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How to choose and apply redundancy selection criteria

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How to choose and apply redundancy selection criteria

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Summary

- Draw up a **redundancy selection matrix** to carry out the scoring exercise for each employee in the redundancy pool.
- Ensure that, as far as possible, selection criteria are **objective and measurable** and not based on subjective opinion.
- Consider what skills and experience are **most relevant for the job** and ensure that the criteria reflect the requirements of the job.
- When assessing performance, where possible base scores on **quantifiable factors** such as sales figures or on recent appraisals and performance reviews.
- Be careful when using **absence levels** as a criterion. A failure to discount absences related to, for example, disability or maternity is likely to be discriminatory.
- Do not rely on **"last in, first out"** as the sole criterion for selection, as this is likely to be indirectly discriminatory on the grounds of age and potentially sex.
- Where possible, ensure that scores are **moderated by more than one person** to guard against bias.
- Make sure that employees identified as being at risk of redundancy are provided with their own score (as a minimum) and **fully consulted** on it prior to the final decision being made.

Introduction

When an employer is in the position of having to select individuals for redundancy from a pool of employees, the criteria adopted and the manner in which those criteria are applied are crucial to both a fair redundancy procedure and, ultimately, achieving a fair dismissal. A redundancy situation in which the employer chooses some employees to be made redundant over others who remain in post is more likely to result in bad feeling and lead to a higher risk of employment tribunal claims by disgruntled employees than one where all employees are made redundant. It is therefore important for the employer to be able to defend the method of selection by showing that it has used appropriate criteria, applied in a fair and consistent way.

Redundancy matrix

In a redundancy selection process, it is advisable for employers to use a redundancy selection matrix, setting out the criteria against which individual employees are scored. The completed matrix should form the basis for individual consultation with employees, once those provisionally selected for redundancy have been identified. The appropriate criteria to include in the matrix will depend on the nature of the job in question. Completion of a matrix in respect of each employee will provide a good contemporaneous record of how the selection process was conducted, which can be used as evidence in any subsequent tribunal claim.

Selecting employees for redundancy for certain reasons will amount to automatic unfair dismissal. This includes reasons relating to health and safety, working time rights, asserting a statutory right, trade union membership or activities, a TUPE transfer, making a protected disclosure and taking part in official industrial action. Adopting a proper set of selection criteria will assist an employer in countering any argument that an individual's selection was for an automatically unfair reason.

Which criteria should be used?

Employers are permitted a wide discretion over the criteria that they decide to adopt. It is not for an employment tribunal to impose its own view as to which criteria should have been used, provided that the criteria are reasonably objective and applied by the employer in a fair and reasonable way. A tribunal should not subject the selection criteria or the application of those criteria to over-minute scrutiny (***British Aerospace plc v Green and others [1995] IRLR 433 CA***). The test is akin to the "band of reasonable responses" test when considering the fairness of an employer's decision to dismiss an employee.

The criteria should be relevant and appropriate to the job, and be objective and measurable rather than subjective and based solely on personal opinion. Whether or not certain criteria are reasonable ones to adopt will depend on the circumstances of each case. Typically "objective" criteria, which are potentially fair, would include factors such as performance, disciplinary record and level of absence. However, these criteria should not be used without a consideration of individual circumstances (see below).

Criteria regarded by tribunals as being too subjective or vague, and therefore unreasonable, include the ability of employees to "keep the company viable" (***Williams and others v Compair Maxam Ltd [1982] IRLR 83 EAT***), and "attitude" (*Graham v ABF Ltd [1986] IRLR 90 EAT*). In *Chagger v Abbey National*, the employment tribunal considered the selection criteria, including "range of influence, empathy, self insight and the ability to win hearts and minds", to be too subjective, and this finding was not criticised at the subsequent appeals to the Employment Appeal Tribunal (EAT) (***Abbey National plc and another v Chagger [2009] IRLR 86 EAT***) and Court of Appeal (***Chagger v Abbey National plc and another [2009] EWCA Civ 1202 CA***).

Perhaps surprisingly, case law also suggests that it is not acceptable to apply a criterion of "costs savings" when selecting for redundancy. The EAT held in *KGB Micros Ltd v Lewis EAT/573/90* that, in assessing the performance of salespeople, selecting for redundancy those who cost most in terms of overheads but who generated the least revenue was not reasonable. The EAT found that the selection process completely lacked objectivity, and that the employer had failed to carry out any proper appraisal of the employees' performance.

It is good practice for the choice of criteria to form part of the redundancy consultation process, and this may be a requirement where the employer recognises a trade union. If the criteria are agreed, either with employees or with the union, this is likely to be an important factor in supporting the reasonableness of the criteria in the event that any dismissals are challenged.

Assessing performance

Performance and ability are potentially fair criteria capable of objective assessment, although this is more straightforward for some jobs than others. For sales positions, for example, to assess performance it would be appropriate to take into account sales figures over a defined period of time. The time frame selected should be a reasonable one, and allowances may have to be made for anyone who has been absent during part of that period, or who may be new to the job, to ensure that the scoring is fair.

This may prove difficult in practice, and employers will have to balance the need to be fair to all those employees at risk of redundancy with the need to avoid discriminating against individuals who have been absent due to maternity leave or disability-related illness. In ***Eversheds Legal Services Ltd v de Belin [2011] IRLR 448 EAT***, the employer scored a female solicitor who was absent on maternity leave during the period being assessed the maximum score in relation to one of the criterion (relating to the rate of recovering fees). As a result of her inflated score, Mr de Belin was selected for redundancy instead. The EAT held this to be direct sex discrimination and unfair dismissal and found that, while an employee who is pregnant or on maternity leave can at times be treated more favourably than colleagues, such treatment must be a proportionate means of achieving the legitimate aim of compensating for the disadvantage occasioned by her pregnancy or maternity. It may be more appropriate in these circumstances for the employer to base the score of any employee who has been absent for a long period on a longer time frame, to take into account performance before or after the period of absence.

For some jobs, it will be reasonable to assess performance with reference to recent appraisals or performance reviews. An assessment of performance may well involve an element of subjectivity but, provided that the manager undertaking the exercise can show logical reasoning behind the scores and is consistent and fair in his or her approach, a tribunal is likely to view it as an appropriate method.

Interviews

An alternative approach is for the employer to carry out an assessment of performance and ability by requiring all employees within the pool to undertake an interview or other assessment exercise. The EAT observed in ***Radford v LTI Limited EAT/164/00*** that it is for the employer to decide how to carry out an assessment of skills. It disagreed with the employment tribunal's conclusion that the skills-based test devised by the employer, whereby the employees had to perform a series of tasks over a set period, disadvantaged the claimant and was unreasonable. A tribunal should consider only whether or not a reasonable employer could have chosen the method of assessment adopted in any particular case; it should not impose its own view as to the reasonableness of selecting a particular individual.

Where employees are selected for available jobs through an interview process, perhaps where redundancies are due to a restructuring exercise, it is important for the employer to be clear about how the selection will be carried out and what information will be taken into account. If the manager carrying out the interviews already knows the employees whom he or she is interviewing, it is probably unrealistic to expect his or her previous knowledge of the employees not to have any impact on the decision, but it is important that the decision is not made on the basis of subjective opinion. For this reason, if this method is adopted, employees should be told what else the manager will take into account (for example, previous performance appraisals or attendance records). It would also be a good idea for the interviews to be carried out by more than one manager, preferably including one who has no previous knowledge of the employee. Some employees may feel disadvantaged by this method of selection, if they have no recent experience of a competitive recruitment process. The employer could consider offering support in the form of coaching or guidance to any employees who have concerns about the process.

Disciplinary records

Disciplinary records are commonly referred to in the process of carrying out a scoring exercise, and this is an acceptable criterion provided that the scoring is consistent and applied in a reasonable way. It may even be acceptable to take into account expired disciplinary warnings for this purpose, although these should be given less weight than any unexpired warnings. In ***Airbus UK Ltd v Webb [2008] IRLR 309 CA***, the Court of Appeal concluded that conduct that was the subject of an expired warning did not necessarily have to be ignored for all purposes when making the decision to dismiss. This decision would appear to support employers' ability to take into account expired warnings in a redundancy exercise. However, the Court did emphasise that this does not necessarily mean that the use of expired warnings will always be acceptable; it will depend on the individual circumstances. Employers may, for example, consider taking into account warnings that have expired in the last 12 months, but not older expired warnings.

Measuring absence

Attendance records are, at first sight, an objective and measurable criterion against which employees can be easily scored. Attendance is a potentially fair criterion adopted by many employers. However, they should take care to ensure that the absence records are accurate and also to consider the reasons for the periods of absence. Absences due to pregnancy-related illness, maternity or other family leave reasons should be discounted, as a failure to do so could result in claims for sex discrimination and unfair dismissal.

Absences directly related to an employee's disability should also be discounted. Under the provisions of the Equality Act 2010, disabled employees can claim discrimination "arising from" their disability in circumstances where counting disability-related absences has resulted in their being selected for redundancy.

For non-disability-related absences, employers may want to distinguish between different types of absence for the purpose of scoring an individual's attendance, regarding some absences as more "genuine" than others. However, employers should be wary of making assumptions about the genuineness of any absence, whether short or long term, without more information. In a redundancy exercise involving more than just a few employees, it is probably impractical to investigate the reason behind every absence fully (other than those related to disability or maternity). In ***Byrne v Castrol (UK) Ltd EAT/429/96***, the EAT confirmed that the employer did not necessarily have to investigate the reasons for an employee's absence, and commented that there was a risk of making subjective judgments about the reasons given by an individual for any absence. One possible method by which the scoring can be carried out objectively is to set the parameters according to both length and frequency of absences, so that a higher number of short-term absences scores lower than a smaller number of long-term absences. During the individual consultation process, employers should remain alert to the possibility that absences may result from a previously undisclosed disability, and be prepared to consider revising the score to discount any disability-related absence.

Length of service

The application of "last in, first out" (LIFO) has traditionally been regarded as a straightforward and uncontroversial method of selecting for redundancy that has the advantage of being objective and easily measurable. However, this method has the disadvantage of being a rather blunt instrument for selection and it does not necessarily result in the retention of the staff with the best skills to meet the future needs of the company. In addition, the use of this criterion risks a challenge that it is indirectly discriminatory on the grounds of age and potentially sex. It has been confirmed by the Court of Appeal in ***Rolls-Royce Plc v Unite the Union [2009] EWCA Civ 387 CA*** that the use of LIFO does amount to indirect discrimination against younger workers, who will have had less opportunity to build up length of service than older workers. However, its use was objectively justified in this instance. It is noteworthy that, in this case, the use of LIFO was one of a set of criteria that had been agreed with the union. Following this decision, it is likely to be acceptable for employers to use LIFO only if it is used as part of a balanced set of criteria, perhaps as a deciding factor when two employees are scored equally on other criteria.

Fair application of criteria

For the selection process to be carried out fairly, the person who does the scoring should be in a position to assess properly the individual's performance against the chosen criteria, with direct knowledge of the employee or access to verified records of the employee's performance. Where the scoring is not carried out by the employee's immediate line manager, perhaps to ensure objectivity, it will usually be necessary for the line manager to have some input into the scoring process.

In addition, where any criteria are not fully objective in nature, the employer can counter any element of subjectivity by ensuring that more than one person carries out the scoring exercise. This can be achieved by the scoring being carried out either independently by two or more managers and then averaged, or by managers meeting to agree on scores.

Consulting employees over their scores

Once all employees in the relevant pool have been scored against the selection criteria, the employer should consult individually with those provisionally selected for redundancy on the basis of their scores. The employer should provide employees with a copy of their own score and give them the opportunity to comment on it and challenge the basis on which the score has been arrived at. A failure to provide individuals with their score to consult properly with them is likely to result in a finding of unfair dismissal (***John Brown Engineering Ltd v Brown [1997] IRLR 90 EAT***).

It has not generally been considered necessary for employers to provide employees with the scores of all those in the pool for selection (***British Aerospace plc v Green and others [1995] IRLR 433 CA***). The tribunals have taken the view that to require employers to disclose all the information on which a decision to dismiss was based would place an intolerable burden on employers, and make the redundancy process unnecessarily protracted. However, it could be argued that, for an employee to be able to challenge his or her score, it needs to be set in the context of the scores of other employees in the pool. There may be circumstances in which a failure to provide the scores of other employees, or at least disclose the "break point" below which employees were selected for redundancy, could lead to a finding that the dismissal was unfair (***Alexander and another v Bridgen Enterprises Ltd [2006] IRLR 422 EAT***). Where an employer elects to disclose the scores of the entire pool, it should be done anonymously so that individual employees are not identifiable.

Once individual consultation has been carried out (with further meetings where necessary), and provided that the possibility of any suitable alternative employment has been fully explored, the employer should confirm its decision in writing to those who have been selected for redundancy. The letter should set out the date of termination together with details of redundancy payments and any other entitlements. It is good practice to offer a right of appeal against the decision. The employer should also write to those who have not been selected for redundancy to confirm that their job is no longer at risk.