

## **LIFO: is there life in the old dog yet?**

For very many years, “last in first out” (or “LIFO” for those of you who like acronyms) was one of the main criteria used to select for redundancies. It was objective and simple to apply.

The Employment Equality (Age) Regulations 2006 introduced an element of doubt as to the fairness of this criterion. The younger the employee, the less likely he or she is to have a long length of service and the more likely it is that he or she would complain about age discrimination. Consequently, since the introduction of the Regulations, many employment lawyers have erred on the side of caution and discouraged the use of LIFO as a selection criterion.

In *Rolls Royce plc v Unite*, the Court of Appeal seems to have taken a pragmatic view and decided that LIFO may be used in certain circumstances. As usual nothing is clear-cut, but the upshot of this decision is that:

LIFO will almost undoubtedly be lawful if used alongside other objective criteria and applied as part of a collectively agreed procedure. LIFO will potentially be discriminatory if used as the sole selection criterion.

What does this mean? It is the role that is redundant, not necessarily the person who does the role. Having decided to make a role redundant, you would follow a redundancy procedure that includes having to select which person should be made redundant. To make sure that the selection process is as fair as possible, you are expected to select employees for redundancy from within a pool of workers (i.e. a group of employees carrying the same or similar tasks). You then apply a number of objective selection criteria and ensure that they are objectively applied. So what could your selection criteria be?

- skills/experience/qualifications.
- length of service.
- attendance or disciplinary records - you must ensure that your records are correct, you should not rely on informal warnings or warnings given outside a proper disciplinary procedure, if relying on attendance you should ensure that absences are not related to a disability.
- standards of work – these should only be relied on if you have a proper and regular performance review system, vague statements about one person’s work being better than another’s will be too vague.

The best way not to fall foul of the law is to respect its spirit. Decide on what criteria you intend to use before you decide which employee out of the pool of workers you want to make redundant. You are free to use the selection criteria that will get the best outcome for your business needs, but whatever selection criteria you decide on, they must be applied fairly and objectively to all those employees in the pool of workers.

For more specific information or to discuss your requirements please call either Amanda Galashan or Julie Calleux at EmployEase on 0845 123 3741, or email us at [info@employease.co.uk](mailto:info@employease.co.uk).

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