Should you offer an opportunity to appeal against redundancy, even if you think providing such an opportunity would be futile?

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Gwynedd Council v S Barratt & I Hughes [2021] EWCA Civ 1322

The facts

The Council, R, decided to reorganise the arrangements it had in place for schooling in a particular area: it determined that it would close some schools and set up a new school in their stead. Teachers at the schools which were going to close were informed. They were also notified that they would be given the chance to apply for jobs at the new school, with any such applications being dealt with by way of a competitive process. They were told that absent success in any such applications, they would be dismissed as redundant, unless they were successfully redeployed into some other suitable role.

Cs applied for roles at the new school; it seems these roles were relatively similar to those in which they had been employed to date. Whereas many of their colleagues were successful, they were unsuccessful in their applications. They were served notice of termination by R. They were not notified of any right to appeal.

Cs wrote to the Governing Body of the school they were employed at, raising the apparent lack of any opportunity to appeal. In response the Governing Body apologised, but went on to explain that no disadvantage arose given that the dismissals were consequent to the pending closure of the school and that no appeal panel would be able to overturn that decision.

Cs later wrote to R complaining of the lack of appeal opportunity. They placed reliance on reg 17 of the Staffing of Maintained Schools (Wales) Regulations 2006, which appeared to provide for such a right. R wrote in response, in essence taking a similar line to that adopted by the Governing Body in the response referred to above, i.e. that any appeal would be futile.

ET

Cs presented claims for unfair dismissal. The final hearing proceeded, at least in part, on the basis of agreed facts.

The ET had considerable reservations about whether redundancy had been the reason for dismissal, or whether the actual reason was rather the approach R adopted of requiring Cs to apply for jobs at the new school. However, the parties had agreed between themselves that redundancy was the reason and ET proceeded accordingly. However, upon consideration of the issue of s98(4), the ET concluded that the dismissals were unfair. The basis of that decision was the subject of some debate at appeal; however, it appears clear that relevant factors in the decision included, at least, the lack of effective consultation and the lack of opportunity to appeal.

The ET also determined the issue of *Polkey*. The ET declined to make any reduction at all; in essence the ET appears to have reached the view that it was simply not possible to determine what would have happened if R had acted in compliance with s98(4).

The EAT

R appealed to the EAT on various grounds. Having not met with success at the EAT, R appealed to the Court of Appeal.

The Court of Appeal

R sought to place reliance on the statutory framework under which teachers are employed. R argued that a right of appeal under reg 17 would have been futile given that it would have entailed an appeal heard by a school which was closing; and that school had no power over any staffing decisions to be taken by the new school. It seems that R also asserted that R could not be liable for decisions taken by independent Governing Bodies.

The Court of Appeal gave these arguments short shrift. As per the Court of Appeal:

- "The staffing regulations plainly do not produce the result that when a teacher is dismissed in the course of a reorganisation of a local authority's schools there is no Respondent against which he or she can bring an effective claim. The Council was the employer of the

Claimants and as employer remained subject to its obligations under the ERA 1996. These include, where teachers are made redundant, the obligation to ensure that a fair process is followed."

R also argued that the ET had in effect concluded that the lack of an opportunity to appeal automatically rendered the dismissals unfair and in so doing had erred. R pointed in particular to the ET's wording as follows:

- "It requires truly exceptional circumstances to refuse an employee the right to appeal against their dismissal."

The Court of Appeal agreed with the EAT that, regardless of the existence of that wording in the ET's judgment, the ET had not in fact approached the issue of fairness on that basis. Reliance was placed on alternative wording adopted by the ET elsewhere in its judgment on the same issue and also the fact that the ET had clearly found fault with other failings on the part of R quite apart from any lack of appeal, including the absence "of any effective consultation".

The Court of Appeal noted that, in its view, the ET had found that R had ignored the established method of dealing with redundancies (as set out in *Williams v Compair Maxam* and *Polkey v AE Drayton Services*) and that R had not challenged the ET's view in that regard as part of its appeal.

As referred to above, the ET had declined to make any *Polkey* reduction. R appealed on that point as well. On first sight, the ET's decision on *Polkey* is surprising, given that it was an agreed fact between the parties that "exercising the statutory right of appeal under regulation 17 would not have made any difference to the outcome. Had the claimants been given such an opportunity, they would still have been dismissed on the grounds of redundancy."

However, R, perhaps surprisingly, had not led any evidence at ET on the issue of *Polkey*. By way of example R had not led evidence to suggest that it had utilised its power under the Staffing Regulations to nominate Cs for positions at the new school (albeit the new school would not have been bound to accept any such nominations); nor had R demonstrated to the ET that it had given any consideration to placing Cs in employment elsewhere.

In light of that evidential vacuum, the Court of Appeal found no error of law in the ET's decision on *Polkey* reduction. As such it appears that the agreed fact referred to above was viewed by the Court of Appeal as a statement of what would have happened upon an appeal by Cs,

given R's apparent fixed view of the matter, as opposed to whether such an eventuality would in fact have been occurred of R had acted in accordance with s98(4).

Comment

It appears that the Council viewed this case as principally one about the failure to offer a right of appeal. However, it seems clear that the weakness in the Council's position was far greater than that.

The Council decided to reorganise its provision of schooling and it came up with a plan as to how to achieve that, including staffing arrangements; as a consequence existing staff were at risk of dismissal. However, the Council failed to consult with staff on the matter; it informed staff of decisions taken and plans put in place, rather than seeking out staff views and consulting with them. There is a significant difference between the two.

As such, whatever the rights or wrongs of the failure to provide the opportunity to appeal, the Council was always going to have an uphill struggle at ET.

If (i) the Council had set out proposals to staff, including in particular proposals as to how staff would be invited to apply for roles at the new school, and the basis on which selections would be made etc, and if (ii) the Council had invited representations on those proposals, consulting effectively and genuinely on such matters with staff, the result at ET may well have been different.

Not only would that have had the potential to remove any criticism of a lack of consultation, it is possible that would also have reduced the impact of the lack of the opportunity to appeal given that, if staff had been consulted on thoroughly at the appropriate time, there may well have been less of any real relevance to raise at appeal.

That said, the failure to offer the right to appeal would still have been inherently risky. Most ETs will look to employers to provide a right of appeal, even in redundancy cases. The failure of an employer to do so is uncommon and, when such a failure occurs, ETs will usually find it to be at least noteworthy.

As confirmed by the Court of Appeal in this case, the failure to offer a right of appeal in a redundancy case will not automatically render a dismissal unfair. However, that does not mean that, in certain cases, it cannot have that effect (such as if there is a contractual right) or that the lack of opportunity to appeal cannot at least be a contributory factor going to a finding of

unfairness. If the employer goes awry in any other way, the lack of opportunity to appeal may be enough to push the matter over line. Failing to provide an opportunity to appeal will usually at the very least place an employer on the back foot in ET proceedings.

Ultimately this case is a reminder to employers to take particular care before declining to follow best practice in terms of key matters such as consultation on redundancy and the provision of an appeal process, even if it considers that such steps would be futile. Employers should bear in mind that what may appear futile to them may well be seen differently in retrospect by an ET.

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