

Mishcon de Reya

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Feature

A guide for poachers and gamekeepers

Briefing

Redundancy consultation: an update on recent developments

**THE**  
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# A guide for poachers and gamekeepers

Daniel Myers (left) and Sarah Keeble (right) discuss employees' duties in relation to recent case law, highlighting implied, fiduciary and express duties, and outlining when those duties end and what protection there is for employers



**THE LAW ON EMPLOYEES' DUTIES IS ONE of the few areas in the employment field that has not been codified by statute. It is derived from a mixture of equity and common law obligations, and as a result is constantly evolving.**

This article looks at the established principles and some of the more recent cases, providing a guide as to the current view on implied duties, fiduciary duties and express duties, focusing mainly on those duties relating to unfair competition, confidential information and issues relating to trust and confidence.

## IMPLIED DUTIES

To preserve the special relationship between employer and employee, and to ensure fairness between the parties, it has become necessary to imply certain terms into all contracts of employment. These implied terms have evolved over time, as the courts have taken it upon themselves to ensure that both employees and employers are bound to behave reasonably, irrespective of the written or oral terms of any contract of employment.

The essence of an employment relationship is that the employee agrees to provide good and faithful service to the employer. This is usually described as the duty of fidelity and it is from this common law duty that most implied employees' duties derive. The duty of fidelity has been well summarised as follows:

'The employee must act in good faith; he must not make a profit out of his

trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third party without the informed consent of his employer.<sup>1</sup>

## Mutual trust and confidence

In *Malik v Bank of Credit; Mahmud v Bank of Credit* [1997], the House of Lords approved the notion that all contracts of employment have an implied contractual term of trust and confidence, formulated in the following terms:

'The employer must not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.'

This is often expressed as the implied term of mutual trust and confidence, and so can be enforced by both parties in the employment relationship. As employers already enjoy the protection of the more established common law duty of fidelity, it tends to be employees who seek to rely on a breach of the implied term of trust and confidence when they are unfairly exploited or undermined. This most often occurs in constructive dismissal situations, where an employee claims that the employer's breach of this fundamental term entitles them to resign, treating themselves as dismissed.

## **Tullett Prebon plc & ors v BGC Brokers LP & ors [2010]**

*Tullett* provides a useful analysis of the current position on the issues that arise in cases where a group of employees leaves in some kind of co-ordinated manner to join a competitor.

The dispute was an acrimonious battle between inter-dealer brokers, who act as intermediaries for banks and other financial institutions. It began when BGC Brokers (BGC) attempted to recruit several desks of brokers from Tullett Prebon (Tullett). In April 2009 Tullett obtained an injunction against BGC, preventing BGC from approaching Tullett staff pending trial of the claim that BGC unlawfully orchestrated a mass exodus of almost 100 brokers. BGC had offered 'forward contracts' (contracts that will only take effect once obligations towards a former employer fall away) and sign-on payments to a large number of Tullett brokers. BGC also provided its new recruits with indemnities in anticipation of claims by Tullett. Three out of the 13 brokers who signed forward contracts with BGC – the so-called 'Tullett Three' – were persuaded to return to Tullett before taking up their employment with BGC. BGC counterclaimed that Tullett induced the Tullett Three to breach their contracts with BGC. Tullett argued that the employees were constructively dismissed by BGC and so were entitled to terminate their forward contracts.

The High Court granted the interim injunction because it considered that the tactics used by BGC, which included fabricating constructive dismissals and

using desk heads to recruit from the inside, showed a cynical disregard for the law and the employees' duties, and gave BGC an improper advantage in the recruitment of the brokers. The order prevented those brokers who had already agreed to move from joining BGC until after the trial and barred BGC from approaching any other employees of Tullett for the same period.

The trial judge, Mr Justice Jack, had to decide whether or not BGC, and the Tullett desk heads who were recruiting from their teams, acted unlawfully. Jack J held that BGC had acted unlawfully, in that they had induced brokers to breach their contracts (by walking out on the basis of spurious constructive dismissal claims) and that they conspired to use desk heads to recruit their desks in breach of their obligations to Tullett. Jack J did not uphold the claim against individual Tullett brokers for conspiracy but held that Tullett could recover signing payments paid to those brokers when their contracts were renewed. BGC appealed on two grounds: the rejection of the brokers' constructive dismissal claims and the dismissal of BGC's counterclaim that Tullett induced the Tullett Three to breach their forward contracts with BGC.

A novel point in relation to employees' duties arose in the context of BGC's counterclaim. The existence of the 'forward contracts' meant that employees were contractually bound to two employers at the same time. This gave rise to an obvious conflict. If the BGC forward contracts signed by the Tullett Three were incompatible with Tullett's rights under the brokers' contracts with Tullett, Tullett could argue that any inducement to breach the BGC contracts was justified. The Court of Appeal held that an employee can simultaneously owe a duty of trust and confidence to more than one party. In this case, there was no actionable inducement by Tullett because of BGC's 'illegal and dishonest conduct'. While the trial judge found that forward contracts were not unlawful in principle, the Court of Appeal suggested that forward contracts will not necessarily be compatible with an employee's duties toward their current employer. Owing a duty of trust and confidence to two arch rivals, while theoretically possible, certainly sounds implausible in practice.

### Duties regarding confidential information

An employee is also subject to an implied obligation not to disclose or misuse the

confidential information or trade secrets of their employer.

The duty of fidelity, as regards confidential information, continues to apply after the termination of the contract of employment, but only to the extent that it relates to 'trade secrets', ie proprietary material such as formulae or a recipe that is crucial to the employer's success (*Faccenda Chicken v Fowler & Sons* [1986]). Any other confidential information – which would include lists of customers, databases, pricing information and so on – can only be protected by means of an express term. However, any attempt by an employee preparing to compete to siphon off confidential information during their employment with a view to using it after their employment has ended, will almost certainly fall foul of the implied term.

### Duty to obey lawful instructions

It could be said that the duty to obey the employer's lawful and reasonable instructions – which is implied by common law – is the cornerstone of any employment relationship; without it there would be no means to compel the employee to perform the work. However, the employee is not obliged to carry out orders that are unlawful, or that are beyond the scope of their contract, or that are clearly unreasonable.

In fact, the obligation to comply with lawful and reasonable instructions is so fundamental that it has been applied even where the employer has committed a repudiatory breach of the contract, but the employee has elected not to resign and claim constructive dismissal.

### Duty not to compete

Even in the absence of any express contractual obligation, an employee is not permitted to work in competition with their employer. This is again derived from the general common law duty of fidelity, whereby an employee's loyalty must only be to their employer. An employee may take 'preparatory steps' to set up in competition but may not actively compete.

The case law dealing with employees' duty not to compete illustrates the fine line between these two concepts. In *Helmet Integrated Systems Ltd v Tunnard & ors* [2006] the Court of Appeal found that a middle-ranking senior salesman did not breach their contract (or any fiduciary duties) despite the fact that during their

employment they were designing and preparing to sell a competing fireman's helmet to the one that they were contracted to sell. The case may have been decided differently if the employee had been a director, or if their role had involved designing helmets rather than sales. By contrast, in *Shepherds Investments Ltd & anor v Walters & ors* [2006] it was held that the defendant employees had crossed the line into active competition as soon as they had instructed lawyers to set up a business that would compete with their employers. This was specifically found to constitute a breach of the implied duty of fidelity. This stark difference shows just how fact-sensitive these cases are.

### Duty to disclose wrongdoing

Employees who are not fiduciaries are not bound to disclose their own misconduct to their employer. In this way, employees are protected against incriminating themselves. Generally speaking, employees are not obliged to report a colleague's misconduct or breach of contract either, although this is much more dependant on individual circumstances. The recent High Court decision of *Lonmar Global Risks Ltd v West & ors* [2010] goes as far as to suggest that an employee who is not a fiduciary is entitled to inform other employees of their plans to engage in future competition with the employer and even offer them a potential job with that competitor in the future. It was found that the employees were not obliged to disclose to the current employer that a competitor was seeking to recruit fellow employees. This decision may be contrasted with another High Court judgment, *Kynixa Ltd v Hynes & ors* [2008], in which it was found that a junior member of the management team had breached their duty of fidelity by not disclosing to their employer that they and two other members of the management team had been approached by a competitor to work for it. It can perhaps be distinguished from *Lonmar* because in *Kynixa* all three employees deliberately misled their employer as to their true intentions. On the duty of fidelity, Williams J said:

'I simply do not see how one can be acting as a loyal employee when one knows that three senior employees (including oneself) may transfer their allegiance to a group of companies which includes a competitor and yet

not only fail to divulge that knowledge but also say things which would have the effect of positively misleading the employer about that possibility.'

These contrasting judgments demonstrate the importance of individual facts in assessing which duties apply and whether those duties have been breached. It appears to be the case that the greater the degree of fraud or underhandedness, the more onus will be placed on employees to bring the misconduct to the attention of the employer.

#### FIDUCIARY DUTIES

Fiduciary duties are imposed as a matter of equity on parties where their relationship has a particularly high level of trust. The relationships between a director and a company, or between partners in a partnership, are the classic examples, though it is now accepted that senior managers can also owe fiduciary duties, particularly where there is a high degree of autonomy and trust conferred. There is also an argument that if an employee is held out as a director (such as sales directors who are not on the board) then such individuals could owe fiduciary duties.

The defining characteristic of a fiduciary duty is a requirement that the fiduciary must put the interests of the other party ahead of their own. In the employment context this means that the fiduciary employee must positively act in the best interests of the employer, even if this is at the expense of their own interests.

An employee under a fiduciary duty would therefore be liable to report their own misconduct to the employer, as well as the misconduct of their fellow employees. This presents a problem for any director or senior manager who is attempting to orchestrate or assist with a team move. Fiduciary duties would extend to encouraging loyalty among existing staff. By enticing or encouraging junior employees to resign and join a new venture, the fiduciary has a conflict, giving rise to a breach of the fiduciary duty. Once the director or senior manager knows that a more junior employee is planning to resign and move to a competitor – especially if this is part of a wider team move – they would also be under an obligation to disclose that fact to the employer.

Of course, employees in this situation do not typically fall on their swords. However,

***'It could be said that the duty to obey the employer's lawful and reasonable instructions – which is implied by common law – is the cornerstone of any employment relationship.'***

establishing a breach of a fiduciary duty is useful in remedy terms, as the employer will usually be entitled to claim an account of the profits made by the employee, rather than being limited to claiming actual loss suffered by way of damages.

While a fiduciary is duty bound always to act in the best interests of their employer, this does not extend to giving up a contractual right. In *Fish & ors v Dresdner Kleinwort Ltd* [2009], Dresdner Kleinwort unsuccessfully argued that senior managers – all members of the bank's executive committee – were under a duty to forego contractually agreed payments in view of the financial crisis and its impact on the bank's profits. It was claimed that the full effect of the crisis was not known at the time these guaranteed bonuses and severance payments were awarded, and that the situation had materially worsened by the date on which payment was due. There was no suggestion that the claimants were responsible for or even contributed to the financial losses. Nevertheless, the bank put forward the case that the claimants' obligation of 'single-minded loyalty', and their express obligation to act at all times in the best interests of the employer, meant that they were duty bound to give up what would otherwise be their contractual right. This argument was given short shrift by the High Court. In the course of an application for summary judgment Jack J held:

'It is clear that... an employee who is in the position of a fiduciary may contract with his employer provided he makes full disclosure and does not place himself in breach of any fiduciary duty. He is then entitled to the benefit of the contract and there is no principle that provides that if subsequent events make the bargain one which the employer would not have made had he foreseen those events, he may require the fiduciary employee to release him.'

With regard to the express obligation to act in the employer's best interests, the judge reasonably concluded that this could not be used to cut down the express provisions of the agreement for payments of bonus and severance pay. The effect of that obligation was that as long as the employee continues to act in the best interests of the company, they will get paid.

#### EXPRESS DUTIES

As the above analysis of the case law shows, reliance on implied terms or fiduciary duties alone is a risky strategy for an employer wishing to protect its business. Express contractual terms will almost always take precedence over implied ones, with limited exceptions as follows:

- Where the express term confers a discretion on the employer and the implied term restricts the exercise of that discretion (for example, the implied term that the exercise of discretion must not be exercised in an irrational or perverse manner).
- Where the implied term relates to something that has been overlooked in drafting the express terms. For example, where an employer provides a permanent health insurance benefit, the courts have inserted an additional implied term preventing dismissal if dismissal would deprive the employee of benefits to which they would otherwise become entitled under the scheme (*Aspden v Webbs Poultry & Meat Group (Holdings) Ltd* [1996]).

Given the findings of the High Court in *Lonmar*, it would seem sensible to include an express clause in contracts of employment requiring the employee to disclose the fact that they have been approached by a competitor seeking to recruit a team. It was confirmed in *Tullett*

***'The employee's conduct will be relevant, and the court will be alive to contrived arguments of repudiatory breach made by employees seeking to avoid their notice periods and restrictive covenants.'***

that this type of provision is permissible and not in restraint of trade.

In light of the uncertainties in common law regarding the extent to which non-fiduciary employees are obliged to report wrongdoing, it would also seem prudent always to include an express contractual provision requiring the employee to report all wrongdoing or misconduct, including their own. This will take precedence over any implied prohibition against self-incrimination.

Careful thought needs to go into the precise wording of any post-termination restrictions that are included in the contract of employment. A detailed discussion on the enforceability of restrictive covenants is beyond the scope of this article, but it is safe to assume that it will never be a case of one-size-fits-all. Post-termination restrictions will only be enforceable to the extent that they are reasonably necessary to protect the employer's legitimate interests, and so an understanding of the employer's business and its clients, customers, commercial arrangements and area of operation is paramount. It is also important to understand the cycle of an employer's business and, in particular, the typical turnover of client relationships as this will be relevant to duration.

A salutary lesson on the importance of careful drafting can be learned from *Phoenix Partners Group LLP v Asoyag* [2010], which related to an employee who was a trader in stock options. Maurice Asoyag was the only employee at Phoenix who worked on the Euro Stoxx index. Asoyag resigned and, after the expiry of his notice period, began another job working on the Euro Stoxx index. Under his contract of employment, he was prohibited from competing:

'With any part of any trade or business carried on by the company in which the employee shall have been actively engaged or involved.'

The High Court found in favour of Asoyag and refused to continue the injunction that had initially been granted. As Phoenix were no longer engaged in any Euro Stoxx business (because Asoyag had taken the business with him) there was no such business being 'carried on by the company'. The contractual restrictive covenant was therefore defeated by its seemingly innocuous use of the present tense.

**BREACHES OF DUTY: WHEN DO EMPLOYEES' DUTIES END?**

In any acrimonious employment dispute where an employee is subject to onerous post-termination restrictions, there are bound to be arguments about alleged repudiatory breach, given that the effect of such a breach committed by the employer is to render any restrictions void. However, particular uncertainty can arise where both sides are alleging that the other has acted in breach.

In *RDF Media Group plc & anor v Clements* [2007], it was suggested that where the employee was already in repudiatory breach of their contract of employment, they could not accept a breach by their employer in bringing the contract to an end. Alan Clements had resigned from his employment and had indicated to RDF that he did not intend to abide by restrictive covenants contained in a share purchase agreement that he had entered into. RDF gave a statement to the press stating that Clements had reneged on his contract and that the company felt surprised and let down that he should want to break his contract. There were some damaging comments in the article suggesting that Clements was dishonourable. Clements claimed constructive dismissal on the basis that the press coverage was defamatory and an attempt to destroy his reputation, which he said was a breach of the implied term of trust and confidence. The court agreed that RDF's actions in

briefing the press had gone beyond what was reasonable or proper and that this potentially gave Clements grounds to assert that he had been constructively dismissed. However, by this stage, it was found that Clements' loyalty had transferred to his new employer, a competitor of RDF, and that this amounted to a breach by him of the implied term of trust and confidence or the duty of fidelity. As such, Clements was not entitled to accept RDF's conduct as a repudiatory breach allowing him to terminate his employment free of restrictions. This was so even though at the time, the employer did not know about Clements' breaches.

This finding was discussed by the trial judge in *Tullett* who queried whether the analysis was applicable in the employment context. He stated that the ordinary position is that, if there is a breach of a contract by A that entitles B to terminate the contract but B does not do so, then the contract both remains in being and may be terminated by A if B has himself committed a repudiatory breach of the contract. The position is therefore somewhat murky, but what is clear is that the employee's conduct will be relevant, and the court will be alive to contrived arguments of repudiatory breach made by employees seeking to avoid their notice periods and restrictive covenants.

*Aspden v Webbs Poultry & Meat Group (Holdings) Ltd* [1996] IRLR 521

*Faccenda Chicken v Fowler & Sons* [1986] ICR 297

*Fish & ors v Dresdner Kleinwort Ltd* [2009] IRLR 1035

*Helmet Integrated Systems Ltd v Tunnard & ors* [2006] EWCA Civ 1735

*Kynixa Limited v Hynes & ors* [2008] EWHC 1865

*Lonmar Global Risks Ltd v West & ors* [2010] EWHC 2878 (QB)

*Malik v Bank of Credit; Mahmud v Bank of Credit* [1997] UKHL 23

*Phoenix Partners Group LLP v Asoyag* [2010] EWHC 846 (QB)

*RDF Media Group plc & anor v Clements* [2007] EWHC 2892 (QB)

*Shepherds Investments Ltd & anor v Walters & ors* [2006] EWHC 836 (Ch)

*Tullett Prebon plc & ors v BGC Brokers LP & ors* [2010] EWHC 484 (QB)

**CONCLUSION**

The common law on employees' duties has developed over time to protect employers against unfair competition and to promote mutual trust between employers and employees. For particularly egregious cases of business sabotage or theft of trade secrets, it is likely that a combination of implied and fiduciary duties will protect employers in the absence of express contractual terms. However, the prudent employer will always ensure that robust provisions are contained in writing in the contract of employment, going beyond the basic protection offered by the common law.

Team moves present a particular problem for employers, especially as these can have a dramatic impact on profits, and where re-building teams and client relationships can take years. Tactics used to poach teams are frequently engineered to try to ensure there is no breach of individual employees' contractual non-solicitation clauses. Apart from offering substantial financial incentives, the competitor will first approach the key player (the most senior member of the team)

***'The prudent employer will always ensure that robust provisions are contained in writing in the contract of employment, going beyond the basic protection offered by the common law.'***

and then approach the remaining team who will tend to follow its leader. Provided notice periods or fixed terms are complied with and provided no team member is involved (directly or indirectly) in soliciting or colluding with anyone else, there will normally be no breach of contractual obligations and the competitor will not be guilty of inducing a breach. However, as recent case law shows, if employees collude in a mass exodus, or indeed departures on a smaller scale, and if the competitor is assisting or encouraging such collusion, the employer may well have claims against the employees for breaches of the implied duty of fidelity (and in some

cases for breaches of fiduciary duties), and against the competitor for inducing those breaches.

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**NOTE**

- 1) Lord Woolf in *Attorney General v Blake* [1998] 1 All ER 833.

## Redundancy consultation: an update on recent developments



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SEVERAL RECENT DECISIONS FROM THE Employment Appeal Tribunal (EAT) have provided helpful and pragmatic guidance for employers on the extent of their redundancy consultation obligations. This article examines the approach that tribunals are taking in determining what action is deemed reasonable and appropriate in a redundancy consultation exercise, and looks at how the EAT views that approach on appeal.

### WHAT IS A FAIR REDUNDANCY PROCEDURE?

Employers are well versed in the principles of reasonable consultation, as laid down by *Polkey v AE Dayton Services Ltd* [1987]. In *Polkey*, the claimant was dismissed for redundancy without their employer having made any attempts to consult with them. The Employment Tribunal (the Tribunal) found that the dismissal was procedurally flawed but that there had been no unfair dismissal because the claimant would have been dismissed even if the employer had consulted with them. The House of Lords overturned the decision and ruled that the claimant had been unfairly dismissed. It set out the importance of a fair and proper process in a redundancy consultation by confirming that:

'In the case of redundancy... the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within its own organisation.'

The question for the Tribunal is therefore whether an employer has acted reasonably, not whether the claimant would have been dismissed even if consultation had taken place. It is only where a proper procedure would be utterly futile, a rare occurrence, that a dismissal may still be fair in the absence of such procedure.

### RELATIONSHIP BETWEEN INDIVIDUAL AND COLLECTIVE CONSULTATION

In the vast majority of cases, consultation with the individual at risk of redundancy will be key to ensuring a fair dismissal. However, what are the employer's obligations towards the individual in a collective consultation? The recent EAT decision in *Dabson v David*

*Cover & Sons Ltd* [2011] looks at the degree of individual consultation required in a redundancy exercise where there has also been a collective consultation process.

In *Dabson*, the respondent entered into collective consultation with employees at risk of redundancy. The respondent did not have a recognised trade union and was therefore required, under the Trade Union and Labour Relations (Consolidation) Act 1992 (the 1992 Act), to elect employee representatives for collective consultation purposes. Only one employee was put forward and they were appointed by the respondent as an employee representative (without a proper election). The claimant was selected for redundancy from a pool of three (which included the employee representative). Although a provisional decision was taken that the claimant would be made redundant, two consultation meetings were held with the claimant before the final decision was made.

The claimant brought a claim for unfair dismissal. First, the claimant argued that, as there had not been a valid election under s188 of the 1992 Act, the respondent was required to consult individually with each affected employee and it had failed to properly do so. Secondly, the claimant argued that there were inconsistencies and inaccuracies in the scoring (namely, that the claimant had been awarded different scores for two apparently very similar criteria and that the person who moderated the scores had subsequently indicated that the scores may not have been correct). Despite these points, the Tribunal found that the dismissal was fair and the EAT upheld its decision.

In relation to the consultation, the EAT agreed with the Tribunal that the overall process was fair and that there was no need to consult individually with the claimant about the matters set out in s188 (such as the reasons for the redundancies, ways of avoiding them and the method for selection) as the employer had already consulted with the representative.

Although the EAT accepted that the respondent had not carried out a proper election, it was held that this was irrelevant since the claim was not brought under the 1992 Act. The question for the Tribunal was therefore whether the process looked at

**'The Employment Appeal Tribunal stated that marking should only be investigated where there are exceptional circumstances, such as bias or obvious mistake.'**

***'Fair consultation involves the provision of adequate information on which an employee can respond. The claimant should have had the opportunity to challenge the scoring, particularly in subjective areas such as flexibility.'***

as a whole was reasonable. The EAT held that the Tribunal was entitled to find that the process was adequate, based on the fact that preliminary consultation issues had been dealt with in negotiations with the employee representative and there had then been two subsequent consultation meetings with the employee (albeit that a provisional decision to dismiss the employee had been made prior to those meetings).

In relation to the claimant's arguments about his scores, the EAT held, referring to previous case law, that close scrutiny by the Tribunal of scores is normally inappropriate. The EAT stated that what is in issue is the question of fairness of the selection procedure overall and that marking should only be investigated where there are exceptional circumstances, such as bias or obvious mistake.

*Dabson* is helpful to employers and appears to set quite a low level for what constitutes fair consultation. *Dabson* confirms that the content of matters discussed during a collective consultation will go some way towards meeting the employer's obligations for individual consultation, albeit that a reasonable individual consultation should still take place in relation to the individual scores. The EAT also took a pragmatic approach when determining that:

- a) a provisional decision to dismiss can be taken before the end of a consultation process; and
- b) scores should only be scrutinised by a tribunal in exceptional circumstances.

#### **EMPLOYEES MUST BE GIVEN OPPORTUNITY TO CHALLENGE SCORES**

The EAT appears to have taken a stricter approach to scoring in another recent case, *Pinewood Repr Ltd (t/a County Print) v Page* [2010], in which it highlighted the

importance of giving employees adequate information to provide them with the opportunity to challenge their selection for redundancy.

The claimant, Mr G Page, who had worked for the respondent for 23 years, was put at risk of redundancy, scored using a redundancy matrix agreed by a union (of which he was not a member) and then invited to a consultation meeting. Prior to the meeting, Page asked why he had been chosen from the pool and asked to see the scores. He was given a copy of the scores at the meeting but did not have much time to consider it. At a second consultation meeting, Page gave the respondent a list of queries about the scores, and the respondent provided him with written answers to the queries at a third consultation meeting. In relation to Page's questions about ability, skill and experience, and flexibility, he was told that the scores were 'reasonable and appropriate' but the respondent did not explain how the scores had been arrived at. Page was made redundant and appealed the decision. In the internal appeal, he complained that he had not been consulted about the selection criteria and that the criteria were not applied in a fair and non-discriminatory manner. Page's appeal was rejected and he was told that the scoring was 'factual and correct'.

Page brought an unfair dismissal claim in the Tribunal. The respondent argued that there was no obligation on an employer to justify its scoring and that the Tribunal should only be concerned with whether the employer's marking and the manner in which it was carried out fell within a band of reasonable responses. A failure to provide more detailed information as to how the employee was scored should not take the employer outside of that band of responses. Page argued that the employee should be able to understand the basis on which the

decision is taken and, in particular, should be given sufficient information to be able to challenge the scores given to him.

The Tribunal agreed with Page and found that the dismissal was unfair, holding that an employer was required to provide an explanation for why an individual has received certain scores. Without giving Page some indication of how their scores had been arrived at, it was not possible for him to challenge those scores during either the consultation or internal appeal process. Further, in a situation where there were only three employees and the marking was close, it was open to the Tribunal to find that the consultation was not sufficient, having regard to the respondent's failure to answer Page's questions. The internal appeal process did nothing to correct the defect.

The EAT agreed with the Tribunal's decision and stressed that 'fair consultation involves the provision of adequate information on which an employee can respond or argue his case'. Page should have had the opportunity to challenge the scoring, particularly in relation to subjective areas such as flexibility. However, the EAT recognised that further explanation of scoring may not be necessary in every case, particularly where scores relate to more objective issues, such as attendance, timekeeping, conduct and productivity.

The EAT considered that it was for the Tribunal to decide whether an employee has been given a fair and proper opportunity to fully understand the matters about which they are being consulted, including whether they have been given sufficient information to be able to challenge the scores. It observed that, in the modern climate, 'much of this information would hopefully have been available to an employee via a previous appraisal process'.

*Pinewood* highlights the importance for employers of:

- 1) fully consulting with employees about their selection and individual scores, particularly where the criteria are more subjective in nature;
- 2) carrying out regular appraisals; and
- 3) conducting a proper appeal.

**LOOKING AT THE WHOLE PROCESS, INCLUDING THE APPEAL**

The importance of the appeal process was also considered in *Peninsula Business Services Ltd v Rees & ors* [2011], which was mainly concerned with the respondent's failure to comply with the now repealed statutory dismissal procedures. However, the EAT also provided useful comments on the overall fairness of redundancy procedures.

The respondent assessed its employees for redundancy and carried out consultation meetings. The claimants were selected for redundancy based on their scores but were not informed of what those scores were. Their internal appeals against their dismissals failed.

The Tribunal found several weaknesses in the respondent's process:

- the respondent had not followed their own guidelines either initially or on appeal;
- having stated that the redundancy exercise would result in four redundancies, the respondent changed its mind mid-process and decided to make eight redundancies instead;
- individual consultation was no more than a scoring meeting; and
- there was no real opportunity for the claimants to challenge the appropriateness or relevance of the selection criteria, or to suggest alternatives to redundancy.

The Tribunal concluded therefore that, while the respondent had not acted in bad faith, the process was 'somewhat secretive and certainly not fully transparent'. It stated:

'On balance, having regard to the lack of transparency... and lack of opportunity for the claimants meaningfully to challenge not just the overall criteria but particularly the individual application of those criteria in their own cases... the respondent did not act fairly in all the

***'It is the whole of the procedure surrounding the dismissal, including the internal appeal, that must be taken into account in considering what is reasonable. This means that a fair and independent appeal can cure any defects in the earlier procedure.'***

circumstances in treating redundancy as a sufficient reason to dismiss.'

The EAT agreed and went on to explain (referring to *Taylor v OCS Group Ltd* [2006]) that it is the whole of the procedure surrounding the dismissal, including the internal appeal, that must be taken into account in considering what is reasonable. This reflects the principle that a fair and independent appeal can cure any defects in the earlier procedure.

However, in *Peninsula*, the EAT upheld the Tribunal's finding that the standard of a reasonable employer had not been met, even when taking into account the appeal stage.

**CONCLUSION**

What these cases show is not just the importance of proper consultation with employees in a redundancy exercise (whether collective or individual) but the significance of transparency in the scoring process and, particularly when the criteria are subjective, the opportunity for employees to challenge their scores. *Pinewood* and *Peninsula* also serve as a valuable reminder of the critical role the internal appeal can play in curing any unfairness or unreasonableness in the procedure.

Following the repeal of the statutory dismissal procedures, there is no longer a statutory requirement that an employer give an employee the right to appeal a redundancy. The ACAS Code of Practice

on Discipline and Grievance, which gives employees a right of appeal on dismissal, does not apply to redundancy dismissals.

However, regardless of this, employers are well advised to offer employees the opportunity to appeal a redundancy dismissal for two reasons:

- 1) to flush out any issues at an early stage when there is still a chance to resolve them (rather than wait for the Tribunal claim); and
- 2) in the event that there have been flaws in the earlier procedure (provided the appeal is fair and independent), to remedy any such flaws and provide the employer with a defence in the Tribunal.

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*Dabson v David Cover & Sons Ltd (unfair dismissal: reasonableness of dismissal) [2011] UKEAT 0374/10/0905*

*Peninsula Business Services Ltd v Rees & ors [2011] UKEAT 0407/10/2104*

*Pinewood Repro Ltd (t/a County Print) v Page [2010] UKEAT 0028/10/1310*

*Polkey v AE Dayton Services Ltd [1987] UKHL 8*

*Taylor v OCS Group Ltd [2006] EWCA Civ 702*