

Redundancy and Fixed Term Contracts – An Update

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Recent developments in the law and practice of implementing redundancies

1. In the current financial climate, many Higher and Further Education institutions are having to introduce redundancy programmes, including potential compulsory redundancies. The general reaction of the unions, UCU in particular, is of vigorous resistance, and it must therefore be expected that opportunities to contest the legality of any attempts at imposed redundancies will be taken.

2. The main issues arising in redundancy situations on which there have been recent developments are:
 - The scope of consultations with union/employee representatives
 - Timing of the start of consultations, and of dismissals following consultations
 - Criteria for selection, with particular reference to LIFO and age discrimination
 - Age discrimination in relation to early retirement and redundancy benefits
 - Changes in pensions legislation affecting early retirement
 - Repeal of the statutory procedures under the Employment Act 2002 and replacement of the ACAS Code.

These points are considered in turn below.

Consultation: must the employer consult over the decision creating the redundancy situation?

3. The traditional view that the statutory requirement to consult recognised unions (or employee representatives if there is no recognised union) only applies to the *implementation* of a decision that leads to a redundancy situation, such as a decision to close a particular site (or in HE/FE terms, to close a campus, department or course) was controversially disapproved by the EAT in *UK Coal Mining Ltd v NUM (Northumberland Area)* [2008] IRLR 4. The EAT in that case, which concerned a decision to close a coal mine with the loss of all the jobs based there, concluded that there was a requirement under the EU Collective Redundancies Directive (98/59) and cases interpreting the Directive to consult over the reasons for the decision to close the pit, and that earlier cases to the contrary (most recently *Securicor Omega*

Express Ltd v GMB [2004] IRLR 9) had simply followed earlier case law which in turn was based on the wording of the legislation before it had been amended in 1995.

4. The case against the employers was a strong one, as they were found to have given an untrue reason for the decision to close the pit, and Elias P observed that the lay members of the EAT considered that the decision was unlikely to have much impact in practice since sensible employers already consulted about the reasons for closure decisions. That may be thought to be a somewhat artificial perception where decisions are taken by a higher level of authority within the organisation, such as a parent company (as in the *Fujitsu* case, below), and - more importantly in the HE/FE sector - such consultations may fall outwith the framework of formal consultations under s 188 Trade Union and Labour Relations (Consolidation) Act 1992, and therefore not be sufficient for compliance with the statute if it does mandate consultations over the reason for a closure decision.
5. The issue has been revisited in *United States of America v Nolan* [2009] IRLR 923, EAT (Slade J). This case concerned the closure of a US Army base; the closure decision was taken by the military authorities in the USA and consultations were confined to the consequences for the 200 British civilians who worked at the base. The USA had waived sovereign immunity. At the EAT it did not dispute the correctness of the *UK Coal* case but argued unsuccessfully that it only applied to commercial decisions to close an establishment. The EAT held (at para 88) that the principle applied equally to reasons of public policy, thus confirming the application of the case to public sector closures.
6. *Nolan* is currently under appeal, and due to be heard by the Court of Appeal in March. Counsel for the USA will be seeking to rely on an additional submission, that *UK Coal* was wrongly decided in the light of a subsequent, and the most recent, case in the ECJ on the parent Directive, *Fujitsu*. Subject to this argument, however, a failure by HE/FE institutions to consult over a decision to close a department or campus that will inevitably or almost inevitably lead to redundancies will be grounds for a claim under the 1992 Act for a protective award. (Not all closure decisions will necessarily lead to at least 20 redundancy dismissals, but in this context both enforced relocation and voluntary redundancies may need to be taken into account in calculating numbers: see *Hardy v Tourism South East* [2005] IRLR 242.)

The timing of the start of consultations

7. The *Fujitsu* case (*Akavan Erityisalojen Keskusliitto Aek ry v Fujitsu Siemens Computers Oy*, Case C-44/08, [2009] IRLR 944) concerned the closure of a factory in Finland operated by Fujitsu, following a decision by its parent company (which was based in the Netherlands) to cease manufacturing operations at the Finnish site. The principal question referred to the ECJ was when the duty to consult crystallises, rather than what matters must be the subject of consultations. However the two points are clearly linked.
8. The Court answered the questions put to it by holding that consultations must begin once decisions are adopted which compel the employer to contemplate redundancies; the fact that all the relevant information needed for consultations is not available at that time is not a reason to delay the start of consultations, since there is no requirement that all of the information required to be given to the consultees must be given at the start of the consultation process. It is permissible to give the information in stages, as it becomes available.
9. The Court went on to hold that the obligation to consult lies on the legal entity employing the workers at risk of redundancy, with the consequence that the obligation to consult only arises when it is necessary for that entity to contemplate dismissing staff, i.e. once a decision has been taken by the parent company that it will need to implement. That point has no obvious relevance in HE/FE, where institutions are autonomous legal entities with no controlling parent (however interventionist HEFCE may appear). But an at least arguable implication of the decision on this point is that if there is no need to consult over the decision to close a site taken by a parent of the employer, there should equally be no obligation to consult over that decision when it is in the hands of the employer itself. However until that is so held by a UK court, the duty to consult over the decision to close an establishment or cease an activity remains.
10. The obligation is not however necessarily to consult at the first opportunity; the requirement is only to consult 'in good time', and at least 30 or 90 days before the first dismissal takes effect, and not to give notice of dismissals until consultations have been completed (or the statutory period for them has run its course): see on this point *Junk v Kuehnel* [2005] IRLR 310. Provided that a later start to consultations does not prevent consultation with a view to reaching agreement on such issues as the employer is required to consult on, there is no requirement to begin the

consultations immediately a trigger for the duty to consult occurs (such as a decision to *consider* the closure of a campus to achieve a required reduction in costs).

11. In summary therefore, HE/FE institutions should, in addition to any more general consultation process that may be followed over proposals for retrenchment of the institution's activities, consult with recognised unions before any final decision is taken on closures which would necessitate, or probably necessitate, redundancies. The *timing* of the consultation is however a matter of discretion, provided that no dismissals (even of volunteers for redundancy) are effected within the statutory 30 or 90 day period following commencement of consultations, and no notices of dismissal are issued before the conclusion of consultations.

Selection criteria. LIFO and age discrimination

12. The traditional approach of selection for redundancy by length of service (Last In First Out) has largely disappeared in favour of a mix of factors, which may themselves be the product of negotiations with the unions, designed to retain the most valuable employees (or, viewed from the other end of the telescope, get rid of the least valuable). However, length of service may still be a factor in the criteria so agreed, and it may well make sense to take it into account because of the greater cost of dismissing longer served employees.
13. The rather unusual litigation instituted by the employers that led to the Court of Appeal's decision in *Rolls Royce plc v Unite the Union* [2009] IRLR 576 involved an application by the employer for a declaration that previously agreed selection criteria which included length of service had been rendered unlawful by the Employment Equality (Age) Regulations 2006, since giving weight to length of service indirectly discriminated against younger employees. The application was resisted by the union, which wished to retain the agreed criteria.
14. The principal feature of the judgments in the CA is the reluctance of the Court to entertain the application in the abstract – understandably so, since the questions whether the criteria would have disparate impact, and if so on what age group, and whether the justification advanced could be shown to be proportionate, would depend on the context of the application of the criteria in an actual redundancy exercise. However despite this reluctance the Court, following the High Court, agreed to hear the case, and made important rulings about the application of the 2006 Regulations to the use of length of service in redundancy selection.

15. Regulation 32 gives limited protection to the use of length of service criteria in the awarding of 'benefits' to employees: there is a complete exemption for service-based conditions of up to 5 years' service, and a less onerous test for the justification of criteria involving longer service. The Court held that non-selection for redundancy is for the purposes of reg 32 a benefit, so the use of service-related criteria, whilst very likely to be indirectly discriminatory, may be justified if it reasonably appears to the employer that the application of the criteria fulfils a business need of the undertaking, such as encouraging loyalty or motivation or rewarding experience. The Court went on to hold both that the business need case was clearly made out, and that the use of length of service as a factor, but not the sole factor, in a redundancy selection exercise, was a proportionate means of achieving the business aim. The Court added however that in giving a ruling in principle it was not intending to prevent individual employees from arguing that the application of the agreed criteria to them entailed unlawful discrimination.
16. The decision thus gives some, but not blanket, legal protection to the use of length of service as a factor in selection criteria. Equally and perhaps more importantly, it removes the principal argument institutions might wish to deploy to justify tearing up existing agreed selection criteria which incorporate length of service as a factor; it is more likely that such agreements will require formal renegotiation if service based factors are to be eliminated from the equation.
17. It is important to note that reg 32 expressly excludes from its scope benefits on termination of employment, so redundancy and severance pay are not within the more benevolent regime for justification afforded by the regulation: see below for the implications of this, and the scope of the limited parallel protection given by reg 33; see further below on this point.
18. A more complex issue in redundancies is the use of age, or more specifically the consequences of age for the cost of redundancy, as a criterion. The USS and LGPS pension schemes make it significantly more expensive to dismiss as redundant anyone over 50 (or, as from 1 April 2010, over 55) because of the automatic access to an unreduced pension conferred by the respective Scheme Rules.
19. The question whether this can justify the potential direct age discrimination involved in factoring into redundancy decisions whether the employee will be entitled to an

immediate and unreduced pension has yet to be considered directly at appellate level. The only case on the use of age in a redundancy decision to reach the EAT thus far is *London Borough of Tower Hamlets v Wooster* [2009] IRLR 980. A finding of direct age discrimination was reached by the ET, and upheld by the EAT, on the basis that Mr Wooster had been made redundant at age 49, after temporary redeployment opportunities were overlooked because they would have resulted in him remaining in employment until he was 50 and qualifying for a costly immediate pension. Importantly, no defence of justification was advanced on the basis of cost (or of the possible illegality of simply paying him to stay on until 50). This case is to be heard by the Court of Appeal in May 2010, but because of the failure to argue cost as a defence, the case is unlikely to shed any direct light on the potential for such a defence.

20. The issue of justification *is* expected to arise, however, in the forthcoming appeal to the EAT in *Woodcock v Cumbria Primary Care Trust*. The case involves the dismissal of the claimant just before he attained 50, in order to avoid the substantial cost that would be entailed in paying him an unreduced pension if he was dismissed a little later, a factor the ET held to provide justification on the facts. This case should shed more light on the difficult question how far cost alone can provide the basis for a defence of justification.
21. The use of age in redundancy decisions may arise in a number of ways:
 - Refusal to accept a 55 year old volunteer for redundancy because the cost would be too great
 - Including in selection criteria as a factor against selection entitlement to an immediate unreduced pension
 - A claim by a younger employee that he/she has been selected as a consequence of an older employee being excluded (from voluntary or compulsory redundancy) because of pension entitlement – effectively, discrimination against A because of B's age.
22. It is difficult to generalise about such cases, and advice on a case by case basis is likely to be needed; such issues are very likely to arise if a systematic cost management approach is taken to the implementation of redundancies, as is most likely when the institution simply needs to reduce its payroll costs to balance the books.

Redundancy benefits

23. Typically, redundancy benefits are both directly and indirectly age discriminatory. The indirect discrimination results from payments based on length of service, whilst the statutory scheme and policies which follow its principles are directly discriminatory because payments are tiered according to age. The statutory scheme itself is protected by reg 33 of the Age Regulations from a finding of unlawfulness, as are payment schemes which follow the structure of the statutory scheme and either disapply the maximum of a week's pay, or increase the rate of accrual by a multiple of the statutory rate, or both.
24. However this protection only applies to those schemes that meet the relatively exacting criteria in reg 33, which include only counting 20 years' service, and using the same multiplier of the statutory rate of accrual across the board. Thus many relatively generous schemes may be deprived of legal immunity because, for instance, they still operate a cut-off at age 65, or tapering of benefits so that nobody receives more in redundancy pay than they would have received in salary from working on to age 65. Different tiering of accrual from age 50 to reflect access to an immediate pension is also a common feature of such schemes.
25. The risks to institutions which still have non-compliant schemes is significant, because it is not possible to predict or prescribe who mounts a challenge, and therefore determine the circumstances in which justification would be required to be shown, and the consequences of a successful claim of age discrimination would be a general rounding up of payments.
26. It is very likely, after the *Rolls Royce* case, that the factor of length of service would be accepted as justified. More difficulty arises with the direct discrimination that may be involved. The point will become more acute following the increase from 50 to 55 in the minimum age for an immediate pension, which will come into effect on 1 April 2010. The point is exemplified by the case of *Loxley v BAE Systems Land Systems (Munitions and Ordnance) Ltd* [2008] ICR 1349, where an increase in the age at which an immediate unreduced pension could be taken had not been reflected in a change in the redundancy pay scheme which applied limits on payments by reference to the old pension age.
27. The point was made in the EAT's judgment in *Loxley* that it might be easy to justify excluding those entitled to an immediate pension from the redundancy scheme (so

far as it was more generous than the statutory scheme, which of course cannot be so excluded); and that tapering provisions linked to the age at which an immediate pension would be payable could similarly be justified. But once the link was broken such justification would no longer be available.

28. The actual decision in *Loxley* was to remit the case for reconsideration, as the ET had misunderstood the nature of the claimant's complaints. The case therefore does not provide a definitive exposition of how a redundancy scheme not compliant with reg 33 may be justified. The same is true of the other decision to date on redundancy pay, *MacCulloch v Imperial Chemical Industries plc* [2009] ICR 1334. In that case the ET was faulted for not having considered the extent of the discrimination against the claimant resulting from the age discrimination in the scheme, in assessing whether the defence of justification was made out; this case too was remitted for reconsideration.
29. The position therefore remains that there is no clear and authoritative basis for assessing the legality of redundancy schemes outwith the protection of reg 33. Additionally, any scheme which contains provisions based around the availability of an immediate pension at age 50 will clearly be vulnerable to claims by anyone dismissed for redundancy between the ages of 50 and 55 following the changes in pension legislation from April 2010. Any institution with such a scheme needs to undertake the revision (and if necessary renegotiation) of the terms of the scheme as a matter of some urgency.

Repeal of the statutory procedure and individual redundancies

30. The statutory dismissal procedure did not apply to redundancies where the collective consultation requirements applied, but did apply to any redundancy dismissals not exceeding the threshold for collective redundancies (at least 20 in any 90 day period at the same establishment. The repeal of the statutory provisions by the Employment Act 2008 removed the requirement to follow the procedure, and the ACAS Code introduced to accompany the 2008 Act's changes expressly excludes redundancies from its ambit, so the risk of an uplift for failure to follow its precepts in a redundancy dismissal does not arise. However:

- Pre-1992 Universities will have to follow the procedure laid down in their Statutes, which in most cases will be the Model Statute imposed by the

Commissioners under the Education Reform Act 1988, but in some cases will be a later modification adopted with the approval of the Privy Council.

- All HE/FE institutions will need to ensure that they meet the procedural requirements of fairness, and avoid exposure to discrimination claims, in the procedures adopted for selection for redundancy, individual consultation, consideration of redeployment and access to any new posts (where redundancy is accompanied by restructuring).
- It is at least arguable that where grievances are raised in the course of a redundancy exercise, and not addressed consistently with the ACAS Code, the uplift provisions of s 207A of the 1992 Act would apply to any award of compensation for unfair dismissal or discrimination.
- There is a greater risk of individual redundancies being contested at ETs in the HE/FE sectors because of the greater potential consequences, including effective loss of career, and the greater difficulties in achieving fair assessments of qualitative criteria for selection than where more routine jobs are concerned.

February 2010