

UPDATE

Guernsey's Employment Tribunal sets the test for a genuine redundancy

Update prepared by Rachel Guthrie (Counsel, Guernsey)

Guernsey's Employment Tribunal (the Tribunal) has provided useful guidance for employers when dealing with the restructure of their organisations and managing redundancies. The Tribunal has reinforced that an employer needs to show not only that there was a genuine redundancy, but that the process applied to the dismissal was reasonable.

The **claim** was brought by a used car sales manager who was dismissed on the basis of redundancy following a restructure of the sales team.

In determining whether there was a 'genuine' redundancy, and therefore a lawful reason for dismissal, the Tribunal articulated a three stage test:

- **Stage one:** whether the employer had ceased, or intend to cease, to carry on the business for the purpose for which the employee was employed or in the place where the employee was employed?
- **Stage two:** whether the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
- **Stage three:** whether the dismissal of the employee caused wholly or mainly by the cessation or diminution of a particular kind of work?

Whilst it is not clear in the judgment, consistent with the wording in the Employment Protection (Guernsey) Law, 1998 as amended (the **Law**), more typically stages one and two are alternates (ie it is a requirement either that there be a cessation in the business or a reduction in the need for employees to carry out work of a particular kind) and that stage three would only be applied if either stage one or two is satisfied.

In this case, the Tribunal found that the employer had failed at each stage. There was no cessation of the business for which the employee was employed; there was no reduction in the number of staff required in the sales department where the employee worked to carry out the type of work that the employee performed and, therefore the employee was not dismissed because of those circumstances. Rather, in this case, the Tribunal held that dismissal resulted from a restructure which involved changes to the 'approach to the work' which had not created in a genuine redundancy situation.

That is not to say that a dismissal arising out of a restructure cannot amount to a lawful reason for dismissal – it can in some circumstances – either by reason of redundancy or virtue of 'some other substantial reason'. In this case, the employer asserted that the reason for the employee's dismissal was 'redundancy' – where in fact, it was due to changes in the approach to work arising out of a restructure of operations. This could, potentially, have been regarded as 'some other substantial reason'. At least in the UK, it is well established that an employment tribunal is entitled to make a finding that the reason for a dismissal is other than that relied on by an employer. Interestingly, in this case, the Tribunal did not appear to turn its mind to whether there was another 'lawful' reason for the employee's dismissal, but merely determined that the provided reason of 'redundancy' was not genuine.

The Tribunal commented that even if redundancy had been the genuine reason for the dismissal, it would have still been unfair because the employer had failed to follow a reasonable process. In particular, the employer failed to:

- adequately consult with the employee about redundancy before a decision was made;
- ensure that the employee knew and understood the redundancy procedure;
- consider ways to minimise or avoid redundancy through retraining and redeployment;
- keep notes of meetings and phone calls with the employee;
- offer the employee an equivalent role that was subsequently advertised in the local paper; and
- adequately resource the restructuring process.

While the Tribunal found that the employee had been unfairly dismissed, it exercised its discretional powers (to reduce any award where it considers it 'just and equitable' to do so) and ordered a reduction of the award by 50 per cent. It did so because, in its view, the employee had failed to engage with the redundancy process (in particular, he did not apply for or explore the details of alternative roles or training offered to him and did not exercise his right of appeal). Interestingly, it also reduced the compensation amount by the value of the token goodwill payment that had been made to the employee in respect of his redundancy.

The lesson to be learned? While the burden is on the employer to demonstrate that a dismissal on the grounds of redundancy was genuine and fair, the employee has a duty to engage in the process and an unreasonable refusal to do so may result in a reduction of any compensation awarded.

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