

Employers wary of discriminating in job cuts process



Donna Reynolds

THE Chartered Institute for Personal Development analysis of unemployment figures suggests the recession is taking a heavier toll on men than on women.

Since the recession started, the number of men unemployed has increased by almost 50 per cent, compared to an increase of 33 per cent for women.

However, at the risk of stating the obvious, recessions do not discriminate on the basis of sex, age, race or creed.

The same cannot be said for employers. When forced to reduce their workforce, some employers look to influence the selection for redundancy to achieve a desired outcome. Their motives are not always legally (or even morally) wrong but unfair selection may amount to unlawful discrimination.

For instance, they may wish to unburden the business of underperforming employees. That in itself is not unlawful, but caution is needed to avoid inadvertently discriminating on the grounds of sex, disability, or any family-friendly statutory rights.

The trap can be sprung, for example, by using attendance records without considering the reasons behind the absence, or by reliance on criteria that are too vague or subjective.

And what about the employer that wishes to "look out for" its long-serving or permanent staff? While it may be true to say that there no longer exists a "job for life", one side effect of embedding such concepts as fairness in the workplace and work-life balance into employment law has been an employer should have a better understanding of an employee's personal situation.

With family-friendly policies on the political agenda, it is no surprise that an employer can find it difficult to reconcile its decision to make redundancies from non-permanent or fixed-term employees with a potential finding of discrimination when it is doing nothing more than providing what it sees as a social justification for dismissal.

However, the EAT's decision in *Amnesty International v Ahmed* makes it clear an employer cannot escape liability for a claim of discrimination on the basis the motive was benign.

This contrasts hugely with German law where employers must justify the dismissal of any employee for operational reasons "in social terms". In accordance with this principle, the employees selected are the ones for whom dismissal will have the least social hardship, not necessarily those with the best technical skills.

The effect is to individualise job losses. Quite how far a German employer is supposed to investigate (pry into?) the likely effects of its decision is beyond the scope of this piece. Broadly, the most important criteria are age, length of service and number of dependants. Others include the employee's financial situation, opportunities for securing future employment, health and also the circumstances of their immediate family.

At first blush, and to UK eyes, this approach appears to be discriminatory. That said, and taking age as an example, in the context of redundancy, length of service can be a lawful criterion for the purposes of UK discrimination legislation. It is, however, better if it is one of many factors and is a proportionate means of achieving a legitimate aim. Thus, in *Rolls Royce plc v Unite the Union*, it was a legitimate aim to respect the loyalty and experience of older employees and protect them from the difficulty of finding new work at a difficult time.

Perhaps there is no room for sentiment and loyalty in the selection process, and the process adopted in the UK on the basis of objective, uniform and transparent criteria that are reasonable and fairly applied is the correct one. Ultimately, your view is likely to depend on which social, political or economic imperative you start from. For example, from a broader UK plc economic perspective, objective "work-only" assessment is probably more likely to enhance business competitiveness by retaining employees on the basis of workplace merit rather than compassion.

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