

## REDUNDANCY SELECTION AND ALTERNATIVE EMPLOYMENT -

### A FREE REIN FOR EMPLOYERS?

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#### Introduction

1. In the context of redundancy selection, the fairness requirements of S98(4) Employment Rights Act have, until relatively recently, been fairly settled for almost 30 years. However, in recent times, there have been substantial changes, arguably with the threshold employers are required to meet being lowered further and further.
2. Redundancy selection essentially involves two matters, firstly the choice of criteria upon which the selection process will be based and secondly, the application of the chosen criteria to the employees in question.
3. As long ago as 1982, the EAT in *Williams v Compair Maxam Ltd [1982] ICR 156* set out the principles which, in the experience of the two lay members, reasonable employers adopted when dismissing for redundancy. In relation to the selection criteria, the relevant principle was that:
  - the employer will seek to establish criteria for selection which so far as possible can be objectively checked against such things as attendance record, efficiency at the job, experience or length of service, rather than depending solely on the opinion of the person making the selection.
4. The EAT stressed that the principles would not stay unaltered forever and that they are not principles of law but standards of behaviour. The EAT in *Rolls-Royce Motors Ltd v Dewhurst [1985] ICR 869*, reminded tribunals of this, stating that the principles should not be treated as if they were a statute or a check-list. Nonetheless, the Compair Maxam principles were routinely applied by tribunals for many years.
5. Over the years, it became a more common and accepted practice for employers to adopt a system of selecting for redundancy which relied not upon a purely objective and verifiable selection process, but upon a managerial assessment the employee's ability and performance as well as upon purely objective criteria. However, that managerial assessment was still required to have an evidenced basis which could be objectively verified. Such an approach has been seen time and time again, including in the following cases:
  - *KGB Micros Ltd v Lewis [UKEAT/573/90]*. The EAT held that the selection of salesmen for redundancy based on a criterion of "costs-saving" (those who cost more in terms of overheads but who generated least revenue were selected) was unfair as this was not an appropriate yardstick by which to assess employees' performance. The employer had failed to undertake any real appraisal of the employees and its selection process completely lacked objectivity, rendering the dismissal unfair.
  - In the first instance case of *Everitt v Sealine International Ltd (Case No 1313646/09)*, it was held that the selection of employees based on the criterion of "commitment" was unfair. The ET considered that unless such a criterion was closely defined and measurable by agreed benchmarks it is subjective, and the fact that employee forums had agreed the selection criteria did not make it any less so.
6. The Williams approach to selection is apt where the employer has a number of employees in the same job and needs to reduce numbers. The employer will generally use this approach to seek to retain the best employees in the smaller number of roles which are to continue, in other words, to separate the wheat from the chaff.

7. One key development in recent years has been the growing practice of employers deciding to undertake a more widespread restructure, placing all affected employees at risk of redundancy and requiring them to apply for alternative roles in the new structure. This normally happens where roles in the future will not be the same as those which have existed in the past, but as will be seen below, sometimes the differences between the earlier and later roles can be marginal.
8. In effect, there are now two alternative methods of choosing who stays and who goes. Under the traditional approach, employees will still be judged according to predetermined criteria, upon which they are scored, normally with the lowest scoring employees being those made redundant. This is true "selection" for redundancy. Under the more recent approach, the issue is not so much one of selection, as all relevant employees will have been selected for redundancy. Instead, there is a selection process to determine who will be offered alternative employment. Here, the process is often more like a recruitment exercise, which can be based on any number of factors and which tends to be forward-looking, supposedly in seeking the best "candidate" for the job in the new structure.
9. Either approach can be a legitimate exercise for employers to adopt, depending on the specific circumstances.
10. In recent years, there has been a marked move away from the traditional approach and towards the recruitment approach, with the selection process being more akin to a normal interview process. However, even where the traditional approach is used, it appears that the courts are now giving far more flexibility and more leeway to employers than was previously the case.

### **The Traditional Approach**

11. As noted above, for many years, the emphasis has been on the use of criteria which are capable of being objectively applied and measured. Provided the criteria were objective, a tribunal would not subject them or their application to over-minute scrutiny (see below).
12. However, still present was the requirement of objectivity in the selection process. In *Alexanders of Edinburgh Ltd v Maxwell and others* [UKEAT/796/86], the selection was made on the basis of "merit". No guidance was given to the selector as to what this should encompass and although he did assess the employees in the pool against various headings, the ET found that there had been no attempt to systematically tabulate those factors for comparison. It was found that the dismissal was therefore unfair.
13. *Graham v ABF Ltd* [1986] IRLR 90 was a case which was dangerously close to the line. Criteria which included "quality of work", "efficiency in carrying it out" and "the attitude of persons evaluated to the work" only very narrowly passed the reasonableness test. The Claimant had been selected for redundancy largely of his poor score in respect of attitude to work, based on having displayed obscene language and hostility, which had led to complaints by colleagues and his manager. The EAT found that this criterion was "dangerously ambiguous" but, not without some hesitation, found the dismissal to have been fair on the facts.
14. However, the requirement of objectivity in the choice of selection criteria has been whittled away in recent times.
15. In *Mitchells of Lancaster (Brewers) Ltd v Tattersall* [UKEAT/0605/11], the Claimant was one of five members of a senior management team. The ET had held that the selection criteria chosen by the employer, namely that losing him would cause the least damage to the Respondent's business, was indefensibly subjective and based solely on the views of the director rather than being an objective selection criterion.
16. The EAT was highly critical of the ET's approach, holding that as a matter of commonsense, it was hard to see how it can be inappropriate for a relatively small company in serious financial difficulty and with five employees in a senior management position, to apply this type

of criteria when deciding which of the five managers to make redundant. The EAT found that the description of the criteria as being wholly subjective did not appear to be either helpful or accurate, finding that while such criteria involve a degree of judgment, they are none the worse for that. It was further held that to object to a criterion because it is *“based solely on the views of the directors”* does not seem to be a fair objection. 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 to 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 EAT noted that the concept of a criterion only being valid if it can be scored or assessed caused them concern, as it could be invoked to limit selection procedures to box ticking exercises.

17. One need only go back to the words used in Williams to appreciate the contrast in emphasis.
18. In *Charles Scott and Partners Consulting Engineers Ltd v Hamilton [UKEAT/0072/10]*, the EAT was dealing with a redundancy situation involving a relatively small business with four directors and seventeen employees, including three associate structural engineers, one of whom was the Claimant. As a result of a downturn in business, it was decided to make one person redundant. The company decided to make redundant one of the associate structural engineers, as they were the highest earners. There was therefore a pool of three for selection. The four directors scored the three employees in accordance with a matrix of criteria they had drawn up after some internet research and discussion. They then carried out the scoring process collectively. The criteria used were time and attendance, capability, adaptability, client/customer focus, length of service, disciplinary record, motivation and team fit, each of which was scored from 1-10 with all criteria having equal weighting. The desire was to seek to retain those employees who could move the business forward. The Claimant's score was the lowest in what the tribunal found was a scoring exercise carried out in good faith.
19. One of the Claimant's complaints to the ET was that the selection criteria had been subjective and unfair as they were not objectively verifiable. The ET upheld that argument, on the basis that *“the selection criteria drawn up by the Respondent bore no relation to the criteria set out in the staff appraisal used by the Respondents until 2007”* and *“apart from the time and attendance and disciplinary record criteria, the tribunal do not accept that the selection criteria were necessarily objective.”* The tribunal also rejected length of service as an appropriate criterion on the basis that this might be discriminatory (although the Claimant made no discrimination complaint). In relation to the remaining criteria, the tribunal accepted that capability, adaptability, client/customer focus and motivation could be deemed objective but that as there was a lack of definition or clear guidance as to how to measure candidates against those criteria, their objectivity was undermined. The tribunal also regarded the criterion of team fit as potentially discriminatory but did not elaborate as to why (and again the Claimant made no discrimination complaint). The tribunal was also critical of the lack of weighting and the potential for double counting.
20. The EAT was highly critical of the ET's approach, noting that *“it is not the case that the adoption of criteria which involves a measure of subjectivity necessarily renders the dismissal unfair..... a number of criteria are regularly accepted as being reasonable – capability and performance for instance – will inevitably involve a measure of judgment which is hard to describe as being anything but subjective.....we are persuaded that the tribunal's approach has involved too detailed a scrutiny of the selection process.....”*
21. It is clear from these recent cases that the EAT is now openly accepting the use of criteria which are not capable of objective verification but which rely for assessment on the subjective views of the managers doing the scoring. Hamilton was a case where the subjective criteria were mixed with objectively verifiable criteria but there is absolutely nothing in the EAT's recent approach to suggest that it was the presence of some objective criteria which tipped the balance in the employer's favour. It therefore seems strongly arguable that an employer may now select criteria which rely solely on the subjective assessments of those undertaking

the scoring exercises and that there is no requirement for any purely objective criteria at all. If this is correct, the position has moved dramatically from that stated in *Williams*.

### **The "Recruitment" Approach**

22. The key authority in respect of the recruitment approach is *Morgan v Welsh Rugby Union [2011] IRLR 376*. This was a profile case concerning the selection of a new national coach development manager by the Welsh Rugby Union. There were two candidates. The first was Mr Morgan, the current national elite coach development manager. His role was to develop coaches with the ability to coach at the premier level of the game. There was a separate post of community rugby coach education manager, held by John Schropfer. His remit was to focus on the development of coaching at lower levels of the game.
23. The employer decided that the two roles would disappear and would be replaced with the new single post of national coach development manager. The new post was a senior role with overall strategic responsibility for developing and delivering coaching services. The job description provided that the role-holder "will be qualified to at least WRU level 4 or equivalent" and would "have an established reputation of developing elite coaches and within the field of coach education". The job description was described as "subject to change pending review by the role-holder and their line manager".
24. Mr Schropfer did not meet that job description. He was not qualified to WRU level 4, but only to level 3. He had no experience of training elite coaches, although he had been assistant coach of the national team. The Claimant fully met the job description. He was qualified to WRU level 5 and had substantial recent experience of training elite coaches. Despite the fact that, on paper, Mr Morgan was the only candidate who fit the bill, both were selected for interview for the new post.
25. The interview panel consisted of a committee of senior officials but did not contain a coach (although it had originally been intended that it would contain one). The candidates were told that the interview would comprise a presentation and standard interview questions. They were asked to prepare a 10-15 minute presentation. Standard questions were prepared for the interview and a scoring system set out. However, the committee did not adhere to that format in Mr Schropfer's interview. He gave a presentation that went on for much longer than the allocated 10-15 minutes, and which set out his plan and vision for the post as opposed to answering the question asked. He was not asked individual questions in the manner envisaged when the interview was planned. The Claimant, on the other hand, kept to the 10-15 minute time limit in his presentation, and was asked the scripted questions.
26. The committee did not produce individual scores for the presentation or for the individual questions, but instead gave overall scores. The committee considered both the Claimant and Mr Schropfer to be capable candidates, but it selected Mr Schropfer, and the Claimant was made redundant. The Claimant brought a claim for unfair dismissal. By a majority, the ET held that the dismissal was fair, considering that the employer had not acted unreasonably in interviewing Mr Schropfer despite the fact that he did not meet the job description. Although the tribunal criticised the fact that the committee had not followed the interview format, and stated that it was regrettable that there was no one with coaching experience on the committee, it considered that the selection process had been fair overall.
27. The Claimant appealed. He argued that the tribunal had failed to have regard to the principles for fair redundancy selection exercises set out in *Williams v Compair Maxam*, in particular as to the requirement to establish criteria for selection which so far as possible did not depend upon the opinion of the person making the selection but could be objectively assessed; and that the selection should be made in accordance with those criteria. Mr Morgan argued that the employer had not applied its own criteria: it had departed from the job description, which was the objective standard of assessment. The Claimant also criticised the tribunal's conclusion that the interviewing process had been carried out in a fair manner, arguing that he must have been disadvantaged by the willingness of the committee to entertain a lengthy presentation from Mr Schropfer and to value it positively. He complained that the marking

regime had not been fully followed and that the committee had had no member with expertise in coaching.

28. The EAT held that the ET had not erred, noting that under S98(4), it is for the ET to determine whether the employer has acted reasonably or unreasonably in deciding to dismiss. The EAT reminded itself that it can intervene if and only if an error of law has been made by the tribunal and that the factors set out in *Williams* in respect of redundancy selection are not principles of law but standards of behaviour. Further, it was noted that a failure to have regard to one of those factors would not, of itself, constitute a misdirection by the ET and that only in cases where there is genuine perversity would the factors be directly relevant. Thus, there is only limited room for an argument that the decision of the employment tribunal was perverse.
29. The EAT further held that the *Williams* factors are only applicable to the selection of employees who are to be made redundant from within an existing group. There are some redundancy cases where redundancy arises in consequence of a re-organisation and there are new, different, roles to be filled. The EAT held that the factors set out in *Williams* do not seek to address the process by which such roles are to be filled. Where an employer has to decide which employees from a pool of existing employees are to be made redundant, the criteria will reflect a known job, performed by known employees over a period. Where, however, 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 ability of the individual to perform in the new role. Whereas *Williams*-type selection will involve consultation and a meeting, appointment to a new role is likely to involve something much more like an interview process. The EAT added that these considerations may well apply with particular force where the new role is at a high level and where it involves promotion. The EAT then went even further, finding that a tribunal is entitled to consider, as part of its deliberations, how far an interview process was objective, but it should keep carefully in mind that an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgment. A tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair. A tribunal is entitled to consider whether an appointment was made capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under s.98(4).
30. The EAT further noted that if the appointment had been external, the employer would not have been bound by its job description or person specification. Similarly, when making an internal appointment, there is no rule requiring an employer to adhere to the job description or person specification. The employer is entitled to interview internal candidates even if they did not precisely meet the job description; and it is entitled to appoint a candidate who did not precisely meet the person specification. The employer is entitled, at the end of the process, to appoint a candidate which it considers able to fulfil the role.
31. In the present case, the tribunal had not erred in law in its approach to the process which the employer had followed. It accepted that it was regrettable that there was no person with specific coaching experience on the panel, but it found that the panel was an extremely senior committee with experience of making key senior appointments. The tribunal accepted that it would have been better if the interviewing panel had followed the intended process more strictly, but after a careful review it considered that the interviewing process was objective and fair. It had not erred in law or reached a perverse conclusion, and the appeal failed.
32. *Morgan* was regarded as an important case, both in sanctioning the use of the recruitment-style process and in confirming the acceptability of a substantial element of personal judgment as to the merits of the candidates.
33. *Morgan* has since been followed by the EAT in the case of *Samsung Electronics (UK) Ltd v Monte-D'Cruz* [UKEAT/0039/11]. The Claimant had worked for the Respondent since January 2008. He was initially employed as "Head of Reseller - Print", with responsibility for two business channels, namely Office Automation ("OA") and IT. In January 2009, the Respondent decided to split the Claimant's job between the two channels. He became "Head

of OA Reseller" and lost responsibility for IT. The Claimant was one of four senior managers who reported to the Head of Print.

34. In the autumn of 2009 the Respondent decided to reorganise its Print Division. This was to be done in two stages. First, the four senior roles would be combined into a single position of "Head of Sales - Print". At the next stage, and under the leadership of the new Head of Sales - Print, several new managerial roles were to be created, reporting to him. There was also to be a reorganisation of the sales team itself. The Claimant was offered the opportunity to apply for the senior role and if unsuccessful, for the new managerial roles.
35. The Claimant applied for the job of Head of Sales – Print and was interviewed. He made a presentation and was asked questions. He was scored according to the ten competencies which were routinely used by the Respondent in its annual assessment process (creativity, challenge, speed, strategic focus, simplicity, self-control/empowerment, customer focus, crisis awareness, continuous innovation and teamwork/leadership). A score of at least 75 was required for a candidate to be appointable.
36. The Claimant was not successful. He therefore decided to apply for one of the managerial roles, namely the role of Business Region Team Leader, believing this to be almost identical to what he had been doing before and that he was therefore the obvious choice for this role.
37. There was one other candidate for the Business Region Team Leader role, namely Mr Bullock. Both he and the Claimant were interviewed, being scored on the same basis as for the Head of Sales - Print post. Neither candidate came close to the required score of 75. The Appellant decided to recruit externally and shortly afterwards engaged an external consultant. The Claimant was subsequently made redundant.
38. In relation to the arguments on selection, there was a distinction between stage 1 and stage 2 of the process. The ET found that the Claimant's non-selection for the job of Head of Sales - Print at stage 1 could not be challenged, noting that the Claimant himself accepted that he was not the best candidate. It then declined to consider the position at stage 2 as a matter of selection for redundancy because at this stage, the parties were concerned not with redundancy but with the offer of alternative employment. However, the tribunal advanced as a proposition that an employer can only fairly select for redundancy on the basis of criteria which can be "objectively measured".
39. In relation to the argument on alternative employment, the tribunal directed itself that in a case like the present, where there was more than one candidate for an alternative role, it was not appropriate to apply the same criteria as in judging selection for the original redundancy, but that nevertheless ". . . *there has to be a degree of objectivity as to the criteria and their application otherwise the process would be unreasonable, applications must be considered properly and the exercise carried out in good faith ...*" Applying that approach, it said that it would not itself have allowed other members of the team to apply for the job of Business Region Team Leader because it was so close to the Claimant's previous role; but it acknowledged that this decision was potentially within the range of reasonable responses and that it could not substitute its own view. It then proceeded to make a number of criticisms of the process which had been followed in assessing the Claimant's (and Mr Bullock's) suitability for that job. These criticisms included a lack of objectivity, for example, because past performance was not considered in an objective or reasonable way. The tribunal went on to find that the dismissal was unfair on two bases, one of which was the flaws in the selection process for the job of Business Region Team Leader.
40. The EAT overturned the ET's decision. In particular, the EAT criticised the ET's reliance on the earlier decision in *Ralph Martindale & Co v Harris* (UKEAT/0166/07), that "the selection criteria must at least meet some criteria of fairness" and in particular that they must be "objective". It was noted that Morgan had made it clear that there were no such specific rules and that *Ralph Martindale* was not authority for any such general principle. The EAT again reiterated that the criteria to be applied in selecting an employee for redundancy cannot be transposed to the process for deciding whether a redundant employee should be offered an alternative position.

41. Applying these principles, it was held that the employment tribunal had not acted unreasonably in offering the post to an employee who it judged to be better able to fulfil the role than the Claimant, notwithstanding that it had departed to some extent from the published interview process.
42. The EAT further held that the tribunal had erred in having found the dismissal to be unfair because the employer had dealt with the selection criteria for the alternative employment in an entirely subjective way. The EAT noted that "subjectivity" is often used in this and similar contexts as a dirty word, but added that the fact is that not all aspects of the performance or value of an employee lend themselves to objective measurement, and there is no obligation on an employer always to use criteria which are capable of such measurement, and certainly not in the context of an interview for alternative employment. Given the nature of the Claimant's job, the EAT said it saw nothing objectionable in principle in his being assessed on "subjective" criteria. The EAT went on to state that the fairness of a decision to dismiss in cases of this kind cannot depend on whether the minutiae of good interview practice are observed.
43. In relation to the criticism that earlier appraisals should have been used in assessing past performance, the EAT held that it was not open to the ET to use this as a basis for finding the dismissal to be unfair. What assessment tools to use in an interview of this kind is *prima facie* a matter for the discretion of the employer. If the tools used had been plainly inappropriate that might be influential on the issue of the fairness, but this was not such a case. The employer regarded the Business Region Team Leader as a new job, despite the clear similarities it had with the Claimant's previous role; and it is understandable that it should choose to interview for it on a forward-looking basis.
44. The EAT found that the ET could not properly have found the dismissal of the Claimant to be unfair on that basis. The Appellant's suitability for the job was assessed in a formal interview process by two senior managers, who applied identified criteria and made a systematic evaluation of his suitability in good faith. To the extent that there were flaws in the process, they were in no sense egregious or such that the Appellant, who was the victim of a genuine redundancy situation, could complain that his dismissal was unfair.
45. The decision in *Samsung* clearly goes further than the judgment in *Morgan* in arguably giving employers an almost free reign to simply appoint the candidates they subjectively decide is the best person for the job. The point made in *Morgan* that this approach (with its substantial degree of subjectivity) is particularly appropriate for high ranking jobs which represent a promotion did not even warrant a mention. The same principle was applied, without further reference, to a new role which was not a particularly senior one and which was on a par with the earlier role. Further, the EAT made it abundantly clear that there is no requirement for the selection for the new role to be based on objective criteria at all, leaving the way open for employers to make purely subjective selection decisions. According to the EAT, absent discrimination, bad faith or "plainly inappropriate" selection tools, tribunals should not interfere with the decisions reached.
46. Again, this represents a significant departure from the approach taken in *Williams* and subsequent cases.
47. The current approach of the EAT is more troubling still when viewed alongside the latest guidance as to the circumstances in which, and the extent to which, tribunals can properly scrutinise the scores given by employers in selection processes, which will apply to either traditional or recruitment-style selection processes.

#### **The Limited Basis for Challenging Scores**

48. As noted above, when faced with the task of selecting employees for redundancy, it was common practice for many years for employers to decide upon a number of different criteria against which the employees in the selection pool should be assessed and then to allocate marks for each employee under each of those criteria. Those selected for redundancy may

complain that the scoring was not carried out accurately or fairly and claim that the resulting dismissal was unfair. The question arises as to whether, and to what extent, the ETs can scrutinise the employer's assessments of those in the pool to discover whether there is any evidence to substantiate the employee's claims.

49. It has long been known that the tribunal's ability to carefully scrutinise the scores awarded by the employer in a marking exercise is limited.
50. In *Buchanan v Tilcon Ltd* [1983] IRLR 417, the ET had held that the onus was on the employer to prove the accuracy of the information on which the scores were based and that as it had not done so, the dismissal was unfair. The EAT held that the ET had imposed too high a standard and there was no such onus on an employer. On further appeal, it was held that the employer does not have to prove to the tribunal that its grading of employees was carried out accurately. Where the complaint is one of unfair selection, all the employer has to prove is that the method of selection was fair in general terms and that it was reasonably applied. Where the tribunal had found that the official doing the scoring had made his decision fairly, using information he had no reason to question, it was unreasonable and unrealistic to require the employer to prove the accuracy of that information.
51. The Court of Appeal in *British Aerospace Plc v Green and others* [1995] ICR 1006 held that an ET should essentially limit its remit to satisfying itself that the method of selection was not inherently unfair and that it was applied in a reasonable way. In refusing an application by the Claimants for disclosure of assessment forms, the CA noted that if a system of graded assessments were to function effectively, its workings were not to be subjected to over-minute analysis: "*in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him, adding that "to allow otherwise would involve a serious risk that the system itself would lose the respect with which it is presently regarded on both sides of industry, and that tribunal hearings would become hopelessly protracted."*
52. A similar approach was followed in *Eaton Ltd v King and others* [1995] IRLR 75. Four employees brought complaints of unfair dismissal, one of the issues in common being the fairness of the employer's application of the selection criteria. The Respondent called no evidence as to how the marks had been allocated or the basis for these. The ET held that the absence of evidence as to how the marks had been arrived at made it impossible to decide that the selection criteria had been applied fairly to the Claimants. The EAT disagreed, holding that all the employer had to show was that it had set up a good system of selection which had been reasonably applied. There is no reason why the managers who made the decisions to dismiss should not have relied on the information supplied to them by the supervisors who carried out the assessments, and the managers should not be expected to explain each marking.
53. In *Taylor and others v BICC Brand Rex Ltd and BICC Cables Ltd* [UKEAT/651/94] the EAT held that in order for the ET to be able to scrutinise the scoring in detail, there needed to be some sort of unfair conduct on the employer's part which could mar the fairness of the system, such as evidence of bad faith, victimisation or discrimination.
54. Tribunals which have embarked on a detailed analysis of how an employer came to mark a particular candidate in a particular way and whether such a mark was justified have, time and time and again, been criticised and overturned by the EAT. There are many examples of this, including the following:
  - *Drake International Systems Ltd v O'Hare* [UKEAT/0384/03]. The EAT held that the ET had erred in criticising an employer for not excluding absences caused by industrial injuries when marking employees against the criterion of sickness absence. The tribunal was found to have fallen into the error of substituting its own view for that of the employer.



*marking scheme has to be objectively verifiable (by which we mean verifiable independently of the judgment of management) as fair and accurate. If overall the redundancy criteria were reasonable then the fact that some items were not capable of objective verification is not fatal to the scheme."*

60. It is therefore clear that the tribunals` remit in terms of considering the scores awarded in the selection exercise is very limited indeed. Even in a case where the hearing had quite properly explored the rationale for the scores awarded (due to the existence of the discrimination complaint) and found the explanations wanting and the scores wholly unwarranted, the tribunal, having rejected the discrimination complaint, was then expected to put that information to one side, step back and apply the very low threshold test set out in the earlier case-law.

### **Where Does This Leave Us?**

61. It is strongly arguable that the current pro-employer approach is highly unsatisfactory for a number of reasons. For example:

- If in a traditional selection exercise the requirement for objective criteria has been whittled down to the extent that it is now permissible to rely largely, perhaps even solely, on subjective criteria and the subjective views of the manager undertaking the scoring, what protection is there against pure personal preference dictating the outcome?
- If in a recruitment-type exercise, the employer is at liberty to pursue applications from candidates who do not meet the essential criteria for the post and to prefer those candidates on the basis of the subjective opinions of those undertaking the interview, even in circumstances where the new post is very similar to the post previously undertaken by the Claimant, what protection is there for an employee whose face is simply not seen to "fit" and who the employer would simply prefer to replace?
- How is the tribunal to assess whether the process was undertaken and the scores really given in good faith if there can be no detailed examination of the marks awarded against clear documentary evidence with which it is inconsistent? How can the tribunal assess (as noted in Morgan) whether the appointment was made capriciously, or out of favouritism or on personal grounds if such an exercise is not permitted?

62. The current approach of the courts to these issues is clearly influenced by the challenges businesses have faced in recent times in terms of the need to streamline and to be ever more competitive. It is understandable that the appeal courts give some leeway to employers to make decisions that will enable them to retain those employees who can most effectively contribute to the future survival and success of the business. The key question, however, is whether the courts have gone too far. Is it now too easy for employers to make the decisions they see fit, without facing any proper or detailed challenge to their processes and scoring?

63. Employees are now aware of how difficult it is to succeed in standard redundancy selection cases. What are they likely to do about this? The likelihood is that more employees will seek to explore the detail of the selection process by alleging an improper motive or influence in the selection decision. Some employees will bring claims of discriminatory selection, citing a protected characteristic under the Equality Act or other protected status. Others may contend that the true reason for their selection was one which may render their dismissal automatically unfair, such as having made a protected disclosure or asserted a statutory right. Having done so, such an employee can expect the tribunal to allow them the opportunity to challenge the selection and scoring process in more detail, so as to highlight inconsistencies which might shift the burden of proof to the employer or call into question the true reason for the selection. We all know how unlikely it is that a tribunal would find a discriminatory selection decision to be one which was open to an employer acting reasonably so the temptation to "have a go" in arguing a discriminatory or automatically unfair dismissal is obvious.

64. In relation to employers, the danger is that the current approach could lull them into a false sense of security, causing them to rest on their laurels and failing to present evidence which is adequate to defeat a claim based on discrimination or improper motive for the selection. For this reason, it is still essential for employers to be seen to have acted fairly and reasonably in all respects and to keep proper records of the decisions reached and the reasons behind them.
65. We have already explored in the earlier session the extent to which claims for automatically unfair dismissal and discrimination are likely to come to the fore as a result of the increase in the qualifying period to claim unfair dismissal to two years. It is also possible that the current, highly restrictive approach of the appeal courts to the question of redundancy selection and selection for alternative employment could lead to the same result.

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