



XpertHR Weekly Podcast

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- Susan Dennehy: Hello and welcome to XpertHR Weekly with me, Susan Dennehy. Considering suitable alternative employment for a redundant employee is a crucial step in a fair dismissal procedure, as failure to do so will render a dismissal unfair.
- With me this week to discuss suitable alternative employment and provide guidance on what is expected of employers is senior employment law editor, Susie Munro. Welcome to XpertHR weekly Susie.
- Susie Munro: Hi Sue.
- Susan Dennehy: So there's three areas where offers of alternative employment are relevant in a redundancy situation; the fairness of the dismissal; entitlement to redundancy payment; and the additional duties towards employees on family-related leave. We'll come onto family-related leave later, let's deal first with the general position when an employer is considering redundancies. Does an employer actually have a duty to offer alternative employment? [0:00:52.8]
- Susie Munro: Well, considering whether there's any alternative work that a redundant employee could do is an important part of a fair redundancy procedure, but apart from employees on maternity leave or other family-related leave, there's no specific statutory duty to actually offer alternative employment in a redundancy situation.
- But exploring whether there is an alternative is part of behaving reasonably in dismissing the employee for redundancy. So if there was an alternative role that the employee could do and that wasn't offered, the tribunal might decide that the dismissal of an employee in that situation was unfair. Obviously that would depend on whether the employee has actually challenged the fairness of the dismissal at a tribunal.
- Susan Dennehy: So what should the employer take into account when looking for this alternative work for the redundant employee? [0:01:43.8]
- Susie Munro: So in the context of whether or not the procedure is fair, there's no need for the alternative role to be suitable for the employee. So the only thing that the employer really needs to be sure about, is they need to be confident that it's a role that the employee would actually be able to perform.

- Susan Dennehy: And when they're looking for alternative roles, what's the situation where the employer works over a number of different sites or has a number of different companies? [0:02:08.8]
- Susie Munro: Yes, they should be considering all possible alternatives, so not just in the section or location where the employee actually works, and they should also be considering whether there are any vacancies in associated employers.
- Susan Dennehy: And there's nothing stopping employers offering something that's quite different to the employee's previous role? [0:02:28.2]
- Susie Munro: No. So an employee might be happy to accept something that's very different or maybe something that's a less senior role as an alternative to redundancy, to having no job at all. So employers should keep an open mind, consider employees' skills, whether there's other jobs that they could do, not just something very similar to the previous job. So they shouldn't take a narrow view of what it might be appropriate to offer to an employee or to make the employee aware of.
- Susan Dennehy: And some employers give the employee a list of vacancies across the business. Employers need to be careful, firstly to ensure that the information on the list contains sufficient details, including the salary of the job, and sufficient details about the job, and if the employer doesn't hear from the employee whether or not they're interested in any roles, they shouldn't just leave it. They should follow this up with a letter to see whether the employee really is not interested in any of the roles available. [0:03:22.7]
- Susie Munro: So it's really part of acting reasonably and following a fair procedure. If you're just going to make a list of vacancies available to redundant employees, then you need to make sure that the employees have got enough information to be able to make a decision about whether or not they're interested in the roles, and yes, it would be good practice to follow it up. Rather than just making a list available, actually engage with the employees and find out whether there is an alternative that they might be happy to accept.
- Susan Dennehy: And what stage of the procedure do you think the employer should start looking for alternative roles for the employee? [0:03:58.5]
- Susie Munro: It really needs to happen as early as possible. So the employer should think of it as a way of trying to avoid redundancies. If an employee's prepared to accept an alternative role, then the employer may not need to go through the redundancy process at all, so alternative work is really something employers should be thinking about from the very beginning and throughout the redundancy procedure.
- Susan Dennehy: And if an alternative position's been identified, should the employer hold interviews or carry out some sort of competitive selection exercise? [0:04:29.4]
- Susie Munro: Well, there's no firm rules on this. It's really going to depend on the circumstances. Things like whether the alternative roles are similar to particular redundant roles, how many people are involved in the

redundancy and how many of them it might be a suitable alternative role for. So say if there's a vacancy that's very similar to a role that is being made redundant and there's only really one person in that role, the employer shouldn't open that up to external competition. They can just offer it to the redundant employee that they think it would be suitable for. If they were to open it up to external competition, that might be found to be an unfair dismissal because they wouldn't have followed a fair procedure.

Susan Dennehy: For the purposes of carrying out a fair procedure and avoiding an unfair dismissal claim, it's not relevant whether the alternative job is suitable or not, but it does become relevant when you're looking at the employee's entitlement to a redundancy payment, doesn't it?
[0:05:24.1]

Susie Munro: Yes, so if an employee turns down an offer of suitable alternative employment – if they unreasonably turn that down – then the employee is giving up his or her entitlement to a statutory redundancy payment. Section 138 of the Employment Rights Act is relevant here. That applies where an employee accepts a new job that will start within four weeks of the end of the old redundant job. And if that applies, then s.138 says there's no dismissal for the purposes of entitlement to a redundancy payment.

But if the employee rejects an offer, then entitlement to a redundancy payment will depend on whether or not the job offered was suitable employment.

Susan Dennehy: So 'suitable' becomes very important. Can you tell us what 'suitable' employment means here? [0:06:10.6]

Susie Munro: Well it's not defined in the Employment Rights Act. Section 141 of the Employment Rights Act says that an employee's not entitled to a redundancy payment if he or she unreasonably turns down an offer of a job that's either the same as the previous job, or is suitable employment for the employee even though it's different in terms of capacity and place and other terms and conditions.

But there's no clarification in the legislation of what to take into account when deciding whether or not something is suitable employment for the employee.

Susan Dennehy: So it could be difficult to know whether or not the job is suitable, but employers should be cautious about denying a redundancy payment?
[0:06:47.1]

Susie Munro: Yes. Ultimately, it's going to be for the tribunal to decide both whether the job was suitable for the employee and also whether the employee was unreasonable in refusing it. And that's going to be difficult to judge in a lot of cases, basically because the tribunal can take into account subjective factors. So the employee's personal circumstances come into play and their perception of the job. So for example, their perception of their future job prospects might be relevant, as well as things like the effect on a particular employee of a change of location.

So employers should be very cautious about denying a redundancy payment in these situations. It's going to be rare that it's so clear-cut that a job is suitable for the employee in all the circumstances and that they've unreasonably refused it. So it's not often going to be clear-cut that they have actually given up their right to a redundancy payment.

Susan Dennehy: And where the employee refuses a job, the employer should drill down and look at the reasons behind the refusal before denying a payment. [0:07:50.9]

Susie Munro: Yes, because it's not just the employer's view of whether the particular job is suitable for the employee when they're comparing it to the old job, so the employee's personal situation is relevant as well.

Susan Dennehy: Okay, shall we look at the employee and what they can do if they are unsure whether or not to accept a new role. Can the employee try out an alternative job without jeopardising his or her redundancy payment? [0:08:11.8]

Susie Munro: Yes. So s.138 of the Employment Rights Act, that applies if before the employment comes to an end, the employer offers an alternative job beginning immediately or within four weeks. So if that applies, the employee can have a four-week trial period, if the offer is of a job that's on different terms and conditions, say in a different location. So the employee can have four weeks to try it out, and that four weeks also gives the employer a chance to see if the employee is going to be able to perform in that new role. And the four weeks can be extended by agreement if it's necessary for the employee to be trained to be able to do the new role.

Susan Dennehy: And what if the trial period doesn't work out for the employee? Would the employee in that circumstance still be entitled to redundancy payment? [0:08:56.0]

Susie Munro: Yes, in most circumstances. Again, it becomes relevant whether the offer was suitable or not. But if the employee decides not to go ahead – say they've been trying out a longer journey to work or a different role – they will generally still be entitled to a redundancy payment. And it's the same if it's the employer that decides to terminate employment after the trial period.

But again, whether or not the offer is of suitable employment is relevant here. If the employee turns down an alternative role during or after the trial period, if the role's deemed to be suitable for him or her, then the employee will be giving up a right to their redundancy payment if they unreasonably refuse it.

And again that's subjective, so it won't be clear whether or not it was suitable, and it's best for employers to be cautious and not to deny a redundancy payment in these situations.

Susan Dennehy: Employees on family leave often have special protection. What's the position for employees on family leave? Do the same rules apply? [0:09:53.3]

Susie Munro: Yes. So extra rules apply when an employee is on maternity leave or adoption leave or shared parental leave. When the redundancies are taking place, there's a more onerous duty on the employer with regards to offering alternative work.

So if there's a suitable, available vacancy, the employer is obliged to offer it to the employee, and that applies where the work is 'suitable and appropriate' in relation to the employee, and where the capacity, place and other terms and conditions are not substantially less favourable than in the previous job.

Susan Dennehy: And the employer actually has to offer the alternative job to the employee. It's not enough to invite them to apply for it in competition with other employees? [0:10:33.1]

Susie Munro: That's right. If there is a suitable vacancy available, it must be offered to the employee on maternity leave, otherwise it's going to be an automatic unfair dismissal, if the employee does claim unfair dismissal.

Susan Dennehy: And that means the employer can be obliged to offer a vacancy to the employee on leave even if there is someone else who is better qualified for the role? [0:10:54.1]

Susie Munro: That's right. So if the vacancy is suitable for the employee, it must be offered. Employees on family leave are favoured over others in a redundancy situation.

Susan Dennehy: So they're in a favoured position. But what if there is more than one person on maternity leave or shared parental leave or adoption leave for whom the job would also be suitable? [0:11:12.1]

Susie Munro: Well that's not dealt with in the legislation and I'm not aware of any case law on that yet. So the duty is to offer a vacancy if there's one available. Arguably the vacancy wouldn't be available if it's already been offered to someone else on family leave, so this wouldn't be an issue unless there's more than one employee being made redundant at exactly the same time.

Susan Dennehy: So the employer could think about staggering redundancies to avoid the situation but that could be difficult. [0:11:39.6]

Susie Munro: Yes. That's not always going to be possible. So the employer just has to decide how it's going to go about this, how it's going to decide who to offer it to. It could decide to offer the vacancy to the person who's most suitable for the role or it could open it up to competitive selection among the people who have the right to be offered it – so everybody who's on family leave at that time for whom it would be a suitable, alternative vacancy. But the important thing is that the employer has to be prepared to justify its decision if it's challenged.

Susan Dennehy: And if there's no available vacancies that would be suitable for the employee on family leave, presumably the normal rules about offering alternative work apply in the same way as for other employees? [0:12:21.2]

Susie Munro: Yes, so even if there are no current vacancies that would meet the test of being 'suitable and appropriate' for the employee, the employer still has to take reasonable steps to find other roles that it could offer. So it might be something where the terms of employment would be seen as less favourable, say on a lower pay scale, or in a different location, the employee wouldn't be at risk of losing their redundancy pay if they refused such an offer as it's not suitable alternative work, but an employee might be willing to accept it as an alternative to having no job at all. And that's really the employer's duty to follow a reasonable procedure in dismissing the employee and to actively consider any alternative work for them.

Susan Dennehy: And employers would need to be careful not to discriminate against an employee on maternity leave when thinking about what alternate roles to offer her. [0:13:06.3]

Susie Munro: Yes, so an employer shouldn't make assumptions about an employee who's on family leave. So, say if there's an alternative role in a different location, the employer shouldn't assume that an employee on family leave wouldn't be interested in it or wouldn't be able to do it because of their new childcare responsibilities. Those employees should be treated the same as other employees and, really, the employer should leave it to the employee to decide whether or not it's a role that they would be interested in.

Susan Dennehy: And a final point, the employer's duty to consider alternative employment for a redundant employee continues right up to the end of the notice period, doesn't it? [0:13:41.8]

Susie Munro: Yes, it's something that the employer needs to be thinking of throughout the procedure, so from the very beginning right up until the end.

Susan Dennehy: Thank you, Susie, for that guidance. There are more resources on our website, including a guide on How to consider offers of suitable work for redundant employees. There is also a section dealing with exclusions from redundancy payments, in the redundancy rights section of the employment law manual and there's also lots of FAQs.

That brings us to the end of this week's XpertHR Weekly, which you've been listening to with me, Susan Dennehy. We're back again next Friday. Until then, it's goodbye from us.