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A Redundancy Masterclass

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Employment Law Webinar

Selection or interviews and other conundrums

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Overview

- Selection or interview
- Is it necessary to offer the right of appeal?
- Disclosure of scores in a selection exercise
- Impact of Furlough & Job Support Schemes

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De-mystification

- Single test
- Section 98(4) ERA 1996
- Fairness
- Did the employer act reasonably in treating redundancy as a sufficient reason for dismissing *the* employee?

Selection or Interview

- It depends
- Traditional cases
- Williams v Compair Maxam
  - Warn
  - Consult
  - Selection Pool
  - Selection Criteria
  - Redeployment

When Might Interviewing Work?

- Reorganisations
- Creation of a new role(s)
- Forward looking assessment of ability to perform the role
- But need to build in objectivity (job descriptions; person specifications; structured interviews)

Morgan v The Welsh Rugby Union

- National Elite Coach Development Manager
- Community Rugby Coach Development Manager
- National Coach Development Manager (wider role with overall strategic responsibility for developing and delivering coaching services)
- Job description
- Structured interview with a presentation and questions

Morgan v The Welsh Rugby Union

- *"Where an employer has to appoint to new roles after a re-organisation, the employer's decision must of necessity be forward looking. It is likely to centre upon an assessment of the individual to perform in the new role. Appointment to a new role is likely to involve something much more like an interview process. These considerations may well apply with particular force where the new role is at a high level and where it involves promotion."* - HHJ Richardson

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Different Outcomes

- Gwynedd Council v Shelley Barratt
- PE Teachers
- *"Threatening to dismiss staff and compelling them to apply for their own jobs or similar jobs ignores years of jurisprudence on dealing with potential redundancy situations. It abrogates the employer's responsibilities and seeks to circumvent employment rights."*

Darlington Memorial Hospital NHS Trust v Edwards

- *"The appointments to the new posts appear to have been based almost entirely on the one off performance of the candidates at short interviews with some very theoretical questions…..Bearing in mind that all the applicants were existing employees of and therefore well known to the Trust precious little regard appears to have been had to experience and background and technical expertise and none at all to such customary matters as length of service, attendance and disciplinary records."*

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Summary

- Dividing line between track record cases and cases where an interview process is justified
- Question of fact & degree
- Smoke and mirrors
- Test remains fairness as set out in section 98(4) ERA

Right of Appeal in Redundancy Cases

- Comes back to section 98(4) ERA
- But line of cases to suggest won't necessarily be unfair in redundancy cases simply because no right of appeal is offered

Robinson v Ulster Carpet Mills Ltd

1991

- Court of Appeal in Northern Ireland
- Lack of appeal did not render dismissal unfair - where no appeal written into employer's redundancy policy (which had been compiled with trade union input)

Taskforce (Finishing & Handling) Ltd v Love

(2005) EAT Scotland – Lady Smith

- Guillotine operator in binding firm
- *"There is no rule that a dismissal for redundancy will automatically be regarded as unfair on account of the absence of an appeal procedure or, indeed, the type of appeal procedure provided in the event that there is one."*

But – Safety First

- Good practice
- Opportunity to cure procedural defects
- Safety value for disgruntled employee

Acas Guide

- *"……set up an appeals process for employees who feel they have been unfairly selected. This can reduce the chances of someone making a claim against you to an employment tribunal.*
- *…….explain in your redundancy plans how someone can appeal. You might meet with employees face-to-face to listen to their concerns or ask them to write a letter or email explaining why they do not agree with your decision."*

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Disclosure of Scores

- Traditional reluctance of ET's to meddle in scoring exercises
- Eaton Limited v King
- British Aerospace v Green

Disclosure of Scores

- Disclosure of other employee's scores generally not required for fairness
- Pandora's box
- Focus of section 98(4) is *the* employee
- Employer must show that it adopted a good system of selection which was fairly administered

Closing

- Should be a consideration of:
  - Furlough Scheme
  - Job Retention Scheme
- But test remains section 98(4) ERA test
- Range of reasonable responses open to a reasonable employer

Getting selection right

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Getting Selection Right

Topics we'll cover:

(1) Subjectivity – not a dirty word

(2) Getting scoring right

(3) Selecting fairly in light of COVID-19

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Subjectivity – Not a Dirty Word

"...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".

Swinburne & Jackson LLP v Simpson UKEAT/0551/12

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Subjectivity – Not a Dirty Word

- "*Employee trajectory*" (Ganeson v Opera Solutions)
- "*Future potential*" (Ganeson v Opera Solutions)
- "*Strategic focus*" (Samsung Electronics v D'Cruz)

Subjectivity – Not a Dirty Word

- "*Customer focus*" (Samsung Electronics v D'Cruz)

- "*Company values*" (Howard v Siemens Energy) – but these must be **well-known**

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Subjectivity – Not a Dirty Word

- Subjective criteria must be applied objectively and fairly
- Subjective criteria that the courts have rejected:
  - "*Costs savings*" (KGB Micros Ltd v Lewis UKEAT/573/86)
  - "Attitude" (Graham v ABF Ltd [1986] IRLR 90)
  - "*[Employees who are] best suited for the needs of the business under the new operating conditions*" (Smith and others v Haverhill Meat Products Ltd ET7631-40/85)
  - "*Employees who in the opinion of the manager concerned, would keep the company viable*" (Williams v Compare Maxam Ltd [1982] IRLR 83)

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Getting Scoring Right

- Don't rely solely on criteria
- Scoring guides are vital
- Simplicity generally key
- Scoring method should be easily:
  - explainable (for the managers)
  - applicable (for the managers)
  - understandable (for the employees – and an Employment Judge)

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Getting Scoring Right

- Attendance records
  - What period should be used?
  - What absences should be discounted?

Getting Scoring Right

- Performance:
  - What if you have no/partial appraisal records?
  - Subjective assessment is lawful if justifiable

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Getting Scoring Right

- Can you rely on:
  - Expired disciplinary warnings?
  - The cost of dismissal?
  - “Flexibility”?

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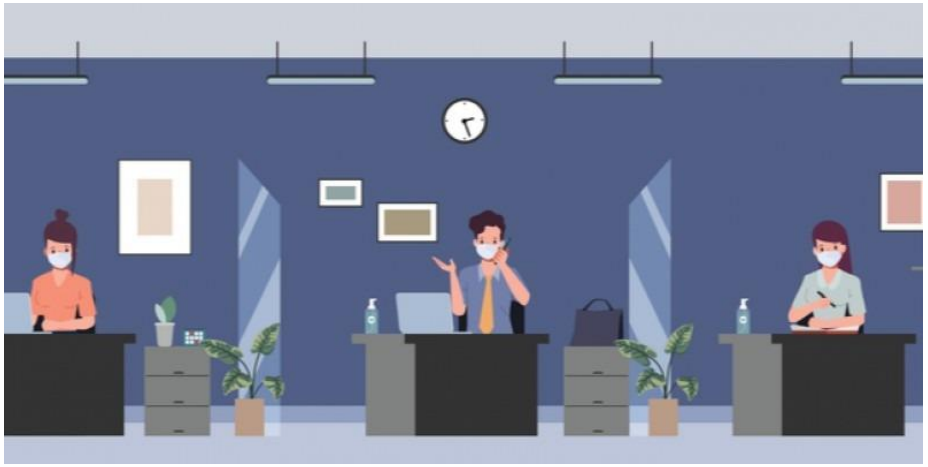
Selecting Fairly in Light of COVID-19



- Shielding – impact on attendance – note Isle of Man decision

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Selecting Fairly in Light of COVID-19

- Risks of selecting furloughed employees for redundancy
- Weighting is key
- Risk of extra HMRC scrutiny?

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Summary

- Don't be scared of using subjectivity, properly moderated
- Keep it simple
- Remember the basic test:

> *"Was the selection which the employer made one which a reasonable employer, acting fairly, could have made?"*

British Aerospace Plc v Green & Ors [1995] EWCA Civ 26

Suitable alternative employment and trial periods

David Morgan
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The Duty to Look for Alternative Employment

- No explicit statutory obligation
- s98(4) Employment Rights Act 1996
  - The determination of whether a reason for dismissal is fair or unfair depends on whether the employer acted reasonably as treating it as a sufficient reason for dismissal
- Vokes Limited v Bear [1973] IRLR 363
  - It was not reasonable to dismiss an employee for redundancy without first trying to find him suitable alternative employment

The Extent of the Duty

- *Quinton Hazell Ltd v WC Earl [1976] IRLR 296*
- The Tribunal determined that dismissal was unfair where the employer had not acted energetically to seek alternative employment.
- Appealed and overturned by the EAT
- The duty is not to make every possible effort but to make reasonable efforts to look for alternative employment

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The Extent of the Duty – Group Companies

- In Vokes the dismissal was found to be unfair because a suitable vacancy had been advertised by a group company and no efforts had been made to consider Mr Vokes for that vacancy.
- *Barratt Construction Ltd v Dalrymple [1984]*
  - No absolute obligation to look for vacancies in other legally independent companies in the group
- But there may be an obligation where HR functions are shared or companies have influence over each other.

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The Extent of the Search

- No obligation to create alternative employment where roles did not previously exist
- But employer must make a thorough search
- *Stacey v Babcock Power Ltd (Construction) Division [1986]*
  - The duty continues even after notice has been given
  - Continues to termination (and sometimes beyond)

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Providing Information

- Employers must provide employees with sufficient information for the employee to decide if the role is suitable
- Employers should not automatically assume that an employee would not be interested in a role because of reduced status or salary (*Avonmouth Construction Co v Shipway [1979*])

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Selecting for a Vacancy

- Where there is more then one employee for whom there is a suitable vacancy, all at risk employees should be informed of the vacancy
- Employers can operate a competitive exercise and can be more subjective in deciding which candidate to appoint – *Morgan v The Welsh Rugby Union [2011]*

Selecting for a Vacancy

- Employees on Maternity, Adoption or Shared Parental Leave have an automatic right to be offered any suitable alternative vacancies
- This cover is to be extended to cover employees from the time they notify the employer of their pregnancy, and similar extensions to the right will apply to Adoption and Shared Parental Leave – but legislation is still progressing through Parliament

Selecting for a Vacancy

- *Ralph Martindale and Company Ltd v Harris [*2007]
  - Inviting applications from the entire workforce before deciding if any potentially redundant employee was suitable for the role did not reflect the practice of a reasonable employer.

Switching Focus – Offering Alternative Employment

- S141 ERA 1996
  - Where before the end of an employee's employment..
    - an offer is made to renew an employee's contract or to reengage him within 4 weeks…
    - and the terms and conditions of the contract do not differ…or
    - the terms and conditions differ but the offer constitutes suitable alternative employment…
  - Then the employee is not entitled to a redundancy payment if he unreasonably refuses the offer

Switching Focus – Offering Alternative Employment

- S138 ERA 1996
  - If the terms and conditions of the new employment differ the employee has a trial period of four weeks from the end of the original employment to decide whether to accept or reject the offer;
  - The statutory trial period can be extended by agreement

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Offering Alternative Employment

- An offer must be made
  - Not sufficient to just inform an employee of the alternative role, the role must actually be offered
  - So inviting employees to apply for roles is not sufficient
- The offer must be made before the termination of employment
  - Be aware the offer is made when it is received by the employee

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The Offer

- Need not be in writing
  - But perhaps should be for evidential purposes
- Need not be personally addressed
  - A “round robin” offer to a group of employees is effective
  - But beware of evidencing the offer was received by an individual if not addressed personally
- Must be reasonably precise and recognisable as an offer of a new role, rather than a general statement of intent
- The new role must start no more 4 weeks after the end of employment

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The Effect of Acceptance

- If an employee accepts the offer they are not treated as being dismissed
- They will have no right to a redundancy payment

The Effect of Rejection

- If an employee rejects the offer they will have no right to a redundancy payment if:
  - The alternative employment was suitable
  - The rejection is unreasonable

Trial Periods

- The employee has a right to 4 week trial period if the terms and conditions of the alternative offered differ from their current role
- Refusal to offer a trial period risks a finding of unfair dismissal
- Four working weeks - Benton v Sanderson Kayser Ltd [1989]

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Trial Periods

- If unsuccessful
  - Employee treated as dismissed on termination of the "old" role
  - But time limit for claiming a redundancy payment runs from end of trial
- If successful
  - Termination of old contract deemed not to be a dismissal
  - No entitlement to a redundancy payment

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Common Law Trial periods

- The statutory trial period applies where the employee is under notice and has been offered an alternative role.
- But a common law trial period may also apply where the employer offers alternative employment by imposing new terms before notice is given
- Employees can still reject new terms following a common law trial period, which could be longer than 4 weeks, and claim a redundancy payment

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Suitability

- All differences will count (unless trivial)
- It is not a global consideration, each term is considered
- The differences could be more or less favourable

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Suitability - Examples

- A failure of the role to match employee skills is likely to be unsuitable
  - The offer of a job as a assembly operator to a skilled card wirer was unsuitable - Standard Telephones and Cables Ltd v Yates [1981]
  - The offer of a lower grade managerial role involving physical work to a hotel manager was unsuitable - Laing v Thistle Hotels [2003]

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Suitability - Examples

- A significant drop in earnings will lead to a finding of unsuitability
- A tribunal can consider the entire benefits package including overtime and bonuses

Suitability - Examples

- Hours of Work
  - A change from night shift work to day shift on less pay was not suitable
  - Loss of the opportunity of regular overtime was not suitable
  - A change in working days which clashed with an employees commitment to visit an elderly neighbour was found to be suitable where the employee could arrange a visit around the new working hours

Suitability - Examples

- Location
  - A change in location may lead to a finding of unsuitability
  - “Commuting is not generally regarded as a joy” Laing v Thistle Hotels [2003]

Unreasonable Refusal

- The employee will not be entitled to a redundancy payment if they unreasonably refuse a suitable offer
- But this is subjective – considered from the employee's point of view and on factors personal to her
  - The circumstances in which the offer was made
  - The duration of alternative employment
  - The employee's personal situation

Unreasonable Refusal

- The burden of proof is on the employer to show the employee's refusal is unreasonable
- Did the employee have:
  - Sound and justifiable reasons to refuse the offer…
  - On the basis of facts as they appeared or ought reasonably to have appeared to her

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Circumstances

- Refusal of an offer is likely to be reasonable if inadequate time is given to consider it
  - Reasonable to refuse an offer made the day before redundancy took effect - *Thomas Wragg & Sons v Wood [1976]*
- Refusal may be reasonable where the employee doubts the employer's motive - *Page v Thorn Lighting Ltd ET/66259/1993*

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Circumstances

- Refusal likely to be reasonable where the employer conducts redundancy process unreasonably - *Commission for Healthcare Audit and Inspection v Ward UKEAT/0579/07*

Duration

- Refusal likely to be reasonable where alternative role is temporary. In *Morganite Crucible Ltd v Street [1972]* rejection of a 12-18 month position was considered reasonable.

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Personal Circumstances

- Depending on personal circumstances an employees rejection of a job at another location could be reasonable or unreasonable *MacGregor v William Tawse Ltd [1967] MacCallum v William Tawse Ltd [1967]*
- It may be reasonable to reject an offer which involved significant increases in travel time and cost – but very case specific.
- Status or career aspirations may also be relevant factors.

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