

White Paper Conference

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Redundancy Selection- The Questions

- 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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Question 1

- In a redundancy selection process, must you put everyone at risk if your objective test clearly identifies who should go?
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Issues limiting employer's freedom

- Is there any collective agreement or customary arrangement determining selection pools?
 - Is there a risk of a collective agreement on pooling incorporated as a term in an employee's contract ?
 - If so risk of interim interdict /breach of contract claim – likely to be rare
 - Otherwise is it reasonable to depart from a non contractual collective agreement/customary arrangement with pooling rules ?
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Issues limiting employer's freedom (2)

- If employer recognises trade union it will be expected to discuss the scope of the pool with the union
 - In collective redundancies the scope of the pool must be discussed with appropriate representatives
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In other cases

- General rule - the Employer has a discretion in choosing the selection pool
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Guidelines on assessing whether correct pool identified

- **Capita Hartshead Ltd v Byard UKEAT/0445/11**
 - The “reasonable responses” test applies in determining the scope the employer has in identifying the pool
 - A Tribunal should not decide if it would have been fairer to act in another way (i.e. substitute its view)
 - Test is whether the dismissal was within the range of conduct which a reasonable employer could have adopted
 - There is no requirement that a pool should be limited to employees doing the same or similar work.
 - How the pool should be defined is primarily a matter for the employer to determine
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Guidelines on assessing whether correct pool identified (2)

- Key issue- Has the employer “**genuinely applied its mind**” to who should be in the pool
- If employer has genuinely applied its mind it will be difficult, although not impossible, for an employee to challenge it

Employer should also act from genuine motives

If employers “genuinely apply their minds”, carefully document their decisions and underlying reasoning it may be difficult to challenge their decisions on pooling

“Pool of one” cases (1) -

- **Alvis Vickers Ltd v Lloyd EAT/0785/04**
 - Geographically based *export manager* –one of eight
 - **Halpin v Sandpiper Books Ltd EAT/0171/11**
 - sole regional employee in China
 - **Prince v Groundwork Wrexham & Flintshire EAT/0492/12**
 - senior manager
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“Pool of one” cases (2)

- **Capita Hartshead Ltd v Byard [2012 IRLR 814]**
 - 4 actuaries
 - 1 suffered steep decline in work- due partly to some pension schemes being wound up
 - Employer restricted pool to this one employee
 - ET held employer’s decision to limit pool due to risk of losing client’s “slight”
 - i.e. Employer had not “genuinely applied its mind” to the issues
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“Pool of one” cases (3)

- **Fulcrum Pharma (Europe) Ltd v Bonassera & another**
UKEAT/0198/10
 - HR manager and HR Executive
 - HR manager in pool of one
 - Only lower level role required
 - EAT upheld ET’s conclusion that the employer had unreasonably automatically determined that because the HR manager’s role had to go , the pool was constituted by her alone
 - But EAT held it did not follow that the pool should have been a pool of 2 and case remitted to ET for reconsideration
 - Effectively this was a bumping case
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Room for a Commercial approach?

- Some employers (mainly private sector) may have scope to consider a more risk based approach
 - Employers want to avoid poor morale that a redundancy process causes and reduce their workload
 - Options include:
 - Consulting narrow pool or
 - Only consult with the employees provisionally selected for redundancy as opposed to the whole pool -
 - Increased risk of claims but may be offset by generous severance/conditional on Settlement Agreement
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Answer to Question 1

- Some employers may have to follow agreed pooling arrangements
 - Otherwise employers have discretion in identifying the pool for selection provided they act reasonably
 - But they must “apply their mind” thoroughly to all relevant issues
 - Pools limited to the number of redundancies required is lawful but in restricted circumstances and will be closely scrutinised at an ET
 - Some employees may have more scope to consider more commercial options but that will partly depend on their risk profile
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Question 2

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

- Looking at the issue of selection and the main factors to be considered in deciding who should be selected
 - Many employers know who they would like to select and have scope to do so
 - and adopt criteria to try and achieve the desired outcome
 - But some require to comply with agreed procedures which does not provide this flexibility
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A balancing act

- The selection criteria should be objective (verifiable) but not necessarily exclusively so. The criteria should also be relevant
 - Few criteria are truly objective
 - Management judgment/assessment is often highly relevant but often subjective.
 - HR assessments need to be focused on measurable outcomes that are relevant to the redundancy exercise
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HR Assessment Exercises

- Objective but in some cases irrelevant?
 - **Mental Health Care (UK) Ltd v Biluan EAT/0248/12**
 - *Redundancy Criteria:*
 - *20% disciplinary record*
 - *20% sickness*
 - *60% Competency*
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Mental Health Care (UK) Ltd v Biluan

- Criteria was very objective
 - But 60 % focused on HR recruitment criteria
 - No measure of past performance
 - Produced some “surprising” results
 - No input from line management
 - EAT held dismissals unfair
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Mental Health Care (UK) Ltd v Biluan(2)

- EAT “We are not surprised that the Tribunal thought that a blind faith in (HR) process... had in this case led the Appellant losing touch with common sense and fairness”
 - Whilst desirable to seek to avoid subjectivity and bias, this goal came at “too high a price”
 - It was misplaced to fear that a Tribunal will find a procedure unfair only because there is an element of subjectivity involved
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Subjective Criteria

- ***Mitchells of Lancaster (Brewers) Ltd v Tattersall***
UKEAT/0605/11/SM
 - ***EAT:***
 - ***“Just because (subjective) criteria are matters of judgment it does not mean that they cannot be assessed in a dispassionate or objective way”***
 - The concept of a criterion only being valid if it can be “scored or assessed” causes us a little concern as it could be invoked to limit selection procedures to box ticking exercises”
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Summarising Answer 2

- In considering selection criteria:
 - If there is no agreed procedure select criteria that may help get the desired outcome
 - **Relevant** objective criteria help provide a robust defence
 - Only use HR assessments that are relevant. Don't focus on recruitment metrics
 - Management's view may be subjective but can partly be assessed in an objective way.
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Summarising Answer 2

- The issue is not how you balance objective factors v HR selection v management assessment but ensuring that the factors you take into account are relevant. The balance or the weighting given to the three overarching interests will vary from case to case. A Tribunal should not interfere with a scoring process unless there is clear evidence that the criteria used are not appropriate in the circumstances
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Questions



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