The EAT sheds light on the definition of redundancies

By Robin Pickard
3PB Barristers

Ballerino v The Racecourse Association Ltd [2024] EAT 98

1. In **Ballerino**, the Employment Appeal Tribunal (**"EAT"**) had to determine whether the Employment Tribunal (**"ET"**) had correctly applied the law on redundancies in a claim for maternity discrimination.

2. The Claimant, who I represented (Robin Pickard of 3PB), had argued before the ET that:

   a. her dismissal while she was on maternity leave was a sham, i.e., her employer had not in fact made her role redundant; and

   b. the new role of Finance Manager and Business Analyst (which would subsume the Claimant's role as Financial Accountant) was a "suitable available vacancy" that she should have been offered while she was on maternity leave (per Regulation 20(1)(b) and Regulation 10 of the Maternity and Parental Leave etc. Regulations 1999 (**"MAPLE"**)).

3. The ET rejected my client's claims on both fronts. The question for the EAT was straightforward: did the ET properly assess whether the Claimant had been made redundant by reference to the applicable legal test? For the reasons provided below, the EAT concluded that the ET fell short of the mark and remitted the case to the ET for fresh consideration.

The facts

4. The facts are summarised as follows:

   a. The Claimant qualified as a Chartered Accountant in 2012.

   b. The Respondent is the trade association for racecourses in the UK and represents and supports its member racecourses.

c. On 1 August 2018, the Respondent employed the Claimant as its Company Accountant with a reporting line to the Chief Executive. She was responsible (*inter alia*) for overseeing compliance with internal controls, preparing management accounts each quarter and preparing *ad hoc* management information. She was initially employed for 40 days per annum, albeit the Claimant was required to work additional days (commanding a day rate of £400).

d. On 21 December 2018, the Claimant went on maternity leave.

e. Upon taking up his post as Chief Executive on 1 February 2019, Mr Armstrong undertook a review which led him to identify a need for the Respondent to provide more effective commercial support to its members. To address that need, he determined that a new full-time role of "Business and Financial Analyst" should be created. That position was advertised externally and five candidates got through the initial shortlist.

f. The first interviews took place in early June 2019. At that stage, as the ET found, candidates were told that the role was "slightly fluid"; it was not suggested that the job would include the Claimant's workload. However, between the first and second round of interviews, the Respondent decided to subsume the Claimant's duties within a new role entitled "Finance Manager and Business Analyst". The ET found that (emphasis added):

   i. "*It is clear that the **new role encompassed the claimant's previous role**, but in every other respect it was completely different*" (para 100).

   ii. "*…, there is remarkably little documentation setting out how it was that Mr Armstrong decided to recruit a new employee and how that **role then came to encompass the claimant's role**"* (para 117).

   iii. *"**As regards the inclusion of the claimant's tasks in this role**, he said that this point had only arisen following the first round of interviews, and was discussed (orally) between him, Mr Clifton [Racing Director] and Ms Davies [Racecourse Services Director and the Claimant's line manager] on Ms Davies's return from holiday around 13/14 June, following which the job description had been varied and Ms Davies given the task of speaking to the claimant"* (para 118).

g. A job description for the Finance Manager and Business Analyst job was finalised on or around 13 June 2019. The Respondent invited two candidates to second round interviews, which took place on 27 June 2019.

h. Meanwhile, on 14 June 2019, the Respondent invited the Claimant to a meeting which was scheduled for 18 June 2019. The ET records what took place at that meeting, as follows:

"74. … the claimant was told that her role was at risk of redundancy as a result of the decision to amalgamate her role with the new role, … she was provided with a job description for the new role and invited to apply for it, but at the same time given a draft settlement agreement, with instructions that if she wished to accept it she should do so within five days. The claimant reacted badly to this approach, and criticises the respondent for not giving her any warning that this was what was meant by "future arrangements", …. During the course of the meeting she criticised Ms Davies for doing this to her during her maternity leave."

i. In the event, the Claimant did not apply for the new role, rather it was her position that the redundancy process was a sham and that she was the subject of maternity discrimination. There was then, as the ET found, an extended stand-off between the parties, with each setting out their positions in writing, until 31 July 2019, when the Respondent dismissed the Claimant with immediate effect. In the meantime, in respect of the position of Finance Manager and Business Analyst, an offer had been made to the successful candidate on 12 July 2019, referring to "*a start date in August 2019 to be mutually agreed*".

The ET's decision

5. The core of the ET's analysis was succinct and reads as follows:

"99. The claimant alleges that the new job (in its revised form) amounted to a suitable available vacancy that she should have been offered as an alternative to redundancy …

100. It is clear that the new role encompassed the claimant's previous role, but in every other respect it was completely different. The main part of the job concerned business analysis, rather than the financial accounting that the claimant had been involved with. It was a full time role, compared with the claimant's then 40 day a year role, and was office based, rather than being home based."

6. The ET therefore found that the Respondent was under no obligation to offer the new role as a "*suitable available vacancy*" as it was an entirely different role, on terms (as to hours and

location) that were less favourable to the Claimant. The ET further accepted the Respondent's version of events (at para 119) that:

> *"119. … they had a plan for recruiting for one role, held interviews for it, and only after those interviews considered that the claimant's tasks should be included within that role. This was not, as the claimant saw it, a device concocted to terminate her employment because she was on maternity leave."*

The EAT's decision

7. Before the EAT, the Claimant argued that the ET had not applied the legal test to establish whether the Claimant had been made redundant. The test for redundancy, under s. 139 of the Employment Rights Act 1996 (**"ERA"**), is that the business's requirements for "*employees to carry out work of a particular kind*" have either ceased or diminished (or are expected to cease or diminish).

8. The Claimant's position was that the ET did not define the particular kind of work that was said to have ceased or diminished and there was nothing to suggest that the ET had applied the test under s. 139 ERA.

9. The Claimant further submitted that the ET's reference to the roles being "almost entirely different" and its rejection of the Claimant's position that the redundancy was a sham, were insufficient. It was contended that the Respondent's need for general accounting skills did not cease or diminish as the new role encompassed these aspects of the Claimant's role and that, here, there was a 1-to-1 replacement of the Claimant's role with the new position. As such, the Respondent's requirements for "*employees to carry out work of a particular kind*" had not ceased or diminished.

10. The EAT accepted that whether or not a dismissal is by reason of redundancy is a question of fact for the ET; **Shawkat v Nottingham City Hospital NHS Trust (No. 2)** [2002] ICR 7 CA, per Longmore LJ at paragraphs 17 and 19 (para 22 of the EAT's judgment). That is a question that is not, however, to be answered as a matter of impression: the ET must be satisfied that the facts of the case before it meet the statutory definition; **Robinson v British Island Airways Ltd** [1978] ICR 304 EAT, at p 308E-G. More specifically, where an employee loses their role in a business reorganisation that does not necessarily mean that they have been made redundant; as Burton P observed in **Kingwell and others v Elizabeth Bradley Designs** Ltd EAT/0661/02.

11. The EAT confirmed, at para 23, that "*[T]he statutory test remains the touchstone; thus it cannot be assumed that there is a redundancy once an employee of one skill is replaced by an employee of a different skill*."

12. At paras 34 to 39, the EAT found that the ET had not addressed its mind to the correct test under s. 139 of the ERA; and the ET needed to address the terms of the statute (per **Robinson**). This was a complex determination of fact and further complexity arose from the fact that a new role had been added to the organisation; taken together with the uncertainty regarding the number of hours required for the work undertaken by the Claimant. This was not a case where redundancy could necessarily be assumed from an apparent reduction in headcount.

13. The appeal was therefore allowed.

Take aways

14. The principle at the heart of **Ballerino** is in many ways a simple one: the law must be applied. At a subtler level, **Ballerino** highlights the legal difference between a business reorganisation and a redundancy; and the care that the ET and practitioners need to take when approaching redundancy situations in the context of a claim for maternity discrimination.

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Robin Pickard

3PB Barristers

020 7583 8055
robin.pickard@3pb.co.uk

3pb.co.uk