Can unguaranteed work constitute alternative employment in redundancy situations?

DENTONS

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Redundancy is one of five potentially fair reasons for dismissal. However, in addition to establishing that this potentially fair reason existed, an employer must satisfy the Employment Tribunal (ET) that, in the circumstances, it was also reasonable to dismiss that employee.

Before employers dismiss an employee by reason of redundancy, among other requirements such as conducting a fair process and "pooling" employees appropriately, employers have a responsibility to take reasonable steps to look for an alternative to redundancy and to consult employees about those alternatives. This includes giving employees an opportunity to be considered for any suitable vacancies which may exist elsewhere in the business. Failure to do so can render a dismissal unfair.

Aramark (UK) Ltd v. Fernandes: overview

Mr Fernandes was dismissed from Aramark by reason of redundancy. It was undisputed that the reason for Mr Fernandes' dismissal was potentially fair. However, at the time of Mr Fernandes' dismissal, Aramark maintained a list of additional workers. This pool of workers was supplementary to Aramark's usual workforce and could be called upon as and when required in times of reduced capacity among its employees. The workers on this list were (by their nature) not employed by Aramark, nor were they guaranteed work. However, they had the prospect of ad hoc future paid work. Mr Fernandes contended that Aramark should have given him the opportunity to be added to that list of additional workers and that Aramark's failure to consider him for its supplementary workforce constituted unfair dismissal.

The ET agreed with Mr Fernandes and held that, by not consulting him about the pool of additional resource, Aramark's dismissal of Mr Fernandes was unfair. Aramark appealed the ET decision on the basis that, even if Mr Fernandes had been placed on the list, he would not have secured alternative employment. Therefore, it would not have avoided his dismissal on grounds of redundancy.

The Employment Appeal Tribunal (EAT) confirmed that the relevant question was whether Aramark had behaved reasonably in treating redundancy as a sufficient ground for dismissing Mr Fernandes. The EAT, in essence, agreed with Aramark. Its decision turned on the fact that, if Mr Fernandes had been added to the list of additional resource, it would have only afforded him the prospect of work, but not the certainty of guaranteed alternative employment. His existing employment would still have ended. The EAT highlighted the key fact that workers included in the pool of additional workers were not employed by Aramark. This meant Mr Fernandes would not have been employed by Aramark simply by virtue of his inclusion in that pool. It found, therefore, that Aramark's failure to add Mr Fernandes to the pool of workers would not obviate dismissal and, as such, was not a relevant consideration for the purposes of determining fairness under Section 98(4) of the Employment Rights Act.

Comment

Employers are reminded that it is well established by case law that the dismissal of an employee for redundancy may be unfair if the employer fails to make a reasonable search for suitable alternative employment. However, employers can be reassured by further case law which confirms that this duty is not to make every possible effort to look for alternative employment, but simply to make reasonable efforts. This case further clarifies that this obligation will not include placing an employee at risk of redundancy in a bank of additional resource where only the possibility of work exists, as opposed to tangible and certain employment as an alternative.

Notwithstanding the above, employers who regularly use a "bank" of supplementary workers, "casual" workers or otherwise, and retain lists of this additional ad hoc resource, should give thought to the specific circumstances before relying on the authority from this case to the exclusion of a wider review. It is possible that workers that fall under these terms may, in reality, for all intents and purposes, be operating as employees rather than ad hoc workers. This might particularly be the case where the workers have umbrella employment contracts that survive the interruption between assignments. Therefore, there is the prospect that inclusion on a list of additional workers in those circumstances might provide alternative employment and avoid the need for dismissal. Failure to consult with an employee about inclusion on a list, or to include them on that list, could arguably raise the risk of a potentially unfair dismissal.

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