The reality of “Bumping” in a redundancy process

“Bumping” in a redundancy process occurs when employee X is redeployed into another role (as a consequence of his/her position being made redundant) and employee Y (who performs that role) is dismissed in place of employee X.

While there is no absolute duty on an employer to consider “bumping”, a variety of case law has deduced that it is certainly advisable to at least consider the option as part of a redundancy process. The fairness of a failure to consider bumping in an unfair dismissal claim will centre on the facts of each case.

However, it should be noted that in considering bumping, it will also be necessary to consult with the employee facing the process, as merely being aware of bumping as an option may be insufficient as a defence against an unfair dismissal claim.

Moreover, before finalising the selection pool in a redundancy situation, employers should give consideration to the possibility of extending the pool both horizontally and vertically, due to the possibility of bumping. In other words, an employer should explore with an employee during the consultation process whether he/she would be willing to consider a more junior role at a reduced salary.

In the current economic climate, many employees may prefer a demoted post as opposed to facing an unspecified period of unemployment.

It is advisable that employers should consider ‘bumping’ in a redundancy situation, but it must be remembered that an employee who has been bumped could also bring a claim of unfair dismissal. It is therefore essential that a proper redundancy process should be followed, with clear documented evidence that employees have been consulted and that alternative employment has been considered.

Practical Implications

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Controlling former employees & your confidential information

It can be a concern for businesses that a former employee with confidential business information may work for a competitor and divulge that knowledge. A recent case looked at the options available to an employer when there is no specific term in the employment contract preventing the employee from working for a competitor.

In Caterpillar Logistics Services (UK) Ltd v Huesca de Crean, the Court of Appeal confirmed that it was not competent for an employer to seek an injunction preventing a former employee with confidential information from working for the competitor. Caterpillar had raised the action against Mrs Huesca de Crean when she began work for Quinton Hazell Automotive Limited. Quinton had been a long-term customer of Caterpillar in a lucrative services arrangement.

Mrs Huesca de Crean’s contract contained a confidentiality clause that specified she must not use any of Caterpillar’s trade secrets or confidential information for herself or others any time during or after her employment there. After she served notice and advised colleagues she would be going to Quinton, Mrs Huesca de Crean received a warning letter from Caterpillar’s solicitors and shortly after this Caterpillar proceeded to raise an action in court to stop her taking up her new job.

Caterpillar sought what is called ‘barring-out relief’ which could stop the employee from working for the competitor at all. This was based on the argument that Mrs Huesca de Crean owed a duty of trust and confidence to her former employer because she had confidential information. They also sought an injunction to prevent her from using the confidential information.

The Court of Appeal unanimously rejected the application for barring-out relief. The judges explained that an employee does not have a duty of trust and confidence to their employer and could only be considered to do so in the most exceptional of circumstances. The Court also rejected the application for the injunction on the basis that there was no real risk of harm to Caterpillar. However, it did state that in different circumstances it could be possible for employers to seek an injunction.
TUPE and change of location

The Employment Appeal Tribunal (“EAT”) has upheld a decision by the Employment Tribunal that the change of location on a TUPE transfer can give rise to a claim for constructive unfair dismissal.

The Transfer of Undertakings (Protection of Employment) Regulations ("TUPE") safeguard the rights of employees when their employing business is transferred. The new employer is deemed to take over the position of the current employer and therefore the employment is continuous.

The claimants in the case Abellio London v CentreWest London Buses worked for bus company CentreWest as bus drivers on a particular route. Operation of this route was transferred to another bus company, Abellio, and the route was to operate from a different depot. This transfer was a service provision change and a relevant transfer for the purposes of TUPE.

The claimants all resigned as a result of the route operating from another depot, as it affected their domestic arrangements and meant an extra 1 to 2 hours travel everyday for them.

Whether or not the move was a change in the working conditions and whether it was a substantial change was a question of fact. Although the move was only a distance of 6 miles, the court had to consider it in its context. A move of 6 miles in Greater/Central London is very different to a move in a rural area. After considering the travel conditions the EAT held that the change in depot was a substantial change in the employees working conditions and this was to their material detriment.

The change of location was a breach of the claimant's employment contract and because the employees resigned as a result of the move, this was constructive dismissal. As the dismissal was for a reason connected with transfer of the undertaking, the dismissal was therefore automatically unfair under the TUPE regulations.

Subjectivity in redundancy cases

A recent case from the Employment Appeal Tribunal (“EAT”) looked at the role subjectivity plays in selecting a candidate for a new position after a redundancy situation.

In Samsung Electronics v Monte D’Cruz the employer, Samsung, decided to restructure their print division. As part of this process they merged several similar employee roles into one. The employees from the original jobs were made redundant and offered an opportunity to apply for the new post or other new roles.

The claimant applied and was assessed on a presentation and several competencies normally used in Samsung's appraisal process, such as creativity, speed, customer focus. However, the claimant wasn’t successful and Samsung offered the post to an external applicant. As a result the claimant was dismissed.

The claimant argued that this process had been unsatisfactory, especially given the subjective nature of the criteria of selection.

The employment tribunal agreed with the claimant, but the EAT reversed the tribunal’s decision.

Although it was true that any tribunal should consider how far an interview process was objective, some subjectivity was inevitable. The EAT agreed with the decision in Morgan v Welsh Rugby Union, that when you assess a candidate, you are likely to use your judgement to a substantial degree.

This case is helpful for employers considering a redundancy situation. It shows that employers will ultimately use some subjectivity when recruiting for new roles created during a redundancy situation. However, it is still important that employers use an interview process that is as objective as possible.
Employers should be aware, however, that this case did not decide that expiry of a fixed-term contract will never be a redundancy dismissal, only that it need not always be. The position will depend upon the facts. The law is likely to continue to develop in this area, and employers should consider the context when a fixed-term contract expires. If there are other changes to the business taking place at the same it is possible collective consultation could be required.

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Practical Implications

**Expiry of fixed-term contracts is not a collective redundancy**

Employers are required by law to consult with employee representatives when they propose to make 20 or more employees redundant at the same establishment within 90 days.

The definition of “redundancy” for the purposes of collective consultation is much wider than the definition of redundancy most employers and employees will be familiar with.

The “usual” definition of redundancy is a situation where an employee is dismissed because an employer has a reduced need for employees to carry out a particular kind of work. The definition of “redundant” for the purposes of collective consultation is a dismissal for reasons not related to the individual concerned. This means that the collective redundancy consultation requirements can apply when 20 or more dismissals are made within a 90-day period, even if some of the employees dismissed were not “redundant” under the normal definition. One example might be when an employer dismisses 20 employees and re-employs them due to a business need to alter the terms of employment. This would engage collective redundancy consultation even though no employees are actually made redundant in the “normal” sense.

That was exactly the sort of situation that arose in University of Stirling v University and College Union. Four fixed-term employees’ contracts expired. They claimed that the expiry of their fixed-term contracts fell within the second definition of redundancy, so the University should have consulted with their representatives.

The employment judge in the Employment Tribunal considered that all dismissals are in some way related to the individual concerned. This meant that the second definition would be meaningless (as no dismissal would be “not” related to the individual concerned), so he decided that what the second definition really meant was a dismissal for a reason not direct or personal to the employee (for example their conduct or capability). On this reasoning expiry of a fixed-term contract is not a reason related to the individual, so collective consultation was needed.

The EAT decided the Employment Judge had been wrong. The EAT rejected the proposition that “not related to the individual” meant “not direct or personal to the individual”. It was purely the expiry of the contracts that gave rise to the dismissal, and no other business factors. The employees had all accepted that the fixed-term contracts would come to an end on a particular event or completion of a project when they were employed. The EAT decided this was a reason related to the individual, so the employees were not “redundant” and collective consultation did not apply.

The prevailing view before this case was that expiry of a fixed term contract can be a redundancy dismissal under both definitions of redundancy. This case suggests that will not always be the case. This will be welcome news for employers as many employers make use of fixed-term contracts. It also limits the scope of collective consultation requirements.
New employer pension duties

From October 2012, new obligations will be rolled out which will oblige employers to enroll eligible employees in a pension scheme and make mandatory minimum contributions.

What are the new obligations?

From the date that applies to each particular company, they will be required to automatically enrol their eligible jobholders as active members of an automatic enrolment scheme.

When do the changes come into force?

The implementation of the new duties will be rolled-out over a five year period with larger employers required to comply first. Rather than narrating all the different times when the changes need to be implemented, there is a useful Government webpage which gives all the relevant dates for the different sizes of business. Click here for the website:

Click Here

Who is classed as a jobholder?

There are three main conditions for an individual to be classed as a jobholder:

1. They must work (or ordinarily work) in the UK under a contract;
2. They must be aged at least 16 and under 75; and
3. They must be paid qualifying earnings by an employer.

The definition of someone who works in the UK under a contract (also known as a “worker”) is intended to be extremely broad and covers both permanent and temporary workers. A casual worker who is engaged purely on a casual basis or on a zero-hours contract may not qualify and the best way to come to a decision about whether someone is classed as a worker is to look at their case individually. In some cases this can be difficult, as several factors need to be taken into account. However, this is something a solicitor could assist with if necessary.

In any event, earnings may be the key factor in deciding whether a worker would be covered by the new obligations. The baseline level of qualifying earnings was set at £5,035 (including bonuses, overtime and statutory maternity, paternity and adoption pay) but this may go up to £5.564 to reflect DWP recommendations.

When do jobholders become eligible for automatic enrolment?

An employer would only be obliged to automatically enroll jobholders into an automatic enrolment scheme on the day when they meet these higher qualifying standards.

What is an automatic enrolment scheme?

This is an occupational pension scheme or personal pension scheme established by the employer that counts as a qualifying scheme and meets certain additional requirements. The additional requirements in this instance are that no new joiner can be asked to make a choice or provide information in order to become an active member.
Redundancy: You can be in a pool of one!

In the recent case of Halpin v Sandpiper Books, Sandpiper Books employed Mr Halpin as an administrator in its London Office. Halpin then moved to China to work in a sales position for the Company and became the only employee based in that country. For business reasons, the Company decided that the role in China was no longer viable and decided to outsource the work.

There was extensive consultation with Halpin, which included offering alternative solutions such as an offer to work part-time. However, Halpin was made redundant.

Halpin brought a claim for unfair dismissal on the basis that he had been unfairly selected for redundancy. The claim was dismissed. The employment tribunal held that Halpin had been fairly selected for redundancy “in so far as he was in a pool of one given his unique position dealing solely with sales and based in China”.

Further, the tribunal noted:

- There had been meaningful consultation;
- There were reasonable steps to investigate the possibility of alternative employment;
- A fair procedure had been followed; and
- The respondent had done all that could be expected in the circumstances.

Halpin appealed but the Employment Appeal Tribunal agreed with the tribunal’s approach, upholding their decision. The decision by the Company to limit the pool to a pool of one was open to it:

“Selection only operates when fairness is concerned, where there is a number of similarly qualified possible targets for redundancy”.

In this instance there were no other “similarly qualified possible targets”. Decisions as to pools and criteria are matters for management and the employment tribunal will rarely interfere with them.

In the circumstances, the ET had correctly dismissed the challenge to the fairness of the decision based purely on limiting the pool to a pool of one.