

HR Bulletin E-Update 33 - July 2012

Restructuring, Suitable Alternative Employment and Redundancy

Continuing cases around recruitment this week, we look at the case of Samsung Electronics (UK) Ltd v Monte D’Cruz (2012) UKEAT0039/1. D’Cruz was made redundant having not been successful at interview for an alternative position with Samsung following restructuring. The Employment Tribunal ruled that the dismissal was unfair based on inadequate consultation and that Samsung has used ‘subjective’ criteria during the selection process. The Employment Appeals Tribunal however upheld the appeal as it felt neither the consultation or selection process were sufficiently flawed to justify an outcome of unfair dismissal.

Facts of the Case

D’Cruz began working for Samsung in January 2008 in the post of Head of Reseller – Print. The role was made up of two areas, IT and Office Automation. A year later Samsung broke the job up and D’Cruz became ‘Head of Office Automation Reseller’ which meant he lost responsibility for IT. As a result D’Cruz was one of four senior managers reporting to Head of Print, Mr Long.

Samsung then restructured its Print Operation in the autumn of 2008 in two stages. Firstly to combine the four senior managers into one post, Head of Sales – Print, and then to create several new managerial posts to report to that new position.

A meeting took place to advise all affected staff that there may be redundancies arising from the reorganisation. Samsung also advised that from the date of this notification, 29th October, until 13th November, the restructuring was open to questioning and this time period constituted a period of consultation.

D’Cruz applied, and went through a selection process for the position of Head of Sales – Print. Samsung used a series of ten competencies in which to assess D’Cruz against.

The competencies had been well established through Samsung’s annual assessment processes. In order to be considered for the post, a score of 75 points or over was required. D’Cruz did not achieve this score and was unsuccessful.

The successful applicant was a Mr Porter, who then managed the next phase of the reorganisation. He arranged a meeting for 19th November at which the new structure was explained and in addition all affected staff, including D’Cruz, were given job packs and a copy of the presentation used by Mr Porter.

The new post of Business Region Team Leader appealed to D’Cruz, he felt that it was almost identical to the role of Head of OA Reseller which he had previously held. D’Cruz did not apply for any other roles as part of the reorganisation and also declined an opportunity to discuss any of the new roles with Mr Porter or Ms Bean, who was a Senior HR Adviser.

Interviews took place for the Business Region Team Leader on 3rd December, D’Cruz and one other candidate, Mr Bullock was interviewed. The assessment criteria used for the position was the same as the Head of Sales – Print. Once more, D’Cruz, and indeed Bullock, did not score the required 75 points to be considered for the position.

Samsung decided to engage the services of an external consultant, a Mr Offin. (D'Cruz referred to this in his appeal for unfair dismissal, as he believed Mr Porter and Mr Offin were friends and this influenced the appointment. It should be noted however that the ET rejected this claim and stated that the appointment of Offin was "above board").

Samsung intended the outcome of the whole recruitment process to be communicated at the same time, but Porter and Bean met with D'Cruz on 17th December to tell him the outcome and provide feedback. It is not clear as to how the meeting progressed but D'Cruz was told of the other available vacancies and he was encouraged to apply for them. The following day D'Cruz was given a letter notifying him that he was at risk of redundancy and that he should consider the list of vacancies discussed the previous day and notify Bean by the 24th December of his decision.

D'Cruz asked to see Bean on 23rd December and handed her a letter in which he challenged the outcome of the decision not to appoint him or to give him detailed feedback. D'Cruz stated at this point he didn't want to commit to any decision on his future, which presumably meant the other vacancies that were available, until he got a response. Bean stated that until Porter was back from leave she could not fully respond. A meeting involving all three of them took place on 11th January 2010 and two days later Bean replied to D'Cruz's letter of 23rd December, which explained the decision not to appoint and as D'Cruz had not applied for any other position within the organisation, he would be dismissed as a result of redundancy with effect from 31st January 2010.

At the Employment Tribunal

The ET started by looking at whether Samsung had met the requirements of the Employment Rights Act 1996 in determining that a legitimate redundancy situation had arisen. The ET concluded that the redundancy occurred at stage one of the reorganisation and stage two was the process by which they offered D'Cruz the offer of 'alternative employment' and therefore satisfied itself that this requirement was met.

The ET considered that there were three areas in which D'Cruz's appeal needed to be addressed, these were, failure to consult, selection, alternative employment. In turn, the ET took the following view...

Failure to consult

The ET found that at stage one of the reorganisation was not fair or adequate, the main reference stated, **"Mr Long (Head of Print) identified what he wished to do in late September early October 2009, there was a meeting on 29th October 2009 and a letter sent out on that date. This provided little more than a warning to the Claimant of what was going to happen. The 'consultation' is only in the sense of identification of the management decision already made and what will then happen. But it is informing rather than consulting. This is not consultation as identified within the case law and there is no communication at this stage beyond the meeting and the sending of that letter ... To put it in context, the meeting took place and the letter was sent on 29th October, the interviews for the Head of Sales – Print role took place on 5th November and 'consultation' ended on 13th November 2009, after the interview dates."**

The ET, paraphrasing went on to add, **"At stage 2, which we have decided falls beyond our remit as to being a redundancy situation, the evidence we heard sounded more like a process of on the face of it meaningful consultation in that meetings were to be held with individuals. However, the Claimant did not attend the consultation meetings and beyond the evidence we heard at the hearing, which was limited ... We therefore cannot reach a view that this consultation provided any more information than that at stage 1."**

Selection

The ET considered the two stages of the reorganisation process. As for stage 1, the ET accepted that the fact that D'Cruz did not get the post of Head of Sales – Print, as D'Cruz himself acknowledged he wasn't the best candidate, was irrelevant. As for stage 2, the ET declined to consider it as it was related to the offer of alternative employment, not redundancy, though it did state that an employer can only fairly select for redundancy on the basis of objective criteria. This matter will be looked at further on.

Alternative Employment

In this case, where there was more than one candidate for an alternative role, the ET didn't feel it was appropriate to apply the same criteria in judging the selection for the original redundancy but stated, **“there has [to] be a degree of objectivity as to the criteria and their application otherwise the process would be unreasonable, applications must be considered properly and the exercise carried out in good faith”**

The ET felt that because the post of Business Region Team Leader was so close to D'Cruz's role when he was first appointed by Samsung, that it would not have let other employees apply for it, though it then felt that that the decision to open the vacancy out to others was reasonable!

The ET determined that the dismissal of D'Cruz was unfair on two counts, which were `inadequate consultation` and `flaws in the selection process` for the post of Business Region Team Leader. In concluding the ET stated, **“our conclusion was that given the selection process for alternative employment was so fundamentally flawed, no Polkey reduction was to be applied. The Claimant was bound to have been successful in obtaining the position of Business Region Team Leader had a reasonable selection process been adopted and applied.**

At the EAT

The EAT focused on the two areas identified by the ET, `inadequate consultation` and `flaws in the selection process, which will be addressed as follows, as well as looking at the issue of `alternative employment`.

On the matter of `inadequate consultation,` Samsung argued that the ET had not considered whether the consultation was either reasonable or adequate, stating; *“Had the ET applied the law correctly, it would have considered the totality of the consultation before determining whether the dismissal was fair under the ERA s98 (4)”*.

The EAT determined that the D'Cruz was made aware of how the reorganisation would affect him, but that the actual process of the reorganisation was not a matter in itself of consultation. The EAT dismissed the ET observation that there was inadequate consultation and that the letter given to D'Cruz on 29th October by Mr Long could be regarded justly as first stage consultation on the reorganisation in this scenario.

The EAT also challenged the ET's view that the D'Cruz was not informed as to the selection criteria or the process relating to the posts for which D'Cruz had applied for. The EAT viewed that in terms of the selection criteria, D'Cruz had been well informed as to the use of the competencies and the scoring methodology to be used. Indeed the EAT observed that D'Cruz did not complain to the ET of any perceived unfairness and it appears that the ET themselves had determined this but did not explain why!

The EAT then considered what D'Cruz had in terms of options should he have been unsuccessful, as he was, in obtaining the position of Business Region Team Leader (BRTL) and if Samsung had acted unfairly. The EAT pointed out that D'Cruz had been made aware of the fact that he could, if unsuccessful in getting the post of BRTL apply for one of the four newly created posts, and offered him the chance to discuss these, an offer which D'Cruz declined.

As for the matter of `alternative employment` the EAT cited the case of ***Morgan v Welsh Rugby Union [2011] IRLR 376***, by reference to the earlier decision in ***Ralph Martindale & Co v Harris (UKEAT/0166/07)***, that “the selection criteria must at least meet some criteria of fairness” and in particular that they must be “objective”. Judge Richardson said of this,

“... [A] tribunal considering this question must apply s. 98(4) of the 1996 Act. No further proposition of law is required. A tribunal is entitled to consider, as part of its deliberations, how far an interview process was objective; but it should keep carefully in mind that an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgment. A tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair.

A tribunal is entitled, and no doubt will, consider as part of its deliberations whether an appointment was made capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under s. 98(4)."

By applying this it was deemed that Samsung had acted reasonably in offering a post to an employee who it judged to be better able to fulfil the role than the claimant, despite the issue that the existing recruitment process had been diverted from somewhat.

The EAT also considered the issue of subjectivity in the process and felt that the fact is that not all aspects of selection can be objectively measured and interestingly felt that there is no obligation on an employer to routinely apply criteria capable of such measurement and certainly not in the context of an interview for alternative employment.

In concluding on the matter of `alternative employment`, the EAT stated that if it had followed the principles adopted in ***Morgan v Welsh Rugby Union*** then they would not have expected the ET to have found that D'Cruz was unfairly dismissed. The EAT was satisfied that D'Cruz was suitably assessed but did not meet the required criteria for the roles to which he applied and that though the recruitment process may have been diverted away from, it was not considered to be such that it warranted or merited challenge to the level that unfair dismissal was the correct outcome.

What does this mean for us?

Reinforcing the ***Morgan*** decision this ruling reinforces that a reasonable degree of `subjectivity` is allowed to form part of a redundancy selection when structured internal recruitment processes effectively represent the selection mechanism. This does not mean of course, that having a measureable and objective approach is not the right approach to redundancy selection, but that it's not the only way in the eyes of the law.

Employment Law Update - 14 September 2012 9:00am - 12:00pm, ETC Venues, Maple House

Back by popular demand, West Midlands Councils are hosting their second annual Employment Law Event in conjunction with the Local Government Association (LGA). We are pleased to confirm that Darren Newman will be our guest speaker. Darren has been an employment lawyer since qualifying at the Bar in 1990. He worked for many years for IDS, writing on the leading employment law journal IDS Brief. He is also the former Head of Employment Law and Social Affairs at the Chemical Industries Association and as an employment law consultant has represented both small and large employers at employment tribunals around the country.

What the session will cover?

- Up to the minute engaging discussions on employment law developments
- Case law analysis and implications for local government and other public sector organisations
- Interactive Q & A panel to enable attendees to share their work experiences

For more information and to register to attend go to [Email admin@wmcouncils.gov.uk](mailto:admin@wmcouncils.gov.uk) or phone 0121 678 1010

Employer Services Team is here to help

For advice and information on employment issues (including on any of the contents of this Bulletin) and consultancy support contact:

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