

## Dismissal: To appeal or not to appeal, that is the question

*A failure to offer or carry out an appeal is not fatal to the fairness of a redundancy or SOSR dismissal, but it will be a relevant consideration that tribunals take into account.*

In light of two recent cases, Christopher Fisher and Katherine Fox consider whether there are situations in which employers do not need to offer employees the opportunity to appeal against their dismissal

**Mayer Brown  
International LLP**



**Christopher Fisher** is a partner and **Katherine Fox** is a senior associate in the employment and benefits practice at **Mayer Brown International LLP**



# Dismissal: To appeal or not to appeal, that is the question

In light of two recent cases, Christopher Fisher and Katherine Fox consider whether there are situations in which employers do not need to offer employees the opportunity to appeal against their dismissal

***A failure to offer or carry out an appeal is not fatal to the fairness of a redundancy or SOSR dismissal, but it will be a relevant consideration that tribunals take into account.***

Employers often ask whether they should offer an appeal against a redundancy dismissal or a dismissal for 'some other substantial reason' (SOSR). Unlike misconduct and performance dismissals, the Acas Code of Practice on Disciplinary and Grievance Procedures (the Acas code) does not apply to redundancy or, arguably, terminations for SOSR. Although the accompanying Acas guide recommends an appeal in redundancy cases, that guide does not have statutory force.

The relevant statutory reference is at s98 of the Employment Rights Act 1996 (ERA). Under s98(1)(b) ERA, a dismissal will be fair if it is within one of the permitted categories under s98(2) (such as redundancy) or if it is for:

*... some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

If the employer can demonstrate redundancy or SOSR, the fairness of the dismissal will then turn on s98(4) ERA, under which the question is:

*... whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.*

In this article, we take a look at two recent cases, one from the Court of Appeal and another from the Employment Appeal Tribunal (EAT), which considered the relevance of the offer of an appeal to the fairness of dismissals for redundancy and SOSR.

## Redundancy dismissals

As noted above, the Acas code expressly states that it does not apply to redundancies. As such, there is no requirement under the code for employers to offer an employee an appeal against a dismissal for redundancy reasons. Employers will, however, often do this on the basis that it may contribute to the overall fairness of the dismissal and, potentially, rectify any procedural flaws in the first stage of the process. But how relevant is the absence of an appeal to the fairness of a dismissal in a redundancy case?

### *Gwynedd Council v Barratt* [2021]

The Court of Appeal had to consider this question in the recent case of *Gwynedd*. The case concerned two teachers employed in a school run by Gwynedd Council. The council decided to consolidate a number of its primary and secondary schools into one new community school. It informed all of the teachers at the existing schools that their employment contracts would terminate but that before then, they could apply for jobs in the new school by completing an application form and an interview. Unsuccessful candidates would then be made redundant.

The two claimant teachers applied and were interviewed for new roles but were unsuccessful. They claimed unfair dismissal, arguing that the council had not adopted a fair process since there had been no consultation at all – the council had simply dismissed those who were unsuccessful in the application and interview process. A specific part of the teachers' argument was the fact that the council had also not allowed any appeal against the dismissals.

### Decision

The employment tribunal found that the process the council had followed was unfair and commented in particular on the lack of an appeal. The tribunal judge said that a right of appeal was ingrained in principles of natural justice and that it would require 'truly exceptional circumstances' to refuse an employee a right of appeal against their dismissal, including in redundancy cases.

The council appealed on various points. On the absence of an appeal against redundancy, it argued that the judge had applied the wrong test and that this should not make the dismissals unfair. Much of its argument was based on *Taskforce (Finishing and Handling) Ltd v Love* [2005], in which the EAT had said that it would be wrong to find a redundancy dismissal unfair because an employer had failed to provide for an appeal hearing.

The Court of Appeal considered *Taskforce* but said that the EAT's comment in that case had to be looked at in the context of its other comments. Once that was done, it was clear that what the EAT was saying was that the lack of an appeal in a redundancy process does not *of itself* make a dismissal unfair. But it could be one of the factors that might lead to an unfair dismissal finding. The Court of Appeal said that while the tribunal judge's test of 'truly exceptional circumstances' might not have been correct, his overall conclusion was justified: the lack of an appeal in the council's process did indeed contribute to the overall unfairness of the dismissal process.

Considering the full facts of *Gwynedd*, it is not difficult to see why this was the court's conclusion. There was a set of local Welsh regulations in place (the 'Staffing Regulations'), which required the council to consult with the teachers and to provide an appeal against dismissals. The council's process had not allowed for any consultation; it had simply offered the opportunity to apply for the new roles and made redundant all those teachers who were unsuccessful.

## **SOSR dismissals**

As one of the five potentially fair reasons for dismissal, SOSR has been used by employers as a net to capture those dismissals which do not fall within the scope of the other four categories. With no statutory definition in the ERA or statutory guidance, that net is wide, provided the reason itself is substantial and can justify the dismissal of an employee holding the job that they do.

It is important that employers are clear about what their principal reason for the dismissal is. A breakdown in the working relationship, for example, may be due to misconduct, poor performance or SOSR and which it is will depend on the facts of the case. The importance of employers getting to the bottom of the real reason at an early stage is underscored by the difference in the procedure to be followed. In a SOSR dismissal, as opposed to a misconduct or performance dismissal, the employer is not required to follow its own internal disciplinary or capability procedures. The Acas code is silent on SOSR dismissals but it is generally understood that it does not apply in these cases.

Nevertheless, s98(4) ERA still requires a fair process. It seems obvious that this should include some discussion with the employee prior to dismissal but, as in cases of redundancy, do employers need to offer a right of appeal?

## ***Moore v Phoenix Product Development Ltd [2021]***

In this case, the EAT had to consider a breakdown in the employer/employee relationship which resulted in the employee being dismissed without being offered a right of appeal.

Mr Moore had been CEO of the company for 16 years before he was replaced in that role, remaining engaged as an employee and director. Things did not go well in that lesser role and a series of confrontations ensued.

An external review by an HR consultant found that Mr Moore was likely to 'attempt to sabotage any CEO coming into the business'. The company alleged that he had been overtly critical of its performance and of the new CEO to a key investor, had approved a director's loan of £60,000 without board authorisation and had delayed obtaining product approval. It also alleged that he had allowed industry accreditations to lapse and had failed to observe key company values.

A board meeting was held at which Mr Moore was able to make representations. After that, the other directors unanimously voted to terminate his employment.

## Decision

The tribunal found that the dismissal was fair because there had been a total breakdown in the working relationship, for which Mr Moore was to blame. Mr Moore appealed on various grounds, including on the basis that the failure to offer him an appeal was enough in itself to render his dismissal unfair.

The EAT rejected this argument. It did note that an appeal will normally, but not invariably, be part of a fair procedure. Here, however, it had been open to the tribunal to find that, even if such an appeal had been offered or carried out, it would have been futile in the circumstances.

The EAT's reasons included that:

- Mr Moore was a board-level director and the company was a relatively small organisation with no higher level of management available for an appeal;
- it was not an option to find different managers for Mr Moore to work with more effectively; and
- 'this was not the kind of organisation where the claimant's shortcomings and the consequent threat to the respondent's future could be addressed through some sort of re-training programme'.

The EAT also found it relevant that Mr Moore was responsible for the breakdown in the relationship and was considered to be 'destructive', destabilising and a 'drag-factor' for the company. He was also unrepentant and had given no sign that he was likely to change his conduct or attitude.

## Key lessons

These two cases offer a number of takeaway points for employers and in-house advisers:

- The overall conclusion is that a failure to offer or carry out an appeal is not fatal to the fairness of a redundancy or SOSR dismissal, but it will be a relevant consideration that tribunals take into account.
- It is important to be clear about the principal reason or reasons for termination. Lines can easily be blurred between conduct, capability and SOSR and which it is will influence the procedure to be followed.
- Based on the very different (and fairly extreme) facts of the two cases above, it is not difficult to see why two different outcomes were reached on the offer of an appeal. The safest route for employers will always be to offer a right of appeal against a termination for redundancy or SOSR. Appeals offer a chance to rectify any challenges from the employee that have not been addressed so far.
- There may be cases where an appeal is not practicable, or where a sufficiently thorough selection and consultation process has happened and an appeal is not needed for a fair dismissal. These cases are helpful in offering a defence, perhaps where:
  - large numbers of employees are involved in a redundancy (or fire and rehire) exercise and both collective and individual consultation have taken place, so that there is nothing more to discuss with the employee; or

- the dismissal involves a senior executive and the organisation is small, with no one suitably senior to hold an appeal, or the board is agreed in its view that the relationship has broken down irretrievably.

## Cases Referenced

- Gwynedd Council v Barratt & anor [2021] EWCA Civ 1322
- Moore v Phoenix Product Development Ltd [2021] UKEAT/0070/20/2005
- Taskforce (Finishing and Handling) Ltd v Love [2005] UKEAT/0001/05/2005

### **Citation reference:**

Christopher Fisher and Katherine Fox, 'Dismissal: To appeal or not to appeal, that is the question', (November 2021 #225) *Employment Law Journal*, <https://www.lawjournals.co.uk/2021/10/29/employment-law-journal/dismissal-to-appeal-or-not/>, see footer for date accessed