whittle* v *Parity Training* (EAT/0573/02), a case where I was representing the employee, the EAT said: 'The further up the ladder of authority an employee is, a reasonable employer is entitled to expect something of a more proactive approach once the opportunity for consultation is given. One would not expect that in the case of a junior employee or one with relatively short service.'

The most important factor is the size of the business. An owner-managed company with six employees is going to know immediately whether there are vacancies available, and whether they're suitable, without a great amount of work. A large organisation with thousands of employees will need to generate lists of current vacancies (including vacancies in associated companies), review them, and ideally share them with those who have been selected for redundancy.

Here are the factors a tribunal will look at in deciding whether a role is suitable…

- Salary: Is it at the same rate of pay? If the employee would have to take a big pay cut, that is almost certainly going to render an offer unsuitable. Look at the value of the entire package. Basic salary might drop, but commission and bonus capability increase, which would probably mean it's suitable. Suitable means suitable, not identical.
- Prestige/seniority: would it be a demotion? A job can still be suitable if it involves a small drop in seniority, although it's unlikely to be suitable if there's a large drop in status (at least, if the employee hasn't expressed interest in a lower-status role).
- Skills: does it require the same or similar skills? If so, or if the employee could acquire those skills in the short-term through training, then it could well be suitable.
- Hours: a change in hours (for example, from day shift to night shift) is unlikely, of itself, to make a job unsuitable and so one which you need not discuss with the employee. But an employee is likely to act reasonably in refusing such a job offer.
- Location: a small or different commute is unlikely to mean a job is not suitable. But if the alternative job is 120 miles away, and requires attendance every day, it's not going to be suitable.

TOP TIPS

1. If in doubt about the suitability of a job, offer it. Let the employee decide if it is right for them. Do not assume that they would not be interested.
2. Keep an open dialogue. If you are concerned that offering a person a lower-paid or lower-status role might offend them, talk to them about it first. They might be open-minded.
3. Remember that even if a role does not immediately seem suitable, it might become suitable if the employee were to receive training and support.
4. Make sure the employee knows about the potential effects of acceptance/refusal of an offer. This could reduce the scope for misunderstanding and a dispute later on.
5. Keep good notes of everything.

WOMEN ON MATERNITY LEAVE

Although I use the phrase 'women on maternity leave', I'm actually discussing women on maternity, parents on adoption leave, and parents on shared parental leave. What I'm about to say applies to all of them.

If a woman on maternity leave is to be made redundant, she is entitled to trump everyone else for any available suitable alternative employment. This is an absolute statutory right, so women on maternity leave go ahead of disabled employees for whom offering a particular role might be a reasonable adjustment.

The Maternity & Parental Leave (etc.) Regulations 1999, regulation 10, reads as follows:

> (1) This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.
>
> (2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) …
>
> (3) The new contract of employment must be such that —
>
> > (a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and
> >
> > (b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had continued to be employed under the previous contract.

She trumps everybody else even if she is not the best candidate. Failure to offer the suitable alternative employment will render the dismissal automatically unfair.

Note that the employer's duty is to make the *offer* of alternative work. So it's not just a duty to give the employee an opportunity to *apply* for it. If the vacancy is suitable for the employee, then the employer must actively offer it, even if better qualified or more suitable candidates are available.

This is something that many managers and small employers push back against. 'We really don't want don't want to have to take her back if that means *not* offering the vacancy to someone who we think is better, and we really, really don't want to offer the role if she's still got another six months on maternity leave, so we can't fill the job for six months' is the sort of thing you'll hear. To which the correct response is: 'That's fine, but better get your cheque book out, because you going down.'

If the employee is already on maternity leave, you are already covering her existing role (even if it is soon to be deleted) and the new job is no different. You can use a variety of methods to cover maternity leave, such as using other team members, or another team, to absorb work temporarily. A colleague can 'act up' (usually with additional pay) until the employee returns from maternity leave. Sometimes external recruitment, on a fixed-term basis, and perhaps through an agency, is needed.

Just remember, under regulation 10:

- 'suitable' and 'appropriate' in reg 10(3)(a) — the new role must be suitable and appropriate; and,
- 'terms and conditions of her employment, are not substantially less favourable to her' in reg 10(3)(b) — the terms and conditions of the new role should not be substantially less favourable than the employee's soon-to-be redundant role.

In practice, this 'not less favourable' part can work against these employees. For example, the EAT has

held in *Simpson* v *Endsleigh Insurance Services* (EAT/544/09) that an employee who worked in King's College, London, (practically next door to my Chambers; I've probably passed her on the street) wasn't entitled to be offered an otherwise suitable and appropriate alternative job in Cheltenham, because the new location (Cheltenham) was substantially less favourable to her than London. Clearly she didn't like Regency architecture and horse racing.

What if you've got one suitable role, but three women on maternity leave? A natural reading of reg 10 suggests they're all entitled to it, but that can't be right. Believe it or not, this point has never been decided a court. I think the answer is simple, though, assuming the tribunal is going to avoid the absurd answer of all three having to be given one job, which is that it goes to the first woman due to return from maternity leave. At that point, it's no longer suitable alternative employment for the others. Another approach might be to speak to the three women informally, as it's possible that two might not want the role and would prefer to take voluntary redundancy. If you ever find yourself in this situation and getting sued, please do come to me because I'd love to argue it in court.

In December 2019, the Government announced it was extending this right to women from the date they formally tell their employer they are pregnant (at the moment, it starts when maternity leave begins), until six months after they return from maternity leave (at the moment, the right ends the day they return from maternity leave). But the Covid-19 emergency has meant the plans to introduce a new Employment Bill containing this extension have been shelved, at least for now.

FOUR-WEEK TRIAL PERIOD

Any person offered suitable alternative employment is entitled to a statutory trial period of four calendar weeks. It's calendar weeks, not working weeks, so time continues to run even when the workplace is closed for a seasonal holiday.

If the trial period finishes, and the employee is neither dismissed nor resigns, then they officially take up the new role. In that situation, there will have been no dismissal, and there'll be no statutory redundancy to pay.

However, if the trial period doesn't work out, the opposite applies. If either you or the employee end the employment during the four-week trial period, then the dismissal is deemed to be by reason of redundancy. But if the employee unreasonably resigns, and if the alternative employment was suitable, they lose their entitlement to a redundancy payment.

This is important: it is unreasonable, and will almost certainly render any dismissal or constructive dismissal unfair, to insist that the employee accepts or rejects the new job offer without allowing a four-week trial period (*Elliott* v *Richard Stump Ltd* [1987] IRLR 215).

The statutory four-week trial period may be extended for longer than four weeks if, and only if:

- It is for the purpose of retraining the employee for the new job
- It is agreed in writing, setting out the date on which the period of retraining ends
- It was agreed before the employee started work in the new job; and
- If the agreement specifies the terms and conditions of employment which will apply to the employee at the end of the trial period.

LOSS OF ENTITLEMENT TO REDUNDANCY PERIOD

We've already established that an employee who unreasonably refuses an offer of suitable alternative work is not entitled to a redundancy payment. It doesn't matter whether the refusal is before a trial period starts — and they just say 'no' — or during the four-week trial period. But employers shouldn't be too quick to assume that a refusal is unreasonable.

First of all, the offer itself must be 'suitable'. That involves looking at the terms and conditions of the new role and comparing them to those currently enjoyed by the employee. If the new role involves anything more than a trivial pay cut, or if it involves unsociable hours or a need to relocate, then it is unlikely to be regarded as a suitable alternative. The same is true if there would be a significant loss of status or seniority.

Even if the role itself is suitable, the employee's refusal of it may be reasonable. Reasonableness in this context is judged from the employee's point of view and their personal reasons for refusing the role are taken into account. These may include family commitments that prevent them working further away from home, or reasons to do with the nature of the work. Provided the employee can explain why the new role was not right for them, a tribunal is likely to be sympathetic to their claim for a redundancy payment.

There's a lot of overlap with suitability, but we're now looking at things much more from the employee's personal perspective. Here are some things that might mean that an employee is acting reasonably in rejecting an offer of suitable alternative employment:

1. Relocation: family reasons can be a reasonable basis on which to reject a job offer in a new location, especially if it involves a spouse having to change jobs, children who would need to change schools, or having to move away from close family members.
2. Commuting: even a small amount of extra commuting time might mean it is reasonable to refuse — for example if the additional commuting meant it became difficult to secure childcare.
3. Status: a loss of status, or sometimes a perceived loss of status, can be a reasonable reason to refuse a job.
4. Employer's behaviour: if the employer has behaved badly during the redundancy process, and perhaps undermined trust and confidence, it might be reasonable to refuse.
5. Job security: it could well be reasonable to refuse a job which is a temporary role only.

Note that for an employer to show that the employee has forfeited their right to a redundancy payment, it must actually *make* the offer of suitable alternative employment to the employee. If the employer didn't make the offer — perhaps because the employee said they weren't interested in any role — then they haven't unreasonably refused an offer of suitable alternative employment, and so don't lose the right to a redundancy payment.

For further information, please visit 'Sources of Further Help' in The Vault or post a question on our Facebook page.

This transcript is correct as of June 2020.
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