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STANDING UP FOR YOU

Jo Seery considers when there is a genuine redundancy under the Employment Rights Act

Genuine redundancy

THE LAW cannot challenge an employer's decision to make redundancies; it can only decide whether there has been a genuine redundancy. This is set out in section 139 of the Employment Rights Act (ERA).

Who can make a claim?

Only employees (anyone with a contract of employment) with two years' continuous service can claim that they are entitled to a redundancy payment if they are dismissed by reason of redundancy. Workers such as subcontractors or agency workers cannot, therefore, claim these rights.

When is there a genuine redundancy?

Section 139 states there is a genuine redundancy situation when:

- an employer closes their business or part of it
- an employer closes the location at which the employee works
- the employer's need for employees to perform the work has diminished.

This definition allows a group of companies to select employees for redundancy from any part of the group, whether or not there is a redundancy situation in each individual company.

A redundancy situation can also arise when the closure of the business is temporary

If the redundancy situation does not fall within one of these categories, but the employer tries to dismiss the employee on the ground of redundancy, they may be able to claim that the reason is not genuine and that they have been unfairly dismissed.

When is there a business closure?

A business closure occurs when an employer ceases or intends to cease carrying on their business. It is the closure of the business that is important so, if they close down and then reopen a completely different business, that would also count as a genuine redundancy.

The issue for tribunals to decide is whether the new business is sufficiently different to the old one, although that is not always easy to determine. In **Lewis -v- A Jones & Sons plc**. the appeal tribunal held that the closure of a family shoe shop, which reopened as a high-end fashion shoe shop, amounted to a closure of the old business because the new business targeted a different clientele and so was completely different.

However, in **Whitbread plc t/a Whitbread Berni Inns -v- Flattery and ors**, the appeal tribunal said that changing the business from a Berni Inn to a brasserie four weeks later was not a closure of the old business.

A redundancy situation can also arise when the closure of the business is temporary. However, this will only usually be the case if it closes down for a significant period of time. In **Gemmell -v- Darngavil Brickworks Ltd**, the tribunal held there was a redundancy situation when the business closed for 13 weeks for machinery repairs. A change in the way the business is run will not, however, amount to a closure for redundancy purposes.

When an employer transfers their business, including the employees, under the Transfer of Undertakings (Protection of Employment) Regulations 2006, the employees are not generally treated as having been dismissed for redundancy purposes.

When is there a workplace closure?

A workplace closure occurs when a department, office or factory, where the employee is employed to work, closes. That applies even if the employer closes the workplace down and moves the work to a different location.

Similarly, when an employee is employed to work at one workplace and is temporarily relocated to another, they will still be treated as being in a redundancy situation if their original workplace closes.

Whether an employee is redundant because of a workplace closure will depend on where the employee is employed to work. Usually, this will be obvious but, if the employee works in different locations or has a mobility clause in their contract of employment, it may not be straightforward.

In determining the identity of the employee's workplace, tribunals consider the factual circumstances, such as where the employee actually works, whether that is fixed or if the employee works elsewhere and any contractual terms that define their workplace.

What about mobile employees?

For mobile employees, such as drivers, the workplace is usually the depot where they are based or the office they report to. In **Exol Lubricants Limited -v- Birch and ors**, two delivery drivers had a contract that stated that their workplace was a depot in Wednesbury in the Midlands even though they lived in Manchester.

Although they were required to drive to the Wednesbury depot every day, their employer agreed to let them park their HGVs overnight in Stockport, near where they lived. When the employer terminated that arrangement. It argued that the drivers were dismissed for redundancy on the basis that Stockport was their place of work.

The EAT applied the factual test above and held that they were not redundant. It took into account the fact that they travelled to Wednesbury every day and their contracts stated that was their base. In doing so, the EAT said that it was important to take into account the terms of their contracts.

What is the effect of a mobility clause?

A mobility clause allows employers to change the workplace of their employees. In **High Table -v- Horst**, which involved an employee who had always worked at one particular workplace, the court held that the employer could not rely solely on the mobility clause to argue that they were now employed at a different workplace in order to avoid making a redundancy payment.

Whether an employee is redundant because of a workplace closure will depend on where the employee is employed to work.

However, this does not mean that an employer cannot rely on a mobility clause to avoid a redundancy situation. In **Home Office -v- Evans & anor** the court held that the employer was entitled to invoke the mobility clause in the contract rather than dismiss the employees as redundant. In that case the employer closed the immigration facility at Waterloo International and sought to relocate the employees to Heathrow. ➲

➲ There are limits, however, to this approach. Once the employer has announced redundancies, and proceeds down that route, for example by consulting with a recognised trade union, they cannot rely on a mobility clause at a later stage to argue that the employees were not redundant after all.

When does work of a particular kind diminish?

The law says that this applies when:

- the need to do work of a particular kind has diminished; or
- the actual workload has not decreased but fewer employees are needed to do it, for example because of the introduction of new technology or because of a reorganisation.

There has been some debate in the past as to whether the "diminishing need" should be assessed by reference to the work the employees actually did, or by reference to the work that they could be required to do under their contracts.

There was a redundancy because instead of two plumbers the college now only had one

This was resolved in **Murray and anor -v- Foyle Meats Ltd**, in which the House of Lords (now the Supreme Court) ruled that the test was whether the dismissal was wholly or mainly "attributable" to one of the definitions of a genuine redundancy. There was no requirement to consider what a particular employee could or could not be required to do under their contract.

In this case, the men were employed in work of a particular kind in the slaughter hall; their principal place of work was the slaughter hall; and their dismissal was as a result of a reduction in work in the slaughter hall even though they could be required to work elsewhere in the factory.

This means that a redundancy situation can arise when there is a reorganisation that leads to a substantial change in the kind of work the employer requires to be done even when the overall number of employees remains the same.

In **Murphy -v- Epsom College**, the Court of Appeal held that each case of re-organisation has to be decided on its particular facts. It is for the tribunal to decide whether the reorganisation and reallocation of functions "*is such as to change the particular kind of work which a particular employee… is… required to carry out, and whether such change has had any… effect on the employer's requirement for employees to carry out a particular kind of work*".

In this case the college had two plumbers and made one redundant when he declined to perform engineering tasks. He was replaced by an engineer who undertook some plumbing tasks. There was a redundancy because instead of two plumbers the college now only had one.

What if the employer wants to make changes to terms and conditions?

There is no redundancy when the employer makes changes to the employees' terms and conditions. For instance, in **Chapman and ors -v- Goonvean and Rostowrack China Clay Co Ltd**, the employer withdrew free transport to work because it was not economic to continue to offer it. Some employees lost their jobs because they could no longer get to work but the Court of Appeal ruled that this was not a redundancy situation.

When an employer proposes to dismiss 20 or more employees in order to implement changes to terms and conditions, they have to consult with "appropriate representatives" which means the recognised trade union (if there is one).

Conclusion

In each case, it is important to assess whether there is a redundancy situation, and if there is, whether the dismissal was caused by it. Redundancy is often used by employers as a veil for a dismissal which would otherwise amount to discrimination or victimisation, such as selecting trade union activists for redundancy.

Jonathan Bacon clarifies the wide discretion that employers can exercise when deciding what selection criteria to adopt when making employees redundant

Diving into the redundancy pool

BEFORE MAKING an employee redundant, employers have to decide who should be in the "pool" (in other words, who is at risk of redundancy) and then select them fairly and objectively.

Who should be in the pool?

When deciding who should be in the pool, employers should take into account the type of work that is ceasing or diminishing, the type of work employees are doing, how much the jobs overlap and whether they are interchangeable. Employers should also seek to agree the selection pool with the relevant union or employee representatives in the workplace.

An employer who employs staff in more than one place should also consider whether to limit the pool so that it only includes employees at one site. In some cases this has been found to be unfair, even when that site was closing completely, but in others it has not.

There are, in other words, no fixed rules about how the pool should be defined (or even that there should be a pool). The important thing is that the employer genuinely applies their mind as to the pool for redundancy, consults appropriately and comes to a reasonable decision based on the facts of the particular case.

How big should the pool be?

There is no requirement that the pool should only contain employees doing the same or similar work. Employers often try to keep it as narrow as possible to avoid damaging staff morale, although employees usually want it to be wider to reduce the risk of being selected for redundancy.

In some cases, tribunals have found that the pool was defined so narrowly that it ➲

There is no requirement that the pool should only contain employees doing the same or similar work

➲ was outside the range of reasonable responses. However, each case is dependent on its own facts, so tribunals have found that it was fair to create a pool with only one employee in it.

For instance, in **Wrexham Golf Co Ltd -v- Ingham** (weekly LELR 289), Mr Ingham had been employed as a bar steward at the club for a number of years. Although he was one of 11 club employees, he was the only person to be made redundant.

The tribunal found that his dismissal was unfair because the club had not acted "within the range of reasonable responses" open to it. The Employment Appeal Tribunal overturned that decision, however, holding that the question for the tribunal was simply to consider whether it was reasonable for the club not to consider a wider pool.

To bump or not to bump?

"Bumping" is the term used to describe a situation when an employee whose role is no longer required is redeployed into the job of another employee

"Bumping" is the term used to describe a situation when an employee whose role is no longer required is redeployed into the job of another employee. That person is then made redundant even though their job is still required.

Although bumping is not always appropriate, employers should bear the possibility in mind because, if they fail to do so, the resulting dismissal may be unfair. For instance, the dismissal of a senior employee was found to be unfair because the employer failed to consider making a more junior employee redundant instead.

Who should be selected from the pool?

Once the employer has decided on a pool for selection, the next stage is to select the employees who are to be made redundant. Again, it is important for employers to carefully consider the criteria they want to use and consult with the union or employee representatives about it.

Employers should follow the established procedure for selection, if there is one, unless there are good reasons for not doing so.

In order to be reasonable, redundancy selection criteria should, as far as possible, be clearly defined, objective and capable of independent verification. However, tribunals can only interfere with the employer's choice if no reasonable employer would have used the criteria in that particular way.

In other words, the question is not whether the employer could have acted more fairly, but whether the choices made were within the range of conduct that a reasonable employer could have adopted.

Employers usually score employees against a range of different criteria, but there is no rule requiring them to do so. If they choose to select solely on the basis of only one or two criteria, they just need to be able to justify that decision.

Potentially fair selection criteria include performance, skills and qualifications, length of service and disciplinary and sickness records. Employers may attach weightings to the criteria to reflect their relative importance, but again these need to be justified.

The period over which a criterion is assessed should not be arbitrary and should be sufficiently long to satisfy a tribunal that it put all

employees on a reasonably level playing field. In particular, the tribunal needs to be convinced that a reasonable employer would have chosen that period of time.

It is often appropriate for more than one manager to carry out the scoring, but if that is not possible the selection process should at least involve a manager who knows the individuals concerned.

Provided the selection criteria are objective, a tribunal will not subject them to minute scrutiny. Employers have a wide discretion in their choice of criteria and the manner in which they are applied and dismissals are rarely found to be unfair on this basis.

Were the criteria too subjective?

Criteria that are too subjective are likely to be unfair. For instance, criteria such as "attitude", "commitment" or "suitability" are risky because the scores may be influenced by a manager's personal feelings about individual employees, or by discrimination.

There have been a few cases in which subjective selection criteria have been found to be fair, but they must be applied in an objective manner. So, for example, in one case "company values" was accepted by the tribunal as a valid criterion. Subjective criteria can be more easily justified where the selection process involves an employee applying for a different job.

In that case it may be easier for an employer to fairly dismiss employees who do not meet the criteria for the new role."

Unfairness can arise where there is glaring inconsistency, bad faith, incompetence or obvious unreasonableness in the scoring process

How should the criteria be applied?

Even if the selection criteria are objective, the dismissal will be unfair if they have been applied unfairly. This does not mean, however, that tribunals get involved with looking in detail at how the individual scores were arrived at (they are not permitted to substitute their own scores for those of the employer), but focus instead on whether there was a good system in place for assessing employees against the criteria.

Unfairness can arise where there is glaring inconsistency, bad faith, incompetence or obvious unreasonableness in the scoring process. For instance a tribunal in one case held that it was unfair for an employer to treat an authorised half hour visit to a doctor as a day's absence.

In another case, giving an employee half the available points for attendance when his record was almost perfect was also unfair. These cases are, however, the exception rather than the rule. In most cases a tribunal will focus on the system of assessment and if this is considered robust, it will not look closely at the scores. ➲

selection for redundancy based solely on length of service (last in first out) may well involve unlawful discrimination based on age

➲ Part of the requirement of having a good system in place is to allow employees to be consulted about their scores. Employers should therefore explain how they were arrived at and the employee should have a chance to challenge the decision. If the employer does that, they are more likely to be able to persuade a tribunal that the scores were fairly applied.

Can the selection be discriminatory?

Employers also need to be very careful that their selection process does not discriminate against any individuals or groups who are protected by the Equality Act 2010. So, for example, selection for redundancy based solely on length of service (last in first out) may well involve unlawful discrimination based on age. However using length of service as one of a number of criteria has been found to be lawful because its use was justified.

Employers also need to be careful not to select employees on the basis that they are part-time or fixed-term as this may indirectly discriminate against women.

They also need to take account of maternity absences in scoring processes, although this is not always straightforward. In **Eversheds -v- De Belin**, (weekly LELR 220) for instance, the employer was found to have over-compensated by awarding a woman on maternity absence the maximum score for a particular criterion which resulted in a male employee being discriminated against.

The duty to make reasonable adjustments also applies when employers operate their selection criteria so, for example, they should consider ignoring some or all of a disabled employee's absences when scoring for attendance.

Christina Simpson looks in detail at the special protection that the law offers to employees on maternity leave

Redundancy and maternity leave

ALTHOUGH EMPLOYERS have to offer suitable alternative employment if it is available in a normal redundancy situation, they must offer it automatically to employees on maternity leave.

What protection does the law offer?

Regulations 10(1) and 10(2) of the Maternity and Parental Leave Regulations 1999 state that if it is not practicable for an employer to continue to employ someone on maternity leave under her existing contract because of redundancy, they must offer her another job that is suitable and appropriate for her to do.

The terms and conditions of the alternative job must not be substantially less favourable than her original terms and it must be available for her to start straight after the end of her original contract.

If such a job exists, the employer has to offer it to an employee on maternity leave, even if there are other staff who are also going to be made redundant and there is another employee who may be better suited to the role.

When does the protection under Regulation 10 kick in?

Until recently, it has not been entirely clear when the automatic right arises for an employee, who is on maternity leave, to be offered suitable alternative employment. Typically, employers have argued that Regulation 10 only applies once the employee has actually been selected for redundancy. In other words, once a scoring exercise has established that she has not secured a new post, or when a restructuring exercise has identified that her job is definitely going.

However, the Employment Appeal Tribunal (EAT) held, in **Sefton Borough Council -v- Wainwright** (weekly LELR 401), that this approach is wrong. The council decided to combine two roles into one during a restructuring exercise that took place during Ms Wainwright's maternity leave. The council then invited both Ms Wainwright and the other affected employee to take part in an interview. However, she was unsuccessful and was subsequently dismissed on the grounds of redundancy.

Ms Wainwright brought tribunal proceedings that included a claim for breach of Regulation 10 and automatically unfair dismissal. The council argued that the obligation to offer suitable alternative employment under Regulation 10 only arose once the process of reorganisation had been completed and, in Ms Wainwright's case, when a decision had been made not to slot her into the combined role. Only at that point was she entitled to be offered suitable alternative employment in preference to other staff.

The tribunal, and later the EAT, disagreed with the council and found that ➲

Typically, employers have argued that Regulation 10 only applies once the employee has actually been selected for redundancy

there had been a breach of Regulation 10. It also found that Ms Wainwright had been automatically unfairly dismissed. Both tribunals confirmed that the duty to offer suitable alternative employment under Regulation 10 arises when an employer becomes aware that the role of an employee, who is on maternity leave, is redundant or potentially redundant. To accept that it does not arise until a selection or restructuring process is complete would undermine the protection Regulation 10 provides.

The effect of this decision is that, from the date the woman is told she is at risk of redundancy up to the point she is dismissed or returns from maternity leave (whichever is sooner), an employee who is on maternity leave has the right to automatically be offered a suitable alternative job if it is available. She should not be placed in the pool for selection or scored against set criteria.

it is currently unclear what the position is if an employer offers only one of a number of potentially suitable jobs, particularly if that job is not the employee's preferred choice

However, the findings in this case are not all good news. The EAT also made the point that if the council had offered Ms Wainwright a job that was suitable, even if it was not the combined role, this might have been enough to satisfy Regulation 10. As a result, it is currently unclear what the position is if an employer offers only one of a number of potentially suitable jobs, particularly if that job is not the employee's preferred choice. It is likely that there will be further cases on this point in the future.

Although it is now clear when Regulation 10 applies, it cannot be assumed that an employee, who is redundant while on maternity leave, will automatically be offered any job that she identifies. The job in question still has to satisfy the test of being both "suitable" and "appropriate".

How should the "suitable alternative employment" test be applied?

In the case of **Simpson -v- Endsleigh Insurance Services Ltd**, the EAT confirmed that both stages of the test must be met. In this case, Ms Simpson's original job in London became redundant while she was on maternity leave. There were potentially suitable jobs available in Cheltenham, which she was invited to apply for. She was told that one would be automatically offered if she did.

Ms Simpson did not express an interest. Following her dismissal, she lodged a tribunal and then an EAT claim, arguing that, because the role in Cheltenham was suitable, it should have automatically been offered to her. She claimed that the parties should only look at the "appropriate" stage of the test after the offer has been made.

The EAT did not accept that argument. It found that both limbs of the test had to be satisfied before employees were entitled to be offered alternative employment under Regulation 10. The tribunal was therefore entitled to find that the Cheltenham job was neither suitable nor appropriate. The fact that it was less favourable to Ms Simpson in terms of work location was an important factor in that decision.

This conclusion means that, if an alternative job is suitable in all other aspects apart from the fact it is in a location which requires further or awkward travel for the affected employee, an employer may be able to argue that the Regulation 10 right to be offered that job does not apply. However, if the employee can show that they are willing and able to move or take on the additional travel, this defence will be significantly weakened.

Bearing in mind the tribunal's findings in Simpson, employees who are made redundant while on maternity leave should make it clear to their employer that they are interested in particular jobs and, if appropriate, that they are willing to take on additional travel.

The Simpson case also set an important precedent about the way in which the suitability of a role should be assessed and whose perspective it should be considered from. The EAT agreed that it should be from the employer's point of view "knowing what it does about the employee".

Clearly this shifts the balance in favour of the employer, making it easier to argue that a job is not suitable even if the employee is adamant that it is.

There were, however, some positive points to come out of the Simpson case for claimants.

When commenting on whether a more senior role could be a suitable alternative, the EAT suggested that it would not be appropriate for an employer to rely on an assessment and interview. Applying this principle to the Regulation 10 obligation generally, it means that if a job is suitable or, arguably even if it is only potentially suitable, it should be automatically offered without any requirement for an application or interview.

Are there circumstances when Regulation 10 does not apply?

The right to what is in effect more favourable treatment under Regulation 10 only applies to alternative jobs that are suitable. If a particular job does not satisfy the Regulation 10 suitability test, then the employer is entitled to place the affected employee in a pool for selection and apply a set of fair criteria to assess if they should be offered the post.

When applying those criteria, the employer does not have to automatically increase the scores of an employee who is on maternity leave, nor do they have to give set scores. In **Eversheds Legal Services - v- De Belin** (weekly LELR 220), for instance, the EAT found that there was no requirement for positive discrimination in favour of an employee on maternity leave as this went beyond what was reasonably necessary to alleviate any disadvantage she may suffer as a result of her absence.

In that case, the tribunal said that it was not proportionate for the employer to award maximum scores to Ms De Belin because she had been on maternity leave during the period that was to be reviewed. Instead, they could have measured the affected employees over a period in which comparable data was available.

What does this mean in practice?

It is clear from the case law that employees, who are at risk of redundancy and are on maternity leave, are entitled to be automatically offered suitable alternative employment, without having to apply for it or attend an interview. This right applies from the point at which they are identified as being at risk of redundancy or when a restructure identifies that their job is potentially surplus to requirements.

Employees, who are at risk of redundancy and are on maternity leave, are entitled to be automatically offered suitable alternative employment, without having to apply for it or attend an interview

However, depending on the circumstances, it may prove difficult for an employee to argue a job is suitable if the employer does not agree. If it is not suitable, employers only have to make proportionate adjustments to selection processes or criteria.

Our pledge to you

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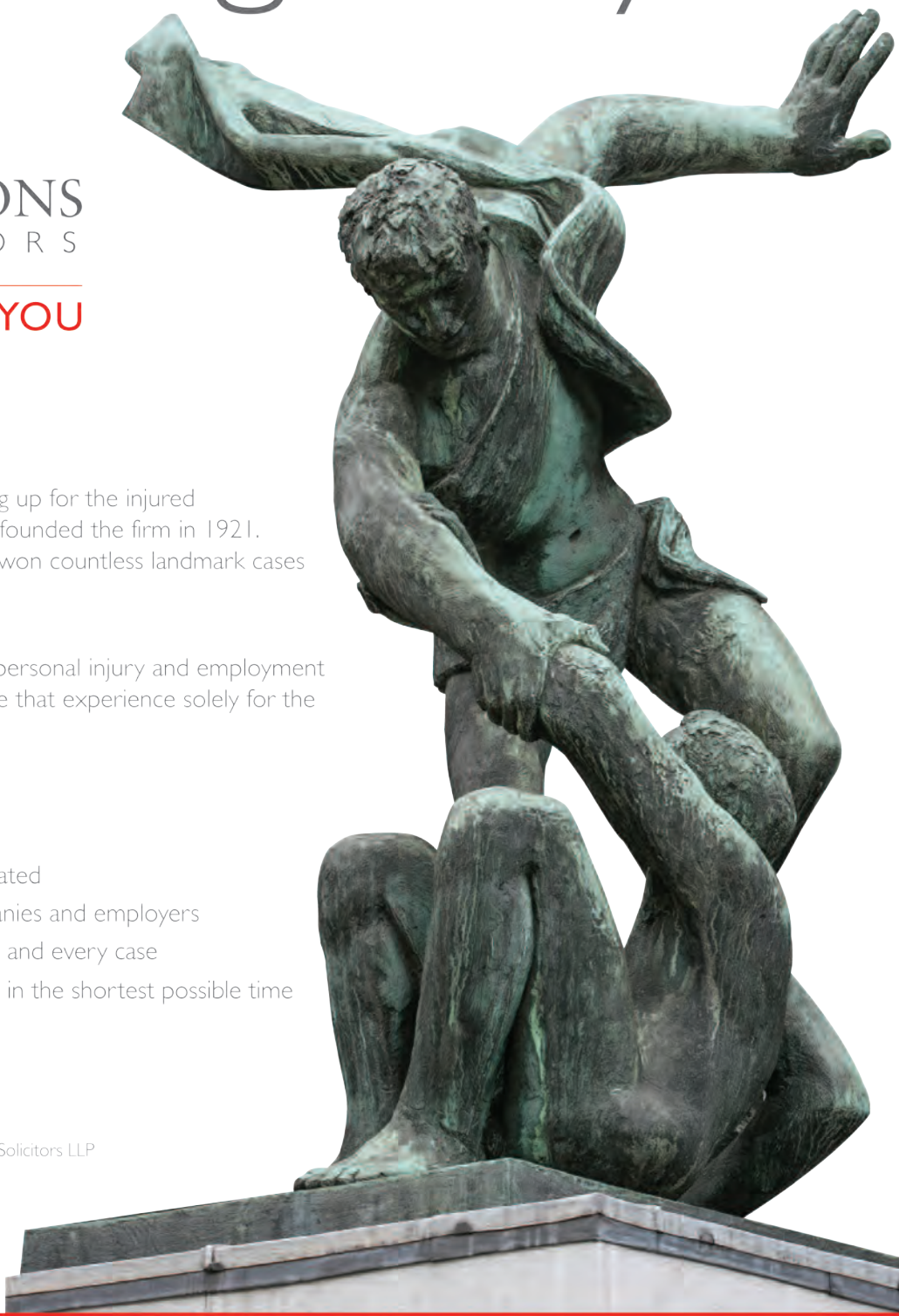

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The Spirit of Brotherhood by Bernard Meadows

LELR aims to give news and views on employment law developments as they affect trade unions and their members. This publication is not intended as legal advice on particular cases.

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