

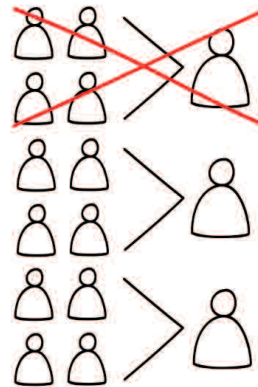
Redundancy – Suitable Alternative Employment

Under the Employment Rights Act 1996, an employee who is dismissed by reason of redundancy will not be entitled to statutory redundancy pay if he or she unreasonably refuses the employer's offer of suitable alternative employment.

In *Bird v Stoke-on-Trent Primary Care Trust*, Ms Bird, a physiotherapist by profession, had refused the Trust's offers of alternative employment after her job disappeared following a restructuring exercise. The Trust declined to pay her any redundancy monies on the ground that she had unreasonably refused offers of suitable alternative posts. Even though her old job was essentially a managerial position whereas the posts being offered were essentially clinical in nature, the Employment Tribunal (ET) decided that one of the jobs was suitable and that Ms Bird had unreasonably refused the offer.

The Employment Appeal Tribunal overturned the ET's decision and, in so doing, gave useful guidance on the approach the ET should take when determining the issues of suitability and reasonableness in such circumstances.

In deciding whether an offer of a new job is or is not suitable alternative employment, the ET must make an objective assessment of the employment offer. The question is not whether the employment is suitable in relation to that sort of employee, but whether it is suitable in relation to that particular employee. Does the job match the person? Does it suit his or her skills, aptitudes and experience? It is important to consider the job as a whole – not only the tasks to be performed but also the terms of employment, especially remuneration and hours, and the level of responsibility and status involved. Location may also be a factor. The fact that the job being offered is different from the employee's existing role does not necessarily mean that it is unsuitable for that employee, but the more different it is, the more difficult it may be for the employer to show that the job is suitable for the employee.



The test of whether or not an employee's refusal of suitable alternative employment is reasonable is a subjective test. The question is not whether a reasonable employee would have accepted the employer's offer, but whether that particular employee, taking into account his or her personal circumstances, was being reasonable in refusing the offer. Whether or not an employee had sound and justifiable reasons for refusing the offer has to be judged from the employee's point of view, on the basis of the facts as they appeared, or ought to have appeared, to that employee at the time the offer was refused.

In this case, the ET had failed to take into account relevant features of the evidence when determining that Ms Bird had been offered suitable alternative employment and had substituted its own views on the reasonableness of her action instead of considering whether someone in her particular circumstances could reasonably have taken the view of the alternative post that she did.

The case was remitted for rehearing by a fresh ET.

In such circumstances, employers are advised to keep a contemporaneous record of reasons for their decisions as this may prove invaluable in helping to justify them in the event of a later claim.

Selection for Redundancy

The Employment Appeal Tribunal (EAT) has held that where all members of a 'pool' are redundant, the employer does not have to undertake a formal redundancy selection process (*Zeff v Lewis Day Transport plc*).



Mr Zeff worked for Lewis Day Transport plc, a passenger car and courier company. The services were provided through four 'desks', one of which was the chauffeur desk. Mr Zeff was a manager and before that had operated as a controller. There were two other controllers and two administrative assistants working on the desk. Following a downturn in business, a number of meetings were held with the members of staff and a decision was reached to close the chauffeur desk. Mr Zeff and the two controllers were made redundant and the two assistants were moved to the car desk and continued doing the same jobs. Although he said he was willing to do any job, Mr Zeff had not made enquiries about, nor did he apply for, any of the jobs posted as vacant at the time. He appealed against the decision to dismiss him as redundant but this was upheld.

Mr Zeff claimed that he had been unfairly dismissed, but the Employment Tribunal (ET) concluded that this was a true redundancy. Closing the chauffeur desk meant that there was no longer a requirement for a manager and two

controllers working on that desk. Their roles were, therefore, redundant. The requirement for the roles carried out by the two administrators did not cease, however. They were able to continue doing the same jobs and were not redundant. The five jobs were not interchangeable and no selection for redundancy therefore arose. No selection criteria were relevant.

The ET did consider that the way in which Lewis Day had dealt with its duty to ensure that any suitable alternative employment was made available to Mr Zeff had been lacking but this defect in procedure did not make the dismissal unfair. Mr Zeff had taken no action with regard to any vacancies. When asked why this was, he had replied that he did not know. The ET concluded that had Lewis Day followed a fair procedure and taken appropriate steps to secure alternative employment for him, Mr Zeff would not have been interested in the vacancies and would, therefore, still have been dismissed.

Mr Zeff appealed against the ET's decision and lost. The EAT held that the ET had found on the facts that this was not a case of three people being made redundant from five similar jobs. The roles for which the requirements of the business had ceased or diminished were the roles of the manager and the controllers on the chauffeur desk. There was no question of selection for redundancy and, therefore, no need for any formal selection criteria. In the EAT's view, the ET was entitled to come to that conclusion of fact. Furthermore, Mr Zeff had done nothing in respect of any vacancies and the ET was entitled to conclude that he had no genuine interest in them.

Contact us for advice on any redundancy matter.

New Minimum Wage Rates

Employers are reminded that new National Minimum Wage (NMW) rates came into force on 1 October 2011.

The revised rates are as follows:

- The adult hourly rate of the NMW increased from £5.93 to £6.08;
- The development rate (which covers workers aged 18-20 years) increased from £4.92 to £4.98; and
- The rate for workers aged 16 and 17 increased 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, increased from £2.50 to £2.60 per hour.

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

Following a recommendation from the Low Pay Commission, the Government has issued guidance for employers on the payment of the NMW for interns and those carrying out work experience. Whether or not someone is a worker and is therefore entitled to be paid the NMW depends on the arrangements in place. The guidance, which can be found at www.businesslink.gov.uk/nmw, includes a new worker checklist and examples of case studies.



Employment Status – What is the Legal Reality of the Relationship?

The Supreme Court has handed down its decision in a case concerning the employment status of 20 valeters who provided car-cleaning services to motor retailers and auctioneers (*Autoclenz Ltd. v Belcher and others*).

The valeters had written contracts with Autoclenz Ltd. that specifically stated that they were not employees but self-employed independent contractors. They were responsible for their own Income Tax and National Insurance Contributions and were paid on a piecework basis, submitting weekly invoices, although these were actually calculated and prepared by Autoclenz based on information provided by the valeters with deductions made for insurance and materials. The contracts were later amended to include express terms stating that the valeters had the right to supply a substitute to carry out the work on their behalf and that there was no obligation on them to accept work nor on Autoclenz to provide it on any particular occasion. These are key factors when determining whether someone works under a contract for services and is therefore self-employed or whether they are working under a contract of service, in which case they are an employee.

In 2007, Mr Belcher and his fellow workers brought claims for unpaid wages and holiday pay, claiming that they were workers for the purposes of the National Minimum Wage Regulations 1999 (NMWR) and the Working Time Regulations 1998 (WTR). The Employment Tribunal (ET) upheld their claims.

The case reached the Supreme Court, which agreed with the Court of Appeal that a clause in a contract that allows someone to send a substitute in his place will, if it is genuine,

mean that the worker is not working under a contract of service for employment law purposes. However, where this does not happen in practice, the ET is entitled to find that the clause does not genuinely reflect the rights and obligations of the worker. Furthermore, it is not necessary for both parties to a contract to have intended to mislead for express terms in the contract to be rejected as not properly representing the true position. It is up to the ET to determine whether the contract reflects the true intentions and expectations of the parties to it or whether it is a sham.

The focus of the enquiry must be to discover the true factual legal obligations of the parties based on an examination of all the relevant evidence. In this case, the Supreme Court held that the ET was entitled to hold that the written agreement did not reflect the true agreement between the parties and there is no need to show that a written agreement is a sham in order to disregard its terms. In the Court's view, the claimants were working under contracts of employment and were in fact employees, although it was only necessary for them to prove that they were workers within the meaning of Regulation 2(1) of each of the NMWR and the WTR to succeed in their claim.

Employers should ensure that any written documentation that is intended to clarify the exact nature of someone's employment status reflects the reality of the working relationship and the intentions of both parties.

Contact us for advice on any employment-related contract issue.

ACAS Issues Guidance on Social Networking

The Advisory, Conciliation and Arbitration Service (ACAS) has issued several factsheets offering practical tips for employers on how to manage the impact of the use of social networking tools at work. These cover:

- managing performance;
- recruitment;
- discipline and grievances;
- bullying; and
- defamation, data protection and privacy.

There are also useful tips on how to develop a social networking policy.

The guidance can be found on the ACAS website at www.acas.org.uk.



Health and Safety Made Simple

The Health and Safety Executive has launched a new website, 'Health and Safety Made Simple', aimed at making it easier for businesses to comply with the law and manage health and safety in the workplace. The online resource brings together in one place all the basic information necessary and is primarily aimed at low-risk businesses – particularly small and medium-sized enterprises.

The site includes 'stop check!' boxes that tell you when you may need to take extra steps and provides signposts to more detailed guidance and industry-specific advice.

The Health and Safety Made Simple website can be found at www.hse.gov.uk/simple-health-safety/how.htm.

Unfair Dismissal – Reasonableness of Decision to Dismiss

In *Wincanton plc v Atkinson and another*, the Employment Appeal Tribunal (EAT) considered whether it was reasonable or unreasonable for a haulage company to dismiss two of its drivers who continued to perform their duties when they had inadvertently neglected to renew their Heavy Goods Vehicle (HGV) licences.

Stephen Atkinson and Nicholas Marrison worked for Wincanton plc on a specialised contract that required them to have not only an HGV licence but also an additional European licence that enabled them to carry dangerous loads.

A routine check revealed that Mr Atkinson had driven without a licence during the previous month and Mr Marrison had done so for five months. Both men accepted that the failure was their fault as it had been their responsibility to arrange for the renewal of the licences. A disciplinary meeting was held, at which the company decided that the potentially serious adverse impact of the men's conduct was sufficient to justify their dismissal. The potentially adverse consequences of their actions were that the company's insurance policy could have been invalidated and it could have faced action from the regulatory authority, thus jeopardising its operator's licence. Furthermore, had it become known that employees of the company had been driving without valid HGV licences, this could have damaged the company's standing when vying for contracts in a very competitive market. The

men's appeal against the company's decision was rejected and they brought claims for unfair dismissal.

The Employment Tribunal (ET) concluded that Wincanton plc had acted unreasonably in treating the admitted serious misconduct as sufficient reason for the dismissal. Whilst it accepted that 'the consequences of driving a lorry loaded with dangerous goods... without insurance are horrific to contemplate', it focused on the fact that the risks to the company were entirely speculative and no actual adverse consequences had ensued.

The EAT found that the ET had been wrong to base its decision on the fact that nothing serious had actually occurred, whilst attaching minimum weight to the potential for adverse consequences. In the EAT's view, the finding that no reasonable management would have decided to dismiss the drivers was an error of law. It would mean that employees who act negligently in breach of their contracts of employment – for example an airline pilot who inadvertently or negligently drank too much alcohol – could not be fairly dismissed if the illegal act had no harmful repercussions for the employer.

The EAT held that dismissal was well within the range of reasonable responses open to the employer in this case. The dismissals were therefore fair and the appeal allowed.

Contact us for advice on any employment law matter.



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