ALLEN & OVERY

Mogane v Bradford Teaching Hospitals – Case summary

In *Mogane v Bradford Teaching Hospitals NHS Foundation Trust and others*, the Employment Appeal Tribunal decided that a redundancy dismissal was unfair where the Claimant was not meaningfully consulted prior to being placed into a redundancy selection "*pool of one*".

Facts

Mrs Mogane, a Band 6 nurse, was employed from 2016 on a series of fixed-term contracts by Bradford Teaching Hospitals NHS Foundation Trust. In addition to the Claimant, there was another Band 6 nurse (carrying out a similar role to that of the Claimant) who was also employed on a fixed-term contract. Shortly before the commencement of the redundancy process and following the successful completion of her probationary period, the second Band 6 nurse was confirmed on a two-year fixed-term employment contract which was due to expire after the Claimant's fixed-term employment contract.

In early 2019, as a result of the Respondent's financial circumstances, a potential redundancy situation arose within the Claimant's unit. In March 2019, she was invited to a meeting at which she was informed of the Respondent's financial difficulties. Shortly thereafter, the Respondent confirmed that the Claimant should be in a redundancy pool of one – this was based solely on the fact that the Claimant's fixed-term employment contract was due to expire before that of the second Band 6 nurse. Only after the decision to place the Claimant in a pool of one had been taken, did any kind of consultation with the Claimant commence. As there were no other suitable roles for the Claimant, she was eventually made redundant in December 2019.

Following the confirmation of her redundancy, the Claimant brought a claim for unfair dismissal which was dismissed by the Employment Tribunal. She appealed and was successful in the EAT, which held that the Claimant's dismissal was unfair as, by applying the sole criterion (namely, the expiry date of the fixed-term employment contract), "*the Claimant was, effectively, chosen to be the employee dismissed before any consultation took place*".

Key Learning Points for Employers

Approach to consultation

This case serves as a useful reminder for all employers that "*genuine and meaningful*" consultation is a fundamental aspect of a fair redundancy process (regardless of whether this is in a collective or individual context). Specifically, employers should ensure that consultation occurs when it is still possible for the affected employee to influence or potentially affect the outcome. In this particular case, consultation should have been undertaken prior to the Respondent deciding that the expiry date of the fixed-term employment contract should be the sole criterion for redundancy selection.

Implied term of trust and confidence

Employers should also be aware of the implied term of trust and confidence, which requires employers not to act arbitrarily towards employees (this equally applies when deciding the selection criteria for redundancy). In this case, a redundancy decision which was predicated solely on which fixed-term employment contract was due to expire first was arbitrary as, without consultation, there was no specific explanation as to why that had to be the sole criterion. To further mitigate risk in this area, where possible, employers should endeavour to apply a number of different and objective redundancy selection criteria.

Pool of one

Helpfully for employers, the EAT acknowledged that "*a tribunal cannot and should not easily interfere with an employer's decision as to the pool*". However, in circumstances where the employer has settled on a pool of one, that employer will be expected to demonstrate that:

i) there is a rational explanation for having a pool of one; and
ii) a reasonable employer would have adopted a pool of one in all the circumstances.

Based on the facts, the Respondent did not advance any credible reason as to why the Claimant was in a pool of one; it was not reasonable for the sole criterion to be the date on which the fixed-term employment contract was due to expire.

A key question most employers would be asking is, when can a redundancy pool of one be reasonable? Clearly this would be fact specific, however, a pool of one would most likely be fair where that particular employee performs a unique and exclusive role. Careful analysis will be required and this is somewhat of a balancing exercise for employers – while a pool of one is inherently risky, this does not mean that, by default, employers should unnecessarily adopt wider redundancy pools as doing so not only can be unsettling for employees, but can also be disruptive to the business.

Gilbert Musanhu
Associate
Tel +20 3088 1116
gilbert.musanhu@allenovery.com