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The Matrix Revisited

How can you navigate the case-law so employers can lawfully include - in a redundancy selection matrix - scope for selecting the candidate with the best cultural fit (which many are keen to do)?

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The Framework

- Culture?
- Direct and Indirect Discrimination.
- Adopting a procedure that is capable of being defended against an unfair dismissal claim

Automatically unfair

- Redundancy concealing the reason or principal reason for the dismissal (ERA)
- Jury Service (S.98B);
- Being a Health and Safety Rep (S.100)
- Asserting a statutory right (S.104)
- But note particularly S.105
- The reason or principal reason is redundancy but..

S.105

- Selection is for an automatically unfair reason (no 2 year qualifying period)
- Redundancy is the reason or the principal reason but
- *(b)* it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and
- Any of Ss 105(1)(c) (2A to 7N)

Protections

- a reason relating to jury service;
- a health and safety reason as specified in [S.100](#);
- a reason relating to a shop worker's or betting worker's refusal to do Sunday work as specified;
- a reason relating to the employee's rights under WTR and various other industry specific regulations;
- employees under the age of 18 for exercising, or proposing to exercise, their right to participate in education or training as specified in S.101B ERA - S.105(4B));
- a reason relating to the employee's role as an occupational pension scheme trustee;
- a reason relating to the employee's role as an employee representative or candidate for the purpose of collective redundancies or a transfer of an undertaking;
- that the employee made a protected disclosure
- a reason relating to the employee's assertion of a statutory right
- a reason relating to the employee's rights under the [National Minimum Wage Act 1998](#)

Protections(2)

- a reason relating to the employee's rights under the [Tax Credits Act 2002](#)
- a reason relating to the employee's right to request flexible working
- a reason relating to the employee's right to request study or training as specified (subject to an exemption for employers with fewer than 250 employees)
- that the employee took protected industrial action
- a reason specified in relation to the Transnational Information and Consultation of Employees Regs
- a reason specified in the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 SI 2000
- a reason specified in the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 SI 2002
- a reason specified in European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009 SI 2009

Protections(3)

- a reason relating to a trade union blacklist prohibited under the Employment Relations Act 1999 (Blacklist) Regulations 2010 SI 2010;
- a reason specified in Reg 17(3) of the Agency Workers Regulations 2010 SI 2010;
- selecting an employee for redundancy for reasons connected with pregnancy, maternity suspension, maternity leave, paternity leave, adoption leave, parental leave, dependant care leave or 'keeping in touch' days. Dismissal is also automatically unfair if the employee becomes redundant during or at the end of his or her maternity, paternity or adoption leave and the provisions relating to offers of suitable alternative employment are not complied, all under the Regulatory provisions for Maternity and Parental Leave and Additional Paternity Leave;
- selecting for redundancy for a reason (or principal reason) relating to his or her membership or non-membership of a trade union, or to his or her participation in trade union activities or use of trade union services trade union recognition or derecognition – under TULR(C)A

Selecting the Pool

- If a Union is recognised seeking to agree with the Union the composition of the pool
- The employer's choice of Pool within a range of reasonable responses, see *Capita Hartshead Ltd v Byard* [2012] IRLR 814 (EAT)
- Occasionally possible to have a pool of one
- In Capita the pool was the same size as number of redundancies
- Type of work ceasing or diminishing
- Normally employees doing the same or similar work

Selection Matrix

- Objective and Capable of Independent Verification
- Subjective Criteria may be adopted if applied objectively
- “Company Values” “Employee Trajectory and future potential”
- In *Swinburne & Jackson LLP v Simpson UKEAT/0551/12* the EAT para 26" ..our law recognises that in the real world employers making tough decisions need sometimes to deploy criteria which call for the application of personal judgment and a degree of subjectivity"

Factors

- Two managers involved
- Careful about disclosable documents
- If elements require a subjective assessment then the managers will have to be able to explain and defend their assessment
- Multiple elements weighted “range of reasonable responsible”
- The criteria have to be fairly applied

Factors

- Performance and ability focused around current and future needs
- Ideally reference to written records, appraisals if a complete record or more than one manager undertaking assessment
- Attendance records may have disability and maternity issues
- length of service may raise age discrimination issues
- Consultation with the employee on their score



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