

MODULE 5: SELECTION CRITERIA

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So far, we've looked at the definition of redundancy and how to choose your selection pool, and in this module, we're looking at selection criteria. Along with consultation, this is the most contentious issue of any redundancy process, and the one you're most likely to get challenged on by disaffected employees.

We will explore the following topics:

1. Objective v subjective criteria. We all know disciplinary record and absence can be measured. But what about things like attitude, flexibility, and potential?
2. Clarity of criteria. All criteria have to be clear, not nebulous or difficult to score. Is 'continuous innovation' acceptable as a factor? Is 'adherence to company values'?
3. How to use the matrix method
4. Last in, first out (LIFO) and length of service criteria: I'll explain why LIFO can't be used any longer and tell you the best way to factor in length of service
5. Performance and skill-related criteria: speaks for itself
6. Absence-related criteria: We will look at how you adjust scores to deal with those on long-term sick or those with disabilities, and how you adjust for those on maternity or similar family-friendly leave. I'll also tell you how Eversheds, one of the

best law firms in the country, got this completely wrong

7. Cost to the business: can you target the most expensive employees? Or, at the other end of spectrum, can you target those whom it be cheapest to dismiss?
8. Miscellaneous criteria.

It's important to note that it's relatively unusual for tribunals to find a dismissal is unfair *just* because of the selection criteria used. Unless the criteria are completely bonkers, what tends to happen is that the tribunal will say the selection criteria are reasonable but weren't fairly applied. It's much more common for the tribunal to criticise the way the employer approached scoring than the actual criteria themselves.

That's not what should happen, because as we'll go on to see in Module 6, tribunals aren't meant to scrutinise individual scores too closely. However, they often get around that by saying it's not the manager's choice of any particular score for an individual that went wrong, but the manager's whole approach to scoring and their lack of understanding of how to score properly under the criteria.

The crucial point about selection criteria is that they should be capable of some element of fair assessment. 'Number of sales in the last 12 months' is easy to quantify. 'Strategic implementation planning

ability' means completely different things to different people: it's vague and it's nebulous, meaning any assessment could be inconsistent and unfair. I want to dispel a really important myth, however: subjective criteria can be OK. The first subtopic in this module is therefore objective v subjective criteria — and the fallacy that's grown up around it.

The theme which you've heard gently rippling through earlier modules continues to bubble along here. An employment tribunal must not substitute its own views of what constitutes reasonableness — in respect of either redundancy selection criteria or implementation of those criteria — for the views of the employer. What matters is whether the selection was one that a reasonable employer acting reasonably could have made (*British Aerospace v Green* [1995] ICR 1066, CA).

Remember this? It's the case of *Williams v Compair Maxam* [1982] IRLR 83, which I talked about in Modules 2 and 3:

'The employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant.'

It's good practice to try to agree the selection criteria with any recognised union, or with elected employee representatives if you're doing collective consultation. But you'll be surprised at what happens if you try.

A union will almost certainly refuse to discuss selection criteria with you. Unions tend to get involved with individual scoring, but they tend to avoid getting involved in any debate over selection criteria. That's because the moment they favour some selection criteria over others, they're seen as favouring some employees over others, and they don't want to be put into the invidious position of choosing between their own members. And if you're consulting with elected employee representatives, they'll just bicker endlessly among themselves about what you should use, because they'll also have a conflict of interests and will generally favour criteria under which they, as individuals, won't get selected. Remember, you've

got to listen to what they say with an open mind, and with a view to trying to agree as much as you can with them, but that's not the same as being under any obligation to agree.

OBJECTIVE v SUBJECTIVE CRITERIA

Common criteria include disciplinary record, qualifications and experience. These have the advantage of being objective and easy to measure. But they do not always help you choose which employees are the best match for your future business needs. Often what you're most interested in are vaguer qualities such as attitude, flexibility, and potential. They can be difficult to measure however, and often involve subjective judgments that can be hard for the employer to explain.

One of the things you'll hear a lot of people say is that selection criteria have to be objective, not subjective. It's easy to say, but it's also a bit meaningless. Businesses, and managers within businesses, exercise subjective judgment all the time. They exercise subjective judgment when deciding what features to include in a new product, or what price to value a service it. They exercise subjective judgment when assessing employees at annual performance reviews, so why shouldn't they exercise subjective judgment when scoring employees using redundancy selection criteria?

I've always thought the whole 'objective good, subjective bad' thing is nothing more than an inelegant way of saying that employers have to use reasonable criteria and score people reasonably. The risk with subjective scores is that they can be decided at the behest of just one person, but I can't see anything wrong with that if it's done dispassionately and fairly.

In the last 10 years, tribunals have begun agreeing with me, and pulling back from 'objective good, subjective bad', recognising that sometimes it can be reasonable to rely on subjective criteria. I'll give you an example from the leading case on this, *Swinburne & Jackson LLP v Ms C A Simpson* [EAT/0551/12].

Swinburne & Jackson were a big solicitors' firm in the North-East of England. Sadly they don't exist any longer — they'd been around for 250 years but went into administration in 2014. Three years before that, in 2011, they needed to cut costs. Among other things, they decided to make one of the four lawyers in their commercial property department redundant.

They put together a generic redundancy selection matrix they had downloaded from Practical Law — and they made changes to make it, in their view, more objective. These are the eight selection criteria they used:

1. Length of service
2. Skills/qualifications/training
3. Experience
4. Timekeeping
5. Disciplinary record
6. Future potential
7. Flexibility
8. Performance.

(I'll be talking about almost all of these in more detail as we go through this module.)

Following the scoring, Ms Simpson had the lowest overall score and she was dismissed. She claimed unfair dismissal. The employment tribunal held that the last three factors were subjective, and said the dismissal was unfair. The Employment Appeal Tribunal agreed because the senior partner was unable to explain his reasons for scoring Ms Simpson so low. But on the crucial objective v subjective point, the EAT said this:

'The simple fact is that in an ideal world all criteria adopted by an employer in a redundancy context would be expressed in a way capable of objective assessment and verification. But our law recognises that in the real world, employers making tough decisions need sometimes to deploy criteria which

call for the application of personal judgment and a degree of subjectivity. It is well settled law that an employment tribunal reviewing such criteria does not go wrong so long as it recognises that fact in its determination of fairness.'

I'm going to give you some examples of criteria which have been held to be too vague or subjective. Do bear in mind that these are old cases, and they also involve employers which didn't do very much to check scores were being fairly assessed by managers, so the tribunal was looking for a way to say the dismissal was unfair. Here are two examples:

- Employees 'who, in the opinion of the manager concerned, would keep the company viable' (*Williams v Compair Maxam Ltd* [1982] IRLR 83) — a case we've looked at in detail already
- 'Attitude' — *Graham v ABF Ltd* [1986] IRLR 90. 'Attitude' was described here as being 'dangerously ambiguous and vague'. That's not to say attitude can never be a factor, as long as everyone is clear on what it means. But in the *Graham* case, it was used as a way of getting around the fact the company should have put Mr Graham through a disciplinary process for misconduct, and it was seen as trying to get rid of him for by a backdoor route.

And here are examples of where so-called 'subjective' criteria *have* been accepted:

- 'Company values' was accepted, at least in theory, by an employment tribunal in *Howard v Siemens Energy ET 2324423/08*. The tribunal found that the employer's use of the 'values' — which were 'accountable', 'altogether' and 'adaptable' — as a selection criterion was reasonable
- 'Employee trajectory and future potential' was accepted as a valid redundancy criterion by an employment tribunal in *Ganeson v Opera Solutions*.

Why have tribunals become more willing to accept subjective redundancy criteria? I think it's because our

economy has changed, so we're no longer mainly in a manufacturing economy where everything can be measured, all workplaces are unionised, and people cleave to objective standards.

We now live in a service economy, in which flexibility is needed, and where technology means creativity and soft skills are valued more highly. And tribunals now recognise that by allowing for subjective value judgments to be taken about people's abilities.

Here's an even clearer example of when a senior judge has made it clear that subjective criteria aren't necessarily a problem. This comes from *Samsung Electronics v D'Cruz* (EAT/0039/11), and the judge was, at the time, President of the Employment Appeal Tribunal:

“Subjectivity” is often used in this and similar contexts as a dirty word. But the fact is that not all aspects of the performance or value of an employee lend themselves to objective measurement, and there is no obligation on an employer always to use criteria which are capable of such measurement...’ (Underhill J)

Just remember that managers relying on subjective criteria, such as attitude, flexibility, or potential, should be able to support their assessments with as much evidence as possible. For example, an employer scoring an employee low on attitude should be able to point to examples of behaviour that supports that assessment.

All this means it's fine to use what are traditionally thought of as subjective criteria, as long as everyone understands what they mean, and how they should be assessed. A much bigger problem occurs where the criteria are meaningless waffle or verbiage.

CLARITY OF CRITERIA

The scorers need to understand how to do the scoring. Sometimes it's just a straightforward 0, 1, 2, or 3 against each of the criteria. Sometimes there is banding — for example a 5 might mean no disciplinary record, a

score of 4 means there's a verbal warning, 2 reflects a written warning, and 0 reflects a final written warning. So a higher score represents a clean disciplinary record, and vice-versa.

Another type of banding might be for absence, where a 5 might represent no absence over the last 12 months, and a score of 0 might represent more than 30 days of absences, or perhaps exceeding a certain Bradford Factor score.

It's therefore important to understand what the criteria mean and how to score them.

In *Samsung Electronics v D'Cruz* (EAT/0039/11), a printer called Mr D'Cruz was not selected for alternative employment because he scored poorly on the assessment. The criteria used were: creativity, challenge, speed, strategic focus, simplicity, self-control/empowerment, customer focus, crisis awareness, continuous innovation, and teamwork/leadership. The employment tribunal said the criteria were 'nebulous' and that nobody could realistically know what they meant.

The EAT disagreed. The judge, Underhill J, said:

‘We see more force in the criticism that the particular criteria adopted were nebulous. We would be hard put ourselves to assign a clear meaning to some of the terms used in the assessment. But lawyers must be wary of assuming that terms that look to them like mere management-speak have no meaning to their regular users. Most large modern businesses have adopted systems of appraisal, often with the active co-operation of employee organisations, which, it must be assumed, they find valuable but whose language would not score highly in an essay competition. Tribunals must not allow a disdain for such terminology to lead them into treating such systems as necessarily worthless.’

I mentioned earlier an employment tribunal case called *Howard v Siemens Energy* (ET 2324423/08). Here, 'company values' was accepted, at least in theory, as a valid criterion by the tribunal. If you remember, the criteria included the employer's values

of 'accountable', 'altogether' and 'adaptable', and the employee's legal team criticised them as being difficult to understand or score properly. But the same point applies there: managers working for Siemens understand exactly what those words mean and can assess the extent to which employees meet them.

I did a case about three years ago where I represented a woman called Bina Hale (*Hale v Dentons UKMEA Legal Services* (ET/2200450/17)). I can tell you the names because the judgment is in the public domain and can be downloaded from the employment tribunals website. Bina was a recruitment manager with Dentons, which at the time was the largest firm of solicitors in the world. She was made redundant when she was due to return from maternity leave, and after a week of me cross-examining senior personnel from Dentons, including a partner, the tribunal found that Dentons had concocted documentation and lied to disguise the fact that they had selected her for redundancy because she was on maternity leave and so easiest to have not come back.

The criteria they had used to score for redundancy were:

- Output of work
- Quality of work
- Relevant skills
- Job knowledge.

When I was cross-examining the two people who did the scoring, I questioned them on what they understood those phrases to mean because they're quite vague. Each of the two witnesses gave very different answers, and it was pretty obvious — at least I thought it was — that they were making up their answers on the spot in the witness box. The absence of clear guidance given by Dentons to the scorers as to what those criteria meant was a red rag to my bull, and it'll be a red rag to a bull when it comes to a nasty barrister like me cross-examining you!

The key lesson is: don't just have criteria. Make sure you have a scoring guide as part of those criteria

which explains what sort of thing managers should be looking for when deciding what score to give.

THE MATRIX METHOD

The matrix method involves drawing up a list of criteria, and assigning scores to each employee under each criterion. The scores are added up and the employees with the lowest cumulative scores will be selected for redundancy.

Some companies like to have very simple redundancy selection matrices — they might have two or three criteria and just add them together to get a total score. Other companies, and I have actually been recently advising such a company about this, has tediously complicated matrices with 15 or 20 different criteria and then they apply all sorts of funny weighting to them.

What's better?

With a simple process...

- a. You can explain it easily, and managers can apply it easily
- b. There's less opportunity for people to slip up when doing the scoring
- c. It looks less like a complex system engineered with a view to getting rid of predetermined people
- d. Employees can understand it and so give sensible feedback during consultation.

The advantages of a complex system are that the more variables you have, the closer you're going to get to selecting the best employees to remain. It also means that any less data-driven factors are balanced out by the more data-driven factors.

To me, it's a no-brainer. Keep it simple. Always. It's not wrong to go for the more complex options, but it adds more work and doesn't — in my view — add a great deal of value. Keep it simple: have half a dozen criteria at most, and if you have any weighting, keep it rudimentary. That is a pro for simplicity.

A pro for complexity, of course, is that if you have built in more variables and cross-checked more variables, the closer you are going to get, arguably, to balancing out any subjective factors. If, for example, you haven't got high weighting on performance — with performance being a simple scoring which is defined in the worst case by one or two managers' assessments — this is going to be much more susceptible to individual subjectivity. We know from every aspect of life, from technology to trying to claim on a Carphone Warehouse insurance policy, that complicated systems have a much greater propensity to go wrong.

In the Resources section in the Vault, you will find my personal template redundancy selection matrix. You need to make sure it's applicable to your business, but it's a really good starting point if you're drawing up selection criteria for a redundancy process.

For the rest of this module, I'm going to be talking about specific criteria that are often used. First, I'll talk about LIFO, and length of service. Then I'll move to performance. Then absence issues. Then the cost to the business, and I'll finish with other, miscellaneous, criteria.

LAST IN, FIRST OUT (LIFO) AND LENGTH OF SERVICE

Last in, first out (LIFO) was the standard redundancy criterion during the 1970s. It was simple — employees would be selected for redundancy in the order in which they joined a company, the most recent joiners being dismissed first.

This has the advantage of being completely objective with no room for favouritism or subjective opinion. But it's got three big drawbacks.

First, the employees with the longest service aren't necessarily the best performing or most skilled employees. As a result, relying simply on length of service might result in the employer losing the employees who could actually be the most valuable to the business. In fact, because of the difficulties this sometimes caused when employers found themselves

employing a predominantly middle-aged/elderly workforce, an occasional alternative was first in, first out (FIFO).

Second, selection for redundancy because of age has been generally unlawful since 2006, and this means that LIFO is likely to be unlawful if the 'last in' are generally the youngest. But if you can justify the age discrimination as 'a proportionate means of achieving a legitimate aim', it's not unlawful because of the objective justification defence in s13(2) of the Equality Act 2010.

Third, LIFO might be regarded as indirect sex or race discrimination if the business is traditionally male or white-dominated and women and non-white employees have only been recruited in recent years, or women have tended to take time off to raise a family and hence have less continuity of employment. In that case, LIFO may have a disproportionate impact on women and non-white employees.

Moral: don't use LIFO as your way of selecting employees for redundancy.

Having said that, length of service can be one of several factors in a selection process. As long as it's not determinative, and probably as long as it's not overly heavily weighted, any selection for redundancy based partially on rewarding length of service is likely to be objectively justified.

It's especially useful to use length of service as a tie-breaker where two or more people have the same score. That's been confirmed by the Court of Appeal in *Rolls-Royce plc v Unite the Union* [2009] IRLR 576. In a 2:1 majority judgment, the court decided that using length of service in a redundancy selection matrix was lawful because it was objectively justified, partly because it helped reward loyalty and partly as it helped maintain a stable workforce. What helped in that case was that length of service had been included in a collective agreement negotiated with a union, but length of service has remained a standard factor to keep in a selection matrix and — as long as it's not a dominant factor — nobody is likely to think twice about it.

PERFORMANCE AND SKILLS

Performance in the job is a perfectly reasonable criterion to use when making a selection for redundancy — but it needs to be applied carefully.

Ideally there should be clear data supporting the score, such as sales figures or other forms of output. Your ability to do this will depend on the role in question. In some jobs, such as those involving sales or productivity targets, performance is inherently easy to measure. In other jobs, assessment of performance will require a more nuanced analysis of the individual's qualities and skills. Sometimes you might want to break performance into sub-categories, each of which can be assessed separately — although remember my recommendation to keep your matrices as simple as possible. As long as the manager (or managers) in question can justify their assessments, they'll be fine. The problem arises when managers can't justify the scores they gave. Remember Module 4: keep careful contemporaneous notes.

Relying on performance appraisals is a brilliant way to score people for redundancy. Doing that means you're not simply relying on a manager's personal opinion at the time of the redundancy selection exercise. It's much harder for an employee to challenge your reliance on appraisals, especially if they've agreed with the appraisal at the time.

But you can't always rely on appraisals. Sometimes they might not have been carried out recently (or, indeed, at all) for some or all of the staff in the selection pool. Sometimes they might have been carried out by different managers, not necessarily with the same approach, and without the moderation and scoring guides you'd expect to see in a redundancy process.

In that situation, there should be some moderation and checking of the appraisals. Ideally, scoring should be done by more than one manager to minimise errors.

You've also got to be careful when assessing performance not to discriminate against somebody who has been absent because of maternity leave, or shared parental leave, or because of a disability.

ABSENCE CRITERIA

Attendance and time-keeping records can be used as redundancy criteria, but you do need to be a little careful. Any periods off work relating to maternity or parental leave should be ignored, as should any periods off work occurring when workers exercise their right to time off to care for dependants in an emergency.

Make sure you use a long enough period to be significant, particularly if you have a lot of long-serving employees, for whom it would be unfair to use a short period, such as six months, if they've been absent a lot recently but have a long history of good attendance.

An example is *Fleming v Leyland Vehicles* (ET/1561/84) where an employment tribunal criticised a six-month period as arbitrary because it meant that an employee with 15 years' service was selected for redundancy while shorter-serving employees who had avoided sickness over the six-month period were retained.

I'd never use less than a year, and two years is better. For those employees who have worked for under two years, apply an appropriate multiplier. So if your assessment period is two years, multiply the number of absence days for someone who has been working for six months by four. They might think that is unfair, as it's not a long snapshot, but let's face it: by definition they haven't got two years' employment and so can't claim unfair dismissal.

Do you need to look into the reasons for the absence? I've mentioned maternity and family friendly leave absence, which has to be ignored. You also need to give special consideration to those who suffer from a disability within the meaning of the Equality Act 2010. If a disabled employee is at a substantial disadvantage in a redundancy selection process, you need to make reasonable adjustments to minimise the impact of that disadvantage (*NTL Group Ltd v Difolco* 2006 EWCA Civ 1508, CA). To put it another way, you need to be prepared to make adjustments to your

scoring process if poor attendance has been caused by an underlying condition that may amount to a disability.

But if maternity, family-friendly, or disability issues don't arise, do you still need to look into the reasons for dismissal? The case law is inconsistent on this. There are a couple of EAT cases that say an employer should look into whether there's a good reason for the absence and, if so, ignore it (*Paine and Moore v Grundy (Teddington) Ltd* [1981] IRLR 267). There are a couple of EAT cases which say that the employer doesn't have to actively look into the reason for absences, but if they happen to know the reason, they should take into account. And there are a couple of cases which say the reason for absence is irrelevant — it's the fact of absence that matters (*Dooley v Leyland Vehicles Ltd* [1986] SC 272, Court of Session (Inner House)).

So that's nice, clear guidance from the courts. What I'd do, although it's not without risk, is take the hard approach of 'absence is absence', and the reason for absence is irrelevant (as long as it's not family-friendly or disability-related). That has the advantage of being easy to apply, and it lacks the risks inherent in managers deciding whether reasons for absence are good or bad, and of managers having to try to justify why they disbelieved an explanation. Ultimately, the employer just has to act reasonably, and I think it's generally perfectly reasonable to take a consistent and firm approach on this.

If you're making adjustments for maternity or disability absence, you've got to do your best to neutralise the factor rather than distort the playing field. I'll give you an example of what I mean. In *Eversheds Legal Services Ltd v de Belin* [2011] IRLR 448, the national law firm Eversheds were making an associate solicitor in their Leeds real estate investment team redundant. There were two associates in that department in the Leeds office, and Eversheds rightly used them as a pool of two. One was male — Mr de Belin. The other, Ms Reinholz, was female. She was absent on maternity leave at the date of the assessment. One of the assessment criteria was something called 'lock

up', which is the amount of time passing between doing the work and the firm getting paid. Because Ms Reinholz was absent on maternity leave, she had no files and so there was no 'lock up' figure available for her. Accordingly, Eversheds gave her the maximum score, which was its standard policy for scoring for women on maternity leave, so that she couldn't claim she'd been marked down due to her absence.

Guess what? Because she was given a full score for that, she beat Mr de Belin by half a mark and Mr Belin was selected for redundancy. He claimed sex discrimination and unfair dismissal, and he won. The EAT said that what Eversheds had done — giving Ms Reinholz maximum marks — was disproportionate and unfair. What it should have done, rather than inflating her score inappropriately, was to adjust the process so as to remove the maternity-related disadvantage without unfairly disadvantaging the other person in the pool. The best way to have done that would be to measure the lock-up performance of both candidates as at the last date when Ms Reinholz was at work.

There's a lesson in that. If one of the best firms of solicitors in the country can't get it right, what help is there for us mere mortals? Well, I think there is some hope, because you're smart enough to be on this course. And this is the way to handle the situation.

If you're making adjustments for somebody on maternity leave, or similar, and using hard data, adjust the period of data to ignore the period of absence. Now in the *De Belin* case, the EAT said that data from before Ms Reinholz went on maternity leave ought to be used for both her and for Mr de Belin. But it will be absolutely fine, in most cases, to take an earlier period of time for the woman on maternity leave but the most recent data for others. If, during consultation, the woman on maternity leave says that's unfair because, say, market conditions changed, then you can decide whether you agree and, if you do, adjust the figures to reflect the different market conditions. You've just got to act reasonably and document your thought process to prove you thought about these things at the time. If you thought about these issues, you'd have to be

very unlucky for a tribunal to criticise your decision — unless it's completely bonkers. The problems arise when you can't prove you thought about these sorts of issues at the time.

Ideally, you need to think about whether it's reasonable to view the employee's past attendance as a reliable indicator of what will happen in the future. An employee might have taken a lengthy period of sickness absence in the past year, but if that was the result of suffering an accident then there may be no reason to think that the absence will be repeated in the future. Another employee may have been absent for less time overall, but show a tendency to suffer short-term unexpected periods of illness with no underlying condition. That employee may be much more likely to have poor attendance in the future and so the measurement of sickness absence should be sophisticated enough to take these factors into account.

Something else I'm asked from time to time is whether you can make someone redundant if they're off work on long-term sick leave. Yes, you can. The underlying point is that the role is redundant. There is plenty of case law that recognises that it can be fair to dismiss someone on long-term sickness leave, even those who receive permanent health insurance benefits, and if you can dismiss somebody because of sickness absence, it is absurd to suggest they have some magic shield against being selected for redundancy when the underlying job has disappeared. But you still need to put them through a fair selection process: you can't just select them because they're not in the workplace.

COST TO THE BUSINESS

It makes total sense that you might want to prioritise the more expensive employees when making redundancies. It's not personal, but if you have costs to reduce, there will be fewer compulsory redundancies if you dismiss the people who earn more.

The flip side is that you might want to focus on those who will cost the least to dismiss, so those with the lowest notice periods and the lowest redundancy payments. I'll come to that in a moment.

Surprisingly, there isn't any case law on this issue, but as a matter of principle, there's nothing wrong with having the cost to the business as a factor in determining who should be selected for redundancy. Ultimately the obligation is to act reasonably, and if dismissing four expensive people means you don't have to dismiss five less expensive people, a tribunal is unlikely to say that's something you're not allowed to take into account.

There is a danger here, though, of both indirect age and sex discrimination. It involves indirect age discrimination because older people tend to earn more, even if through nothing more than regular annual pay rises over a period of years or decades. It involves indirect sex discrimination in part because men tend to spend more years in the workplace than women, and in part the gender pay gap means men just do — on average — earn more than women.

You can't therefore rely just on cost to the business. But there's no reason why you shouldn't rely on it as one of several factors, as that's likely to be reasonable when it comes to fair or unfair selection for redundancy, and objectively justifiable when it comes to defending an indirect discrimination claim.

So what's the best way to factor it in, and score it as part of a scoring exercise?

There's no single answer, but one way is to score employees based on which quartile they fall into for the role, scoring 0, 1, 2, or 3. So if you have 100 warehouse operatives, then those being paid in the top 25% would score '0', and those whose salaries were in the bottom 25% would score '3'. (That's assuming a higher number means you're more likely to remain in the business).

But there is a further issue. Sometimes, the reason for paying somebody a bit more is because, over time, they've demonstrated skills and accomplishments which justified above average pay rises. So think carefully about whether you actually want to be scoring down, because they earn a bit more, the very people who had demonstrated excellence in the job

over a long period of time. You should also, during the consultation process, give people the opportunity to take a pay cut. If they say, 'I'd rather do the job for less and keep my job than be made redundant', then you should score them here on the basis of the salary they'd be willing to accept going forward.

There is, as I said, another way of looking at this. You might want to focus on those who will be cheapest to dismiss because they'll have the lowest notice and redundancy payment rights. This is actually last in, first out by another name, because the people who will be on the lowest notice and the lowest redundancy payments are generally those with the shortest service. So immediately, you might be in danger of indirect discrimination. Again, you'll be fine as long as the cost of dismissal is no more than one of several factors. What you can't do is use cost of dismissal as your sole or dominant selection criterion.

MISCELLANEOUS CRITERIA

There are four other points I want to mention on selection criteria:

1. A common criterion is flexibility, which I discussed earlier when talking about objective v subjective criteria. It's absolutely fine to have that as a factor, but do try to base the assessment on real examples of flexibility (or lack of it) and make sure the reasons are recorded in the scoring document. Also make sure that you're not scoring people down based on their lack of flexibility to do something it is unreasonable to ask them to do. For example, in *Mole v Lamex Foods* (ET/3303708/09), the employee was scored down for flexibility because of an unwillingness to attend head office two to three days per week and travel throughout the UK. However, the claimant worked from home while the other two in the pool worked from head office. Scoring the claimant down for flexibility because of reluctance to travel was held to be unreasonable and outside the range of reasonable responses, given the difference in where their contracts required them to work.
2. Another common criterion is disciplinary record. I discussed this earlier when talking about clarity of criteria and the importance of providing clear scoring notes. Using disciplinary records is rarely going to be objectionable, although there is an issue about whether you can take into account expired disciplinary warnings. The answer is it's probably defensible — just about — if everything else you do is reasonable. But in conjunction with any other issue, it's likely to tip a dismissal over into being unfair (*Airbus UK Ltd v Webb* [2008] ICR 561, CA.)
3. Avoid having part-time v full-time work as a selection criterion. Selection of a part-timer for redundancy in preference to a full-time employee is a breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI 2000/1551 unless it could be justified on objective grounds (*Hendrickson Europe Ltd v Pipe* (unreported, EAT, 15 April 2003)).
4. Also consider automatically unfair reasons for selecting people for redundancy. There are obvious ones, such as maternity, whistleblowing, or trade union-related reasons: if the principal reason for selecting someone for redundancy is that they made a protected disclosure, it's automatically unfair. Section 105 of the Employment Rights Act 1996 has a list of about 15 things that make the selection for redundancy unfair. They are mostly what you'd expect, but there are a couple of obscure ones as well. I do think that it's unusual for people facing redundancy to react by saying, 'Oh yeah, that is absolutely right. I clearly am the weakest person here doing this particular job.' What you tend to find is people think, 'Oh, there must be another reason why I have been selected.' Then they look down the ERA s105 list and assert they were selected for trade union reasons, or whistleblowing reasons, and so on.
5. I'm going to round off this module by emphasising something I've already said several times: Keep. It. Simple. In *Mental Health Care Ltd v Biluan* (EAT 0248/12), the employer devised an elaborate

system for assessing potentially redundant staff. It was a masterpiece of complex, objective, scoring out of 100, with competency exercises and assessments. But it produced surprising results, in part because none of the actual managers who knew the candidates had any input. Here's what Underhill P said at the Employment Appeal Tribunal:

'We appreciate that the Appellant took a lot of trouble over this redundancy selection exercise and put a lot of resources into it, which is in principle to be applauded. But the fact is that it chose an elaborate and HR-driven method which deprived it of the benefit of input from managers and others who actually knew the staff in question, and which by its very elaborateness was liable to be difficult to apply consistently.'

You can download my model redundancy selection template by going to the Vault and selecting Resources. In Module 6, we learn about scoring, about individual consultation, about how to deal with employees' challenges to their scores, and the impact of furlough on the consultation process.

To summarise, here are my recommended criteria:

- Length of service
- Disciplinary record
- Qualifications
- Leadership skills
- Productivity
- Cost to the business
- Experience
- Absence
- Attitude, flexibility, and potential
- Length of service as tie-breaker

For further information, please visit 'Sources of Further Help' in The Vault or post a question on our Facebook page.

This transcript is correct as of June 2020.

Please see the disclaimer at paragraph 4 of <https://gettingredundancyright.com/terms/>.

GETTING REDUNDANCY RIGHT

- MODULE 1:** Introduction
- MODULE 2:** Definition of Redundancy and Challenging
- MODULE 3:** Avoiding Redundancies
- MODULE 4:** Choosing your selection pool
- MODULE 5:** Choosing your selection criteria
- MODULE 6:** Scoring and individual consultation
- MODULE 7:** Collective consultation
- MODULE 8:** Alternative employment
- MODULE 9:** Dismissal
- MODULE 10:** Miscellaneous issues



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