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Redundancy consultation and selection concerning expiry of a fixed term contract – EAT put the spotlight onto a 'selection pool of one'

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The Claimant, a Band 6 nurse, along with another Band 6, were employed by the Trust on fixed term contracts. In March 2019 a redundancy situation arose because of the financial circumstances of the unit in which both nurses worked and a reduction in staff was required to reduce costs. The Claimant had been employed since 2016 on a series of one-year contracts, the most recent of which was due to expire on 1st June 2019. The second nurse had been appointed for the first time on a two-year fixed term contract shortly before the redundancy process commenced. Therefore, the second nurse's contract was due to expire after the Claimant's contract.

The Claimant was invited to a meeting and told of the financial difficulties the Trust faced. Shortly, after this meeting the Trust decided that the Claimant should be made redundant given that her contract was due to expire first. The Trust then consulted with the Claimant regarding suitable alternative employment. Crucially there was no consultation with the Claimant prior to deciding that the date of expiry of the contract would be the sole determining criterion, which effectively identified the Claimant as the person to be made redundant. No suitable alternative role could be found and therefore the Claimant was made redundant. Her unfair dismissal claim was dismissed by the Tribunal who accepted that the dismissal was fair. The Claimant appealed to the EAT.

The EAT upheld the appeal and held that the Claimant's dismissal was unfair. It was satisfied that adopting one criterion which simultaneously decides the pool of employees and which employee is to be dismissed, without any consultation before that decision is made, is unfair. The EAT noted that:

- It is well established that consultation is a fundamental aspect of a fair redundancy procedure.
- For that consultation to be genuine and meaningful, a fair procedure requires that consultation take place at a stage when an employee or employee representative can still potentially influence the outcome.
- In circumstances where the choice of criteria adopted to select for redundancy has the practical result that the selection is made by that decision itself, consultation should take place prior to that decision being made.
- To do otherwise merely presented the Claimant with a "fait accompli".
- The implied term of trust and confidence requires that employers do not act arbitrarily towards employees in the methods of selection for redundancy.
- While a pool of one can be fair in appropriate circumstances, it should not be considered, without prior consultation, where there is more than one employee.
- The EAT therefore substituted a finding that the Claimant was unfairly dismissed for redundancy.

What to take away

Terminating employment to save costs can be a difficult process for managers as it involves effectively terminating the employee's employment for reasons unrelated to the individual. Further, in areas such as healthcare where use of fixed term contracts can be commonplace, it is understandable that deciding not to renew the contract of an employee whose contract expires first may be the fairest solution. However, expiry of a fixed term contract is still a dismissal in law and therefore a fair reason and process is required for employees with over 2 years' service to avoid a successful unfair dismissal claim. Non-renewal of a fixed term contract on the grounds of cost (particularly where the contract has been renewed previously) could amount to a redundancy. Therefore, this case is a useful reminder that as part of a fair redundancy process, consultation with affected employees is not only key but must be taken at a time before any final decisions about selection are made.

Although the EAT did not specifically say that, as well as consulting before the final decision was made, the Trust should have also expanded the pool to include the other Band 6 nurse, they referred to the Trust's decision on pool (and as a consequence that the Claimant should be dismissed) as "an arbitrary choice". Whilst it is not the function of the Tribunal to interfere with an employer's decision as to the pool, Tribunals do need to be satisfied that the pool chosen was one that a reasonable employer could adopt in all the circumstances. Therefore, it would also be advisable to consider whether the pool adopted in relation to any proposed redundancies is reasonable in the circumstances or should be widened to include those doing the same/similar role. It is also prudent to have in mind that selecting fixed-term employees for redundancy simply on the basis of their fixed-term status, could amount to less favourable treatment under the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, unless their selection can be objectively justified.

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