Failure to consult over proposed redundancy pool meant dismissal was unfair

In the recent case of *Valimulla v Al-Khair Foundation*, the EAT held that an employer's failure to consult with an employee about a proposed redundancy pool meant the dismissal was procedurally unfair. Further, the decision not to pool the employee with four other employees who performed the same role as the employee had to be looked at again by a new Employment Tribunal.

What happened in this case?

The employer is a faith-based charity, with a head office and six branch offices. Team members moved between offices frequently. Mr Valimulla started working for the employer in February 2018 as a Liaison Officer and his role involved fundraising in the community, for example, through schools and mosques. Four other Liaison Officers were employed nationally. Mr Valimulla was the only Liaison Officer who was not branch-based and worked from home.

During the coronavirus pandemic, charitable contributions decreased due to the fact that places of worship were closed. As a result, all Liaison Officers assigned to collect revenue from places of worship were placed on furlough, including Mr Valimulla. Eventually, the charity decided to make redundancies. Mr Valimulla was the only Liaison Officer who was identified as being at risk of redundancy.

Three redundancy consultation meetings took place. At the first meeting, Mr Valimulla was told that it had been decided that his role would "disappear" with the closure of branches and the retention of just two regional hubs. At the second meeting, Mr Valimulla put forward a business case as to how his role could continue, which was considered but rejected. After the final meeting, Mr Valimulla was dismissed by reason of redundancy.

Mr Valimulla claimed that he had been unfairly dismissed. Amongst several criticisms of the process, he argued that the employer had not identified a redundancy pool nor applied selection criteria before selecting him for redundancy. However, the Employment Tribunal accepted the employer's argument that his role was unique, and he was in a self-selecting pool of one.

Mr Valimulla appealed.

What was decided?

Mr Valimulla argued that the Employment Tribunal had failed to deal adequately with two questions. First, the employer's decision not to pool him with the other four Liaison Officers and, second, the failure to consult with him about the proposed pool of one.

On the decision not to pool him with the other Liaison Officers, the EAT noted that the Tribunal had found a redundancy situation had arisen because the employer had a reduced requirement for employees to carry out Liaison Officer work, but this was not tied to work being performed in a

specific location. Yet the Tribunal gave no reasons why it had accepted the employer's assertion that Mr Valimulla's role was unique, meaning he should be in a pool of one, rather than a pool of with all of the other Liaison Officers employed nationally.

Although the EAT accepted that there is no one prescribed process for selecting employees for redundancy, Tribunals must scrutinise an employer's approach when considering the fairness of a dismissal. This requires an assessment of whether the employer had genuinely applied its mind to the question of pooling and to determine whether the chosen pool was reasonable. Here, the Tribunal needed to consider whether the employer's response came within the band of reasonable responses, which required consideration of Mr Valimulla's role, the similarities and differences between the roles of all five Liaison Officers, how the employer had approached pooling and the rationale for its ultimate decision.

On the question of consultation, the EAT held that redundancy consultation needs to be "meaningful". It was unclear how this could be the case here, when consultation had only started *after* Mr Valimulla had been placed in a pool of one. Meaningful consultation does not simply mean informing staff about a decision or proposal, giving them an opportunity to make representations and then putting the original decision or proposal into effect. Instead, it means setting out a provisional proposal, along with its rationale, and providing an opportunity for feedback. The decision-maker should consider such feedback and decide whether to alter the original proposal (and if not, why not) before making a decision.

The EAT upheld the appeal. The question of the failure to

pool with the other Liaison Officers was remitted to a new Employment Tribunal to consider. However, the failure to consult about the pool meant that the dismissal was procedurally unfair, although the question of what the outcome would have been had consultation taken place (i.e. would the pool have changed and, if so, what are the chances Mr Valimulla would have still been made redundant?) was remitted to the new Tribunal.

What does this mean for employers?

This decision serves as useful reminder for employers of two essential ingredients of a fair redundancy dismissal.

First, employers must identify the appropriate pool of employees from which to select potentially redundant employees. This involves interrogating which roles are the same or sufficiently similar to justify being pooled together. The fact that roles are different in some ways may or may not be enough to justify different treatment. Importantly, employers must be able to show they applied their mind to the question and reached a reasonable conclusion. Getting the pool wrong may mean any subsequent redundancies are procedurally unfair and it could also lead to claims of discrimination in certain circumstances.

Second, employers must consult with employees on the provisional pool for selection (and any selection criteria to be used) before making the final decision. This consultation should take place when the proposals are still at a formative stage, so that employees have the opportunity to influence outcomes. The need to consult about the proposed pool was

critical in this case, given that the employee was to be placed in a pool of one, meaning his dismissal was almost inevitable. However, consultation on the proposed pool should take place in all cases where pooling is being used.

Valimulla v Al -Khair Foundation

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.