



# Role reversal

*If an employer makes dramatic changes to the content of a job, does that constitute redundancy? Vanessa Nicholls reports*

The classic case of redundancy is where a business closes down altogether, or closes in the place where the employee works. But the concept is wider. An employee is also redundant if his dismissal is due to the fact that the business needs fewer employees to carry out 'work of a particular kind', or expects to do so.

This part of the definition of redundancy is often in issue in the context of a business reorganisation or restructuring where a company changes the terms on which employees work. If so, it may be necessary to examine how substantial those changes are, in order to decide whether the definition of redundancy applies. If, for example, a company decides to restructure 10 jobs within a department so that the content of the job changes substantially, it may in fact be deciding that it needs 10 fewer employees to do work of one 'particular kind' and 10 more employees to do work of a different 'particular kind'.

This was the issue in *Martland v The Co-operative Insurance Society*. The Co-op wanted to change some of the terms and conditions of its financial advisers. Some of the changes the Co-op wanted to make were significant. For example, some employees were expected to increase by 50% the time spent selling financial products; the amount of commission was also to be reduced, although basic salaries were to be increased.

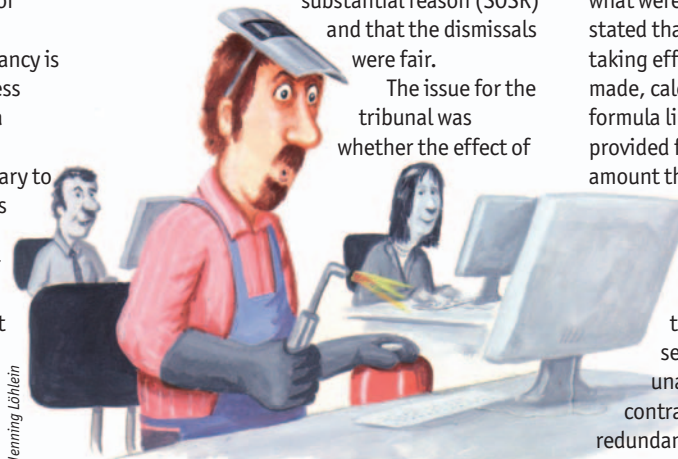
The Co-op sought to achieve this variation to employees' contracts by agreement with the recognised trade union, but that was unsuccessful. It was also unable to obtain consent from the employees individually to the proposed changes. So, to bring about the necessary changes, it terminated the employees' existing contracts of employment and offered to re-engage them on the new terms.

The employees argued that they had been dismissed by reason of redundancy. They argued that the extent of the changes that the

company was seeking to implement constituted a change in 'the kind of work' so as to trigger a redundancy. The Co-op argued that this was not a redundancy (so no redundancy payment) because the employees had been fairly dismissed for some other

substantial reason (SOSR) and that the dismissals were fair.

The issue for the tribunal was whether the effect of



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the new arrangements was to alter the particular kind of work that the employees were carrying out. It concluded that the essence of the job was selling and that the changes in the method of performance did not mean that there was a different kind of job being performed. The tribunal therefore agreed with the Co-op that the dismissals were for SOSR. The employees' appealed against this finding to the Employment Appeal Tribunal.

The second issue in dispute in this case was whether the terms of a collective agreement relating to redundancy formed part of the employees' contracts, so as to create legal rights. The terms of a collective agreement can become part of an individual employee's contract by a process known as 'incorporation'. The clearest mechanism for doing this is a term in the employee's contract of employment that expressly states that the agreement is part of the individual's terms and conditions.

In this case, employees' contracts said: "Any terms agreed in the course of collective

negotiations between the company and the trade union will have been incorporated into and form part of this agreement". The collective agreement in question was headed 'Organisational Change and Redundancy Process'. One of the appendices provided for what were termed "severance terms". It stated that, "in the event of redundancy taking effect, a severance payment will be made, calculated in the following way...". The formula linked pay to years of service and provided for payments well in excess of the amount the employees would have received had they only been entitled to a statutory redundancy payment.

Before the tribunal, the employees argued that the term of the collective agreement relating to severance pay was clear and unambiguous and conferred on them a contractual entitlement to the enhanced redundancy payment. The tribunal agreed with them but given its finding that the dismissals were for SOSR in practice it made no difference as no redundancy payment, statutory or contractual, was triggered. The Co-op cross-appealed against this aspect of the tribunal's judgment.

1. Do you think that the EAT agreed with the tribunal's finding that the employees were not dismissed for redundancy but instead were dismissed for SOSR?
2. In your view, was the tribunal right to conclude that the severance terms were incorporated into contracts of employment?
3. Does it make a difference to know that a subsequent paragraph of the collective agreement under the heading 'Organisational Change and Redundancy Process' stated: "This process is not intended to form part of individual contracts"?

To find out the answers to these questions turn to page **56** >>



# What would you have done?

*What's your view of the case on page 9? Here, you can compare your answers with those of Vanessa Nicholls*

**1.** The EAT stated that the real issue for the tribunal was whether the effect of the new arrangements that the Co-op was seeking to introduce was to alter the particular kind of work that the employees were carrying out. The EAT acknowledged that the tribunal had accepted that the changes were significant and were unwelcome to many of the employees. Notwithstanding this fact, however, it was important to decide whether the new terms and conditions of employment brought about a situation in which the employees were being required to carry out work of 'a particular kind' which was different to the work they had performed under their existing contracts.

The EAT said that the tribunal's role was to consider whether or not the change in the nature and quality of the tasks and the way in which they were being carried out was sufficient to say that the work that the employees did could now be described as being of a different kind. This exercise, the EAT said, is classically an area for the tribunal to determine. It is a question of fact for the tribunal taking into account all the evidence before it. The EAT went on to say that there is no single right or wrong answer to that question and it involves

assessing all the relevant evidence and reaching a judgment.

The EAT reminded itself that it was not for them to make that assessment. It may be that other tribunals might have

assessed the evidence differently. However, the EAT was wholly satisfied that, in this case, there was no basis for saying that the tribunal's decision was unsustainable on the evidence and therefore wrong. As such, the EAT had no basis for overturning the tribunal's judgment and upheld the finding that the employees were not dismissed by reason of redundancy but for SOSR.

**2.** Strictly, it was not necessary for the EAT to consider this issue since it upheld the tribunal's finding that the employees were not dismissed by reason of redundancy. Nevertheless, the EAT went on to consider whether or not, had the employees been redundant, they would have been entitled to an enhanced redundancy payment.

Collective agreements may create legal rights if they form part of, or are incorporated into, the contracts of employment of the employees they cover. To answer the question, when is a collectively agreed term incorporated into a contract of employment, you start by looking at the intentions of the employer and employee as shown in the individual contract. The next step is to consider whether the provision of the collective agreement is 'apt' to be a term of the contract. Not every term of a collective agreement will be apt – because, for example, it is too vague or because its purpose is solely to regulate the relationship between the parties to the collective agreement, namely the employer and the union. So an agreement dealing with collective bargaining arrangements

between the employer and the union would not be capable of incorporation, but an agreement on working hours or rates of pay would be.

The EAT held, in this case, that the collectively agreed severance terms at issue were precise, unambiguous and intended to

regulate the relationship between the employer and the individual employees rather than the employer and the union. On that basis, arguably they should be contractually enforceable terms. As such, if the employees had been dismissed for redundancy, they would have been entitled to the enhanced redundancy payments.

**3.** The fact that the collective agreement, headed 'Redundancy Process', stated "this process is not intended to form part of individual contracts" could have a bearing on the outcome.

Frequently, a collective agreement will not say anything about which of its provisions should be incorporated into individual contracts of employment and which should not. In those circumstances, the only issue will be whether the term in question in the agreement is apt for incorporation. Equally, some agreements deal with a combination of procedural and substantive issues, and the terms dealing with substantive issues may be capable of being incorporated even if the terms covering procedural issues are not.

Where the collective agreement purports to determine the question of which of its provisions should be incorporated into individual contracts of employment – for example, as in this case by stipulating what is not to take effect as a contractual term – that determination will, at least in the normal case, be respected.

On the facts of this case, it was only the 'process' or procedure for handling the redundancies that was intended to have no contractual effect. The actual severance terms themselves were different and were capable of being incorporated into individual contracts therefore potentially giving rise to an entitlement to an enhanced redundancy payment.

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