Employment Legal Update – Redundancy pools: Less is more (risk)?

Historically, tribunals have given employers considerable latitude when it comes to defining redundancy pools. However, redundancy pools have been under the spotlight in recent weeks, with two separate cases considering the fairness of using redundancy pools consisting of just one employee. Obviously, where a redundancy pool is the same size as the number of redundancies to be made, the subsequent selection and consultation processes become of less relevance. In such scenarios, tribunals are more likely to examine closely whether the choice of pool was reasonable.

Interestingly, the outcomes of the two cases differed. So, where does that leave employers? Is it safe to use a pool of one employee? The answer, as is so often the case, is that it depends on the facts. However, the good news is that it is still difficult (although not impossible) for a tribunal to challenge the employer's choice of pool, provided that the employer has "genuinely applied its mind" to the decision.

Beware a pool of one ...

In *Capita Hartshead Limited v Byard*, Ms Byard was employed by Capita as one of four actuaries. Each actuary managed a number of pension funds. Through no fault of her own, Ms Byard lost many of her clients and had insufficient work. Accordingly, Capita decided that there was a potential redundancy situation. A pool comprising only Ms Byard was used on the basis that it was "*feasible and responsible*". Ms Byard claimed Capita had acted unfairly in excluding the other actuaries from the pool. Capita defended its decision on the grounds that: only Ms Byard's workload had reduced; scheme actuary appointments are personal; there was a risk of losing clients if they were transferred between actuaries; and team morale would be affected if the other actuaries were told that they were at risk of redundancy, given that their workloads had not reduced.

The Employment Appeals Tribunal ("EAT") issued the following guidance for tribunals assessing the reasonableness of a redundancy pool:

1. the question a tribunal must ask is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted;
2. that reasonableness test is also applicable to the selection of the pool;
3. it is not necessary for a pool to be limited to employees within the same or similar work. The question of how the pool should be defined is primarily a matter for the employer. It would be difficult for the employee to challenge it where the employer has genuinely applied its mind to the problem;
4. the tribunal is entitled, if not obliged, to consider and scrutinise the reasoning of the employer to determine if it has "genuinely applied" its mind to the issue of who should be in the pool; and
5. even if the employer has genuinely applied its mind to the issue of who should be in the pool for consideration for redundancy, it will be difficult, but not impossible, for an employee to challenge it.

In this case, the EAT found that Capita had not genuinely applied its mind to the issue of the redundancy pool. If it had done, the Tribunal felt it would have included the other three actuaries, as the Tribunal found, on the evidence, that the risk of Capita losing business if clients were asked to change actuary was "*slight*". Therefore, Ms Byard's dismissal was found to be unfair due to the use of a redundancy pool of one.

But a pool of one can be reasonable (in certain circumstances)

In *Halpin v Sandpiper Books* , Sandpiper, a book distributor, expanded its market into China. Mr Halpin was employed in the UK in a primarily administrative role and was subsequently promoted to a sales role in China (which involved him being posted there). When Sandpiper decided to outsource the work in China, Mr Halpin was made redundant, having been placed in a pool of one (and after his employer had carried out a thorough redundancy process). Mr Halpin argued that other employees based in the UK with interchangeable

skills should have been included in the pool, and that no reasonable employer would have limited the pool to only those workers whose work had diminished.

The EAT held that the decision as to pool size is for the employer. Sandpiper's decision was logical and one that a tribunal could not easily overturn. Mr Halpin was the only employee in China; the fact that he had previously taken on administrative and analysis duties that were still mainly done by others did not mean that the pool was inappropriate. The pool was therefore considered reasonable.

This is perhaps a classic example of when a pool of one might be appropriate, i.e. where the role that is disappearing is unique.

Impact and Recommendations

Both cases demonstrate that redundancy pools of one are potentially more open to challenge than larger pools. Whilst these cases should not automatically deter employers from using a redundancy pool of one, they do demonstrate the need for caution.

When considering whether a pool of one is appropriate, the facts in *Sandpiper*, where there was a discrete and standalone role, should be contrasted with those in *Capita* where there were four employees who did similar work. A pool of one is clearly more suited for use where the redundant role is unique. If there are other employees doing similar work to the chosen employee, it may be difficult to justify not including them in the pool.

One of the reasons given by the employer in the *Capita* case for not using a larger pool was that it would have had a damaging impact on morale. However, Capita could have avoided this problem by only consulting with the individual who achieved the lowest score, after the application of objective criteria to those in the pool. Of course, those not initially selected could only be told that they were provisionally safe pending the outcome of consultation (otherwise the consultation could have the appearance of being a sham). Nevertheless, this approach generally succeeds in minimising the impact of redundancy pools on the rest of the team.

We would advise employers involved in any redundancy exercise to ensure their reasoning in determining the pool is well documented. This is of particular importance when the redundancy pool is the same size as the number of proposed redundancies. Such documentation will help an employer to demonstrate the reasonableness of its decision and that it has "genuinely applied" its mind to it.

The EAT has previously suggested that an employer "genuinely applying" its mind to the issue of who should be in the pool, should, in appropriate cases, consider whether to "bump" other employees i.e. include in the pool employees whose roles are not initially affected by the proposed redundancies (which is what Mr Halpin argued his employer should have done). However, it is our view that "bumping" will rarely be helpful for employers as it is likely to create more difficulties than it resolves. Nevertheless, it may be useful for employers to document that "bumping" has been considered (and in most cases rejected) when a redundancy pool of one is being proposed.

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