

Getting Redundancies Right – Case Study 2

Scenario

You are the Human Resources Manager for Ad-Fab Limited, an advertising agency employing 150 people in the UK: 135 in a Soho office and 15 in a Canary Wharf office. Brian Obama, the Chief Executive Officer, has decided that it is necessary to re-organise the company in an effort to make cost savings, given the economic downturn and the dramatic falls in advertising revenue. Mr Obama has identified a reduced need for creative staff. He would like to reduce the creative team in the Soho office from 30 to 15 employees and the creative team in the Canary Wharf office from 10 to 4 employees.

Mr Obama would like you to advise on the quickest and easiest way to make the redundancies.

1. Is collective consultation required:

- a. In the Soho office? and**
- b. In the Canary Wharf office?**

You should consider whether the Soho and Canary Wharf offices should be treated as one “establishment” and the redundancies across the two offices should therefore be added together. Provided that the two offices are distinct entities, each with a certain degree of permanence and stability, each assigned to perform distinct tasks and each of which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks, then they will be separate establishments. If there is joint operational management at each site, it is likely that they form a single establishment. However, shared support functions - for example, HR/payroll or finance - will not point towards a single establishment. Where the same or similar activity is carried out at each site for shared (internal or external) customers and/or where there is evidence of employees working across sites or being relocated on a temporary or permanent basis from one site to another, then the two sites are likely to be treated as one establishment.

In addition, Mr Obama is proposing to reorganise the creative team in Soho. At present, the Soho creative team is split into three groups – media, telecoms and sport. Each group has 10 members of staff – a Creative Director, two creative managers, five creative assistants and two researchers.

Mr Obama is proposing to merge the three groups. He would like to retain one overall Creative Director, three creative managers (one for each of media, telecoms and sport), nine “generalist” creative assistants who will work across media, telecoms and sport and two generalist researchers. He would be happy for those employees currently employed as creative directors to be considered for the creative manager roles and, likewise, the creative managers may apply for one of the nine new generalist creative assistant roles. However, he does not feel that the researchers would have enough experience or skills to carry out the creative assistant roles so he is not proposing to offer them the opportunity to apply for the creative assistant roles.

2. Does this change your advice about whether collective consultation is required in the Soho office?

YES – employees will be changing terms and conditions as well as being made redundant, which is likely to take the number of affected employees in the Soho office over 20.

3. How should the staff in the creative teams be pooled?

The fact that the company is proposing to merge the three groups (media, telecoms and sport) suggests that staff who do similar work in each of these groups should be pooled together, provided that their roles are broadly interchangeable. So, for example, the three

Creative Directors should be pooled together and all the Creative Managers should be pooled together.

4. *Should the Soho staff be pooled with the Canary Wharf staff?*

In principle, the fairest method would be to pool the Canary Wharf employees with the Soho employees, provided that their roles are broadly interchangeable, however if you are trying to argue that the Soho and Canary Wharf offices are separate establishments, pooling the staff from the two offices together may well undermine the company's arguments about this.

Mr Obama has chosen the following criteria which he is proposing to apply to the various pools, in order to select the employees to be made redundant: (a) attendance; (b) commitment; (c) creativity; (d) experience in the media/telecoms/sport field (as applicable); (e) computer skills/experience.

1. *Are these appropriate criteria for selection?*

Attendance and commitment may both raise issues of disability discrimination for employees who are absent with a disability or on pregnancy-related absence. It might also amount to discrimination on the grounds of pregnancy for anyone who is absent with a pregnancy-related illness or might be argued to be indirect sex discrimination by women with family commitments. Creativity is quite subjective, although it may be necessary to consider the "creativity" of the Creative Directors. However, this should be considered by reference to the employee's performance and appraisals, rather than a manager's perception of an employee's creativity. Experience is a relevant and appropriate criteria although care should be taken not to equate experience with length of service, as this may amount to indirect discrimination on the grounds of age and, unless it is objectively justifiable, it may be unlawful. Computer skills and experience should only be used if such skills are relevant and necessary for the role.

2. *If not, what criteria would you use?*

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

During the consultation process, one of the creative managers at risk of redundancy informs you that he has been diagnosed with a serious illness which affects his memory. He is concerned that this may affect his score during the selection process and may affect his application for the generalist creative assistant roles.

1. *Is it necessary to make adjustments to the redundancy process in respect of this employee?*

If the illness amounts to a disability, the employer has a duty to consider making reasonable adjustments to its "provisions, criteria or practices", including the redundancy process.

2. *If so, what steps would you take?*

The employer should consider increasing the employee's scores to take account of the effects of the illness and should also consider any adjustments which could be made to the new role, to assist him.

You have started the consultation process and have applied the selection criteria to the pool. However, one of the employees at risk of redundancy asks you if they can leave tomorrow, as they already have another job lined up.

1. *Are you happy to let them go, before the consultation process has been completed?*

Employers must have properly carried out collective consultation with employee representatives before notices of dismissal can properly be issued. Even if the employee is, in effect “volunteering” for redundancy (i.e. the selection criteria have not yet been applied to the pool and the employee is resigning) voluntary redundancies may still be regarded as “dismissals”. Therefore allowing them to leave early is technically a breach of the collective consultation duties, although the consequences of this can be mitigated if the employer obtains the agreement of the appropriate representatives to volunteers leaving early. In those circumstances, it is unlikely that an employment tribunal would make any protective award against the employer for failure to complete the consultation process.

2. *Are you required to make a redundancy payment or will they be considered to have resigned?*

Volunteers for redundancy are still treated as having been dismissed and are therefore entitled to a redundancy payment (although of course this depends precisely when in the process they resign).

One of the Creative Directors who has been selected for redundancy has been offered a creative manager role. However, now he has had time to consider the role further, he considers that the new role involves a loss of status.

1. *What are the consequences if he refuses the new role?*

It depends whether the new role is suitable and whether his refusal is reasonable. Given the lower status, it may be a reasonable refusal so the employee will still be entitled to a statutory redundancy payment. If the employee unreasonably refuses suitable alternative employment, he will not be entitled to a statutory redundancy payment.

2. *If he accepts the new role, what considerations should the company bear in mind?*

He will have a statutory trial period of 4 weeks, during which time he can resign and, provided that his resignation does not amount to an unreasonable refusal of suitable alternative employment, he will be treated as having been dismissed from the date the original contract was terminated and he will be entitled to a redundancy payment.