

Dismissing for redundancy: making sure all other options are explored properly

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Lovingangels Care Home Ltd v Mhindurwa, [2023] EAT 65

Facts

C was employed by the R as a live-in carer. The person for whom she cared went into hospital. Usually the R would have moved C to care for another individual. However, the effects of the pandemic were such that there was less opportunity to do so. C's last day of work for the person for whom she cared was 8.2.20; she thereafter received no work, and no pay.

The Coronavirus Job Retention Scheme (CJRS) came into force on 23.3.20.

In May 2020 (seemingly prior to the subsequent letter of 18.5.20) C asked to be furloughed. R's position was that they could not agree to do so; the reason they gave was that there was no work for her. It is unclear why they saw that as a sound reason for not placing her on furlough.

On 18.5.20 R invited C to attend a meeting on 12 June to discuss her possible termination by reason of redundancy further to R's inability to offer her any further live-in care work.

The last date on which any employer could have commenced furlough for an employee under the CJRS scheme was 10.6.20.

The planned meeting occurred on 12 June. On 13.7.20 R wrote to the C giving her notice of termination.

An appeal process then followed which appears to have had little impact.

The ET

The ET found the dismissal to be unfair.

In the ET's view the circumstances were just the type which the government had had in mind when it had set up the furlough scheme. R could not in the ET's view have known how long the existing situation was going to continue. Despite that R failed to give consideration to whether C could have been furloughed for a period to see whether circumstances changed.

The ET also reached the view that the appeal process was a rubber stamp exercise, with no proper exploration of the matters being raised. Further, the appeal officer, once again, failed to give consideration to whether C should be furloughed. The ET found the flawed appeal to be a further reason as to why the dismissal was unfair.

The EAT

For reasons known only to R, R sought to challenge the decision of the ET on just one of the two grounds on which the tribunal had found the dismissal to be unfair, i.e., R's failure to give consideration to the possibility of furlough.

As subsequently pointed out by the EAT, the failure to challenge the second ground was always going to lead to the appeal being unsuccessful.

As to the point challenged by R, it seems that R was going to have to persuade the EAT that the ET's view was a view that no reasonable tribunal could take. R adopted a number of arguments in support of its appeal, perhaps in an attempt to skirt round that large hurdle. However, given the ET's rationale, R was always going to have an uphill struggle. It does seem quite clear that an ET could reasonably take the view that an employer's failure to give proper consideration to furlough in the particular circumstances rendered the dismissal unfair.

As pointed out by the EAT, the ET did not say that R should have or was obliged to offer the C furlough. Rather the ET's criticism of R was in R's failure to consider the possibility properly.

As set out in the facts above an interesting point in this case was that from 10.6.20 the government furlough scheme was closed to new entrants. It follows that by the time of the key meeting on 12.6.20 and the later termination letter of 13.7.20, no proper consideration of furlough would have had any positive effect for C. R seems to have sought to rely on this point at the EAT.

However, as pointed out by the EAT, this point was not raised in front of the ET. The EAT took the view that R had raised no good reason as to why it should be permitted to raise the point for the first time at the EAT.

In any event, it would seem that it would at best have been a remedy point. In terms of liability, the unfairness arose not in R's failure to furlough C at any particular point but rather in R's failure to give the possibility proper consideration. Arguably that failure would give rise to unfairness, regardless of whether or not the scheme had closed by the relevant point was closed by the time of the key meeting. Furthermore, as pointed out by the EAT, C had in any event asked to be furloughed prior to the scheme closing.

Comment

This case serves as a useful reminder of the need for employers to give careful consideration to all options before reaching a final decision to dismiss. The key point in this case was not that the employer was legally obliged to place C on furlough; but rather that the employer was legally obliged to give proper consideration to the possibility. If the employer had given proper consideration to the possibility but had decided against doing so for sound and rational reasons, it seems highly unlikely that the ET would have found unfairness as it did.

Similar issues arise when employers proceed to dismissal without properly exploring whether there is alternative work which could be undertaken by an employee at risk of redundancy, as an alternative to dismissal.

Before proceeding to a decision to dismiss by reason of redundancy, employers would be well advised to explore thoroughly all possible options for avoiding termination and to listen carefully to any proposals made by employees at risk. Proceeding to dismissal in the absence of having done so will often leave employers exposed to the risk of a finding of unfair dismissal.

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