

REDUNDANCY SELECTION

In a redundancy selection process, must you put everyone at risk if your objective test clearly identifies who should go? How do you balance (1) objective factors, (2) the outcome of HR selection exercises, and (3) management assessment?

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Introduction

Redundancy processes have an archetype of sorts. If perfectly conducted, such a process should contain the following steps:

- the employer chooses the pool from which redundancies will be made;
- some, preferably, objectively measurable selection criteria are drafted, against which those in the pool will be scored later in the process;
- a first round of consultation meetings is conducted to discuss the redundancy situation and the draft selection criteria;
- the employer provisionally applies the selection criteria to those in the pool;
- a second round of consultation meetings is held to discuss with individuals their provisional scores as against the selection criteria;
- the employer confirms those who are selected for redundancy; and
- a third consultation meeting is held with the person(s) with the lowest scores to see if a suitable alternative to their redundancy can be agreed (such as a role elsewhere in the business, or changes to their working arrangements).

This can potentially be a long-winded process for an employer and also one that can be distressing for both the staff eventually selected and those who remain. Therefore, it is understandable that an employer may want to customise the process to its needs. It may want to devise a way to avoid putting all its staff at risk, thereby shortening the process and limiting its scope. Alternatively, it may want to tailor the selection criteria to the particular needs of its business as it enters a redundancy situation.

In this paper, the two problems posed by the title of this session will be taken in turn. Firstly, does an employer need to put everybody at risk if it knows not everyone will be dismissed? Secondly, how far do an employer's redundancy selection criteria need to be objective in order to be fair?

Must you put everyone at risk if your objective test clearly identifies who should go?

To follow the archetypally "fair" procedure set out above would mean consulting everyone in the pool at the outset, thereby putting them 'at risk'. If the employer already knows that particular people have fallen short against its criteria, it may not want to unsettle staff in the pool who are not truly at risk at all. Going through the maximum number of consultations also takes the most time and resources, which most employers would prefer to avoid if possible.

An employer may therefore decide to truncate the redundancy consultation procedure by applying its "provisional" selection criteria to the pool and putting at risk only those who "provisionally" score poorly. This saves the high scorers from the upset of being put at risk, and

saves the employer from having to consult with them when they know they will not be made redundant which has its own risks.

From a commercial point of view it seems like a 'no brainer', but is it lawful?

Within that there are two distinct, but overlapping, questions: (i) how far is it ever lawful to delay putting employees 'at risk'; and (ii) in particular, does having a cast-iron objective test allow you to short circuit the process?

The risks of not putting people 'at risk'

At the outset, one should note that if an employer's handbook, policies or contracts commit it to conducting a particular redundancy procedure, then, deviating from the prescribed procedure would not only be breach of contract, but would almost certainly render the resulting redundancy dismissals unfair.

Even for employers who are not hamstrung by their policies, any decision to truncate a redundancy procedure carries with it some degree of risk.

In every case, the consequence of taking a shortcut is that the person(s) eventually made redundant were put at risk and consulted later in the process than they would otherwise have been. The timing of the consultation carries its own risks.

The employer arguably also loses the benefit of employees' suggestions to resolve the situation. As the Employment Appeal Tribunal said in *Poat v Holiday Inn Worldwide*¹:

"It is, of course, normal for warning and consultation to take place and, as has been pointed out in many, many cases, it really is a matter of common sense; the purposes of consultation are various. First of all, leaving aside anything else, it is courteous and humane to consult people when you are thinking of making them redundant, or have decided provisionally to make them redundant. Of course, there is the possibility that the employee may have ideas for ways in which redundancy can be avoided altogether, so far as he or she is concerned. The employee may be able to make suggestions about alternative employment, may indicate that he or she would be prepared to accept less well-paid work or work on less favourable terms, or to retrain for other work, or to go abroad, even. Or to do things which would help the employer out of the emergency which arises. Then, of course, there are other matters which have been pointed out in other cases, such as the question of the length of notice which is appropriate and whether the employer can help the employee in some other way by finding him employment, perhaps with a quite different firm, by giving him a good reference and so forth. These are all matters which might be raised in consultation. Clearly, it will be a very bold thing for any employer to say or, indeed, any person to say, "I can dispense with consulting somebody. Nothing that person could possibly say would make me change my mind in any material way". That is a very strong thing to say."

At the end of a process like this, the person(s) (and the Tribunal) eventually made redundant may (perhaps rightly) get the impression that the decision was in some way predetermined or that their fate was sealed before they were consulted.

These factors may be taken into account by an Employment Tribunal considering whether a redundancy procedure was fairly conducted. This, as was made clear in *Mugford*², is a question of fact and degree for the Tribunal.

¹ EAT/883/93

² *Mugford v Midland Bank Plc* [1997] ICR 399 at 406H

The Tribunal will therefore take into account all relevant factors, including the size of the pool.

It is important to remember that we are not discussing a situation where an employer determines that the appropriate pool is the same size as the number of employees who need to go e.g. a pool of one when there is to be a single redundancy, in which case that employee is essentially self-selected for redundancy.

This was the case in *Alvis Vickers Ltd v Lloyd*³; Mr Lloyd was the company's sole export manager with responsibility for Greece, Cyprus and Portugal, and the company had determined that "*the potential for meaningful new business in Greece, Cyprus and Portugal was limited*". Therefore, it was held reasonable for the employer to have placed Mr Lloyd in a pool of one and, whilst the Employment Tribunal had "*grave doubts*" as to the level of consultation, that was not the reason for the dismissal being unfair.

The factors affecting the selection of the pool are not within the scope of this paper. Instead, the question relates to how and when one identifies that certain individuals among a pool of multiple people are at risk of redundancy, and the size of pool is a factor in that assessment.

Size of the pool

It may be that, irrespective of any other risks a truncated redundancy procedure may entail, it simply is not considered to be fair in view of the size of the pool chosen by the employer.

It seems from the case law that very small pools – particularly, pools consisting of two people – are not apt for a shorter redundancy procedure.

See for example the case of *Grant v BSS Group Plc*⁴. In that case, the EAT held that, if a pool of two was a reasonable one for the employer to choose one employee from, the failure to consult both people equally would contribute to a finding of unfair dismissal:

*"The exercise becomes a simple comparative exercise between two people... that fact makes it of particular importance for the employer to ensure that the actual process of applying the criteria to the two people involved [is] carried out fairly and even-handedly between the two of them before making a genuine decision which of the two was to be selected to have to be made redundant."*⁵

There have been no reported cases on the point since *Grant*, but one can imagine that this kind of argument would continue to be successful in cases involving a small pool given that the conceivable benefits to truncating a process (including saving time and resources and reducing the number of people alienated by being put at risk) do not have the same impact where a pool is so small.

Assume, then, that we are talking about a somewhat larger pool, such as an entire team or department of the business. In that context, one can look more closely at the particular risks of a truncated redundancy procedure resulting in a finding that the eventual dismissals were unfair in all the circumstances.

Timing of consultation

The stage during the process at which the employer chooses to consult the employee(s) is very important. Waiting until late in the process to speak to staff is a factor which may tend against

³ *UKEAT/0785/04*

⁴ *UKEAT/0832/02*

⁵ *ibid.* at paragraph 28

the fairness of a dismissal; for example, the dismissal in *Air 2000 Ltd v Mallam*⁶ was found to be unfair because Mr Mallam was only consulted once his employer had made the decision to remove his role.

The key for an employer considering truncating its redundancy process is therefore to avoid cutting it down so much that the first an employee knows about the process is once they have been chosen for dismissal.

Referring to the ideal process set out in the introduction, it would mean starting with the ‘second’ consultation – the stage where the pool has been provisionally formed, the criteria provisionally identified and some staff have been provisionally scored, but no decision has been finalised. That is considerably safer than waiting until the ‘third’ consultation, where the lowest scoring employee(s) are informed of their redundancy and suitable alternative vacancies are explored.

If an employer has reached the view that its ‘objective test clearly identifies who should go’, it has very likely bypassed the second consultation and skipped right to the end of the process.

The reason that the timing of consultation is relevant to the fairness of a dismissal is that it can impact on whether the dismissal decision is viewed as having been predetermined (that is to say that there is nothing the employee could say to change the situation).

Predetermination

If it appears that a redundancy decision was a *fait accompli*, a whole host of issues can arise. Most seriously, it could give rise to the impression that the redundancy process was a sham or pretence, which would very likely result in an unfair dismissal.

Even if a tribunal were to find that there was in fact a redundancy situation and a genuine process, it could still be found to be unfair if the consultation were inadequate.

There is good authority to the effect that an adequate consultation will only have taken place if it is meaningfully conducted at a ‘formative stage’; that is to say, before anything has been decided and before the employer has identified “who should go”.

That authority is the *British Coal*⁷ case. In that case, the Divisional Court stated:

“Fair consultation involves giving the body consulted fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely.”

An employer looking to streamline the redundancy process will therefore need to be clear that its process is still genuine and that it still has an open mind as to where it will lead. This is likely to be an easier picture to paint if there is more than one person provisionally selected for redundancy on the basis of the provisional scoring; a lone, provisionally redundant employee may well feel unfairly singled out.

The impact of having cast-iron selection criteria

It is problematic for an employer to conclude that having an objective test set in stone allows it to skip elements of a redundancy selection process.

⁶ *UKEAT/0773/03* and *UKEAT/0058/04*

⁷ *R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price* [1994] IRLR 72

The first issue is in the assumption that the test ‘clearly identifies who should go’. More about selection criteria will be discussed later in this paper, but suffice to say at this stage that a sensible selection test will normally take into account a number of factors. Therefore, the chances of a particular person (or particular people) standing out as the clear people to lose are slim. In a real world scenario, it is more likely the scores for people in the pool will occupy a spectrum from stellar performer to lacklustre, and there will be variations in scores across criteria.

The second issue is the criteria themselves. The general expectation is that employers will have consulted with employees in the pool as to the selection criteria to be applied. Beginning the consultation process at such a point where provisional selection has taken place deprives potentially affected employees of having a say in the criteria before they are applied to them.

We could give an employer the benefit of the doubt and assume that the objective test it used had previously been agreed with a union or the staff more generally, and then been recorded in its redundancy policy as the test it will always use. Even in this scenario, the employer cannot as of right skip to the end of a redundancy selection process.

Even if the criteria are agreed in the abstract, an employee, if consulted, may have been able to raise good arguments as to why a particular criterion should not be applied in a particular case. Equally, they may be able to give a reasonable explanation for why their score against a particular criterion is lower than average.

Asking for the employees’ comments on their scores can capture some of this input; it is therefore wise to give employees a breakdown of their provisional scores and give them the opportunity to comment. This was where the employer in *John Brown Engineering v Brown*⁸ fell down – it had a set of selection criteria it used in every redundancy situation, went ahead and scored pooled employees, then failed to give the employees their marks. The Tribunal at first instance stated:

“...there is a very clear distinction between a situation where an employer provides full information of the assessment system and the individual mark of the employee selected for redundancy and, as in the present case, where the respondents took the decision to withhold markings. By doing so the employee had no opportunity to raise any specific matters which might have had a bearing on the mark achieved, such as his attendance or timekeeping record or even simply to check the arithmetical accuracy of his total score.”

The Scottish EAT upheld that decision, holding that the lack of transparency regarding the selection marking turned the process into a sham.

An important facet of consulting at an earlier stage is that the failure to do so could open an employer up to discrimination claims. If an objective criterion such as level of attendance is applied, the person who had taken the highest number of days off that year is the obvious choice. However, applying that criterion blindly could be indirectly discriminatory. For example, it would put disabled employees at a particular disadvantage, and perhaps also female employees who have to take days off for childcare issues. Without giving the employee the chance to explain their reasons, an employer runs the risk of discrimination claims as well as arguments that a resulting redundancy was unfair.

Another way an employer can insulate itself against arguments against the selection process is to ensure that the process of marking each employee is clearly documented, and the markers’ notes retained. If an employer is able clearly to evidence the way it went about scoring employees and why it scored particular people in the way that it did, it will give the Tribunal something to go on

⁸ [1997] IRLR 90

in holding that the process was fairly conducted. The failure to adduce any evidence as to the marking process was a pitfall for the employer in *King v Eaton Ltd*⁹.

One last way in which an employer can shore up their truncated redundancy procedure is to offer the right to appeal. If it takes the form of a rehearing, a disgruntled employee will be able to use the appeal to challenge the application of the objective test at that point, which could render the dismissal fair if properly administered¹⁰.

Polkey arguments

If an employer chooses to conduct a shortened process on the basis of its objective test, and the redundant employee brings a claim in the Employment Tribunal for unfair dismissal, there are two lines of argument.

Obviously the first is that the decision to dismiss was fair, and so was the procedure by which it was made. Alternatively, it could argue that even if the dismissal were procedurally unfair because of the lack of consultation in the selection process, the ex-employee should not be entitled to anything because a fuller consultation would not have changed the outcome.

An employer could argue that going through a full redundancy selection process would have been futile because, from an objective standpoint, it was obvious at the outset who was to be made redundant.

The *Polkey*¹¹ case is well-known, as is its effect on reducing compensation by a percentage of up to 100% on the basis that the employee would have been dismissed in any event had a fair procedure been followed.

In *Ashby v JJB Sports Plc*¹², this was the EAT's decision – whilst there had been a procedurally unfair redundancy in that Mr Ashby had not been consulted, it was patently clear from the start that he did not have the HR experience necessary to fill the new role of HR Director once his role as Head of Human Resources and Payroll (which made more use of his background in payroll management) was cut. In upholding the ET's decision that the dismissal was fair, the EAT stated:

*“This was, in truth, a case far from the ordinary case of redundancy selection; it concerned a manager in a very senior post which was being lost due to a substantial reorganisation. The Tribunal applied the correct test; and we see no error of law in its reasons.”*¹³

As indicated in the above quote from David Richardson J in *Ashby*, this kind of case is rare and employers seeking to rely on that inevitability argument are running a risk of liability. This is because of the way that the inevitability must be judged; in *Poat*, Judge J Hull QC was keen to highlight the distinction drawn between the two kinds of case discussed in *Polkey*. He said:

“What the Tribunal has to do is not to ask “would it have made any difference if the employer had consulted?” but say to itself, “Could the employer, in the circumstances, reasonably have concluded at the time when he reached his decision that it would be utterly futile or utterly pointless to engage in consultation?”

⁹ [1996] IRLR 201

¹⁰ *Lloyd v Taylor Woodrow Construction* [1999] IRLR 782

¹¹ *Polkey v A E Dayton Services* [1987] IRLR 503

¹² *UKEAT/0114/12*

¹³ *ibid.* at paragraph 31

It is, of course, logically a fairly fine distinction between the two matters because obviously the post hoc question, as I have called it, "would it have made any difference" which, as the House of Lords says, is highly relevant to the assessment of compensation, will often be answered in the same way as the first question I have asked. Equally, logically, there is a very clear distinction because, in the one case, one must look without the wisdom of hindsight, at the situation as it was at the time of the dismissal and immediately before. In the other one, of course, one can look at matters which arise afterwards."

This makes clear that there are two points at which the question of inevitability arises: firstly, when assessing liability, which requires that the employer reasonably believed at the time that consultation would be futile, and; secondly, when assessing a percentage by which to reduce a Claimant's compensation, in which situation the benefit of hindsight can be used.

Conclusion

All in all, despite the legal risks it is generally sensible for an employer to shorten the redundancy process by only consulting with at risk employees once they have been provisionally scored against provisional selection criteria. There are good commercial reasons for choosing to do so – the main ones being employee engagement, time and resources.

Owing to case law surrounding small redundancy pools, it is likely that such a decision will be safer where the identified pool is fairly large.

The mere fact alone of having a set-in-stone, objective set of criteria will not be enough to ensure that the employer is free from liability for failure to consult. However, having decided to shorten the process, there are things an employer can do to ensure that the process is more likely to be considered to have been conducted fairly. The first is to avoid leaving consultation too late, starting at a time when a final decision is still to be made and making that fact clear to staff. The second is for the employer to ensure that its selection criteria are applied fairly, and that records are kept to that effect. Once the provisional scores are reached, affected employees should be given the breakdown and afforded the opportunity to comment. Finally, employers may elect to offer an appeal by way of rehearing to increase the chances of remedying any gaps from earlier on in the process.

Disenchanting a large portion of a workforce by putting them all at risk despite only a few jobs ultimately needing to go is far from ideal. A Tribunal's job in assessing fairness is to take into account all of the circumstances, so as long as the shortened procedure is conducted fairly and even-handedly, there are merits to approaching a situation in this way and whilst the courts have not tackled this issue head-on, there are good arguments to be made that it is lawful. Reaching a clear conclusion as to who should go (subject to suitable alternative employment) before having consulted is likely to be a bridge too far.

Even if the risk materialises and the dismissal is found to be procedurally unfair, the employer could argue that the employee would have been made redundant in any event after a fair process. This argument could, if successful, significantly reduce the financial liability attaching to the unfairness of the dismissal.

How do you balance (1) objective factors, (2) the outcome of HR selection exercises, and (3) management assessment?

The nature of the selection criteria set by an employer in a redundancy selection process is relevant to whether or not the process was conducted fairly.

As discussed above, the ideal scenario is that the employer consults the union or its workforce more generally on the selection criteria it proposes to use, before it applies them. This allows the union or workforce to point out difficulties with any of the proposed criteria and make suggestions as to how they could be modified.

Ultimately, however, an employer has a relatively wide discretion as to the criteria it chooses. A Tribunal is not permitted to substitute its view or to interfere with what was chosen unless the criteria are those no reasonable employer would use.¹⁴

This does not equate to total free reign, however, and employers are still expected to choose fair selection criteria, if sensibly possible, capable of unbiased application to everyone in the pool.

Objective criteria

The starting point on what fair selection criteria should look like is *Williams v Compair Maxam Ltd*¹⁵, where Browne-Wilkinson P (as he then was) set out guidelines including the following:

“Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against things such as attendance record, efficiency at the job, experience, or length of service.”

Clearly, then, the fairest kind of selection criteria are those which are objective and capable of measurement. Two of the examples mentioned in the above quote – attendance records and length of service – were historically particularly commonly used and very straightforward in any kind of job to measure objectively.

Depending on the nature of the work, the other two examples – efficiency and experience – are also sometimes capable of objective measurement. In some jobs, efficiency will be measured by how many set items of work each staff member gets done in a set time period (such as number of products made per hour or number of calls answered per day), although many jobs are less easy to quantify numerically.

Experience could quite easily be conflated with length of service, when in reality it should take into account the employee’s expertise including that gained at other workplaces; again, in some jobs, this is easy to quantify, such as in the legal sector by reference to a solicitor’s PQE. Otherwise, things like qualifications and training are likely to be relevant to a score for experience. An employer may also decide to score employees on the basis of experience in particular tasks, or with using particular machines¹⁶.

The benefit of using fully objective criteria is that they are straightforward to quantify and to compare between employees; this generally reduces the scope for prejudice or bias from managers.

That said, using exclusively objective criteria is not without its pitfalls, both in terms of the effect of particular criteria and the reliance on entirely objective criteria.

The classic criterion for redundancy selection is ‘last in, first out’ (“LIFO”). In other words, this is length of service. It has become less commonly used in recent years as the potential pitfalls to using it have become more apparent. Another theory is that LIFO has gone out of fashion now

¹⁴ *Earl of Bradford v Jowett (No. 2)* [1978] IRLR 16

¹⁵ [1982] IRLR 83

¹⁶ *Abbotts and Standley v Wesson-Glynwed Steels Ltd* [1982] IRLR 51

that the influence of unions has declined, as unions tended to put it forward as the fairest criterion.

From a legal perspective, the problem with LIFO as a redundancy criterion is that it is potentially indirectly discriminatory. Favours long service puts young people (who naturally cannot have been working for as long) and women (who are more likely to take career breaks to care for children) at a substantial disadvantage. Therefore, an employer relying solely or mainly on LIFO for the purposes of redundancy selection is at the risk of claims for age and/or sex discrimination, unless the use of it as a criterion can be objectively justified.

It is likely to be easier objectively to justify using length of service as a criterion if it forms part of a set of varied criteria. This was the situation in *Rolls-Royce plc v Unite the Union*¹⁷, where points were awarded for length of service, as well as a number of other criteria. The Court of Appeal held that whilst that criterion was indirectly discriminatory towards younger workers, its use was objectively justified in pursuit of the company's legitimate aims of rewarding loyalty and maintaining stability in the workforce. The fact that it was one criterion among several helped ensure it was a proportionate means of achieving those aims.

Nevertheless, for those reasons, and also because the correlation between longest servers and best performers is far from exact, employers these days more commonly include a number of other criteria in the redundancy selection matrix, and/or use LIFO as a tie-breaker.

The employer in *Northgate HR Ltd v Mercy*¹⁸ did precisely that – Mr Mercy and the other person in the pool had achieved the same number of points by the end of the selection process, so Mr Mercy was identified for redundancy on the basis of having 12 years' service compared to his colleague's 20 years. The use of that method was not criticised (though the Employment Tribunal's overlooking a "glaring error" in the scoring was).

It is also unwise from a purely practical perspective to rely heavily on LIFO to select employees for redundancy. This is because, without the input of any other factors, it is a somewhat arbitrary way of deciding and will not guarantee that the people most suited to helping the business in difficult times will be retained.

A similar issue arises from slavishly following attendance records. As described above, the danger with counting days off against employees (especially if they have not been consulted to explain the absences) is that it could be relying on inaccurate information or overlooking good reasons for the absences.

The consequence of this is that women (either due to pregnancy-related sickness absences or due to having to stay to care for ill children) are substantially disadvantaged, as are those with disabilities. Therefore, consultation is important. Even then, you can be left with some very fine distinctions. Reliance solely or mainly on attendance is discouraged.

Given the pitfalls that some traditional criteria have, an employer may be forgiven for wondering, therefore, whether it would be easier to simply scrap the whole thing and create a whole new means for selecting redundancies.

This was the plan devised by the employer in *Mental Health Care (UK) Ltd v Biluan*¹⁹. It was faced with a genuine redundancy situation and, because its appraisal records for the pool were incomplete, it decided to import the assessment centre arrangements it used for the recruitment

¹⁷ [2009] IRLR 576

¹⁸ [2007] EWCA Civ 1304

¹⁹ UKEAT/0248/12

of new staff to identify who should be made redundant. The employer was expressly trying to apply some uniformity to the test and eliminate bias.

There was a maximum score of 100 available in the overall redundancy scoring exercise, with 20 points each relating to disciplinary record and sickness absence respectively, and the remaining 60 hinging on the outcome of the competency assessment.

The competency assessment comprised three elements worth 20 points each: a written assessment; an interview involving 5 questions worth 4 marks each; and a group discussion about a hypothetical scenario. Everyone in the pool took the tests and was scored accordingly.

This process was admitted to have thrown up some unusual results, as even some managers expressed surprise at which staff had been chosen for redundancy, as they were regarded as “*very good workers*”²⁰.

The Employment Tribunal and the EAT were surprised by this approach. In its judgment, Underhill J (as he then was) in the EAT stated:

*“the question of what selection criteria to adopt is a well-recognised example of the kind of issue on which there will typically be a wide range of reasonable choices; and the same can be said for the methods of competence assessment to be used.”*²¹

On the other hand, Underhill J went on to say:

*“it is indeed in our experience very unusual for an employer conducting a redundancy selection exercise primarily on the basis of competence to base its decision on that issue entirely on assessments of the kind carried out here, without any reference to past appraisals or the views of managers; and we have already noted that it produced some outcomes that took everyone by surprise.”*²²

Ultimately, the decision to rely predominantly on the objective criteria set out in the competency assessment was held to be unfair, largely because it was out of touch with the employees’ actual performance at work. In its conclusion, the Court of Appeal held:

*“We appreciate that the Appellant took a lot of trouble over this redundancy selection exercise and put a lot of resources into it, which is a principle to be applauded. But the fact is that it chose an elaborate and HR-driven method which deprived it of the benefit of input from managers and others who actually knew the staff in question, and which by its very elaborateness was liable to be difficult to apply consistently. That method produced results which were acknowledged to be “very surprising” but which were persisted in because the processes were thought to be so “robust”. We are not surprised that the Tribunal thought that a blind faith in process – the characteristic déformation professionnelle of HR departments – had in this case led to the Appellant losing touch with common sense and fairness. The goal of avoiding subjectivity and bias is of course desirable but it can come at too high a price; and if the fear is that employment tribunals will find a procedure unfair only because there is an element of “subjectivity” involved that fear is misplaced.”*²³

It is apparent from this decision that relying only on objective criteria is not always the right decision, and this is a sentiment echoed more widely in the case law. Essentially, it is possible for a selection test to be too objective.

²⁰ *ibid.* at paragraph 10

²¹ *ibid.* at paragraph 25

²² *ibid.* at paragraph 25

²³ *ibid.* at paragraph 35

In *Nicholls v Rockwell Automation Ltd*²⁴ the EAT made clear that not all selection criteria need to be objectively verifiable by reference to an independent source, and that the selection process need not be “*the subject of box-ticking exercises*”.

A similar sentiment was shared in *Mitchells of Lancaster (Brewers) Ltd v Tattersall*²⁵ and *Swinburne & Jackson LLP v Simpson*²⁶. In *Simpson*, the EAT stated 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.*”²⁷

This opens the door for managers and HR departments to use a bit more judgment in how they determine who to make redundant, so long as the more subjective criteria are capable of being applied in an objective way across the pool.

Subjective criteria

That said, reliance purely on subjective criteria to select employees for redundancy is risking a finding of unfairness, as it leaves open significant scope for redundant employees to argue that they were chosen due to some improper reason whether arbitrary (such as personal loyalties to others) or malign (like discrimination).

However, as we have seen from the case law, the inclusion of some more subjective criteria into the mix is not just commonplace, but arguably preferable.

A caveat to that is the EAT’s statement in *Graham v ABF Ltd*²⁸ that the more subjective or nebulous a criterion is, the more important it is from a fairness perspective to consult with employees on it.

HR departments often develop their own selection exercises (which are more effective than that used by HR in *Biluan*) using a mix of objective and subjective criteria aimed at suiting the needs of the business. This is no bad thing. As HR tends to have a more top-down view of the company’s needs during a redundancy situation than an individual manager might, it can be helpful to have them work up a first draft of the criteria to be refined by managers.

As part of a redundancy selection exercise, HR sometimes opts to map employees’ trajectories in the company to predict future potential. The Employment Tribunal in *Ganesan v Opera Solutions Ltd*²⁹ held that this is potentially a fair criterion to apply, despite the necessary element of subjectivity.

HR might also have a way to measure which employees fit best with the company’s long-term goals and its values. Adherence to “*company values*” was accepted in principle as being a potentially fair criterion so long as it is applied consistently and transparently³⁰. On the other hand, “*attitude*” was deemed too vague to be a fair criterion without some means of objective measurement behind it³¹, as was straightforwardly asking who was “*best suited for the needs of the business under the new operating conditions*”³².

²⁴ *UKEAT/0540/11 & UKEAT/0541/11*

²⁵ *UKEAT/0605/11*

²⁶ *UKEAT/0551/12*

²⁷ *ibid.* at paragraph 26

²⁸ [1986] IRLR 90

²⁹ ET/2203343/09

³⁰ *Howard v Siemens Energy Services ET/2324423/08*

³¹ *Graham v ABF Ltd* [1986] IRLR 90

³² *Smith and others v Haverhill Meat Products Ltd* ET 7631-40/85

At the same time, as helpful as HR can be in corralling a redundancy situation, one of the reasons the employer fell down in *Biluan* was that they had overlooked the feedback of managers as to the employees' real world performance.

This makes it clear that there will be a benefit to having management-based criteria factored into most redundancy selection processes.

Managers' input will probably be most useful in relation to the assessment of employees' performance, as they are the people with the most first-hand experience of their work.

The issue is that 'performance' in the abstract is open to interpretation unless parameters are attached to it. The best way of measuring it is with regular appraisals conducted across the board by reference to defined criteria. The record of the outcome of the appraisal will be the most accurate record of performance in most industries, unless there is a more cut-and-dried way to measure it (like performance versus sales targets for salespeople, or recorded hours over target for solicitors). The other benefit is that if an employee has agreed with the feedback set out in the appraisal form and signed their name to it, they have limited scope to challenge it being taken into account in the redundancy process.

An employer is on less solid ground where it relies on anecdotal evidence from different managers, but disregarding that input completely is probably not the way to go.

A better route is probably to adjust the weighting of the criteria so that, whilst the more subjective measurements are not excluded entirely, they are not determinative.

Weighting the criteria

As implied in the question, when it comes to constructing a fair redundancy selection process, it is all about finding a balance. A good selection process will probably include a mix of objective and subjective criteria which come from a variety of sources, including HR, management and a list of classic go-to criteria.

Employers have a margin of discretion as to how they choose to weight their criteria – as with the criteria themselves, it just has to be within the sphere of reasonableness. The weightings will normally reflect those matters which are most important to the employer at the time and in particular with an eye to the future needs of the employer. Performance-related criteria will often attract a rather high weighting, where more administrative matters such as attendance falling at the lower end of the spectrum.

As discussed above, the weighting on a length of service criterion should generally be low given the potential for discrimination claims.

Beyond that, it is essentially a matter of an employer's judgment as to how to weigh up different criteria. That said, there should at least be some logic to that weighting and the employer should be able to provide some kind of explanation for it. The Employment Tribunal in *Simpson* "expressed some surprise" about the weighting method used; whilst the EAT noted that this particular point had no consequential effect on the case, it described this as a 'raising of the judicial eyebrow' in circumstances where "the Tribunal were not being provided with an explanation for why weighting was necessary at all or why it was deployed in the way it was"³³. This should not be too taxing for employers – so long as some thought has gone into the weighting and it is not arbitrary, it should be relatively straightforward to explain.

³³ *UKEAT/0551/12* at paragraph 46

Application of the criteria

The nature of the criteria in the abstract and the way they are weighted is only one side of the story. The other is how those criteria are applied in practice.

Relying heavily on redundancy selection criteria which seem entirely fair on paper is a good start for an employer, but they also have to be applied in a fair and objective way.

Taking the most basic of examples, relying on attendance records makes for an objective assessment, but errors in the data can undermine the fairness of the selection. If an employee has a near-perfect attendance record yet only achieves 50% of the marks for attendance, the redundancy dismissal will be unfair³⁴; likewise, it will be unfair to treat an authorised half an hour absence to attend a doctor's appointment as a full day's absence for the purposes of redundancy selection³⁵.

In assessing whether or not redundancy selection criteria were applied fairly, it is not open to the Employment Tribunal to re-mark employees against the criteria in the way they think is fairest. This is part of the restriction on Tribunals substituting their own views for those of the employer. Equally, the Tribunal should not get lost in the detail of how particular scores were arrived at³⁶.

There are caveats to this rule, however. It may be appropriate for the Tribunal to concern itself with particular marks given to an employee if there is an impression of bias or an obvious mistake³⁷ or, as in *Mercy*, where there is a "glaring inconsistency"³⁸ in the scoring between employees. Where things like that arise, the employer needs to have an explanation for why those scores or negative comments were given³⁹.

Whilst this does not mean that particular managers responsible for the scoring need to give evidence⁴⁰, it means someone in management must have the ability to provide explanations if called upon to do so⁴¹.

This was the fundamental issue with the redundancy process in *E-Zec Medical Transport Services Ltd v Gregory*⁴². Two managers, Mr Dean and Mr West, were each responsible for marking employees against half of the selection criteria. Ms Gregory challenged their decision to make her redundant; the Employment Tribunal was less than pleased with the way Mr Dean and Mr West had conducted the process. It said:

"the criteria guidelines were not applied in such a way as to make the dismissal a reasonable one. We conclude that the scoring applied to the Claimant was not applied in a reasonable, fair and objective manner. There was no evidence put to us to demonstrate how Mr Dean scored apart from Mr West confirming he was "comfortable" with the scoring. The decision to allow Mr Dean to use his personal judgment (without any supporting evidence to justify his scoring) when applying the criteria was not a process that fell within the band of reasonable decisions available to a reasonable employer in a redundancy situation and was therefore unfair. The absence of evidence before us as to how the scoring had been arrived at made it impossible for us

³⁴ *Hattersley v Lucas Aerospace ET 13651/87*

³⁵ *Boulton and Paul Ltd v Arnold UKEAT/341/93*

³⁶ *British Aerospace plc v Green* [1995] IRLR 75 and *Bascetta v Santander* [2010] EWCA Civ 351

³⁷ *Dabson v Cover & Sons Ltd UKEAT/0374/10*

³⁸ [2007] EWCA Civ 1304, at paragraph 23

³⁹ e.g. *Family Mosaic Housing Association v Badmos UKEAT/0042/13*

⁴⁰ *Buchanan v Tilcon Ltd* [1983] IRLR 417

⁴¹ *Bristol Channel Ship Repairs Ltd v O'Keefe (EAT 15 December 1976)*

⁴² *UKEAT/0192/08*

*to decide that the selection criteria had been fairly applied and accordingly the Claimant had been unfairly selected.*⁴³

The EAT agreed with this analysis:

*“it was an unfair process that fell outside the band of reasonable decisions for the key criteria to be left to one individual who was not able to support his marking by reference to any company documents such as performance appraisals, who had not spoken to any other manager concerning those marks and who had made no notes or given any indication as to how he had made this individual choice”.*⁴⁴

Similarly, it counted against the employer in *Simpson* that the officer who had conducted the redundancy *“was unable to explain the outcomes or his judgment and reasoning in relation to the scoring achieved by the application of those criteria”*⁴⁵.

Therefore, even the most fairly drafted criteria will not save an employer who does not apply them in an even-handed way.

Conclusion

Overall, the case law suggests that the best way to go when designing a redundancy selection matrix is to put together a mixture of criteria. This will include some entirely objective criteria, some which depend on input from managers and some which HR deem appropriate in the circumstances.

The key is for a company to have some kind of rationale for choosing the criteria it has, and to apply to them a weighting which makes sense to their needs as they go through the redundancy situation. Then employers have to ensure that those criteria which are fair on paper are applied fairly in practice.

An essential element of that in almost every case is consultation with the workforce. Whilst there are good reasons why an employer may want to avoid putting everyone at risk at the outset, some degree of consultation (ideally on the criteria themselves, but certainly on the provisional scores) is extremely important in ensuring the process is fair.

Ultimately, there is no exact science to choosing and applying redundancy selection criteria; the law recognises this by giving the employer a measure of discretion as to the choices it makes in that regard. Whichever decisions an employer makes, keeping records of the reasoning behind the choices of criteria and the scoring will help to safeguard its position.

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⁴³ *ibid.*, at paragraph 15

⁴⁴ *ibid.*, paragraph 25

⁴⁵ *UKEAT/0551/12* at paragraph 34