

Malone & Ors v BA

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Over 5000 cabin crew brought claims for breach of contract against their employer British Airways (BA). The Claimants alleged that the unilateral reduction of crew complements below the levels which had been agreed through collective bargaining was a breach of individual contracts of employment with cabin crew. BA argued that, while some collective agreements were incorporated into contracts of employment, provisions relating to crew complements were not.

The crew complements set out in the collective agreements were higher than those stipulated by the Air Navigation Order 1989. Under the collective agreement BA could, with trade union agreement, declare a period of disruption enabling a crew was required to operate 'one down' where required. However, other crew members would receive financial compensation. In relation to the two relevant collective agreements, changes to those agreements had always been agreed bilaterally.

In the financial year 2008/9, BA suffered operating losses and therefore sought to make costs savings, including savings to cabin crew costs of £140 million. Negotiations commenced in February 2009. By October 2009, no agreement had been reached and employees were informed that crew complements would be reduced. This resulted in strike action. It was accepted at first instance that the changes resulted in harder work and increased stress. However, the court was not satisfied that there was sufficient objective evidence of mutual intention to give the provision legal enforceability by any individual crew member.

Alexander v Standard Telephones [1991] IRLR 286 considered whether redundancy selection provisions in a collective agreement were incorporated into individual contracts of employment. It was held that where the contractual intention of the parties could not be ascertained from the contract, it could be inferred from other material including collective agreements. Even where a document expressly incorporates provisions it is still necessary to consider whether it is 'apt' to be a term of the contract.



In *Keeley v Fosroc International Ltd* [2006] IRLR 961, which considered whether enhanced redundancy payments contained in a Staff Handbook had been incorporated into the employment contract, Auld LJ stated that a good way of testing the provision was to consider whether 'if the redundancy policy had been set out in identical terms in [the] ...statement of employment terms, it could seriously have been argued, as a matter of construction that it was not apt for a contractual term, and on that account, not part of the contract'.

The Claimants submitted that provisions relating to crew complements were apt for incorporation because they bear upon workload and productivity, in turn impacting upon pay and matters germane to the individual's contract of employment. BA submitted that the provisions were inapt: there was nothing in the contracts of employment inviting their incorporation; nor was there anything to suggest an intention to create an enforceable term.

The Court of Appeal considered a number of different provisions within the collection

agreement and found some to be clearly enforceable by an individual employee (e.g. maximum trip lengths) and some that were obviously not enforceable (e.g. that every effort would be made to publish rosters 28 days in advance). It was difficult to ascertain whether some provisions were enforceable or not. In relation to the provisions on minimum crew contingencies it was found that 'the various relevant considerations point in both directions, for and against incorporation'.

It was not clear from the language of the provision in the collective agreement whether it was intended to be enforceable by an individual employee or not. It was found that crew complements impact upon working conditions, particularly workload, and that this points towards incorporation. It was also accepted that

an undertaking as to the size of a team of workers who undertake a task may in some circumstances be enforceable by individuals. However, BA argued that if employees were allowed to refuse to work on aircraft that did not have the agreed crew complement there would be 'anarchy'. Aircraft could be grounded at the will of one or two members of staff who refused to work without the full agreed crew complement even though to do so was lawful. It was submitted that this could not have been intended by the parties. The Court of Appeal found that in consideration of this factual matrix, the provisions relating to minimum crew complements were not intended to be individually enforceable. They were 'binding only in honour', which could, if breached, lead to industrial action.

The appeal was therefore dismissed.

Catherine Atkinson





The Loneliest Number

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“A pool of one”. This apparent contradiction is the phrase frequently wheeled out by employers to justify the selection for redundancy of an employee whose post is being deleted from the organisation chart. The approach has the benefits of being simple and straightforward; it avoids disruption and the inevitable loss of morale that occurs when a group of employees is warned that it is at risk of redundancy. But will a dismissal from a pool of one be found to be fair?

As ever in the fact-sensitive world of unfair dismissal decisions, the answer is not entirely clear-cut. It might be fair; it might not; it all depends. What it depends on, has however been made a little clearer by the decision of the EAT in *Fulcrum Pharma (Europe) Ltd v Bonassera* EAT/0198/10/DM.

The *Fulcrum Pharma* case involved the restructuring of the employer's HR team, which consisted of an HR manager supported by an HR executive. Because it was the manager's post that was to go, only the manager was considered for redundancy. The employer gave no real consideration to pooling the executive with the manager (despite the facts that the manager had previously undertaken all aspects of the job carried out by the executive and that the executive had covered for the manager whilst she was off sick) or to asking the manager whether she might accept the more junior post. The Tribunal found the dismissal unfair on the basis that there had been no reasonable determination of the appropriate pool of employees at risk. The EAT agreed that the employer's decision to limit the pool to one, without meaningful consideration or consultation, was unfair. However, the Tribunal's conclusion that the pool ought to have comprised the two employees was not properly supported and was remitted for reconsideration.

The first, vital principle emphasised by the *Fulcrum Pharma* decision is that the employer must be able to justify the way in which the pool has been created – particularly in the case of a pool of one. The assumption that, because it is the job of a specific employee that is going, it must be that employee that is made redundant, will almost invariably render the dismissal unfair (see *Taymech Ltd v Ryan* EAT/663/94).

The threshold for the employer on this issue is not going to be a high one. The employer is entitled to the benefit of the “band of reasonable responses” test and any Tribunal would be reluctant to interfere where the employer has made out some kind of genuine

business case for the definition of the pool. As was said in the *Taymech* case:

“The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind to the problem.”

The difficulties for a claimant in the Tribunal were reinforced in *Lomond Motors Ltd v Clark* UKEAT/0019/09/BI:

“Employers are to be afforded a good measure of flexibility in the determination of the pool and a finding that their judgment was unreasonable must be based on a sound rationale. Pointing to a matter or matters not taken into account cannot, of itself, constitute such a rationale ...”.

Thus, a legitimate factor to be taken into account by an employer might be a desire to preserve existing relationships between marketing managers and their clients – see *Alvis Vickers Ltd v Lloyd* EAT/0785/04/CK, where one of nine regional export managers was alone considered for redundancy so as not to disrupt the good relations between the others and their customers.

As cases such as *Alvis Vickers* make clear, the usual consideration in deciding whether a pool of one ought to be expanded to include others, is whether there is a case for bumping an employee to make room for the employee whose work has dried up or whose post is being deleted. Very often, the question will arise as to whether a junior employee should be bumped in favour of a more senior. Whether in any case it would be fair or unfair to lump senior and junior employees together is highly fact-sensitive. However, the second issue highlighted by the *Fulcrum Pharma* case is that Tribunals must approach the issue in a principled manner.

In *Fulcrum Pharma* it was suggested that the starting point might be to determine within the consultation process whether or not the senior employee would be prepared to consider the junior role and reduced salary. If so, the principles set out by the EAT in *Lionel Leventhal*

Ltd v North UKEAT/0265/04/MAA would be relevant to determining whether subordinates should be brought into the pool, as follows: (1) whether or not there is a vacancy; (2) how different the two jobs are; (3) the difference in remuneration between them; (4) the relative length of service of the two employees; (5) the qualifications of the employee in danger of redundancy; (6) any other factors applicable in the particular case.

The third issue emerging from *Fulcrum Pharma*, and where it seems to go further than previous decisions, is that it may well not be sufficient for an employer to have thought about and to be able to justify the definition of the pool – there must also be consultation on the subject. In that case the employer had given some thought as to why only the claimant was at risk and had gone as far as preparing model answers on the topic to be deployed at the meeting with the claimant. However, the topic was not in fact debated directly at the meeting and the model answers were not required. The EAT considered that the employer should have done more and should have raised those matters with the claimant in order to ensure that she had been properly consulted. The failure to do so was fatal.

The careful and diligent employer will ensure that the rationale for the definition of the pool (particularly when it is a pool of one) is recorded and communicated to the employee at risk. Presumably the best way of doing this would be to include it in the redundancy warning letter; inviting discussion on that issue along with the others. The employer which does not do so potentially opens up a clear line of attack from an alert claimant in an area in which, given the latitude which employers must be allowed by Tribunals, such clear attacking options can be rare.

Philip Jones





The Malicious Reference

The last vengeful act of the spurned employer is often a poor reference with the result that the employee may find themselves on the job market for so long that they become virtually unemployable. If the prospective employer is reluctant to take on someone who has previously brought proceedings against their former employer, then it is legally correct to advise the employee that they have an arguable case against the new company. However, the time, expense and emotional toll on the employee makes this a particularly procrustean bed of nails. When will the torture end?

In *Chagger v Abbey National* it was recognised in the Court of Appeal, that the employee could be compensated by the former employer where an act of discrimination has led to their dismissal in circumstances where prospective employers are reluctant to hire them. A further layer of the protective cloak enveloping employees has now been added in the case of *Bullimore v Pothecary Witham Weld* [2011] 18.

Ms. Bullimore, a solicitor, had resigned her employment with the Respondent and brought proceedings for unfair dismissal and sex discrimination which were eventually settled. She managed to secure another position with a different firm subject to the provision of a reference by the former employer. The reference provided stated that she had resigned and added that she had brought proceedings against the firm and in response to a question about her strengths and weakness noted that *'she could on occasion be inflexible as to her opinions.'* This resulted in the Claimant suing both her old employer and the prospective employer who had withdrawn the offer of employment when they had received this reference. Only the claim for victimisation under the Sex Discrimination Act 1975 against the Respondent (the old employer) proceeded to trial.

The employment tribunal upheld the claim for victimisation and awarded her compensation for injury to feelings but refused to award her compensation for loss of earnings in the new position which she had lost because of the reference on the basis that this was too remote. In familiar tortious terms it had argued that the independent act of the prospective employer had broken the chain of causation and that their sins should not be visited on the old employer.

In considering the recent authorities, the EAT stated that the tribunal had erred in not awarding the claimant compensation for loss of earnings. Mr. Justice Underhill noted that it is now regarded as misleading, or at least inadequate, to analyse remoteness primarily in



terms of causation. The modern approach is to seek to confine the language of causation to the purely factual issue of whether the damage would have occurred but for the defendant's wrongful act. This is an analysis of 'cause in fact' which he distinguished from 'cause in law' where questions of remoteness are judged by different criteria such as 'direct', 'natural' or 'foreseeable'. He noted that *'the ultimate question is how far, in the circumstances of the particular case, the responsibility of the tortfeasor ought to fairly extend.'*

The EAT noted that the tribunal seemed to have considered the acts of the prospective employer to be particularly heinous given the fact that they were a firm of solicitors. The tribunal considered that their behaviour being wrongful and illegal was neither foreseeable nor a natural consequence of the giving of that information. [One might ask, rhetorically, what was the purpose of providing the information then?] Mr. Justice Underhill noted the fallacy of this reasoning. The whole purpose of a job reference is that it should be taken into account when the recipient is choosing whether to offer

the candidate a job. A negative or damaging reference is liable to have precisely the result that occurred in this case. In an important passage he noted:

'...it seems to us that as a matter of policy and fairness the respondents ought plainly to be liable here. When an employer (or ex-employer) gives, for an illegitimate reason an adverse reference which leads to a prospective future employer deciding not to make or to withdraw, a job offer to a candidate it is hard to see why that consequence should be regarded as too remote to attract compensation from the original employer: so far from being remote, it seems to us both close and direct.'

Clearly, the employer in this case had written an outrageous reference; sadly this sort of behaviour is not uncommon, it was only surprising that the employer was so crass and explicit in damning the Claimant. The analysis of causation and remoteness is very helpful to claimants and will may encourage those, with the knowledge, advice and stamina to remove this blight on their career prospects.



Religion in the work place

Amachree v Wandsworth



Susan L. Belgrave

When one is involved in a case that is subject to media reporting it is quite amazing how much at variance with the facts the articles actually are. So it was with the Council worker 'who was told he would be dismissed for saying God bless'.

Mr. Amachree had been employed by Wandsworth Council for several years as a homelessness officer dealing with individuals who applied to the Council as threatened with homelessness or already homeless. On a particular day a service user attended for interview. During the course of the interview, it emerged that she had a terminal medical condition which had been diagnosed over 10 years ago. At the end of the interview Mr. Amachree asked her whether she was a believer to which she replied no. He advised her that she should put her faith in God as doctors do not have all the answers and discussed videos of miracles where individuals had been healed because of their faith despite their doctor's view that their condition was incurable. The length of time this conversation took and the full details were disputed. However, the following day the service user sent in a written complaint saying that she had felt belittled for her lack of faith and that Mr. Amachree's advice could be dangerous and another person might stop taking their medication altogether based on Mr. Amachree's advice.

Mr. Amachree was suspended from work pending an investigation and advised that the matter was confidential. Mr. Amachree consulted the Christian Legal Centre and they issued a press release on his behalf. He was also interviewed by the BBC and various articles appeared in national newspapers. It was in this manner that the service user's gender, occupation and the nature of her condition were published. She was recognised by friends and family members by this description.

As a result a second disciplinary charge was added of breaching confidentiality. Mr. Amachree had received a similar complaint several years previously for making identical comments to another woman with a terminal illness. On that occasion he had been asked to write an apology. Following a disciplinary hearing in this case he was dismissed by the Council.

Despite a vigil at the Council offices, his appeal was dismissed by councillors hearing the appeal. His claim to the employment tribunal alleged religious discrimination and unfair dismissal. The Council argued that training in interview technique was given to all officers and they were enjoined to discuss only relevant matters during an interview. Mr. Amachree was at liberty to discuss his religion with his work colleagues and the prohibition related to topics of discussion during an interview with service users. It was not unknown for such individuals who could be overwrought, angry and stressed to become emotional or violent (indeed the interview was conducted in a room with a glass partition) and it was important that officers remained professional at all times. Mr. Amachree's behaviour had fallen short of the standards expected of officers and he had lost the trust of the Director of Housing who had given him an instruction to keep the matter confidential. The Director was concerned that he appeared not to appreciate what he had done wrong and had no confidence that he wouldn't do the same thing in future.

It was argued variously, on behalf of Mr. Amachree, that he had been engaged in a private conversation with the service user and

the rule that he should confine himself only to relevant matters was discriminatory. Further, the Council would not have instituted disciplinary proceedings against him had it not been for the fact that the conversation had been about religion as opposed to say homeopathic medicine or any other subject. It was argued that the prohibition had a disparate impact on Christians whose teachings encouraged them to share their faith. In a thorough review of the authorities, the tribunal dismissed both the direct and indirect religious discrimination claims. Mr. Amachree had not been dismissed because he was a Christian but because he chose to share his religious views inappropriately with a service user. In relation to the indirect discrimination claim, there was no evidence that Christians were more affected than others by the instruction to discuss only relevant matters in an interview setting. It was noted that all faiths consider the message of their religion ought to be shared with others. The tribunal reminded itself that it should not substitute its own decision for that of the employer when it came to consider the fairness of the dismissal which was within the band of reasonable responses.

While these cases have garnered a great deal of publicity and the debate will surely continue in 2011, the courts have been clear that an employer will not fall foul of the discrimination legislation where they seek to enforce strict rules or codes of behaviour in the workplace. The recent Court of Appeal cases in *Ladele v Islington* and *Macfarlane v Relate* make this abundantly clear. There has been no appeal against this decision.

Susan L. Belgrave

Represented Wandsworth Council; the ET decision has not been appealed.