Does the failure to place a redundant employee on an existing "bank" workers list render a dismissal unfair?

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Aramark (UK) Limited v Mr Fernandes UKEATS/0028/19/SS (13th March 2020)

The claim

It was common ground between the parties that the claimant had been dismissed for a fair reason, namely redundancy. The point of contention arose from the fact that, at point of dismissal, the respondent had in place a list of workers upon whom it would call upon to undertake adhoc work as and when needed.

The claimant contended that the respondent's failure to place him on that list rendered the dismissal unfair. It appears that he relied on the generally accepted principle that, in order for a redundancy dismissal to be fair, it is necessary for the employer (amongst other things) to have made reasonable efforts to assist the relevant employee to obtain alternative employment.

The ET

The ET accepted the claimant's argument. The ET concluded that the failure to place the claimant on the list of workers at point of dismissal rendered the dismissal unfair.

The EAT

The respondent appealed. Their core argument it seems was that being placed on the list would not have placed the claimant in alternative employment and as such did not obviate dismissal; it was not something which could be required under s98(4) ERA 1996.

The EAT in essence agreed. Being placed on the list would provide a worker with the prospect of work, but not with any guarantee of work. Those on the list were not employed by the respondent. Placing the claimant on the list would not have the effect of obviating dismissal. As such it was not a relevant consideration for the purposes of s98(4).

Comment

In this case it appears that the factual findings included that those on the list were not "employed". This, it seems, followed from the lack of any obligation on the respondent to offer work to those on the list. In those circumstances it can be seen that being placed on the list would not provide "alternative employment" and/or in any event would not obviate dismissal.

However, employers who are in the habit of using "bank" workers, or "casual workers", and who retain lists of such workers, should take care before concluding from this authority that there is no need to offer a place on any such list to dismissed staff.

Depending on the facts, workers referred to by employers as "bank" or "casual" workers (or other adhoc workers) can nevertheless be "employees". In some cases such workers will be employees for the purposes of each assignment; in some cases they will have "umbrella" (or "global") employment contracts subsisting in between assignments; and in some cases the reality of the situation will simply render them employees in the standard sense. In such circumstances, a place on a list of such workers could arguably provide alternative "employment" and/or obviate dismissal.

As such, arguably, despite this authority, in some circumstances the failure to provide a dismissed worker the opportunity to be placed on such a list could still raise the risk of unfair dismissal.

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