To err is human (to forgive is not always possible)

For many years, employers have understood that errors by them in their disciplinary or grievance procedure can be corrected by a properly conducted appeal. In essence, an employer has got two chances to get its procedure right.

However, a very recent EAT case has changed that belief and decided that a breach of the statutory dismissal procedure cannot be cured even by the employer carrying out a properly conducted appeal.

In *GM Davies v Farnborough College of Technology*, the College had sent Mr Davies a letter telling him he was in a redundancy pool. He was told the selection criteria, the consequences of selection and was invited to attend a meeting. At the meeting, Mr Davies was told that he had the lowest score in the pool and would be made redundant. Mr Davies had not been informed prior to the meeting that he was to be made redundant nor was he given his scores in advance of or at the meeting. He appealed against the decision and the employer went through a proper appeal process. The EAT said the original decision was a breach of the statutory dismissal procedure as he had not been given enough information to enable him to understand and challenge the decision to make him redundant at the meeting. This breach of the statutory dismissal procedure constituted automatic unfair dismissal. Crucially the EAT said this could not be cured by the employer then carrying out a properly conducted appeal.

This is a key decision. There is no reason to confine this decision to a breach of the statutory dismissal procedure on redundancy. It would apply to any breach of the statutory dismissal or grievance procedures.

Clearly, this makes it more difficult for employers to avoid the findings of automatic unfair dismissal, or breach of the statutory grievance procedure. It means that employers need to ensure that both the initial meeting and the appeal are properly conducted; the employer does not get a second bite at the cherry. Our view is that breaches of the employer's own internal procedures (which are not also breaches of the statutory procedures) are not affected by this case. Therefore, there is still some scope for an employer to rectify some breaches on appeal.

What should an employer do if, at an appeal stage, it comes to the view that there has been a breach of the statutory dismissal or grievance procedure? The employer should evaluate carefully whether it is better to proceed with the process, whilst acknowledging privately that there may well be a finding of automatic unfairness, or consider whether to start again. If the employer elects to proceed this may still result in an automatically unfair dismissal (or a breach of the statutory grievance procedures) but the compensation awarded may be reduced if there is a properly conducted appeal. In the *Davies* case the employer was able to convince the EAT that Mr Davies would have been made redundant in any event, and so his compensatory award was significantly reduced. Alternatively, the employer may wish to start again. This is currently a relatively unusual step in internal disciplinary procedures (although it is a regular step within the Employment Tribunal system). However, in our experience it would be a relatively unusual disciplinary and grievance procedure which, at the moment, has an express power allowing for a matter to be remitted from an appeal back to a first level hearing. We would recommend that this power is written into companies internal procedures so as to avoid any argument by an employee, facing resumption of the first level hearing, that this was outside the scope of the company's disciplinary and grievance procedures. If the employer remits the matter back to the first level, we think there is a very good prospect of the breach of statutory procedures being cured by the employer, so as to ensure that the dismissal is fair overall.

If you would like to discuss this case or issues arising from it, please speak to your usual contact in the Employment Group.

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