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Individual selection for redundancy

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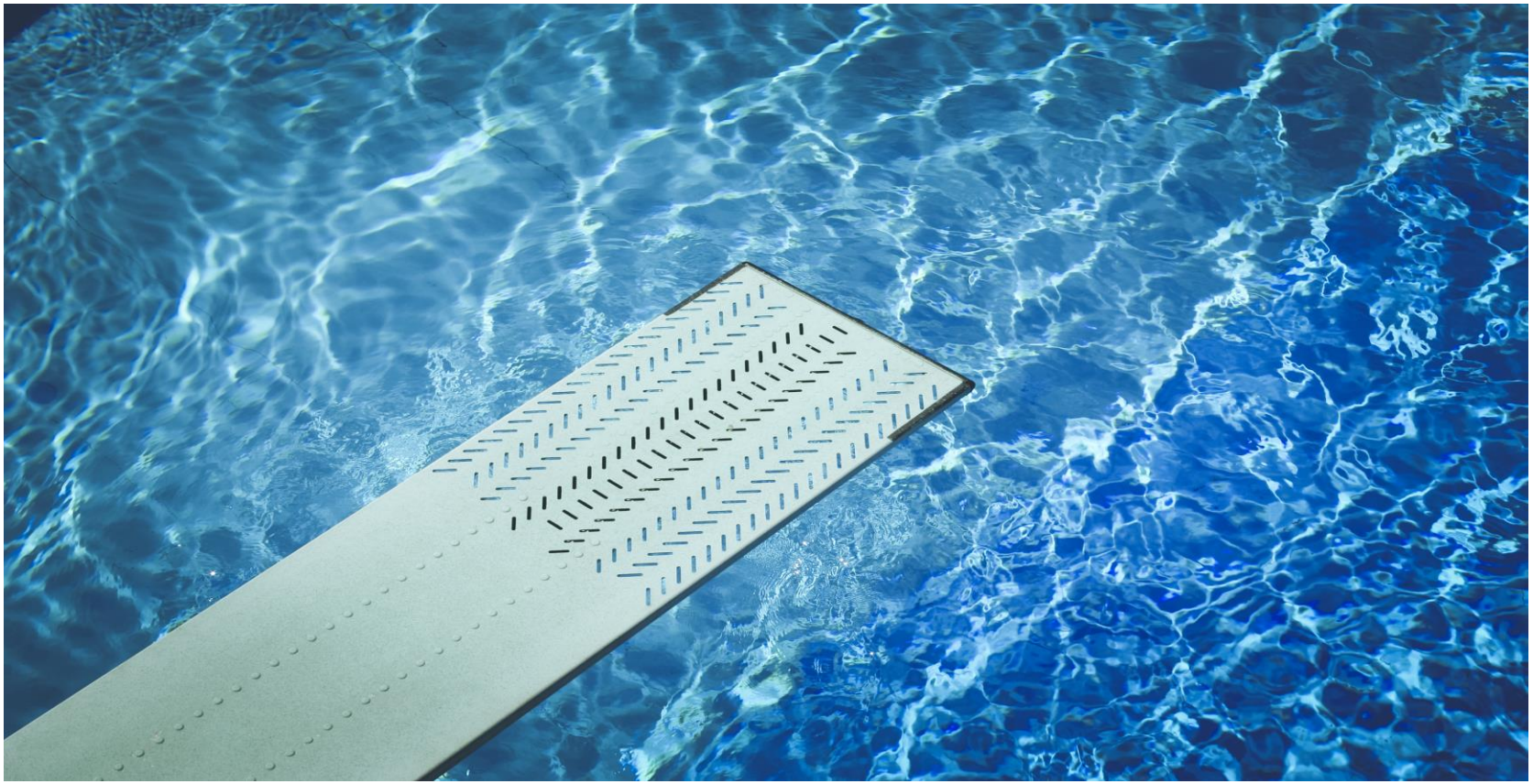
This talk will cover

(1) Pools
(2) Selection Criteria
(3) Selection for redeployment
(4) Equality and selection

Pools



Pools: general approach

- Employer must consider pool for redundancy selection. Otherwise dismissal likely unfair (***Taymech Ltd v Ryan*** UKEAT/663/94).
- No fixed rules about how the pool should be defined (***Thomas & Betts Manufacturing Ltd v Harding*** [1980] IRLR 225 (CA)
- Range of responses test applies to pool.
- Expect consultation with Union as to pool if employer recognises Union (***Williams v Compair Maxam*** [1982] IRLR 83).
- Difficult for employee to challenge pool where employer genuinely applied mind to the problem (***Taymech***).
- Useful summary or authorities in ***Capita Heartshead v. Byard*** UKEAT/0044/11 (at para 31)

Pools in practice

- Focus in on particular kind of work that is ceasing / diminishing and which employees perform that work.
- Relevant factors likely to be:
  - What type of work is ceasing / diminishing?
  - Extent to which employees doing similar work (possibly even those at other locations).
  - Whether employer has “genuinely applied” its mind to the composition of the pool. Is there a paper trail to demonstrate?
- Risk to morale and cost / complexity of widening the pool vs. risk (and cost) of claims.

Pools of one

- Employee role genuinely unique (***Halpin v Sandpiper Books Ltd*** UKEAT/0171/11/LA)
- No consideration of wider pool at all (***Wrexham Golf Co Ltd v. Ingham*** UKEAT/0190/12/RN)
- Consideration of a wider pool (***Capita Heartshead Ltd v. Byard*** UKEAT/0445/11)

Pooling of senior employee with juniors

- ***Leventhal*** factors:

1) Whether or not there is a vacancy going forwards
2) How different the two jobs are
3) Difference in remuneration
4) Relative length of service of the two employees
5) Qualifications of employee at risk

- Where employee could be pooled with juniors, justify by reference to ***Leventhal*** and/or give business reasons for refusing to bump juniors

Selection Criteria

Employer's broad discretion

- Well-established for over forty years that Tribunals cannot substitute their own principles of selection for those of the employer.

- ET can only interfere if the selection criteria adopted are such that no reasonable employer could have adopted them or applied them in the way in which the employer did (see: ***Earl of Bradford v. Jowett*** (No 2) [1978] ICR 431).

- Further, the much cited ***Williams*** guidelines makes reference to the need for "*objectivity*" in selection criteria:-

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

Subjective criteria?

- In ***Mitchell of Lancaster (Brewers) Ltd v. Tattersall*** UKEAT/0605/1/SM, the Master of the Rolls helpfully indicated (paragraph 21) (emphasis added):
  - *"The Tribunal in this case also criticised the criteria adopted by the Respondent because they were not "capable of being scored or assessed or moderated in an objective and dispassionate way". Just because criteria of this sort are matters of judgment, it does not mean that they cannot be assessed in a dispassionate or objective way, although inevitably such criteria involve a degree of judgment, in the sense that opinions can differ, possibly sometimes quite markedly, as to precisely how the criteria are to be applied, and the extent of which they are satisfied, in any particular case. However, that is true of virtually any criterion, other than the most simple criterion, such as length of service or absenteeism record. 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."*
- But see: ***Abbey National v. Chagger*** **[2010] IRLR 47 (CA).**
- Danger of being "too objective": ***Mental Health Care (UK) Ltd v Biluan and anor*** **EAT 0248/12.**

Specific criteria

- Last in, first out?
- Performance, skill and knowledge;
- Flexibility;
- Disciplinary record;
- Attendance.

Particular issues of application

Inconsistency in marking.

- ***Dabson v. David Cover & Sons*** **UKEAT/0374/10/SM**): ET should not go beyond seeing whether the selection, including the marking, was fair and should only investigate marking where there was an absence of good faith or obvious error.

No system for moderating scores.

- ***First Scottish Searching Services Ltd v. McDine*** **UKEATS/0051/10/BI,** EAT criticised an ET finding that dismissal was unfair in the absence of "*some system for moderating*" two sets of scores for two groups of employees when there were no findings of fact in relation to: (i) the risk of unfairness having given rise to an actual inconsistency as between the two scores (the markers had applied the same scoring matrix and followed the same scoring system in relation to each of the two groups of employees), or; (ii) what would have been the outcome on the scores themselves if some system of moderation had been applied (the danger here being of the ET falling into the impermissible trap of microscopic analysis of the scores).

Double Marking

- In ***Carclo Technical Plastics Ltd v Jeyanthikumar*** **EAT 0129/10,** EAT upheld ET, where a verbal warning was counted twice against C, the criteria were not applied fairly.

Selection for redeployment

Selection for redeployment

- Fair and objective selection criteria (***Williams v Compair Maxam***)
- ***Williams*** guidelines do not apply where "*forward looking*" new and different roles to be filled in reorganisation (***Morgan v Welsh Rugby Union*** [2011] IRLR 376)
- Subjectivity not a dirty word and fairness of decision cannot depend on minutiae of good interview practice being followed (***Samsung v. Monte D'Cruz*** UKEAT/0039/11/DM)
- Harder for claimants to mount successful challenge to fairness of selection processes for redeployment
- Beware: new job must be markedly different to old job otherwise ***Williams*** still applies (***Gwynedd Council v Shelley*** UKEAT/0206/2018VP)

Equality and selection

- EqA 2010 does not contain any provisions that relate specifically to redundancy. However, an employee may seek to rely on the Act where:
  - the redundancy was a ‘sham’, in that the dismissal was not by reason of redundancy, but was instead by reason of a protected characteristic
  - the employee’s selection for redundancy constituted victimisation for his or her bringing a discrimination claim or taking other action protected under the Act, or
  - the application of the selection criteria, the failure to offer alternative employment, or any other aspect of the redundancy process, was influenced by a protected characteristic and thereby amounted to direct or indirect discrimination.

Direct discrimination / victimisation

- Usual burden of proof principles apply.

- ***Cooperative Centrale Raiffeisen Boerenleenbank BA v Docker*** **EAT 0088/10** C was London-based global head of securities for a Dutch bank. The "*something more*":
  - of English nationality, whereas the person chosen for redeployment when the bank decided to relocate its securities team to Utrecht was Dutch;
  - the bank had not asked the claimant whether he was prepared to move to Utrecht, had not internally advertised the vacancy for the head of securities position there, and had not consulted the claimant about appointing a member of his London team to that position.
  - the appointment decision had been taken by the bank's Global Head of Financial Markets, who not only was Dutch himself but came from the same village as the appointee, and that the latter happened to be the only Dutch employee employed in the London securities team.

- Difficult to rebut shifted burden of proof without robust selection criteria.

- Direct age discrimination can be objectively justified.

Indirect discrimination

- More likely (unwittingly) to apply in redundancies than direct.
- Usual principles apply, including requirement to prove application of PCP.
- Indirect discrimination can be objectively justified:
  - the Government stated in the 'Coming of Age' consultation document on the draft Age Regulations that 'the test of objective justification will not be an easy one to satisfy … treating people differently on grounds of age will be possible but only exceptionally and for good reasons'.
  - Test broader than for direct age discrimination justifications which must related to genuine public aims: "*intergenerational fairness" and "dignity" (**Seldon v Clarkson Wright and James* [2012] ICR 716 (SC)*)***
- LIFO can be justified but not just for administrative convenience.

Positive discrimination?

- Not lawful: *Eversheds Legal Services Ltd v De Belin* [2011] ICR 1137.

- However:

  - employers have a statutory responsibility to offer suitable alternative employment initially to any employees made redundant while on maternity, adoption or shared parental leave (MPL Regs, reg 10(2); PAL Regs, reg 23; SPL Regs, reg 39).

  - given that a non-disabled person cannot benefit from the provisions of the EqA, moving a disabled employee to the head of the queue for redeployment in a redundancy situation (but behind any employees on maternity leave, etc) will not incur liability in discrimination law, whereas moving people of a particular race or sex would. A tribunal might, in fact, consider it a reasonable adjustment to offer a disabled employee preferential treatment.

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