



XpertHR Weekly Podcast

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- Susan Dennehy: Hello and welcome to XpertHR Weekly with me, Susan Dennehy. When an employer gets to the stage that it realises that redundancies have to be made, it needs to work out which jobs it is most likely to be able to lose and put those jobs in a pool for redundancy. It is vital that the employer is able to show that it has followed a fair procedure in deciding who will be selected from redundancy from that pool.
- With me this week to discuss how to decide on fair selection criteria as part of the redundancy process is Susie Munro, Senior Employment Law Editor at XpertHR. Good morning, Susie.
- Susie Munro: Hi Sue.
- Susan Dennehy: So what does an employer need to do to make sure its method of selecting employees for redundancy is fair? [0:00:44.9]
- Susie Munro: Well the most common way of going about it is to put together a matrix. So this sets out all of the selection criteria that the employer is going to apply when making the decision on who to select for redundancy, and then each employee in the pool is scored against each criterion, for example given a score on their skills or experience. The scores are then added up and the people with the lowest marks are selected for redundancy. The benefit of doing it this way is that it's absolutely clear what's being taken into account and how the decision has been made. An employer doing it this way will be able to explain to the affected employees how the decision's been made and if any employees challenge the decision, it's going to be much easier to defend the decision.
- Susan Dennehy: How should employers choose the criteria to apply? [0:01:33.4]
- Susie Munro: It's important to choose objective criteria. So selections shouldn't be on the basis of the opinions of individual managers on who they want to retain. You need to be able to assess everybody against the criteria in an objective way. So you need to choose criteria that are measurable and not just based on opinion.
- Susan Dennehy: And are there some criteria that employers always use? [0:01:56.9]

Susie Munro: No, not really. It's for the employer to choose criteria that are relevant to the particular job and to their particular business needs. So an employer can choose the criteria that are going to lead to the most valuable employees being retained. If the selection criteria are challenged, a tribunal's going to be looking at whether a reasonable employer could have chosen those selection criteria. So it won't be looking to decide for itself what criteria it thinks the employer should have used but it'll only find that criteria are unfair if the employer's decision to use them was completely unreasonable. So employers do have a degree of discretion and flexibility in the choice of criteria.

Susan Dennehy: And is there any criteria that employers should always avoid? [0:02:42.8]

Susie Munro: Yes, there are some automatically unfair reasons for selection for redundancy. That would be things like trade union membership, pregnancy, whistleblowing, all things that it's going to be easy for employers to avoid using those in the selection process. It's going to be more difficult when you're looking at the effects of absence. So obviously employers need to avoid discriminatory criteria and if an employee's absence record is going to be included in the selection process, then employers need to discount any absence on maternity leave or pregnancy-related absence and also any sickness absence that's related to disability. But the most difficult area can be on how to score employees on other criteria like performance if the employee hasn't been at work for the whole of the reference period that's being assessed, say for example they've been on maternity leave or disability-related sick leave.

Susan Dennehy: So how should an employer approach that? [0:03:42.2]

Susie Munro: Well it's not easy to get it right because the employer, as well as avoiding discrimination against the absent employee, they need to avoid disadvantaging other employees, and this is what happened in the case of de Belin and Eversheds Legal Services. So this was where an employee had been on maternity leave during the period being assessed. The employer gave her the maximum score for one of the criterion that was on the recovery of fees. They gave her the maximum score because her actual performance couldn't be measured because she wasn't there but this was found to be discriminatory against the male employee who was selected for redundancy as a result of that scoring. It was found to be direct sex discrimination and an unfair dismissal.

Susan Dennehy: Well giving the maximum score, they did try to get it right. So how could the employer handle things differently? [0:04:30.5]

Susie Munro: Well one option would be to use a different time frame over which to assess employees. So you could come up with a time

frame including a period when the employee was actually at work. So you'd be able to assess her actual performance over a time rather than automatically giving an absent employee the maximum score.

Susan Dennehy: And looking at the criteria, what criteria should employers be using? [0:04:53.1]

Susie Munro: So you're looking for criteria that can be judged objectively, for example performance, skills and knowledge or attendance.

Susan Dennehy: You mentioned performance there. Not always easy to measure objectively. There are so many variables, aren't there? No two jobs are likely to be the same and it is one of the areas that employers frequently fall down on, isn't it? [0:05:10.9]

Susie Munro: Yes, so it can be difficult to measure performance objectively. There are going to be some jobs where there are figures available to do that, so say in sales roles. In others, there might be scores from performance reviews. If employees have been assessed against objective targets, those could be used, or employees could be assessed on the basis of appraisals, as long as ratings have been applied consistently across the employees in the pool.

It's important to try and come up with a fair time frame over which performance will be assessed, so a longer time frame is likely to give a more accurate picture. An employee could be disadvantaged if their performance is measured over a particularly short period, for example if he or she was engaged on particularly challenging work or if it was a time when he or she was covering for absent colleagues. It might not give an accurate reflection of their performance levels.

Susan Dennehy: And you mentioned attendance as a criterion. That also can be difficult. You mentioned earlier the problems with maternity leave and pregnancy-related leave and it might seem unfair to penalise someone because they've been off sick because they've had surgery or something like that. How should an employer approach this? [0:06:23.5]

Susie Munro: So attendance is a fairly common criterion to use. As you mentioned, maternity leave, pregnancy-related absence and disability-related absence should be discounted, but in relation to other absences the employer won't generally be expected to investigate the reasons for the absence. But something that they could consider is weighting the scores so that multiple short-term absences score less than longer term absence. So the example that you mentioned, somebody who's had an operation, they would be treated more favourably than somebody who's taken a number of individual sick days. But

really employers need to avoid making decisions about which absences appear to them to be more genuine because they'd be introducing their own subjective opinions. Having said that, they do need to bear in mind that their decisions must be fair in all the circumstances.

Susan Dennehy:

What are the other common criteria? [0:07:18.0]

Susie Munro:

So the 2015 XpertHR survey on redundancy policies and procedures found that the most common selection criteria were skills and competencies, assessment of past performance, disciplinary record, adaptability and ability to be trained for alternative jobs, absence and attendance records, and qualifications and experience.

Susan Dennehy:

And looking at disciplinary record, how far back can the employer go? For instance, can they include expired warnings? [0:07:46.4]

Susie Munro:

Well it's not automatically unfair to include expired warnings but if they are going to be included, they should certainly be given less weight than current warnings. There's case law to say that it's not automatically unfair to include expired warnings but that's not the same as saying that it will always be fair in every instance. So it's going to depend on the circumstances. It's unlikely to be fair if the employer is using very old expired warnings. But generally an employer can include a disciplinary record as a criterion for selection as long as the disciplinary rules have been applied consistently.

Susan Dennehy:

And you used to see employers use 'last in, first out', LIFO. Do many employers still use LIFO? [0:08:29.1]

Susie Munro:

No, it's no longer as popular as it was, basically because of the risk of indirect age discrimination. So selecting people for redundancy on the basis that they're the most recent people to join the organisation can discriminate against younger people. It might be possible to justify that approach but that's going to depend on the circumstances. It should certainly be given lower weighting to other criteria or possibly it could be used as a tie-breaker if all other scores are the same. But it may be best just to avoid using LIFO at all, to avoid the risk of an indirect age discrimination claim.

Susan Dennehy:

So you can use it as part of a criteria but you shouldn't really use it on its own? [0:09:11.2]

Susie Munro:

You could possibly use it with other criteria but no, definitely not as the only basis for selection.

- Susan Dennehy: So what else, apart from the actual criteria that they choose, should employers take into account to make sure that their procedure is fair? [0:09:23.0]
- Susie Munro: So before finalising the matrix of selection criteria, the employer needs to consult with employees on the criteria that it's proposing. So if there is a collective consultation process, consultation on the selection criteria should be part of this, so the employer would be consulting with the trade union or employee representatives. Even if there is no collective consultation, the employer still needs to consult with employees. One thing to remember is that you can give different weighting to different criteria, so not everything is judged to be as important, and that could be something to negotiate with employee representatives – say if there's a particular criterion that they're not happy with, you could negotiate that that is given less weight and therefore has less influence on the decision.
- Susan Dennehy: And moving onto the procedure around applying the criteria, how should an employer go about making sure that it's acting fairly? [0:10:19.4]
- Susie Munro: The important thing is to keep evidence of the decision-making process. So the employer needs to be able to show that it has thought carefully about how to make the decision in relation to each individual employee, and that should involve taking notes of the scoring process for each employee. It's important to take time over the scoring process. It's not something that can be done quickly, just going through and ticking boxes. You need to make sure that you've got the right information on which to make the decisions so that you're making accurate decisions, and also the appropriate people need to be involved. So that would be managers with knowledge of each of the individual employees.
- Susan Dennehy: And if an employer finds itself in a tribunal, it's likely to need to be able to show how it came to its decision so it will need the paperwork to support that, won't it? [0:11:08.7]
- Susie Munro: Yes, so the paperwork will be necessary. Basically the employer needs to be able to show that it has acted fairly in all the circumstances in making the decision that it has done on selection.
- Susan Dennehy: Should employees be given the right to appeal the selection decision? Is this an area where an employee has a right of appeal? [0:11:25.0]
- Susie Munro: Well there's no statutory right of appeal but certainly employers need to allow the employees to challenge the decision. So they need to let employees know their own scores and also probably

where they sit against the scores of other people in the pool. But the employer doesn't need to give each employee details of all of the scores of all of the other people in the pool. What's important is that employees have the opportunity to challenge the decision, say if they think that there's been a mistake in the scoring or if the criteria have been unfairly applied. This could be done as part of the individual consultation procedure or there could be a separate appeal procedure, as long as employees do have the chance at some point to challenge the decision.

Susan Dennehy: And they might need to rescore if necessary. [0:12:10.7]

Susie Munro: Yes. If it looks as though things might not have been done properly, the employer needs to build that into the process, to rescore if necessary.

Susan Dennehy: Where can listeners find more resources on our website? [0:12:22.4]

Susie Munro: So we've got a "how to", How to choose and apply redundancy selection criteria. We've also got a model policy on selection for redundancy. That's in the Policies and Documents section. And I mentioned the 2015 survey on redundancy policies and procedures. That gives detail about how employers go about choosing the selection criteria for redundancy.

Susan Dennehy: Thank you very much for that very helpful guidance.

Susie Munro: Thanks Sue.

Susan Dennehy: 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 but until then, it's goodbye from us.