

White Paper Conference on Redundancy and Dismissal

Selection for redundancy

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The Question

When constructing the redundancy selection grid, what weight should you give to soft measures such as attitude and diligence?



Key Principles

Redundancy and Unfair Dismissal

To dismiss fairly for redundancy the employer must:

- establish that redundancy was the real reason for the dismissal
- act reasonably in all the circumstances of the case in treating redundancy as the reason for dismissal

Reasonableness test

- Band of reasonable responses
- Tribunals should not substitute their own views for those of the employer
- See *Polkey* guidelines for fairness on redundancy

Polkey v AE Dayton Services - the facts

- Employer needed to cut costs by reducing number of van drivers
- Manager advised employees they were redundant without warning or consultation
- Tribunal held they had not been unfairly dismissed because, even if they had been consulted, they would have been made redundant
- EAT and Court of Appeal rejected Polkey's appeals



Polkey v AE Dayton Services – the judgment

House of Lords held that redundancy dismissal will normally be unfair unless the employer:

- warns and consults employees about the proposed redundancy
- adopts a fair basis on which to select for redundancy (including selecting against proper criteria)
- considers suitable alternative employment

Selection criteria: *Williams v Compair Maxim*

The EAT held:

"...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 such things as attendance record, efficiency at the job, experience or length of service."

Selection criteria: *Williams v Compair Maxim* (continued)

Redundancy criteria should (ideally) be:

- objective (i.e. measurable)
- capable of independent verification (i.e. not just based on personal opinion)
- the subject of prior consultation with any recognised trade union

Potentially fair selection criteria

- Potentially fair selection criteria have been held to include:
 - Performance and ability
 - Experience
 - Length of service
 - Attendance records
 - Disciplinary records
- Weightings



Issues with particular selection criteria

- Last in first out (LIFO)
- Performance, skills and knowledge
- Flexibility
- Disciplinary records
- Attendance records

Examples of criteria held to be too subjective

- Employees “who in the opinion of the manager concerned would keep the company viable”
- Employees who were “best suited for the needs of the business under the new operating conditions”
- Need to retain a “balance of skills”
- “Attitude” and “Commitment”
- Employees whose dismissal would result in the most “cost savings”

Subjective criteria

More recent cases have recognised that subjective criteria may be appropriate if applied objectively, eg:

- Adherence to “company values”
- “Employee trajectory and future potential”
- “Attitude” found not to be too subjective on grounds that this comprised:
 - way in which work was carried out
 - quality of work

Subjective criteria (continued)

EAT in *Swinburne & Jackson LLP v Simpson*:
“...our law recognises that in the real world employers making tough decisions need sometimes to deploy criteria which call for the application of personal judgement and a degree of subjectivity”

Mitchells of Lancaster (Brewers) Ltd v Tattersall

The facts:

- T employed by MoL as property manager
- MoL owned hotels and pubs and needed to reduce costs
- MoL had 5 senior managers (including T)
- MoL decided to make T redundant because his role was least productive in generating revenue
- All the other managers had revenue-generating skills

Mitchells of Lancaster (Brewers) Ltd v Tattersall

The decision:

- ET held T's dismissal was unfair because criterion was "wholly subjective"
- EAT held:
 - criterion was not inappropriate for small company in financial difficulty
 - criterion was a matter of judgement that could be assessed objectively
 - *"the concept of a criterion only being valid if it can be 'scored or assessed' causes us a little concern, as it could ... limit selection procedures to box ticking exercises"*

Case study

Theresa's Treats - Background



Theresa's Treats is a manufacturer of cakes, biscuits and savoury snacks. Owing to a sudden and dramatic fall in the popularity of their products, TT has decided to cut costs by reducing headcount of the sales team from 15 to 10. All 15 employees are put at risk of redundancy.



Theresa's Treats – Redundancy selection

Because TT does not have complete appraisal records, the HR director advises that selection for redundancy should be based on:

- a competency assessment carried out by HR including:
 - a written test
 - an individual interview
 - a group exercise including a hypothetical scenario
 - disciplinary records
 - sickness absence records
- ... with a significant weighting in favour of the assessment

Theresa's Treats - Questions

- Do you think that this process is fair or unfair?
- If you think it is unfair, why?
- What, if anything, would you do differently?



Key points

- Employers have wide discretion in choice of criteria
- Tribunals should only interfere if employer's approach falls outside band of reasonable approaches
- Objective criteria are less open to challenge
- More subjective criteria can be used but:
 - make them as clear as possible
 - make them relevant to needs of the business
 - apply them as objectively as possible
- Where possible, seek to agree criteria with unions/employee forums

Questions?



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