

Watkins v Crouch t/a Temple Bird Solicitors [2011] IRLR 382

Angela Watkins, was employed as a secretary. She was placed in a redundancy selection pool of 8 employees, which included Ms Woodhouse, the firm's receptionist, who had 6 years' service and a detailed knowledge of the firm's clients, its procedures and processes, and other business contacts who dealt with the firm.

The selection criteria made known to the employees, were fee-earning ability, client-facing skills, knowledge of the firm's administrative procedures, availability for suitable work following any re-organisation, and adaptability. Ms Watkins scored 10 out of 25 and was selected for redundancy, but she discovered that Ms Woodhouse had received a lower score, but had been retained. Ms Watkins brought an unfair dismissal claim.

The employer' argued that it had been made clear to the employees from the outset that their scores against the five criteria were not to be decisive and were only one part of the decision-making process, along with other factors, such as the requirements of the business, the skills of the employees and the resources which would be needed to carry out the firm's work.

Ms Watkins argued that she had only been informed that the scoring was only one part of the decision-making process when she had received the letter telling her what her scores were and Ms Woodcock, who had been one of the two lowest scorers, had been taken out of that pool so that she would not be made redundant.

The tribunal found the dismissal fair. Although another employer may have chosen to tell the employees of its decision to treat Ms Woodhouse's role as unique, that did not make the process a sham and the agreed criteria had been applied fairly and objectively.

The EAT upheld Ms Watkin's appeal. The selection criteria had not been fairly applied because factors other than the agreed criteria and the scores that they had produced were taken into consideration in Ms Woodhouse's case. The tribunal had not assessed whether it was fair to use factors other than the scores that the employees had achieved in deciding which employees should be made redundant or Ms Watkin's case that the firm had changed the selection criteria when it realised that Miss Woodhouse would have had to go if those criteria were applied. The case would be remitted to a differently constituted employment tribunal for rehearing.

The key learning point is that selection for redundancy must involve the fair application of objective criteria to everyone in the selection pool. The rules can't be changed after the scoring if the result is not deemed 'right' for the business. It could be the case that a pre-notified overall deciding selection criterion of 'business requirements' may be fair, depending on how it is applied. However, such a subjective criterion might not satisfy the requirement for selection criteria to be sufficiently objective so as to eliminate, bias.

Keeping You One Step Ahead



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Fuller v London Borough of Brent [2011] IRLR 414

Ms Fuller, a bursar at a school for children with special needs, objected to the way a child was being restrained, and refused to follow the head teacher's instructions to leave the scene. Given that she had already had a verbal warning, she was suspended, and subsequently dismissed for gross misconduct. Ms Fuller brought a successful unfair dismissal claim in an employment tribunal. The Council appealed to the EAT, which allowed the appeal. In its view, the tribunal had impermissibly put itself in the place of the employer by deciding that it would not have dismissed for gross misconduct. Ms Fuller appealed.

The Court of Appeal allowed the appeal and restored the tribunal's decision. It noted that, on appeal, an appellate court will err if it substitutes its own view of the reasonable employer's response for the view formed by the tribunal, absent error of law or perversity on the tribunal's part.

While a tribunal's judgment must be read carefully, the reading must not be 'so fussy that it produces pernickety critiques'. Over-analysis of the reasoning process, being hypercritical of the way in which the decision is written, and focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round, should all be avoided. The Court agreed that there were deficiencies in the tribunal's judgement. But when read in a fair, reasonable, sensible way and in the round, it could be seen that the tribunal had applied the required correct objective assessment of the employer's response.

The case serves as a useful reminder that the ultimate test in an unfair dismissal claim where reasonableness is concerned is whether the decision to dismiss fell within the band of reasonable responses that the employer could take in the circumstances. It is not for the tribunal nor the EAT to substitute its own view.

Mahood v Irish Centre Housing Ltd IDS 924

Mr Mahood is Irish and a protestant and worked for Irish Centre Housing (ICH Ltd) as a temporary project worker, which required a CRB check to be carried out. He worked alongside Mr Toubkin, another temporary project worker hired through an employment agency. Mr Mahood raised a grievance that Mr Toubkin had made derogatory remarks about Irish and protestant people, mimicked his accent, and behaved in an aggressive and intimidating way towards him. The day after, an altercation between the two resulted in Mr Mahood being told to go home by his manager while the dispute was resolved. Mr Toubkin's agency contract was terminated but Mr Mahood was also dismissed two weeks later because of concerns that he had not been CRB checked.

Mr Mahood presented a number of claims before an employment tribunal under the Race Relations Act 1976 (RRA) and the Employment Equality (Religion or Belief) Regulations 2003 (the Regulations), including that ICH Ltd was vicariously liable for Mr Toubkin's actions. The tribunal found that there had been victimisation by ICH Ltd, but dismissed claims of discrimination. In the appeal, ICH Ltd submitted that it could only be liable under the RRA or the Regulations if Mr Toubkin was its agent (acting on the employer's behalf) or 'employed'.

The tribunal had not made a finding on this issue. ICH Ltd argued that, as an agency worker, Mr Toubkin came within neither category and so there could be no liability. However, the EAT, while holding that Mr Toubkin could not possibly be considered as 'employed', also held that under the RRA or the Regulations, an employer could in principle be liable for the discriminatory acts of an agency worker acting as ICH Ltd's agent where that worker was exercising the authority of, or being controlled by, the employer, or where he or she has the employer's authority to do the acts in question, where those acts are done in a discriminatory manner but are just as capable of being done in a lawful manner.

The tribunal, however, made no findings on the agency worker's status, i.e. whether he was acting as an agent, or what steps the respondent had taken to prevent discriminatory conduct. The case was remitted to the same tribunal to re-examine the issue on the basis of the evidence before it and if the tribunal did find the respondent liable, to consider whether the statutory 'prevention' defence was made out. The practical implication here is that in certain circumstances an employer could be liable for the discriminatory acts of an agency worker, where he or she is acting as an agent.