

# Redundancy and Alternative Employment

## Bird v Stoke-on-Trent Primary Care Trust

### The EAT considers the tricky issue of redundant employees' refusal of suitable alternative employment

Handling redundancy can be daunting for both employers and employees. There may be a substantial redundancy payment involved and the dismissal could lead to an unfair dismissal claim.

There is a requirement for employers and redundant employees to consider suitable alternative employment. An employee's unreasonable refusal of alternative work could mean an employer does not have to make a redundancy payment. The Employment Appeal Tribunal (EAT) recently had to consider these issues in the case of Bird v Stoke-on-Trent Primary Care Trust.

#### Genuine redundancy

For unfair dismissal claims, tribunals have to consider first if this is a genuine redundancy situation, falling within the statutory definition of redundancy, then whether it is fair to dismiss for that reason (the general test of fairness is in section 98(4) of Employment Rights Act 1996). The employer must have acted reasonably in dismissing the employee in all the circumstances.

#### Unfair dismissal

There are three potential stumbling blocks for employers, each of which could render any subsequent dismissal unfair. Employers have to:

- consult with the employees affected



- identify the correct pool of employees for selection for redundancy and apply objective selection criteria to those in the pool
- consider alternative employment.

The alternative need not be as suitable as the original employment but it must be offered, provided it is not insulting to do so. There is certainly no need to create a vacancy.

### **Redundancy proposal**

The legal test for alternative employment for a redundancy proposal is altogether different. Here the alternative employment must be both objectively suitable for the employee and not unreasonably refused by the employee. If both these requirements are met, an employer can avoid having to pay either a statutory or contractual redundancy payment.

The legal test used to determine whether the alternative role is in fact suitable is often misunderstood and misapplied by employers and tribunals alike. This is perhaps due to the fact that while, in theory, the suitability of alternative employment and the reasonableness of an employee's refusal of an employer's offer are entirely separate issues, in practice the two often overlap and are confused. It is critical to keep them separate.

### **Objective assessment**

Suitability requires an objective assessment of whether the job offered is appropriate for the employee concerned.

Whether an employee's refusal of a suitable job is reasonable depends on a subjective test and requires an analysis of the employee's reasons for rejecting it. This can cover many factors, including the employee's personal circumstances such as their personal and family commitments.

### **Unreasonable refusal**

In the EAT case, Bird was dismissed for redundancy, but did not receive a redundancy payment on the grounds she had unreasonably refused

offers of suitable alternative posts. An employment tribunal had determined that one of the posts was suitable for her.

**For further information please contact:**

**Barry Mordsley  
Consultant**

**E:** [bmordsley@salans.com](mailto:bmordsley@salans.com)  
**T:** +44 20 7429 6090

**London**

Salans LLP  
Millennium Bridge House  
2 Lambeth Hill  
London EC4V 4AJ

**E:** [London@salans.com](mailto:London@salans.com)  
**T:** +44 20 7429 6000

The EAT decided the tribunal had failed to take into account two features of the evidence that were relevant to whether the post was suitable for this particular employee. So, in determining that the employee had refused the offer of that post unreasonably, the EAT held the tribunal had substituted its own view about the reasonableness of the reasons for her refusal, rather than considering whether someone in her circumstances could reasonably have taken the view of the alternative post which she did. It remitted the case to a fresh tribunal.

**Burden of proof**

It is important to remember that, if there's a claim, it's down to an employer to show both that the alternative employment offered was suitable and that the employee's refusal was unreasonable.

Employers should make notes at the time these important decisions are taken. These may prove to be invaluable if the employer is subsequently required to justify its decision in front of an employment tribunal.

Case ref UKEAT/0074/11/DM. For the full decision, go to [http://www.bailii.org/uk/cases/UKEAT/2011/0074\\_11\\_2107.html](http://www.bailii.org/uk/cases/UKEAT/2011/0074_11_2107.html)

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