Suitable alternatives

When employers are considering alternative employment for employees at risk of redundancy, they often assume that a ‘suitable’ job must be comparable with the employee’s current position.

William Garnett unravels the confusion over what is a ‘suitable alternative’ position for an employee at risk of redundancy

One of the common mistakes made by employers when considering whether to place an individual who is at risk of redundancy into an alternative post is the belief that the vacant job must be ‘suitable’, which they assume means comparable.

It is trite law that a reasonable employer must consider whether there is any other post into which an individual who is at risk of redundancy can be redeployed. It is also trite law that those at risk of redundancy have priority over the remainder of the workforce (those not at risk), and it is often assumed that individuals at risk should be considered for internal vacancies before those vacancies are externally advertised.

In actual fact, the employer simply needs to behave in a way that is within the band of reasonable responses to the circumstances. There have been cases in which employers have been found to have acted reasonably by requiring those at risk to compete with external candidates. That will, however, be the exception to the rule, and where an individual is self-evidently appointable into a vacancy it would be surprising that an external candidate is appointed, even if they are ‘better’. Redundancies do not usually give the employer the opportunity to improve the quality of the workforce by bringing in external candidates.

Does the alternative post have to be comparable?

A common error made by employers is believing that only comparable roles should be offered to an individual at risk of redundancy. The tribunal is full of senior staff, dismissed as redundant, who contend that if they had only been given the opportunity to work as a junior administrator they would have taken it up rather than be dismissed.

The obligation of the employer is to consider individuals at risk for any post that they are likely to be capable of performing, including any temporary or part-time positions. This may mean considering roles above and below the individual’s current position. Clearly individuals who are underqualified for a role
are not going to meet the requirements. However, unlike with an external applicant, employers should consider whether there is any training they could offer that would enable the individual to meet the requirements of the role within a reasonable period. This training would be undertaken during the trial period, which employers may consider extending beyond the statutory four-week period for this purpose.

It is also the case that individuals might be said to be overqualified for a role and so it is pointless employing them into it because they will only stay in it for a short period of time while they look for another job. This is a problem in those rare cases where employers still have salary protection, they could end up having to significantly overpay an individual to fulfil a function. That might make them unsuitable, even though they could clearly fulfil the job. However, this is not a straightforward situation and employers should take advice if they have salary protection schemes. Hesitation is advised before ruling people out of posts, both above and below their existing post. Do not assume people will refuse to be demoted and equally that they will not rise to the challenge of taking a step up.

It follows that an individual at risk will not always be suitable for a vacant role. Should they then be allowed to even apply? On the one hand, it sounds tough to tell them that they are self-evidently unsuitable such that they cannot even apply. Equally if you allow them to apply and do not appoint them because you conclude that they are unsuitable, you run the risk of the individual arguing they must have been close to suitable to have been allowed to apply and that in reality you simply preferred a ‘better’ candidate. There will be cases when it is much better to be upfront with the individual about not allowing them to apply at all.

There will be others where the individual might be told that they can apply, on a non-competitive basis, but that there are real reservations about their suitability. It may be in those circumstances the individual might choose not to do so. There is also an opportunity to give the individual the option of applying and, if unsuccessful, being paid standard redundancy, or if they choose not to apply (if that is what you are hoping for) an enhancement might be offered.

**Why the confusion over suitability?**

Part of the confusion around suitability stems from the fact that there is a provision in the ERA dealing with the consequences of the ‘unreasonable refusal’ of an offer of ‘suitable alternative employment’. In such circumstances, an individual, while still being redundant, is denied their right to a redundancy payment. It is worth stressing that when looking at whether or not there has been an ‘unreasonable refusal’ of ‘suitable alternative employment’, whether or not the employment is ‘suitable’ is an objective test, ie could the individual do the job, was the job on comparable rates of pay, comparable status etc. By contrast, the unreasonable refusal is a subjective test i.e. did the individual turn it down because they did not want to be line managed by a particular person or did not want to relocate to a particular place. It is generally not as easy as one may think to demonstrate that the refusal was unreasonable, so it is important to examine the individual’s reasons carefully and take advice before withholding a redundancy payment.

“...When looking at whether or not there has been an ‘unreasonable refusal’ of ‘suitable alternative employment’, whether or not the employment is ‘suitable’ is an objective test, whereas – by contrast – the ‘unreasonable refusal’ is a subjective test”

**Find out more**

The tribunal watch article on page 9 covers an interesting case on alternative employment offered to a redundant employee.

There is more information for employers on the employment pages of our website at [www.bwbllp.com/services/employment/advice-for-employers](http://www.bwbllp.com/services/employment/advice-for-employers)