

Slaughter and May Podcast
Redundancy in focus: “People not employees”

<p>Clare Fletcher</p>	<p>Hello and welcome to the second in our series of Slaughter and May podcasts - Redundancy in Focus. I am Clare Fletcher a professional support lawyer in the employment team and today I am joined by Lizzie Twigger and Katherine Flower, both senior counsel in our employment team. Today’s episode is called “people not employees”. There are five key points that Lizzie and Katherine will discuss today. Firstly, does the workers contractual label matter when it comes to redundancies? Secondly, we will look at how some of the traditional terminology in redundancy doesn’t really fit in the current climate. Thirdly, how different the outlook is now from the last financial crisis in 2008. Fourthly, how mind set is going to be key for the next generation of redundancies, and finally the importance of getting the business case right at the outset. So Katherine if I can start with you, we’ve called this podcast “people not employees” does the contractual label actually matter?</p>
<p>Katherine Flower</p>	<p>Well redundancy protection is only attached to employees i.e. an individual whose entered into a work under a contract of service or apprenticeship. There is a discrepancy with the directive which apply to workers but for at least UK case law limits the applications for employees. What are these protections, well they relate to process for termination and in particular the decision making process and obligations on an employer who is contemplating redundancies and require subject to the relevant conditions being met, a collective consultation in certain payments to be made. This can be a costly exercise for employers in terms of time and money. So are there other alternative ways to look at headcount reduction and cost benefits?</p>
<p>Lizzie Twigger</p>	<p>Workforces are becoming more flexible and they’re increasingly made up of different types of worker of course, so I mean one question, does a zero hours employee even need to be considered for redundancy. The work just isn’t there so no work is required, no works done. Can you place the zero hour’s employee on a permanent freeze until the work picks-up again? And we’ve seen examples of this in some of the cinema groups which has had to close temporarily, whereas others, for example, Everyman has recently been in the press, their permanent employees have been put on layoff which is in effect re-designating them as zero hours contractors, since there usual work and pay is withdrawn, even if they remain in employment and what do you do with agency workers for example?</p>
<p>Katherine Flower</p>	<p>Well this group are not employees and their arrangements for their provision can normally be terminated or amended more freely and with more limited cost implications, but details of numbers of agency workers are part of the required information to be given to representatives in a collective consultation. Which in our experience have set an expectation that such workers are often regarded as primary targets for headcount reduction before looking at employee redundancies.</p>

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Lizzie Twigger	Yes and another type of contract I've been asked about a lot recently is that of fixed term contract worker. There's a few issues there, we know it amounts to a dismissal but it can be excluded from the numbers for the purposes of collective redundancy consultation. Although it has to be included, if it's terminated before the end of the term which has certainly caught some employers by surprise.
Katherine Flower	So a cost saving which involves letting FTCs expire will have no effect on the trigger for collective redundancy consultation. So this suggests that allowing FTC to expire might be another easy reduction, but is it, is there a discrimination angle here Lizzie?
Lizzie Twigger	And there's a very specific protection attaching to FTCs so that any targeting on the basis of the FTC status does need to be considered quite carefully. There is a question over this, and actually it's almost the opposite of the position on agency workers, this shouldn't in my view be a blanket assumption that an FTC role can go, an employer needs to assess carefully decisions taken for those roles and their removal. Albeit that the less than two years might look as though it gives more flexibility.
Katherine Flower	There is no doubt that even without the impact of Covid there's been a huge move in recent years to more flexible ways of hiring workers, where we've been moving away from traditional for some time. With the additional impact of the pandemic, can we even still think in the traditional terms of one establishment and headcount reductions?
Lizzie Twigger	I think we have to because that's actually what the law says, where an employer is proposing to dismiss as redundant, twenty or more employees at one establishment within a period of ninety days or less, then there's a duty to consult on a collective basis and there's some pretty stringent penalties for a failure to do so. So I think you ignore those terms at your peril but what does that mean in the new environment? And, you know you might even ask what an establishment anymore is.
Katherine Flower	And in relation to collective exercise, it's certainly true that the language 'at one establishment' is given rise to a significant amount of case law. Key cases like Woolworths have confirmed that an establishment means the entity to which the workers are assigned to carry out their duties, but a number of employers have recently made public their decision as to how to operate their businesses in the medium and long term, which involves far greater use of flexible working arrangements and employers working from home. In some cases even, this has meant employers giving up their office space completely, so what does this mean for our understanding of establishment, if all employees are ultimately largely working from home? Does that mean that in some sectors the employer will itself be the establishment?

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Lizzie Twigger	Yes quite. And how easily is headcount assessed in a world where employees have been working more flexibly and quite often remotely with much more limited visibility. Is it still possible to assess if there really is a diminished need for employees, the answers to those questions are quite likely to be more difficult and complicated than before Covid I'd have thought and not only does this mean that the employers rationale and decision making process will need to take such flexibility into account when making a proposal but it's going to have to be relevant for selection and assessment of performances round and much harder to do.
Katherine Flower	So I think they're saying, it will be for the employer to show why a role must be lost, rather than just done in a different way. Given the backdrop to any redundancies in the next twelve to twenty-four months will be employees having become quite practiced actually at working more flexibly and balancing working from home and childcare and other care and responsibilities. I think employers can expect employees to be more creative in coming up with alternatives for the loss of their job and employers will need to anticipate and respond to that to what might look like very different consultations.
Lizzie Twigger	And I think some of that will be very positive indeed. The airline pilots union BALPA they had discussions with EasyJet. EasyJet had originally anticipated over seven hundred pilot redundancies, they ended up in fact with 60 voluntary redundancies and 1,500 pilots opting to go part-time to save the jobs of colleagues, and this is in the world where pilots who are highly skilled professionals won't easily find other pilot roles anywhere for some time, so they individually are impacted but the employer when things are likely to pick up are going to need them and want them to go back to full time work so the employer gains too. And I guess that's another angle, really on what we might call the new redundancy exercise. We are dealing with the impact of people in the world that's going to look very different than even the one we faced back in 2018 in the recession.
Katherine Flower	Yes, people will be faced with losing their jobs where whole sectors of the economy has been radically changed or even in some cases disappeared. It's clear that quite apart from the physical risks of Covid, there are fear of mental health implications. Some of that will be the threat of job losses and our expectation is that there are very likely to be many more difficult consultations in which the human angle will be very much at the forefront.
Lizzie Twigger	Which is of course why we've called this podcast "people not employees" because I think now more than ever the personal impact of redundancy will be huge. It's far greater uncertainty in the job market. The recent joint ACAS, CBI, TUC statement stresses the importance of handling these exercises carefully and recognising the matters impact on employee's mental health particularly in this climate. I mean they use phrases like "do this openly", "do it generally" and "do it with dignity".

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Katherine Flower	It's perhaps concluding then, that in the next generation of redundancies, mind set will be key?
Lizzie Twigger	I think we are, we've been talking about new ways of working and the implications for the traditional approach to redundancies, we all keep saying it, that the current situation really is unprecedented. Past financial crises which has given rise to redundancies has really looked quite different, there is no furlough, no short term changes to terms and conditions, no suspended periods of alternative ways of working. There was a sense that there would be a recovery and, you know, there must be a sense that there will be a recovery again now but this time we don't know when and we certainly don't know what it will look like.
Katherine Flower	And an employer's perspective would be quite different now too, and employers may be more creative in terms of the alternatives to redundancy that they propose. The BALPS solution shows a really impressive working with employees, union and management in a collective way, to achieve what is cost surprising but definitely encouraging outcome.
Lizzie Twigger	And I'd have thought we can expect not just collective consultation but individual employers to do the same too, and the more creative and carefully thought through the option, the more difficult it may be to respond to, unless the employer is usefully open-minded, especially if as will inevitably quite often be the case, the answer eventually is that it needs to take the difficult to dismiss anyway.
Katherine Flower	It has always been the case though hasn't it that employers should approach redundancies and associated consultation in a spirit of openness and genuine dialogue, I guess it maybe isn't always like that though. It is true that it has been difficult for employers to make suggestions to avoid or mitigate redundancies that might be workable or even attractive to employers. But now employers will be far better placed to argue for a different approach and may even be able to go some way to demonstrating how it can work by reference to the last six months of so.
Lizzie Twigger	Yes, I think what's been lip service in the past could be significantly improved if it's possible properly to engage in some creative thinking. You know, perhaps consultation may be able to do properly that, and exactly what the legislation itself requires, you know the words are that you're looking for new ways, for ways of avoiding the dismissal reducing their numbers and mitigating the consequences of them, and if we can genuinely do that it would be, you know, quite a marked change I think. But to be ready for those discussions, I don't know about you Katherine, for me it's likely to be more important than ever to have a properly prepared business case for your approach right from the start?

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Katherine Flower	I completely agree, having a clear business case set out and articulated has always been key to implementing a redundancy programme because it central to being able to explain why the changes have been proposed. It will become even more important though, knowing what needs to change and why on the one hand, and what you need to achieve on the other will be critical for those consulting with employees and representatives.
Lizzie Twigger	Yes, if employees are making creative proposals, the employer needs to know in their minds their clear goal and they need to be able to easily explain it because, although how that goal reached maybe a more creative process than the pure numbers reduction of the past. The fact is the goal and the purpose of the change being implemented must be clear, and it must be kept in mind because otherwise, you know, as somebody said to me recently, the risk is that you are going to end up with an end result which is not what is needed, and you're going to have trouble going down the line. I think as long as a clearly articulated issue that a workforce can understand, if we can bring new approaches to the traditional loss of jobs exercise, well you know that's got to be a good outcome of this difficult pandemic, don't you think?
Clare Fletcher	Absolutely thanks Lizzie. And that brings us to the end of today's podcast, do look out for future episodes in this series which we will be publishing in the coming weeks. You can find all our podcasts via the Slaughter and May website. Thank you and goodbye for now.