

EAT provides guidance in dismissals over pay cuts

(Richard Owen-Thomas)

The Employment Appeal Tribunal [EAT] in deciding the case of ***Garside & Laycock Ltd v Booth*** **Appeal No. UKEAT/0003/11/CEA** reiterated the considerations that apply in cases concerning dismissal for a failure to accept a pay cut.

In 2009 Garside & Laycock, a company providing building and maintenance services to public sector clients began to experience trading difficulties. The consequence being that the company asked their employees if they would accept a wage cut of 5%. A vote was held for the employees to consider changing their contracts to reflect these new proposals, and the Applicant was one of two members of staff who refused to accept these terms. The Applicant was subsequently dismissed, and by the time he was dismissed he was the only one out of 77 employees that refused to accept these terms.

The Applicant then appealed the dismissal and during this appeal he was offered a review of his pay levels after six months, but he rejected this and his dismissal was maintained and he took the matter to the Employment Tribunal. They found that the employer here had to establish “some other substantial reason” as a ground for dismissal, and in this case they had. Accordingly, the Tribunal then went on to determine whether in fact the dismissal had been unreasonable.

The Tribunal then decided that the dismissal had been unfair; referring to ***Catamaran Cruisers Ltd v Williams and Others [1994] IRLR 386*** they asked of the present case whether the employer was in a situation so desperate that the only way of saving the business was to introduce those pay cuts. The Tribunal in deciding whether the decision was a reasonable one assessed if it was reasonable for the employee to have rejected the pay cut or not.

The EAT decided that the Tribunal had erred in its decision and that the case needed to be reheard by a fresh tribunal. It came to this decision for two reasons. Firstly, that it took the wrong approach in deciding the reasonableness of the decision, and secondly, that the test that had been lifted from *Catamaran* had been wrongly chosen, in fact they had used the very test that was rejected by that Tribunal.

Concerning the assessment of reasonableness it was decided by EAT that the Tribunal was wrong when they assessed the reasonableness of the employee’s decision to reject the pay cut. Instead what they should have done was to assess whether the employer was reasonable to have dismissed the employee for not accepting that pay reduction. This is clearly stated in s 98 [Employment Rights Act 1996] and is whether;

“[...] the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee.”

The second point EAT took issue with was the Tribunal’s use of the *Catamaran* case to find that an employer may only offer less favourable terms if the very survival of the business depended on it. Eat found that the Tribunal had misunderstood the rationale of that case, that test actually having been rejected rather than supported. It followed that the same test ought to be rejected in the present case. They found that this test went too far, and it would be enough to show a good sound business reason behind the decision of the employers.

It was for these two reasons that EAT sent the case back to be reheard by a fresh Tribunal, and in doing so they gave guidance on the correct way in which Tribunals should deal with dismissals.

The guidance deals with the assessment of reasonableness itself, particularly whether in all the circumstances it was reasonable. Under 98(4)(a) Circumstances would include such factors as such the size and resources of the employer’s undertakings. It was also considered that reasonableness will also depend a great deal upon the procedural aspects of a decision, and in assessing this it will often be necessary to examine the nature of the proceedings, and how appropriate they were. They considered that this might go so far as to involve issues as to the extent to which the workforce were persuaded or not by the reasoning of the proposed cuts however dubious that reasoning may be.

Importantly, It was also reminded that under s 98(4) (b) the Tribunal must consider whether the dismissal was 'in accordance with equity'. Speaking theoretically, they noted that this may include the assessment of how the management had suffered in these pay cuts, noting that in an economic downturn a business would wish to make costs across the board, not necessarily just in one sector. It may be a considerable factor if management for example had proposed heavy pay cuts to the workforce, but none to itself.

This decision stands as a reminder that in deciding whether a dismissal due to refusal to accept a pay cut is fair or not, a tribunal must consider all the factors, viewing the pay cuts as part of the grand scheme of an over-all costs saving package. It will also be important to keep in mind whether the dismissal was in accordance with equity in coming to a decision.

It seems that this is part of the recent case law which is curtailing the use of a wide interpretation of ‘some other substantial reason’ as a defence. It reminds practitioners that SOSR is not a ‘get out of jail free’ ticket and a comprehensive justification must be put in evidence, in no less a way as one would with a redundancy dismissal, and also a flawless procedure will be of significant assistance.

If you would like to discuss this, or any other employment law matter, contact me at rowen-thomas@13kbw.co.uk or in Chambers on 0207 3537204

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