The Public Sector Recession

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1. Overview

According to the latest forecast from the Chartered Institute of Personnel and Development (CIPD), unemployment levels will rise to almost three million by 2012. It is predicted that this will be due largely to recession in the public sector. Though jobs will be mainly affected, there has also been suggestion of a slowdown in public sector pay awards.

In May 2010, Chancellor George Osbourne stated that £6.2 billion worth of public spending cuts must be made by April 2011, which amounts to a 25% cut within the public sector. This figure also includes £1.5 billion worth of savings on consultancy fees and travel costs. The implications for HR professionals are immense, including recruitment freezes (some of which are already in place), pay reviews for some civil servants, early retirement and voluntary/compulsory redundancies. The pay review may even dictate that pay awards be aligned with the private sector.

Last month's announcement of pay freezes for some senior civil servants, and low pay increases for many other public sector workers could be representative of an overture toward these public spending cuts. The reactions they have provoked could also represent a foretaste of the direction public sector industrial relations will take over the coming years.

The responsibility for facilitating the public spending cuts will largely fall to public sector HR professionals.

2. The role of HR professionals

The recession environment is unprecedented for some HR professionals in the public sector, being decades since any significant redundancies were seen. The government is now putting HR professionals under pressure to deal with a major people risk management issue, whilst concurrently threatening to withdraw the much needed support of some well established consultancies.

The new government has said that the critical role of HR under such extreme circumstances is to support the economic recovery, with limited assistance. This means HR professionals will be dealing with the personnel affected and the inevitable union backlash alone. The ongoing high profile dispute at British Airways gives an indication of what might occur within the public sector.

> "The new independent fiscal watchdog, The Office for Budget Responsibility (OBR), predicted the economy will expand by 2.6% in 2011, down from the 3% to 3.5% estimate given in Labour's last Budget.

> The lower figure will likely increase the impetus of the coalition government to cut public spending, as lower growth means fewer tax revenues" (BBC News, June 2010).

The time has come for HR to be a major influence within the public sector rather than a support function which has little effect on income and expenditure. However, HR will now have a stronger voice on income and expenditure planning and will be key not only to individual public sector organisations but in the wider economy.

Pay awards for 2010/11 will be a major challenge for HR and public sector staff retained in the organisation. There will be an issue keeping good staff as an insecure environment often leads individuals to look for stability elsewhere. The old saying "The rats deserting the sinking ship" may have some significance, despite predictions of almost three million unemployed.

The headline unemployment rate has risen to 8.0% - its highest level in nearly 14 years, according to latest data from the Office for National Statistics (ONS). This was the final unemployment data release prior to the general election. Last week ONS figures showed that overall UK unemployment was rising faster in this recession than at any time since the 1980s.

3. Implications for the Public Sector

"Up to 350,000 public sector jobs may be lost over the next five years and that there could be a dramatic increase in industrial action." (CIPD).

Some sources predict that this figure is too conservative and may be as high as 750,000. Further indications are that it will be preceded by around 30,000 local authority job cuts in 2011.

The CIPD said while reducing the UK's record budget deficit in a timely manner should boost the UK economy in the long term; it will damage the short term outlook.

UK unemployment has been less severe than expected during the recession and there has been a decline in the number of new job seekers in three out of the first four months of 2010. However, the CIPD, and other institutions, don't expect this optimistic trend to continue.

According to a CIPD study, over 30% of public sector employers need to cut staff in the next quarter despite talks of stability and even growth. The worst hit areas will be public administration and defence. The Unite union said that the impact of such cuts in certain areas would be "devastating" to the local economy.

Unite has argued that cutting public sector jobs would hinder rather than help Britain's economic recovery.

> "Public services and their staff are integral to the UK's recovery from the global recession caused by reckless banking practices." (Gail Cartmail, Assistant General Secretary for the Public Sector, Unite)
>
> She added: "According to TUC analysis, a 10 per cent cut in 2007/8 public sector expenditure equates to 200,000 jobs. In cities, such as Newcastle where two thirds of the economically active are employed in the public sector, the impact of such cuts would be devastating to the local economy – reduced taxation, reduced spending and, ironically greater reliance, on public services such as Job Centres and increased government expenditure on supporting the unemployed and their families."

This is a massive issue for public sector organisations and HR will have the challenge of dealing with it. However, the Government have also asked for savings of £1.5 billion on consultancy fees and travel. This is likely to leave HR professionals unprepared, unprotected and unsupported. Consultancies with historical links to the public sector are used to help prepare and minimise risk to the organisation. Without them public sector organisations are threatened by more financial exposure from Employment Tribunal Claims for individuals arguing unfair dismissal or those dealing with the aftermath (such as claims for stress etc).

The government should recognise that a good consultant can be extremely cost effective, will support staff and assist in minimising the people risk. Their current black and white view will only seek to cause more harm than good.

4. Redundancy Pitfalls

Within the public sector, compulsory redundancy and the experience of downsizing is scarce. The redundancy pitfalls can be extremely costly, not just in monetary terms (potential claims, compromise agreements), but in staffing costs (HR to deal with the issue), legal fees, negative publicity and the affect on the people who are left behind. The feeling of insecurity will remain unless steps are taken to look after the people leaving the organisation.

What follows is a guide to redundancy and to the pitfalls which will need due consideration from the HR professionals dealing with this highly emotional and contentious situation.

4.1 Definitions of Redundancy

Advice and support during one of the most emotive of HR issues is essential to minimise risk and the effects on those left behind. There

are a number of contentious areas that HR professionals need to understand in order to provide effective advice and avoid Tribunal claims.

Here are the two definitions of redundancy:

Standard definition

Many HR professionals are familiar with the definition of redundancy which governs entitlement to a redundancy payment (contained in s.139 of the Employment Rights Act 1996 ('ERA')):

'an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:

(a) the fact that his employer has ceased or intends to cease:

(i) to carry on the business for the purposes of which the employee was employed by him; or

(ii) to carry on that business in the place where the employee was so employed.

Or

(b) the fact that the requirements of that business:

(i) or employees to carry out work of a particular kind; or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer;

...have ceased or diminished or are expected to cease or diminish.'

Therefore 'redundancy' situations often involve the closure of a business or workplace, or a diminishing need for employees (e.g. less work available or fewer employees required for the same amount of work).

Definition for collective consultation purposes

The first trap for the unwary is that the definition of redundancy for the purposes of deciding the necessity of a collective notification and consultation process is wider than the standard ERA definition.

- Where an employer proposes to dismiss as redundant 20 or more employees at one establishment within 90 days, under s.188 of the Trade Union and Labour Relations (Consolidation) Act 1995 ('TULRCA') he must consult with 'appropriate representatives' of those employees.

- 'Dismissal as redundant' means 'dismissal for a reason not related to the individual concerned, or for a number of reasons all of which are not so related' (s.195 of TULRCA).

This definition can apply even when there is no intention to lose jobs or workers. The classic example is where an employer wishes to change the terms and conditions of its workforce (e.g. to introduce new restrictive covenants). If change is being considered following a TUPE transfer, employers may issue a notice to employees stating that they are proposing to terminate their employment and re-engage them on new terms and conditions (perhaps subject to signing a compromise agreement). Such a notice would fall within the TULRCA definition of proposing to dismiss as redundant and trigger the collective consultation obligations. Even a compromise agreement, meeting all of the usual statutory requirements, cannot effectively compromise an employee's right to collective consultation in a redundancy situation.

Given that the protective award for failure to appropriately consult is up to 90 days' actual pay per affected employee, it is essential that those advising employers in such situations understand this wider definition of redundancy.

4.2 Meaning of 'establishment'

The next pitfall for employers (particularly those who operate businesses from more than one site) is failure to recognise the meaning of 'one establishment' for the purposes of triggering the collective redundancy consultation requirements referred to above. There is no statutory definition of 'one establishment', but considerable case law exists.

What constitutes ‘one establishment’ is always a question of fact, and generally the Tribunals have taken a common-sense approach. At a basic level 'one establishment' means the unit to which the workers are assigned to carry out their duties. The following have been important factors in determining whether different sites are distinct establishments:

(i) geographical separation of the sites

(ii) managerial independence; and

(iii) whether the sites are permanent or temporary.

However, the key message from the European Court of Justice seems to be that the term 'establishment' should be defined very broadly, in order to limit, as far as possible, cases of collective redundancies which are not subject to Directive 98/59 (which TULRCA implements) (Athinaïki Chartopoiia AE v Panagiotidis (C-270/05 [2007] IRLR 284)).

Employers must give careful consideration to where redundancies are being made. If there is a risk that some or all of those places could be deemed to be ‘one establishment', employers should assume they do. Collective consultation should be undertaken if 20 or more employees are likely to be dismissed over a period of 90 days or less.

5. Nature and timing of consultation

Once collective consultation is recognised as necessary, the extent and timing of the consultation should be decided. Under s.188 of TULRCA, consultation must take place in good faith with a view to reaching agreement, and include discussion about:

(a) avoiding the dismissals

(b) reducing the numbers of employees to be dismissed; and

(c) mitigating the consequences of the dismissals.

An important recent judgment was made by the Employment Appeal Tribunal (EAT) in UK Coal Mining Limited v National Union of Mineworkers and another [2008] IRLR 4. The EAT held that where the business reason behind the proposal to dismiss (in UK Coal, the proposal to close the mine where employees worked) and the proposal to dismiss itself are inextricably linked. As part of the collective redundancy consultation process the employer must consult employee representatives not only about the dismissals, but also about the business reasons behind them.

This affects not only the scope of consultation (which is considerably wider than previously thought), but also its timing. Consultation must start sufficiently before the decision on the 'reason' for the proposed redundancies is taken to enable consultation to be entered into with a view to reaching agreement (as required by TULRCA) - i.e. potentially considerably earlier than previously believed.

Finally, because Tribunals tend to 'read across' various employment legislation, the safest route for employers is to discuss the business reasons behind a redundancy as part of the process of consulting individuals (in order to avoid claims of unfair dismissal), even where the collective redundancy consultation obligation is not triggered.

6. Mobility clauses and avoiding 'redundancies'

The recent Court of Appeal decision of Home Office v Evans [2008] IRLR 59 has given employers with mobility clauses in their contracts of employment a means to avoid redundancies in certain situations.

The Home Office decided to close Waterloo International Terminal as a base for its immigration operations. It initially decided that employees at the Terminal would be offered suitable alternative

employment ('SAE'), and then dismissed as redundant on the Home Office's enhanced redundancy terms if they declined this. When the Terminal closure was announced, the Home Office had decided to invoke the mobility clause in its contracts of employment to require staff to work elsewhere, rather than be dismissed as redundant. The mobility clause stated 'you are liable to be transferred to any Civil Service post, whether in the United Kingdom or abroad'. Upon Mr Evans being informed that he was being transferred to Heathrow, he resigned and brought a claim for constructive unfair dismissal.

Both the Employment Tribunal and the EAT found in favour of Mr Evans. In particular, the EAT found that there was a 'representation to the workforce' that if a decision was taken to close the Terminal, the agreed redundancy procedure would be followed. On the basis of the decision in Curling v Securicor [1992] IRLR 549, it held that the Home Office could not 'dodge' redundancy procedures by invoking its mobility clause so late in the process.

The Court of Appeal rejected the contention that there had been a 'representation' (because the issue of a representation was impermissibly raised for the first time by the EAT, which is only entitled to hear appeals on a point of law from the Employment Tribunal). Curling was a case in which the employer relied on a mobility clause for the first time at Tribunal, having previously treated the dismissals as a redundancy. That was too late to raise the point. However, the Court of Appeal held that there is no reason in law why an employer should not use a mobility clause to avoid a redundancy.

The legal position in Evans was that 'the Home Office was bound to follow [its internal] redundancy procedure in the event of dismissals on the grounds of redundancy or when dismissals on account of redundancy are proposed. If, however, the Home Office preferred to invoke a mobility clause in order to avoid redundancy dismissals it was entitled to make that choice…The position is not altered by the fact that internally the Home Office initially envisaged following redundancy procedures if the [Terminal] were to close…the question was not the Home Office's motive for its change of mind, but whether it was legally entitled to invoke the mobility clause…' The Court of Appeal therefore found that there was no breach of contract and no grounds for dismissal.

This decision means that employers should always consider whether there are express terms like mobility clauses contained in their contracts of employment to help avoid making redundancies. It appears that employers cannot invoke an express mobility clause in an unreasonable manner because of the implied term of good faith, trust and confidence (United Bank v Akhtar [1989] IRLR 207, where the employer tried to transfer the employee from Leeds to

Birmingham on a few days' notice despite the employee's spouse's ill health posing difficulties with moving).

Therefore, although the general rule is that express terms must be considered in preference to any implied terms, consideration must be given to whether invoking the clause is consistent with the implied term of trust and confidence. This emphasises the point of giving proper consideration to express terms at an early stage. It is particularly important that employers do not make representations to their workforce that a redundancy situation has arisen (and a redundancy policy will be followed) if they wish to be able to rely on a mobility clause to avoid redundancies. However, overall this is a very helpful judgment for employers.

7. Pooling and associated employers

Employees must be selected for redundancy from a pool of appropriate employees. It is important that the employer is able to prove objectively that there has been careful consideration about which employees fall into the pool for redundancy selection purposes. Employers should remember that, for redundancy pooling purposes, the business of one employer can (and should where it is beneficial to an employee) be treated as the same as the business of another employer (an 'associated employer') if:

- one is a company controlled by the other (which may be a company or an individual); or
- both are companies controlled by another employer (who again may be either a company or an individual).

'Control' normally means control of more than 50% of the votes attached to shares (but could also mean, e.g. control of the Board). Larger corporations, and those with group company structures, should always consider whether there are 'associated employers' whose employees should form part of the pool. If they don't, there is a risk that employees who are made redundant might succeed in a claim for unfair dismissal.

7.1 Selection Criteria

An area where many employers fail is the decision and implementation of the selection criteria applied to the pool of potentially redundant employees. The criteria used for ascertaining who will be made redundant, or the conditions of the redundancy, should be objective and verifiable by reference to data such as attendance and efficiency records:

- who should/should not, have their employment terminated immediately

- who should/should not go on garden leave
- any criteria used regarding the amount of severance package an employee receives.

In particular, they must not be discriminatory (that is not on the grounds of the employee's race, sex, disability, sexual orientation, religion/belief or age).

Common criteria (including some of the pitfalls in relation to them) are:

(a) skills and competencies; knowledge and qualifications; conduct (including disciplinary record); versatility and adaptability

(b) Attendance record

(c) Health

(d) Last in, first out ('LIFO').

7.2 Employees on maternity leave

The first trap for employers to avoid with employees who are on maternity leave is excluding them from consideration altogether. If an employee on maternity leave should have formed part of the 'pool', failing to include them could turn other redundancies into unfair dismissals, and may amount to sex discrimination against males. Alternatively, selecting someone for redundancy because they are pregnant, have given birth or are taking/have taken maternity leave, will make their dismissal automatically unfair and will almost inevitably amount to direct sex discrimination. At the initial stage of selection for redundancy, employees on maternity leave should be treated in the same manner as all other employees.

However, if an employee on maternity leave is selected for redundancy, then at that stage they gain additional rights. Regulation 10 of the Maternity and Parental Leave Regulations 1999 means that a potentially redundant employee on maternity leave must be offered any suitable available vacancy (i.e. a vacancy that is suitable, appropriate and not materially less favourable than the employee's previous job) that exists, or her dismissal will be automatically unfair. In addition, it may involve sex discrimination. The offer must be made to the employee on maternity leave even if there are other, better qualified candidates whose positions are also potentially redundant.

8. Conclusion

There are many potential pitfalls and traps for the unwary employer, but those who follow the correct process should be able to make redundancies without incurring any unanticipated liabilities.

Understanding the relevant legal obligations and seeking appropriate advice at an early stage is key. HR's should ensure that the correct processes are followed. They are responsible for both economic recovery and people risk management.

Without the right consultants and preparation the financial and PR risks are huge. The government have essentially held public sector HR to ransom, because they will be unable to get the right expertise to ensure deficits are met. Ultimately it potentially increases the financial risk to public sector organisations.

The provision of outplacement facilities for staff who may be at risk of redundancy minimises the risk to those personnel left within the organisation. This advises and guides staff on the way forward and give them choices which they may not have considered (e.g. early retirement, retraining, redeployment and voluntary redundancy). Outplacement therefore reduces the need for compulsory redundancy and minimises risk to the organisation.

The public sector is recognised for looking after its staff, yet outplacement is not high on the agenda. The advantage is not only will the people exiting the company feel that they have been looked after, the people left behind will also feel valued and employee engagement will be less of an issue, in what is an extremely insecure and contentious time.

With careful planning and the right programme, outplacement can minimise compulsory redundancies and negative PR, which can have untold consequences.

Most outplacement products are used to assist the people exiting the organisation. However, Career Sage is designed to assist at the "AT RISK" stage, giving people choices, some of which may not have been considered. This ultimately results in fewer compulsory redundancies.

Outplacement is the tool with which the public sector can carry on looking after its staff. This can only help further during these testing times.

To discuss any of the issues raised in this document in more detail, please contact:

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