

On the right side of the law

The effects of the credit crunch are being felt across boardrooms the length and breadth of the country.

Late in 2008, Acas, the national advisory and conciliation service, issued a press release reporting that the number of businesses seeking online advice on redundancies, lay-offs and business restructuring had quadrupled since May.

It added that employers are asking about their legal responsibilities, consultation periods and advice on how to decide which employees to make redundant.

For many companies however, mass redundancies are an unattractive option for morale reasons and particularly in those organisations with generous contractual redundancy schemes.

The alternative to the redundancy route for any organisation is working out how to restructure the business to improve productivity and save jobs at the same time.

A reorganisation might include a reduction of overtime working in affected departments; the introduction of short-time working where practicable; introducing flexible working; cutting hours to fit either budget or workload; or relocating members of staff to different departments.

The difficulty, of course, is that such changes to employees' terms and conditions of employment are not at all easy to implement, and can be very expensive if done wrong.

An employer should first try to obtain the employees' consent to the changes. If this proves unsuccessful, an employer is lawfully allowed to give notice to terminate the original contract of employment and offer re-engagement on new terms,

However, in order to avoid any unfair dismissal claims further down the line - even though the employer is offering to immediately re-engage the employee - it is essential the employer can demonstrate the reason for terminating was a potentially fair reason within the meaning of section 98 of the Employment Rights Act. Definitions include conduct, capability, retirement, redundancy, contravention of an enactment, or because of what is referred to as Some Other Substantial Reason (SOSR).

There has been much controversy over what, in fact, constitutes SOSR. In essence, an employer must be able to demonstrate the variations to the employee's contract of employment were for 'a sound business reason',

These sound business reasons may be because at a necessary reorganisation of the business; economic necessity; a need to protect the interests of the business; an expiry of a fixed-term contract; or even because of the employee's personality.

The good news for employers is that Employment Tribunals generally attach great weight to the employer's reasons for making changes to terms and conditions, but

will also take into account, usually to a lesser extent, the impact of the changes on the employee.

But in order to defend potential unfair dismissal claims, the employer should certainly ensure it is in a strong position to demonstrate that the changes are required to improve the company's poor economic position.

This would involve producing clear evidence of the company's poor financial position and also evidence to demonstrate the changes proposed would actually have the effect of improving the company's financial position. The employer should also retain evidence of having considered alternatives, where appropriate.

In addition to ensuring there is a fair reason for dismissal, an employer also has to show that proper procedure was followed. Such is human nature that it's true to say employees are much more receptive to change if they are advised of the proposed variations early and understand why they are necessary.

If more than 20 employees are affected by the proposed amendments to terms and conditions of their respective contracts, there is an obligation for the employer to collectively consult and DBERR must also be involved.

Employers need to be aware that with strict employment laws, business decisions in these uncertain times need to be carefully assessed and planned well ahead. John Macmillan is a Partner with MacRoberts and is a specialist employment lawyer. He has had wide involvement in drafting employment contracts and disciplinary rules and other policies.

For further information, please email: john.macmillan@macroberts.com

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