

# Jumping the hurdles



As we approach the beginning of the financial year, many employers are faced with the challenge of managing staff in reduced circumstances, and while the Olympics will undoubtedly bring economic benefits, the games will require some careful man management. **Sarah Booth** and **Kevin McCavish** report.

With experts predicting that the UK's economy is, at best, likely to stagnate this year and may, at worst, tip into a 'double-dip' recession, many businesses face a difficult trading environment. With further spending cuts looking set to bite, the public sector is also set to shrink. HR teams are likely to be at the forefront of attempts by their organisations to weather the economic storm.

## Restructuring

Business strategies are likely to be closely scrutinised to ensure maximum effectiveness. Areas that are loss making or lacklustre could be ripe for restructuring. Any areas that are overstaffed may need to be streamlined and, where new business opportunities are being developed, re-deployment of existing staff or further recruitment may be needed.

Often, a restructuring involves redundancies and this is

typically a difficult process for employers to complete without incurring legal liabilities because employees enjoy various employment protections. The key for employers is to ensure that they follow a fair procedure and communicate adequately with employees.

Employers considering a restructuring exercise

need to keep in mind the following legal issues.

### Collective consultation

Where 20 or more employees are being made redundant at a single establishment over a period of 90 days or less, there is a statutory obligation on the employer to inform and consult with 'appropriate representatives' of the employees.

Appropriate representatives are trade union representatives (where these exist) or other employee representatives such as those on an existing staff forum or those who have been elected specifically for the purpose. In addition, an employer must notify the Secretary of State of certain information about the proposed redundancies, at least 30 days

before the first redundancy dismissals take effect. Failure to do so is a criminal offence.

### Unfair dismissal

An employee with 12 months' or more continuous employment is entitled not to be unfairly dismissed (note that this is expected to rise to two years for employees employed on or after 6 April 2012). Although redundancy is a potentially fair reason for dismissal, a redundancy dismissal is likely to be unfair unless the employer:

- asks for and properly considers volunteers for redundancy;
- identifies an appropriate pool for selection;
- consults with the individuals in the pool, individually (where there are less than 20 employees being made redundant within a 90-day period) or collectively through appropriate representatives;
- uses objective selection criteria and applies those fairly to those in the pool. Criteria should be free from subjective elements and employers should be alive to discrimination issues when deciding on a selection criteria, e.g. disability or maternity related absences should be stripped out if absence is used as a criterion; and
- fully considers whether there is any suitable alternative employment that can be offered (whether within its own organisation or any associated employer).

Any employee who is out of the workplace, for example on maternity leave or long-term sickness, must not be forgotten during any redundancy exercise and should be treated in the same way as other employees, as far as reasonably practicable. It is important that they are

## REDUNDANCY AND POOL SELECTION

On 22 October 2010 the Employment Appeal Tribunal (EAT) handed down its decision in the case of *Fulcrum Pharma (Europe) Limited v. Bonassera and HR Advantage Limited*. The judgment is important for employers carrying out redundancy selection exercises.

The EAT upheld a Tribunal's decision that the claimant had been unfairly dismissed by reason of a flawed selection process and, particularly, that the employer had chosen the wrong pool from which to select employees as redundant.

It is generally accepted that a Tribunal will not interfere with an employer's choice of pool from which to select redundant employees as long as there is some reasonable basis for that choice.

However, in this case the EAT agreed with the Tribunal that the employer had failed to properly consult with the affected employees about the size of the pool when it had insisted on a pool of one (a senior HR manager) rather than two (which would have included the other more junior employee in the HR team) despite the fact that this was suggested by the affected employee.

The EAT emphasised that it may be appropriate to consider including both junior and senior employees in a selection pool so that the choice is a 'vertical' one rather than just those employees who are essentially inter-changeable because they are carrying out the same sort of work at the same level, i.e. a 'horizontal' pool.

The EAT approved the guidelines laid down in the case of *Lionel Leventhal Limited v. North* for a Tribunal to decide whether or not it was fair for an employer to dismiss without considering alternative and subordinate employment (i.e. 'bumping' an at-risk employee into a more junior position):

- whether or not there is a vacancy;
- how different the two jobs are;
- the difference in remuneration;
- the length of service of the two employees; and
- the qualifications of the employee at risk.

In this case the EAT added that the appropriate starting point within the consultation process would be to see if the more senior employee would be prepared to accept the more junior role at a reduced salary.

What are the lessons to be learned from this decision? Prior to this case, as long as an employer had applied their mind to the possibility of bumping, a Tribunal would not be expected to find that the dismissal was unfair due to a failure to bump. In other words, although employers should consider if 'bumping' were appropriate when faced with a redundancy situation they were not required to bump.

Although this case does not go as far as suggesting that an employer must now always bump, it does suggest that an employer should be more open-minded to the possibility of a vertical pool and that they should at least raise the question with more senior employees about whether or not they would be prepared to undertake a more junior role. If the answer is no then the employer probably does not need to go any further. If the answer is yes then the employer will need to consider (and document that consideration) all the relevant factors to decide if bumping would be appropriate.



## OLYMPIC CHALLENGE

The Olympic Games are only weeks away. While it will bring commercial opportunities for many businesses it could also create headaches for HR, and not just those teams dealing with staff in London.

The Olympic Games start on 27 July 2012 and run until 12 August 2012. The Paralympic Games start on 29 August 2012 and close on 9 September 2012.

There is likely to be severe travel disruption in both London and other locations where events are taking place. This will involve not only public transport but will also see road closures and parking restrictions.

If managed effectively, the Olympics could be a cheap and easy way to boost staff morale and employee engagement; for example, employers could provide a big screen to show main events (such as the opening / closing ceremonies) on work premises.

The key to avoiding workplace conflict will be clear and early communication with employees to ensure that everyone knows what is expected of them. Any special rules introduced must then be enforced consistently.

If your organisation has not already formulated a plan and appropriate policies they will need to do so sooner rather than later. The following business and HR issues may need to be considered:

- How is your own business likely to be affected by the Games? Which departments might be particularly affected, e.g. security, catering?
- Could your business be indirectly affected, e.g. if your supplies are coming from London or need to travel through it and are delayed by traffic disruption how will you manage this?
- How are your staffing requirements likely to change during the Games, e.g. do you anticipate increased demand due to high visitor numbers and increased footfall? Will you be changing your opening hours to capitalise on the business opportunities presented by the Olympics?
- Will you need to engage temporary workers or ask existing staff to work more / different hours? If so, do you have the contractual power in your employment contracts to do this or will this be voluntary? Will you offer some sort of incentive / bonus to existing staff to encourage buy-in?
- Will you allow an extra element of flexible working during the Games so that employees can swap shifts, take unpaid leave or temporarily change their hours? If so, how will you communicate this clearly to employees and ensure special arrangements are consistent across the organisation?
- How will you treat requests for leave from employees who want to attend the Games (either as volunteers or spectators)? Will such employees be subject to your normal holiday policy or will you introduce a procedure specifically for the Olympics? Note that there is no legal obligation on employers to allow extra paid leave over and above normal holiday entitlement. ACAS has just issued Q&As for employers on managing volunteers.
- How will you encourage employees to



book any annual leave early to ensure that business needs can still be met?

- Will the needs of the business allow you to accept all such requests? If not, on what basis will such leave requests be granted fairly, e.g. first come / first served or ballot of all those who have requested leave?
- Given the likely travel disruption, will you relax usual rules on lateness or will you allow employees to work more flexibly to accommodate potential problems?
- Will you let everyone who wants to work from home during the Olympics and, if so, do you have the IT capacity to enable this or will you need to manage when staff will be allowed to work at home?
- How will you deal with employees who fail to show up for work and who you suspect may be taking an unauthorised 'duvet day' to watch the Games? It may be helpful to remind employees that 'throwing a sickie' will be an unauthorised absence and may result in disciplinary action.
- Be clear about what is acceptable absence. It may be helpful to issue special guidelines for employees to make clear that unauthorised absence will be treated as unpaid leave.
- Employees may try and keep track of the Games via the internet, but if large numbers are doing so this could have implications for IT systems. Decide whether you are happy for employees to use your IT systems in this way or whether you will take a zero-tolerance approach.
- Do you have the space to have a special screening room for certain events or will you allow staff to have TV/ radio on in the background? Consider the drawbacks of the latter – will staff find it too distracting and will it cause resentment among staff with no interest in the Games who are working harder to compensate for colleagues who do?
- Remember that not all employees will be interested in the Games, and they should not be made to feel excluded if they do not want to get involved.

### Further information

Kevin McCavish is a Partner at Shoosmiths

t: 03700 86 8802

e: kevin.mccavish@shoosmiths.co.uk

Information on travel disruption is available for businesses at the official Olympics website.



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given all information at the same time as their colleagues and are consulted with as much as they wish to be. Where an employee who is on maternity (or other parental) leave is selected for redundancy they must be offered any suitable alternative vacancy ahead of other employees. This is a rare example of a requirement to positively discriminate and is an absolute right. Failure to offer any such vacancy will mean the dismissal is automatically unfair and may also amount to sex discrimination.

### Redundancy payments

Employees with more than two years' continuous employment will be entitled to a statutory redundancy payment based on age, length of service and pay. As of 1 February 2012 the maximum payment is now £12,900. An employee may also be entitled to an enhanced redundancy payment if this is a term of their contract. Where there has been a practice of always paying an enhanced payment this may have become an implied term.

### Alternatives to redundancy

Redundancies (or the way they are implemented) can

have a detrimental impact on employee relations. Additionally, a reduced workforce may solve problems in the short term, but may limit a business' ability to expand in the longer term.

There are a number of alternative options that should be considered:

- Reducing the number of agency workers or other temporary workers;
- Reducing or removing overtime (as long as this is not contractual);
- Removing discretionary benefits;
- Temporary lay offs (where there is a contractual power to do so);
- Encouraging employees to take unpaid leave;
- Placing employees on temporary secondment with other organisations;
- Consulting with employees regarding changes to pay and benefits;
- Considering whether savings could be made by offering benefits on a salary sacrifice basis; and
- Freezing pay (as long as there is no contractual or collectively agreed right to a pay increase).

### Performance management

Difficult economic times may highlight performance issues that could otherwise have gone unnoticed, particularly where there has been a headcount reduction. By following a performance management process as soon as issues are identified, an employer may be able to dismiss poorly performing individuals, without having to resort to redundancies further down the line.

Capability is one of the potentially fair reasons for dismissal. Whether a dismissal for capability is fair will depend upon the reasonableness of the employer's decision to dismiss, taking into account the particular circumstances, and ensuring that a fair procedure is followed. A dismissal for capability is unlikely to be fair unless an employer:

- carries out a proper investigation to identify the performance issues and has the necessary evidence to illustrate this;
- makes the employee aware of his/her performance issues and the consequences of a failure to improve;
- gives the employee an adequate opportunity to improve;
- provides the employee with the training and support that is reasonably required to assist the employee in reaching the required standard;
- regularly reviews the employee's progress; and
- offers the employee the right of appeal against the decision to dismiss.

Employers should be aware of any issues that could impact upon an individual's performance (such as an illness or childcare responsibilities) that could give rise to sex, disability or other discrimination issues.

The best way to prepare for the difficult times ahead is to take a proactive approach. Proper processes take time and should not be rushed or implemented 'on the hoof'. It is all too easy for an employer to fall foul of the complex legal requirements around redundancy and performance management. Specialist advice is likely to be required, but HR can add value by helping their businesses to avoid legal liabilities through proper planning and communication with employees and their representatives.

### FURTHER INFORMATION

Sarah Booth is an Employment Specialist at Shoosmiths.

t: 03700 86 5048

e: sarah.booth@shoosmiths.co.uk

www.shoosmiths.co.uk