Career focus

Facing redundancy

What is the law when a training post comes to an end? Employment lawyer Judith Firth discusses the question with particular reference to the recent glut of registrars in obstetrics and gynaecology

In the mid-1990s the Calman report required all doctors entering the specialist registrar grade to obtain a national training number (NTN), but issuing numbers to existing registrars was not straightforward. In obstetrics and gynaecology, large numbers of registrars were given numbers to enter the grade, even though it was predicted that, at the end of their training, there would not necessarily be consultant posts for them to go to. Five years later, the implications of that decision have come home to roost. Far more doctors hold the certificate of completion of specialist training in obstetrics and gynaecology than there are consultant posts. While this problem is obviously political, it also has legal implications for employers. Redundancy is a concept that was historically never associated with employment in the NHS, with its ever expanding needs. It has now become a real possibility, with the consequences of an increased risk of claims for unfair dismissal and claims for statutory redundancy payments. However, there are several hurdles that an employee must clear in order to demonstrate the right to make a claim of unfair dismissal or the right to a redundancy payment.

Employee or trainee?

Firstly, the right not to be unfairly dismissed and the right to a statutory redundancy payment arises only in respect of employees. There may be arguments as to whether a trainee in gynaecology has a contract of employment or merely one of training. In the case of *Daley v Allied Suppliers* 1983 the applicant was on a youth opportunities training programme sponsored by the respondents and was held to have a contract of training, with the work content being only secondary. The purpose of the contract was to enable the trainee to acquire experience and skills, and on this basis the applicant did not hold the status of an

Basic redundancy checklist

- Has the employee been fairly selected?
- Has a proper process of consultation been carried out?
Employees should be fully advised of the manner in which their positions may be affected and the way in which the redundancies are to be carried out
- Alternative employment should be considered and offered where possible
- Confirm redundancies. *Employees should be advised in an individual meeting of the final decision to make them redundant. This meeting should then be followed up in writing*
- Consider training managers in counselling and consultation skills

employee to bring a claim at the tribunal. A distinction was drawn between a contract where the primary purpose is to teach and to learn and one where the primary purpose is to carry out tasks on behalf of the employer. On this basis it could be argued that a senior house officer or specialist registrar is not an employee but a trainee and therefore has no employment rights. However, this argument would be very difficult to sustain. Medical training involves the treatment of patients but also involves carrying out specific tasks on behalf of the employer that are not part of structured training but of the master-servant (employer-employee) relationship. In this case the contract will be a contract of employment. In some circumstances a person can be both trainee and employee. In the case of *Oliver J P Malnick* an articulated clerk was held to be working under a training contract with her particular solicitor and under an employment contract with the firm at the same time.

Length of service

Secondly, an employee must have the required length of service in order to bring a claim of unfair dismissal. Until recently an employee was required under section 108 of the Employment Rights Act 1996 to have two years' continuous service to bring a claim. This limit

was reduced on 1 June 1999 to one year. Despite this reduction in the service requirement, continuity may sometimes be difficult to achieve, depending on training routes and geographical location. This may be further complicated by the difficulties of identifying who is the employer for purposes of continuity within the structure of the NHS. Generally, there is no statutory continuity between health authorities or authorities and hospital trusts, and, as a result, a mobile training contract or rotation arrangements may result in an employee failing to achieve the required continuity of service for a claim of unfair dismissal. However, an employee who enjoys stability, such as completing all levels of training within one trust, should achieve the required continuity of service with ease.

Fixed term contracts are often used in the NHS for the stages of training from preregistration house officer to specialist registrar. The non-renewal of a fixed term contract is a dismissal in accordance with section 95 of the Employment Rights Act. On this basis, in the event of a contract not being renewed a claim of unfair dismissal may arise as long as the employee has the required length of service. To avoid this risk the fixed term contract may contain a standard waiver clause under section 197 of the Employment Rights Act, whereby the employee waives

his or her right to claim unfair dismissal on the non-renewal of his or her contract. The Employment Relations Act, which received royal assent on 29 July 1999, will prohibit the use of waiver clauses to prevent claims of unfair dismissal (although the right to a redundancy payment may still be waived). This will mean that an employee whose fixed term contract expires without renewal and who is not successful in obtaining, say, a consultant post, could claim unfair dismissal.

Applying the principles

In the case of the fixed term contract of a specialist registrar expiring and there being no consultant post available, the resulting dismissal might be treated as a redundancy and allow a claim for a statutory redundancy payment. Recent case law would help the employee in making this argument. In *Safeway Stores v Burrell*¹ the employer carried out a management restructure, as a result of which the employee's position disappeared. While the details of this case might not seem particularly relevant, the reasoning of the tribunal in identifying the circumstances in which a redundancy may arise in the workplace generally is crucial. The tribunal stated that there may be several underlying reasons that lead to a redundancy. These might include a need to make economies, reorganisation, or a reduction in general requirements. The first question to be asked is, was there a diminution in the employer's requirements for employees to carry out work of a particular kind (redundancy)? In answering this question, it is irrelevant to consider (at this stage) the terms of the applicant's contract. Secondly, if there is a redundancy, was the employee's dismissal attributable to it?

Thus, a specialist registrar might argue that, as a result of the diminution in the requirement for medical staff (redundancy), his or her contract was

not renewed and that this is a dismissal and is attributable to redundancy. This has been controversial: the decision in the Safeway case was heavily criticised in another case (*Church v West Lancashire NHS Trust*²). However, the arguments put forward in the Safeway case were fully supported when a higher authority—the House of Lords—considered *Murray and another v Foyle Meats* earlier this year.³

Unfair dismissal

In the event that dismissal is by reason of redundancy it is crucial to the fairness of the dismissal that it is carried out in a proper manner. Case law has clearly established that for a dismissal to be fair in this context a tribunal will look at the overall question of reasonableness. This will involve ensuring that a proper process of consultation has been carried out. When fewer than 20 redundancies are proposed the employer is required only to consult with employees on an individual basis. This means warning the employee of the impending redundancy and the reasons for it and identifying with the employee alternative positions that may be available to avoid the potential redundancy. A failure to properly consult could lead to a claim of unfair dismissal.

Redundancy payment

An employee who has two years' continuous service at the date of

dismissal and is dismissed by reason of redundancy is entitled to a statutory redundancy payment based on age and years of service. Under section 197 of the Employment Rights Act, when the employee has a fixed term contract of two years or more the right to a statutory redundancy payment may be waived on non-renewal of the contract by including an express waiver clause in the contract. Employers would be well advised to include this type of clause in any fixed term contract of two years or more to avoid liability. It should be noted that continuity for the purposes of statutory redundancy pay is calculated by reference to employees' periods of continuous employment in the NHS as a whole and not merely with reference to their continuous employment with the employer from whom they claim the redundancy payment. The alternative position to redundancy may be that dismissal is for some other substantial reason. This could be on the basis that, although a redundancy situation might exist, the employee's dismissal was not attributable to or caused by it. Thus, it might be argued that the reason for the dismissal of a specialist registrar was that the training contract was a "once in a lifetime" agreement that had come to an end. Again, even when dismissal is not by reason of redundancy, an employer must ensure that it has followed a fair process with the employee,

which means consulting with the employee in relation to his or her likely dismissal.

Conclusions

The message to employers must be to follow a proper procedure in dismissing employees to minimise the risk of a successful claim of unfair dismissal. The arguments in the *Murray* case indicate that a specialist registrar whose fixed term contract expires without renewal and who has two years or more continuous service may be entitled to a redundancy payment. If this is the case employers should ensure that the relevant waiver for redundancy payment is valid and up to date to limit any financial liability on dismissal. The maximum compensatory award for unfair dismissal, which is currently £12 000, is due to be increased later this year to £50 000. Clearly, the financial penalties for getting it wrong are vastly increased, making even more crucial that the proper procedure is followed.

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¹ Safeway Stores plc v Burrell (1997) IRLR 200.

² Church v West Lancashire NHS Trust (1998) IRLR 4.

³ Murray and another v Foyle Meats Ltd House of Lords 8/7/99.

Further reading
Firth J, Nickson S. *Redundancy*. London: Institute of Personnel and Development, 1999.

Briefing

● The recent Career Focus article (classified.bmj.com/careerfocus/7205cf.htm) on the dangers of the corridor consultation prompted this response, which reinforces the point very well: "Some years ago I remember being asked by a well respected GP who had just come on to my list to sign a form stating that he was fit to continue on the FHSA list. He had just reached the age of 65. Meeting him in the hospital car park, I signed the form without demur. He had always appeared fit and active and was well-respected by his colleagues. Within two weeks he had a major stroke, and eventually died in his early 70s. I never even checked his blood pressure or tested his urine before signing the form."

● Most employers now have a policy on whistleblowing, according to a survey reported in *IRS Employment Trends* (1999;685:7-16). Individuals who would like independent advice outside the workplace can continue to contact Public Concern at Work through its website (www.pcaw.demon.co.uk/main.html).

● The fascinating *Pay and Benefits Bulletin* has a special report on millenium pay (1999;477:5-12). Most employers are paying staff double or triple time with additional bonus payments (median £250). Those with a First Direct bank account may wish to ring to congratulate call centre staff on New Year's Eve: they'll be on eight times their usual pay. Meanwhile the *Health Service Report* (1999;23:2-15) finds 40 NHS organisations that have ignored the government's imprecation for staff to "accept their obligations under normal terms of service" and will pay bonuses, mostly of the order of £100-£150, though the only specific mentions of medical staff in the report exclude them from such deals.

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