Small scale redundancies – what level of consultation is required?

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***De Bank Haycocks v ADP RPO UK Ltd* [2024] EWCA Civ 1291**

The facts

C worked in recruitment, in a team of 16 people, all of whom were focused on one client.

Towards the start of the pandemic, in March 2020, demand from the client dropped by 50%. In early May 2020, R decided to reduce the client team headcount (although no decision was made at that time as to the level of reduction).

At the start of June 2020, the team manager assessed her staff against various criteria. C scored lowest.

On 18 June 2020, the decision was taken to reduce the team headcount from 16 to 14.

On 19 June 2020, a timetable was set for the redundancy process.

C was invited to a first consultation meeting to take place on 30 June 2020. The purpose of the meeting was to inform him of the situation; and the Claimant was told that he could ask questions and could suggest alternative approaches in light of the reduction in demand.

Further meetings took place, as part of which C was informed of the selection criteria (but not his scores). He did not (at that stage) raise any challenge about the selection criteria. C was dismissed at the final meeting on 14 July 2020.

C appealed. As part of the appeal process, C was informed of his scores against the selection criteria; and C challenged the criteria used and the way they had been applied. His appeal was rejected.

The ET

C pursued a claim of unfair dismissal. The focus of his case appears to have been on the use of allegedly subjective selection criteria, the allegedly unfair application of the same and the alleged failure to provide sufficient information to challenge the scores.

The ET dismissed the claim.

Although the EAT later described the criteria used in the matrix as "entirely subjective criteria", the ET did not consider they were such as to render the dismissal unfair; the ET also reached the view that the criteria had been applied fairly; as regards the failure to provide C with his scores against the selection criteria prior to dismissal, the ET took the view that the matter had been remedied at appeal.

The EAT

C appealed to the EAT. The EAT upheld the appeal. This was principally on the issue of consultation.

As part of its Judgment, the EAT reviewed relevant authorities and proceeded to set out best practice guidelines in respect of consultation.

The Court of Appeal

R appealed to the Court of Appeal, and C cross-appealed. R's appeal was successful.

In reaching its decision, the Court of Appeal conducted a careful analysis of the judgment of the EAT in upholding C's original appeal; the Court reached the view that the EAT had erred in its analysis of employers' obligations when dealing with small-scale redundancies in non-unionised workplaces.

In that regard, the EAT had expressed a number of key points, including:

(i) that employers should undertake "workforce consultation" (i.e. consultation with the workforce as a whole, as opposed to individual consultation) in addition to individual consultation, even in non-unionised workplaces and absent any statutory obligation to undertake collective consultation;

(ii) that consultation should cover the proposals in general (as opposed to just how the proposals will effect the individuals impacted); and

(iii) that consultation should occur when matters were at a formative stage.

The Court took no issue with the view that it is good practice for the scope of consultation to cover the proposals as a whole and as such to beyond issues which are peculiar to each individual impacted. The Court made clear that applies even if consultation is taking place solely on an individual basis.

As regards the EAT's view that consultation should occur when proposals are at a "formative stage", again the Court took no issue. Further the Court, helpfully for practitioners, provided some additional insight into the meaning of the phrase, by accepting the following propositions:

- it means that consultation should occur at a stage where it can make a difference to outcomes and that does not necessarily equate to early consultation in a temporal sense;
- what matters is that the employer still has an open mind and not, as such, how soon after the proposal was first formulated the consultation occurs; and
- consultation should occur "at a point at which the employee can realistically still influence the decision".

However the Court did not agree that employers were generally obliged to undertake "workforce consultation" even in small scale redundancies, as suggested by the EAT (see (i) above).

Having addressed the core matters of principle, the Court turned to address the particular case before it.

Given the way in which C had argued his case at ET and the particular grounds of appeal thereafter adopted, it transpired that the scope of the appeal was in fact limited. The core issue for consideration was whether R's approach of undertaking the scoring exercise before any consultation had taken place rendered the dismissal unfair.

The Court agreed that it was bad practice for R to have undertaken the scoring exercise before any consultation had commenced. The Court also accepted that if the decision to dismiss C had effectively been made at the point of that scoring exercise (i.e. before the consultation period had even started) the consultation was not undertaken at a formative stage.

However the Court took the view that the decision to dismiss had not in fact been made when the scoring exercise was carried out:

- "[the approach adopted did] not mean that the die was irrevocably cast when it transpired that his score was the lowest. If in the course of the consultation he, or anyone else, had persuaded Ms Hancock or her HR advisers that the criteria were flawed (or that she should not be the sole decision-maker and/or should have had access to more information) it was not too late for the exercise to be re-done. No doubt that would have been inconvenient and caused a little delay, but it would certainly not have been impossible. The scoring decision only constituted an "effective" decision to dismiss if ADP would not in practice have been prepared to reconsider."

Further, C had not challenged the selection criteria prior to dismissal; and the ET had found that when he did so (i.e. at appeal) R had investigated C's complaints carefully and had, fairly, rejected them. That finding had not been appealed.

Comment

Employers can breathe a sigh of relief in light of the Court of Appeal's confirmation that small scale redundancies, generally speaking, do not require an added obligation of "workforce consultation", in addition to individual consultation.

However employers should ensure that, even in small scale redundancies, the scope of consultation is not limited to matters specific to each individual (such as alternative employment); rather it should include a wider scope, such as the opportunity for staff to comment on the proposals as a whole.

Further, such consultation should take place whilst the employer still has an open mind and at a point when the employee can realistically still influence the relevant decisions.

In this case, perhaps surprisingly, the Court seemed willing to accept that it was open to C to challenge the criteria at a later stage despite the actual scoring exercise having been undertaken before consultation was commenced. Employers would be well advised to avoid risking such an approach and to make sure that scoring is not undertaken until after consultation has commenced and those effected have been given the opportunity to comment on the proposed criteria and related matters.

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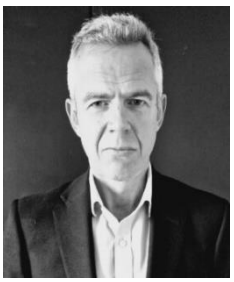

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