Legal update - Major changes to restructuring and redeployment processes

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9 May 2011

Duty to offer redeployment?

If an employee's position is to be disestablished, employers are obliged to consider redeployment opportunities, and to build that into the consultation process. One of the previous leading cases in this area (*Thwaites*, decided under the Employment Contracts Act 1991) held that, in the absence of a specific contractual right, an employee whose position was to be disestablished had no entitlement to be redeployed to a different position. This meant that, while employers often invited and indeed encouraged employees to apply for vacant positions in a restructuring, they did not have to offer the positions to affected employees automatically.

Good faith of course provided an important overlay on this, and required employers to act fairly and to have a good reason for not appointing an affected employee to a vacant position. So, for example, if a new position was created that was made up largely of an employee's former duties, and the employee could take on the new duties (allowing for a reasonable degree of training, support and supervision), it may well have been unjustifiable for the employer not to redeploy the employee.

Late last year, these principles were taken a step further. The Employment Court in *Wang v Hamilton Multi-cultural Services Trust* found that there was a **duty** to offer redeployment to an employee if the employee was capable of performing the role, even if he or she was not necessarily the best person for that role. In the *Wang* case, the employer accepted that with a reasonable amount of training and "up-skilling" Mr Wang would be able to do the new job. The Court said this meant he should have been offered the new position rather than being required to apply for it.

This is a surprising outcome in our view. The new role was much more senior and would have meant a nearly 50% uplift in pay for Mr Wang. How the *Wang* decision will play out in the context of the State Sector obligations to notify vacancies and appoint on merit also has yet to be tested.

Even so, the message for employers is that they need to think carefully about a decision to open up a vacancy to the market when the job can arguably be done by an employee whose employment would otherwise be terminated for redundancy.

Duty to provide information

The very recent Full Court decision of *Massey v Wrigley & Kelly* has taken a very wide view of the obligation to provide "relevant" information under the section 4 good faith provisions. On its face, the decision requires employers to make available almost **all** information produced during the redundancy process, e.g. background information leading to the proposal, working notes, information about options that were discarded and documents produced during a selection process.

The *Wrigley & Kelly* case concerned a 'contestable reconfirmation' process, i.e. existing employees who did the same job applying for a reduced number of positions. The unsuccessful applicants had been consulted on the selection criteria, and had been given information about the selection process and panel, feedback about their applications and interviews, and an opportunity to comment on that feedback. They sought more information about the selection process. This included interview and assessment sheets for the other candidates, all handwritten notes and the information in the minds of the selection panel members which led to their recommendations. The employer said that it had provided the applicants with sufficient precise information, which is what the law required (taken from an earlier leading case, *Simpson Farms v Aberhart*). It also said that the additional information the employees requested was confidential and that there was good reason to maintain confidentiality, in terms of the exceptions to section 4 (e.g. to protect the privacy of natural persons).

The Court disagreed. It said that "relevant information" was much wider than "sufficient precise information", and that there wasn't sufficient "good reason" to maintain confidentiality over the other candidates' information. In essence, the rights of the two unsuccessful employees trumped the privacy rights of the employees who were successful in the selection process and the promises of confidentiality that were made to the employees on the selection panel. This will be a surprising result for many employers - and employees - and it is far from clear what circumstances will satisfy the Court that there was good reason to lawfully withhold information on privacy grounds.

Further, and while *Wrigley & Kelly* was not about the initial restructuring proposal, clearly it has implications for that part

of the process too. It means that almost all documentation that touches on a redundancy process must be shared. At the redeployment stage, all of the information considered in the application and interview process may also need to be shared, depending on whether the employer can show that there was sufficiently good reason for maintaining confidentiality in the particular circumstances.

The upshot is that employers will need to take special care in both the design and implementation of their restructuring processes to ensure that they comply with the principles set down by *Wrigley & Kelly*. We would of course be happy to assist.

A final note

The *Wrigley & Kelly* decision has broader implications beyond restructuring. The good faith obligation to provide information applies when an employee is making **any** decision that could have an effect on ongoing employment. So it also applies to dismissals for misconduct, incapacity, poor performance and other reasons. The impact may not be as great for those sorts of dismissals, but it is worth remembering.

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