

### REDUNDANCIES FOLLOWING A TUPE TRANSFER

When one business has acquired another similar business under the Transfer of Undertakings (TUPE), the need for redundancies often arises. In *First Scottish Searching Services Ltd. v McDine and Middleton*, the judgment of the Employment Appeal Tribunal (EAT) illustrates what approach the Employment Tribunal (ET) should adopt when deciding what constitutes a fair redundancy selection process when the selection pool includes employees of the transferor and the transferee.

First Scottish Searching Services Ltd. (FSSS) had acquired another property title search business, SPH, in 2009. The contracts of employment of employees of SPH were automatically transferred to FSSS in the TUPE transfer. FSSS had warned that redundancies would be likely and, in the event, used the same scoring matrix as it had adopted during an earlier round of redundancies in 2008. Former employees of SPH were assessed by managers who had transferred with them, whilst the scoring for existing FSSS employees was carried out by managers familiar with their work. The scores of the latter group were also compared with those achieved in the 2008 redundancy exercise. As it turned out, all of the employees identified as being at risk of redundancy had transferred from SPH.

Two of the dismissed employees contended that the redundancy exercise was biased and brought claims for unfair dismissal.

The ET criticised the redundancy selection system used by FSSS because it did not incorporate 'some system for moderating the two sets of scores'. In its view, because there was a 'clear and overt risk of unfairness', the entire redundancy process was unfair. FSSS appealed against this decision.

The EAT upheld the appeal. The ET had failed to give any explanation of what it meant by 'moderating' the scores nor, indeed, how

moderation came to be a feature of the case at all. There were no findings of fact as to what might actually have been done to achieve

whatever it was the ET had in mind nor as to what would have been the likely outcome if 'some system of moderation' had been employed.

Under Section 98 of the Employment Rights Act 1996 (ERA), whether a redundancy dismissal is fair or unfair depends on whether the employer acted reasonably or unreasonably in deciding to dismiss the employee. The ET had fallen into the trap of engaging in a 'microscopic' reassessment of the redundancy selection process and had substituted its own opinion for that of a reasonable employer. It had sought perfection when this is not what is required by the ERA.

There was no finding of fact as to any inconsistency of approach between the two sets of managers and no evidence of deliberate bias. Furthermore, the ET had failed to consider the impact on the redundancy decision of the claimants' scores for length of service – a wholly objective criterion that no amount of moderation could have affected – which was clearly substantial.

**We can advise you on any redundancy matter.**



“ In many cases, there will be a band of reasonable responses, with room for legitimate differences of opinion amongst reasonable employers as to what is a fair way to act. ”

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## POLKEY REDUCTIONS – SOME SPECULATION INEVITABLE

In *Eversheds Legal Services Ltd. v de Belin*, whilst upholding Mr de Belin's claims of unfair dismissal and sex discrimination, the Employment Appeal Tribunal (EAT) found that the Employment Tribunal (ET) had failed to address Eversheds' argument that the amount of the compensation award should have been discounted in order to reflect the possibility that the claimant would have been dismissed as a result of a subsequent redundancy exercise a year later. This is commonly known as a 'Polkey' reduction as this point was first established in the case of *Polkey v A E Dayton Services Ltd.*

Eversheds had produced evidence to show that, had he not already been made redundant, Mr de Belin would probably have been selected based on the criteria used in the later

redundancy exercise. The ET dismissed the argument, describing the evidence as 'speculative' and insufficient for it to carry out a Polkey exercise.

The EAT held that this reasoning was 'plainly unsatisfactory'. The ET had a duty, as part of its obligation to give reasons for its decision, to consider the evidence rather than dismiss it. In the EAT's view, the ET was 'seduced into abandoning its proper course, as tribunals still too often are, by the siren word "speculative"'. Although earlier case law warns against engaging in speculation, this caution should not be interpreted too widely. The authorities also state that any assessment of future loss will inevitably involve a speculative element. In assessing how long an employee would have been employed but for the dismissal, it is for the

employer to adduce any relevant evidence on which it wishes to rely. When making its assessment, the ET must have regard to all the evidence presented. Whilst there will be circumstances where the evidence is such that no sensible prediction can be made, the ET has a duty to take account of any material that will assist it in determining a compensation award that is fair.

A degree of uncertainty is an inevitable feature of the exercise and the mere fact that an element of speculation is involved is not a reason for failing to evaluate the evidence.

In the circumstances, there was clearly a case to answer and the question of compensation was remitted to a different ET for proper consideration.

## DISABILITY DISCRIMINATION – FAILURE TO MAKE REASONABLE ADJUSTMENTS



Under Section 4A of the Disability Discrimination Act 1995 (DDA), employers had a duty to make reasonable adjustments to working practices in order to ensure that a disabled employee was not disadvantaged. Under the Equality Act 2010, which has now replaced the DDA, this duty remains largely the same.

In a recent case (*Tameside Hospital NHS Foundation Trust v Mylott*), the Employment Appeal Tribunal (EAT) held that an employer's failure to take steps to facilitate a disabled employee's

application for ill health retirement was not a breach of the DDA. Whilst upholding other findings of disability discrimination against the Tameside Hospital, (which related to its handling of Mr Mylott's situation when he was absent from work for a long period with work-related stress), the EAT overturned this aspect of the judgment of the Employment Tribunal. In the EAT's view, the duty did not extend to enabling a disabled employee who was no longer able to do their work (or any available alternative) to leave their employment on favourable terms. The whole concept of an adjustment is that it is made in order to make it possible for the disabled employee to remain in employment. It does not extend to ensuring that they are compensated for no longer being able to do so.

**Long-term sickness absence is a difficult area of the law and we strongly recommend that you take advice based on your specific circumstances before taking any action.**

## MINIMUM WAGE RATES

The Government has announced that it has accepted the recommendations of the Low Pay Commission (LPC) on new rates for the National Minimum Wage (NMW) that will come into force on 1 October 2011.

The revised rates are as follows:

- The adult hourly rate of the NMW will increase from £5.93 to £6.08;
- The development rate (which covers workers aged 18-20 years) will increase from £4.92 to £4.98; and
- The rate for workers aged 16 and 17 will increase from £3.64 to £3.68.

The apprentice rate, for apprentices under 19 or those aged 19 or over and in the first year of their apprenticeship, will increase from £2.50 to £2.60 per hour.

From 1 October 2011, the accommodation offset will rise from £4.61 per day to £4.73.

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