Does an employer’s failure to offer an appeal make a redundancy dismissal unfair?

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In the recent case of Gwynedd Council v Barratt the Court of Appeal confirmed that, on its own, the absence of a right to appeal against dismissal for redundancy does not make it unfair. However, it is one of the factors to be considered when determining the overall fairness of the dismissal.

What happened in this case?

The two Claimants were teachers employed by the Council to work at a secondary school (**School 1**). The Council decided to close School 1 and replace it with a school for children aged between 3 to 18 years of age (**School 2**). School 1 was to close at the end of the Summer term in 2017 and the School 2 was due to open in September 2017.

The Council did not consult with the Claimants (or their trade union) about the redundancy procedure at School 1 or the recruitment procedure at School 2. Instead, it invited the Claimants to apply for new roles within School 2. However, the "new" roles were similar to their old roles at School 1. The Claimants were interviewed for the positions but unlike most of their colleagues, were unsuccessful. In May 2017, the Council gave them notice of dismissal by reason of redundancy, with a termination date of 31 August 2017. The Claimants were not offered the opportunity to appeal against their dismissals.

The Claimants succeeded in their claims for unfair dismissal. The Employment Tribunal held that the Council's procedure had been unfair for a number of reasons, including the lack of consultation and appeal. The Council appealed arguing that the Tribunal had made an error by stating that only in "truly exceptional circumstances" was it acceptable to

refuse an employee the right of appeal.

The Employment Appeal Tribunal (**EAT**) dismissed the appeal, confirming that the Tribunal had correctly applied a test of overall fairness. While the Tribunal had concluded that the lack of any appeal or review process was unfair, and no reasonable employer would have refused to consider an appeal in the circumstances, it had also been concerned by the lack of any opportunity for the employees to raise a grievance against the procedures adopted or be consulted about the dismissals.

The Council appealed again to the Court of Appeal

What was decided?

The Court of Appeal dismissed the Council's appeal. Agreeing with the EAT's reasoning, it stated that even though the test of "truly exceptional circumstances" that the ET had applied was incorrect in law, this did not invalidate the Tribunal's conclusions on the overall fairness of the dismissals. The Court confirmed that the lack of an appeal or review procedure does not of itself make a redundancy dismissal unfair. Nevertheless, it is one of the elements to be considered when determining the overall fairness of the dismissal.

The decision confirms that where the original selection for redundancy is in accordance with a fair procedure, the absence of an appeal is not fatal to the employer's defence. However, where it is questionable, an appeal may save the day for an employer.

What does this mean for employers?

While this decision offers some comfort to employers that a failure to allow an appeal will not mean that the dismissal is inevitably unfair, the safest approach will generally be to offer the employee the opportunity to appeal.

Where it is not practical or desirable to do so, employers need to be especially careful to engage in meaningful consultation and fair selection procedures to reduce the risk of being found to act unfairly.

Gwynedd Council v Barratt

If you would like to discuss any issues arising out of this decision please contact Theo Nicou (theonicou@bdbf.co.uk), Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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