

## Getting Redundancies Right – Case Study 1

### Scenario

You are the Human Resources Director for Euroflot Limited (“Euroflot”), an international airline, based at London Gatwick airport. Euroflot employs 1000 people in the UK, including 750 at Gatwick Airport and 190 at Manchester Airport. Following the economic downturn and the decline in business passengers, Euroflot’s managing director Gordon Broome wishes to make cost savings by reducing headcount by 10% at both Gatwick and Manchester. At both airports, the ground staff are represented by the trade union UNITE, but all other employees are not members of a trade union. Mr Broome has asked you to advise on the most cost effective and quickest way to deal with the redundancies.

**1. Is collective consultation required:**

**a. At Gatwick Airport?**

**YES**

**b. At Manchester Airport?**

**NO – Gatwick and Manchester are almost certainly separate “establishments”, so assuming there are only 19 redundancies at Manchester and no other changes to terms and conditions of employment for the remaining employees, there is no need to collectively consult.**

**2. If collective consultation is required, with whom should the company consult and for how long?**

**Ground staff can be consulted via their trade union but you will have to ask the other employees to elect representatives unless there is already an elected employee representative body (authorised to be consulted about redundancies) in place.**

A month ago, four employees in Euroflot’s Manchester engineering team were made redundant, although the company signed compromise agreements with them and therefore only a cursory consultation process was followed.

**1. Does this change your advice about whether collective consultation is required at Manchester Airport in the current round of redundancies?**

**The safest approach is to collectively consult with the 19 employees because the company is proposing more than 20 redundancies at one establishment within a 90 day period. However, note the 1978 employment tribunal case of the TGWU v Nationwide Haulage which said that it was not necessary to retrospectively impose the obligation to consult in respect of dismissals that had already happened, merely because further redundancy proposals emerged. It held that a “proposal” refers to what will happen in the future, not what had already happened: so the dismissal of X employees, followed by a proposal to dismiss Y employees, did not, in law, amount to a proposal to dismiss X+Y employees. They would only amount to a single proposal if the employer already had the second batch in mind at the time of the first batch. This is only a first instance decision and is also quite an old decision, which is why we would suggest that collective consultation is carried out in these circumstances.**

Mr Broome says he has already identified the 19 people he wishes to make redundant at Manchester Airport. He tells you he has chosen the 19 employees with the worst attendance record and hands you a sheet of paper with their names and likely redundancy costs.

**1. Is it acceptable to select employees based on their attendance record?**

**Possibly, provided that none of the employees were absent because of a disability, pregnancy-related illness or for family friendly reasons. You should double-check this and**

disregard any such absences. However, we would advise that this criteria should not be used on its own but in conjunction with other objective criteria.

**2. *If not, what other criteria would you suggest instead?***

Skills, knowledge and experience by reference to the requirements of the new roles and should be as objective/reasonable as possible.

**3. *What advice would you give Mr Broome about the fact that he has pre-selected the 19 employees and set them down in writing, before the consultation process has commenced?***

This requires extreme caution as it suggests the consultation process will be a sham, especially if there is any way in which the employees might get hold of the information. Note also that the document is probably disclosable in the event of litigation. In any event, the company should still go through a meaningful consultation process with the employees and listen to any concerns raised by them which may affect their score.

Mr Broome says that at London Gatwick, one of the 75 members of staff identified to be made redundant is the Operations Director, Paul Mandelson. However, Mr Broome is concerned that Mr Mandelson might be offered employment very quickly with another airline, because of the confidential information he has access to about Euroflot and its operations. He therefore wants Mr Mandelson excluded from the business as soon as possible and put on garden leave during the consultation process and also for the duration of his notice period.

**1. *Is this possible?***

It depends whether the company has a right to put the employee on garden leave both (i) before the company has given notice to terminate the employment; and (ii) during the notice period. Even if it does have the right to put the employee on garden leave before the company has given notice to terminate, this right should be used with caution, as putting an employee on garden leave during a redundancy consultation process might seem (to the employee at least) like the redundancy is a foregone conclusion and that consultation is a sham. If there is no right to put the employee on garden leave at all, and the company puts the employee on garden leave without the employee's consent, the company may not be able to rely on any restrictive covenants in the employee's contract, as it will have acted in breach of the contract of employment.

**2. *If so, what safeguards would you use/how would you explain it to Mr Mandelson?***

Explain that no final decision has been taken and the redundancy remains subject to consultation with Mr Mandelson. If there are other employees being pooled with Mr Mandelson, the other employees in the pool should be treated in the same way.

You are aware that in all previous redundancy exercises which the company has undertaken in the last five years, the company has paid employees an enhanced redundancy payment of three weeks' pay per year of service. There is no written redundancy policy and the employees do not have anything in writing to demonstrate that the enhanced payment has been made in the past. Employees who were made redundant previously signed compromise agreements agreeing to keep the terms of the redundancy payment confidential. However, you believe employees are well aware of the policy and in fact the trade union UNITE has already approached you seeking reassurance that employees will receive the three weeks' pay per year of service in this round of redundancies. Mr Broome says the company is not prepared to pay more than statutory redundancy pay. UNITE have indicated that if the company is not willing to continue with its practice of paying three weeks' pay per year of service, it will ballot its members for strike action.

**1. *Has the enhanced redundancy payment become contractual by custom and practice?***

We probably need more information about the number of redundancies which have taken place over the last five years and what happened before that period. The employees must show that the practice is "reasonable, notorious and certain" - the

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policy's terms must be fair (and not arbitrary or capricious), must be generally established, well known, and must be clear cut. Often, the key to determining whether there is an implied right to enhanced payments is whether a clear and certain policy of making such redundancy payments has been communicated to employees. If not, it will be difficult for employees to establish a reasonable expectation to such enhanced payments or that the redundancy policy is sufficiently "notorious".

2. *If you are unsure, what additional information would you need in order to be able to assess this?*

As above

3. *What would your advice be to Mr Broome?*

Assuming that there haven't been many redundancies in the last five years and nothing has been communicated to the employees about past enhanced redundancy payments, the company could proceed on the basis that the payment is not contractual, although this may be subject to challenge.

One of the employees at risk of redundancy at Gatwick airport is on maternity leave.

1. *What is your advice to Mr Broome about how to deal with this employee?*

They should be invited to consultation meetings in the usual way, however they are not obliged to attend work and efforts should be made to meet them at a convenient location/to allow them to arrange childcare. When scoring the employee, allowance should be made for the fact that the employee has not been in work for a number of weeks/months because of the maternity leave.

2. *If she is selected for redundancy, are there any special considerations which you should bear in mind?*

If there is a suitable alternative role it must be offered to the employee on maternity leave in priority to other employees. If the employee is not due to return from maternity leave for a number of months, the company should fill the alternative role temporarily only, until the employee on maternity leave is ready to return.