



HR in the East Midlands

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In Deep with Darren

This month's article from Darren looks at the importance of consultation before redundancy selection – including when those affected are on fixed term contracts.

A recent case from the Employment Appeal Tribunal should refocus attention on the need for proper consultation before an employee is selected for redundancy – even where the employee in question is on a fixed-term contract.

In *Mogane v Bradford Teaching Hospitals NHS Trust* the employer needed to make one employee redundant from a research unit which had been running at a consistent loss. There were two potential candidates for selection – both were nurses employed on fixed term contracts. One nurse had recently been appointed on a two-year contract. The other had longer service, having been employed on a series of one-year contracts since 2016. Since her contract was due to expire first, the decision was taken that she

should be the one to be made redundant through the non-renewal of her contract.

She was invited to a meeting to discuss this, but it was clear that by the time the meeting took place the decision not to renew her contract had been taken. The meeting was focused on the prospects for finding her alternative work within the Trust. Strenuous efforts were made to find her some alternative and her contract was even extended for a time while options were explored. Ultimately however no suitable alternative could be found, and her contract was allowed to expire.

The expiry of a fixed term contract is a dismissal and since the employee had been employed for more than two years – on a series of one-year contracts – she was entitled to bring an unfair dismissal claim. This failed before the Tribunal which held that given the upcoming expiry of her contract the employer's approach had been a reasonable one.

The EAT overturned this decision and – somewhat unusually - chose not to remit the matter for reconsideration but ruled that the dismissal was unfair. This was because the employer had not carried



out any consultation with the employee until the decision to dismiss her had already been made.

In reaching its decision, the EAT relied on the case of *Williams v Compair Maxam Ltd* – an EAT decision from 1982 which set out key principles of fairness for the handling of redundancies. That case very much assumes that an employer is embarking on quite a large-scale redundancy exercise and that there is a trade union in place representing the affected employees. The EAT in the *Mogane* case held however that its principles remained relevant to the present day and applied in the case of individual as well as collective redundancy cases. The key requirement was the need for consultation over impending redundancies and, in particular, consultation over the criteria to be applied in making a selection.

In this case the sole criterion adopted by the employer was that the employee whose fixed term contract expired soonest would be the one to be selected. There was no rationale given for that decision and there had been no attempt to consult either employee over it. The only meaningful consultation was over the issue of alternative work and, by the time those discussions took place, the decision to dismiss the employee had already been taken. A reasonable employer would have consulted the affected employees over the choice of selection criteria.

The employer was probably lulled into a false sense of security by the fact that both employees at risk of redundancy were employed on fixed term contracts. It might seem natural to a manager that allowing a contract to expire without renewing it is a safer legal option than bringing it to an end prematurely by giving notice. In legal terms however this is not the case. Since allowing a contract to expire is legally defined as a dismissal, the employer has just as much of a duty to act reasonably in allowing a contract to expire as it does in terminating it with notice. The question is why the employer has allowed the contract to expire and if the reason is redundancy, then the same principles will come into play as in any other case.

This does not mean that there is absolutely no point in having an employee on a fixed term contract at all. Where the role is genuinely dependent on specific external funding or is linked to a project that is expected to come to an end then a fixed term

contract is a good way of setting appropriate expectations around how long the job is likely to last.

An employer's argument that a role was linked to a two-year grant is strengthened somewhat if the employee is given a two-year fixed term contract. But this does not mean that the employer can ignore the principles of fairness that apply to other dismissals. As much care needs to be put into allowing a fixed term contract to expire without renewal as into a decision to dismiss an employee with notice.

A failure to consult in a redundancy case may make the dismissal unfair, but it often leads to limited compensation. If the employer can persuade the Tribunal that consultation would have made no difference to the outcome, then compensation may be reduced by as much as 100 per cent. In this case however, the challenge the employer will face is that it is difficult to see why the expiry of the fixed-term contract should be the sole basis for selection. The rival employee seems to have had less than two years' service and would have been unable to claim unfair dismissal. The suspicion arises that there was some other reason why the employer wanted to keep one nurse in preference to the other. Perhaps the newer employee was thought to be more competent or more flexible? If so, then that should have been made the explicit basis on which selection was made and a proper assessment conducted. Then there would have been some objective and logical basis for the decision taken by the employer.

If the expiry date of the fixed term contract was just being used as cover for a selection that was really based on the employer's perception as to which employee was the most effective, then the Tribunal might be less inclined to find that proper consultation would have made no difference to the outcome. In a redundancy exercise it is always best for the process of selection to be open and transparent.

