SUMMARY

2011/60: Dismissal for refusing pay cut may be fair provided employer has sound business reasons and acts reasonably (UK)

<p>The Employment Appeal Tribunal (‘EAT’) has confirmed that it may be fair for an employer to dismiss an employee for refusing to agree to reduction in pay if it has good business reasons for implementing the change and acts reasonably in the circumstances. The focus in such cases should be on the reasonableness or otherwise of the employer’s behaviour rather than the reasonableness of the employee’s refusal to accept the new terms.</p>

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Facts

Mr Booth had been employed as a welding maintenance worker by Garside and Laycock Ltd ('Garside'), which provided building and maintenance services, for seven years. Garside's business started to experience trading difficulties and it decided to ask its employees to accept a five per cent pay reduction. Its managers held a number of meetings with employees to explain the problems the business was facing and to ask them to vote on whether to accept a

pay cut in an attempt to avoid redundancies. Garside asked employees to accept a majority vote. It also decided that abstentions would count as votes agreeing the change.

A substantial majority of employees (77) voted to accept the pay cut, there were seven abstentions and four voted no. However, two of the 'no' votes were cast by individuals who were already facing disciplinary proceedings for gross misconduct and were subsequently dismissed. Ultimately, Mr Booth was the only employee who held out against the pay cut and Garside wished to impose it on him unilaterally.

Garside's Managing Director, Mr Garside, held three meetings with Mr Booth. At the second meeting, Mr Garside dismissed Mr Booth for refusing to agree to the pay cut but simultaneously offered him a new contract. Mr Booth was given the choice of either having the new terms and conditions that had been offered to all other staff, or maintaining the previous terms and conditions with the exception of pay but with the possibility of a bonus. Mr Booth refused both offers.

Mr Garside repeated the offers at a third meeting and Mr Booth refused again. He appealed (internally[1]) against his dismissal and at the appeal meeting he was offered a review of his pay after six months, but he refused this offer too. The appeal was unsuccessful and Mr Booth brought proceedings in the Employment Tribunal ('ET') for unfair dismissal.

The Employment Tribunal's Decision

Under the relevant legislation, the Employment Rights Act 1996 (the "ERA'), the ET had to establish whether the employer had a reason for the dismissal that was potentially fair. If so, the question was whether in the circumstances 'the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee' which should be determined according to 'equity and the substantial merits of the case'.

The ET considered the potentially fair reasons for dismissal set out in the ERA, which are: conduct; capability; redundancy; illegality; and 'some other substantial reason of a kind such as to justify the dismissal'. The ET decided that Garside's reason for dismissing Mr Booth was 'some other substantial reason' and therefore a potentially fair reason. However, the dismissal would only be fair if Garside had acted reasonably in treating it as a sufficient reason for dismissal.

When considering this second question, the ET said that it 'sought to balance the relative advantages and disadvantages of the reduction in pay and the imposition of new terms and conditions'. The ET decided that it had been reasonable for Mr Booth to refuse to accept the pay cut. It also said that it must consider whether the employer's financial situation was so

'desperate' that the change to terms and conditions was the only way to save the business. The ET found that this had not been the case and that the employer's decision had lacked 'cogency'. It concluded that the dismissal was unfair. Garside appealed against this decision to the EAT.

The Employment Appeal Tribunal's Decision

The EAT held that it was not the case that a dismissal for refusing a pay cut would be unfair unless the employer's financial situation was 'desperate'. It is sufficient if the employer has a 'sound, good business reason' for wanting to make the change.

The EAT also ruled that the ET had been wrong to focus on whether Mr Booth had been reasonable to refuse the pay cut. Rather, the focus should have been on whether Garside acted reasonably in dismissing him for his refusal to accept the change. The EAT observed that if the employee is acting reasonably, it does not necessarily follow that the employer is acting unreasonably.

Finally, the EAT found that the ET's reasoning was opaque when it decided that Garside's decision 'lacked cogency'. There was nothing lacking in cogency about a business that was facing difficulties trying to cut costs nor in it seeking to ensure that all staff were on the same pay scales.

The EAT did, however, observe that as the fairness of a dismissal has be determined 'in accordance with equity', it might be relevant to consider upon whom the proposed pay cuts would fall. There may be cases where management propose to cut the pay of all staff except themselves, where consequent dismissals would not be fair. The upshot was that the EAT decided to remit the case to a different Employment Tribunal to be reheard.

Commentary

This judgement usefully clarifies the principles that apply in determining whether a dismissal is unfair in the context of an employer unilaterally imposing changes to terms and conditions of employment. It confirms that, depending on the circumstances, it can be fair to dismiss employees who refuse to agree to such changes so long as the employer has a sound business reason for needing to make them. However, 'some other substantial reason' is a broad category of case and simply to identify that a dismissal falls within it is not sufficient in itself to justify it. In addition, it must be reasonable for the employer to dismiss for that reason (i.e. the reason must be sufficient) and the employer must follow a fair procedure. The following are recommended as the minimum procedural steps that should be followed in this type of situation:

- The employer should consult with affected employees about the proposal to cut pay and any alternatives.

- The employer should give genuine consideration to the employees' views and any representations they make before reaching a final decision.

- The employer should consider alternatives to decreasing pay, such as short-time working, redundancies or other cost-saving measures.

- If the employer decides to press ahead with the pay reduction, it should ask employees on an individual basis for their consent to the variation of their contractual terms and conditions. If an employee consents, the change takes effect by mutual agreement.

- The employer should then consider how many employees have consented and how many have refused and decide whether to impose the pay cut on the latter. If so, it should warn them that any further refusal to agree will result in the termination of their employment.

- The employer should give contractual notice of termination and at the same time make an offer of new employment on the new terms to start when the notice period expires.

- The employer should offer the employee a chance to appeal against its decision to dismiss and at all stages consider any representations and suggestions put forward by the employee.

Generally speaking, an employer is likely to be in a strong position if the great majority of employees have agreed to the pay cut and there is just a small recalcitrant minority holding out against it. Note that the procedural steps outlined above are principally relevant for the purposes of complying with the unfair dismissal legislation contained in the ERA. In addition, if an employer is proposing to change the terms of at least 20 employees - where this will potentially involve dismissing them and offering to re-employ them on the revised terms - the employer will have a duty of collective consultation with trade unions (if recognised) or elected employee representatives under the Trade Union and Labour Relations (Consolidation) Act 1992.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): the Dutch Supreme Court has developed a three step approach when testing whether a unilateral change of terms of employment is acceptable:

1. Did the employer have a sufficiently sound reason, related to changed circumstances at work, and taking into account all relevant circumstances, to propose the amendment?

2. If so, was the employer's proposal reasonable, again taking into account all circumstances?

3. If so, could it be reasonably expected of the employee to accept the proposal?

If the answer to all three questions is yes, then the employer is entitled to implement the amendment, although it is not entirely clear how this is to be done.

There is debate on how steps 2 and 3 relate to one another - i.e., are they not basically the same test? One question is whether the circumstances to be taken into account may be entirely collective, as seems to be the case in the judgment reported above. Suppose one employee is in such financial difficulties that accepting a proposed pay cut would cause him to lose his house, whereas this is not the case for the other employees, would that put an obligation on the employer to exempt that one employee, for example on the basis of a hardship clause? In this case, even if such an exemption risks other employees not giving, or withdrawing, their consent? A Dutch court might refuse to accept an entirely collective weighing of interests.

Footnote

1 Having an internal appeal procedure is normally necessary to avoid a successful unfair dismissal claim. Also, if the employer does not offer an appeal against a decision to dismiss and the employee succeeds in an unfair dismissal claim, the Employment Tribunal has discretion to increase the damages payable by up to 25%.

Subject: Unfair dismissal; changing terms and conditions of employment

Parties: Garside and Laycock Ltd - v - Booth

Court: Employment Appeal Tribunal

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