BCLP. Client Intelligent

Insights

CONSULTATION IN NON-COLLECTIVE REDUNDANCY SITUATIONS

UK HR TWO MINUTE WEEKLY

Nov 21, 2024

SUMMARY

This week we look at a case that covers the issue of what constitutes proper lawful consultation in smaller scale redundancies (fewer than 20). In particular, the case looks at whether there a need for group consultation, and what the rules are on timing.

The claimant was a recruitment consultant in a team of 16. In June 2020, there was a redundancy exercise and the 16 employees were scored by reference to redundancy criteria. This exercise was completed on 11/12 June 2020. The claimant received the lowest score. There was no consultation at this stage.

On 30 June 2020, after the selection process, all staff in the pool were informed individually they were at risk of redundancy. A 14-day consultation period began. The claimant was informed of the factual situation, of the need for redundancies, that he could ask questions, and that he could suggest alternative approaches.

He was invited to a further meeting on 8 July and a final meeting on 14 July at which he was handed a dismissal letter, explaining his employment had been terminated by reason of redundancy.

The claimant appealed against his dismissal. In particular, he complained that there had been no “group consultation”, just individual consultation and that consultation had taken place weeks after the selection process had been made - what was the point in consulting after the decision to dismiss him had already been taken?

By the time of the appeal meeting on 10 August 2020, the claimant had received his own redundancy scores but not those of his colleagues. He argued his scores were too low, challenged

the redundancy selection criteria and complained about the lack of consultation over his scores. His appeal was unsuccessful.

The claimant brought a tribunal claim arguing that the redundancy was unfair.

EMPLOYMENT TRIBUNAL

The tribunal accepted the claimant knew nothing about his scores until the appeal, but concluded the respondent had carried out a conscientious investigation into scoring. After being given all relevant information about the redundancy scores, the claimant still failed to demonstrate that his scores were unfair and/or should have been higher. He could not show that he had been unfairly selected for redundancy. The tribunal dismissed the claim.

The claimant appealed to the EAT. Having discovered during the tribunal hearing that the redundancy scoring took place weeks before consultation began, the claimant argued that consultation was completely flawed, in particular that the decision to make him redundant had already been made by the time consultation began.

EAT

The EAT upheld the claimant's appeal, finding that the redundancy was procedurally unfair. In particular, there had been a lack of meaningful consultation at a formative stage – consultation was too late. The EAT found that the respondent's failure to conduct "**general workplace consultation**", which meant consulting with the employees as a group rather than individually was a breach of the requirements of good industrial relations practice. The EAT also held that consultation carried out weeks after the selection process had been completed was too late – weeks after the selection had already been made was hardly a formative stage!

The respondent appealed to the Court of Appeal.

COURT OF APPEAL

The Court of Appeal reversed the decision of the EAT.

It found the EAT had been wrong to suggest that there was any requirement for group consultation in smaller-scale non-collective redundancies. Only individual consultation was necessary.

The EAT held that where there is no collective consultation, it is good practice for employers to allow employees, during individual consultation, to express their views both on issues which are particular to them as an individual and which are common to the group as a whole. A failure to do so may not necessarily render any subsequent dismissals unfair, as this would always depend on the circumstances, but employers should be aware that individual consultation is not only for addressing individual matters.

However, there was no need to consult with affected employees as a group.

In terms of the timing, previous case law had confirmed that fair consultation means **consultation at a formative stage in the process**. "Formative", held the Court of Appeal, means that consultation must take place at a stage when the employer still has an open mind, and the employee can realistically influence the outcome of the redundancy exercise.

Although it is good/best practice to give employees at risk of redundancy an opportunity to comment on proposed selection criteria for scoring/selection, failure to do so does not inevitably result in a redundancy process being unfair, provided the employer remains open during the consultation process to being persuaded that their choice of criteria is unfair or that the exercise was done by the wrong person and/or on the basis of inadequate information.

The decision to dismiss would only be unfair if the claimant had been denied a genuine opportunity to ask the respondent to redo the scoring exercise. The claimant did comprehensively challenge the selection criteria and his scores at the appeal stage of the redundancy process and the respondent investigated this. This was enough to discharge the respondent's obligations.

The court made it clear the respondent had departed from good/best practice in relation to both the failure to consult with the claimant over his scores and the timing of the scoring exercise. However, the respondent had conducted a careful investigation of the scoring on appeal, which remedied the original flaws in relation to failing to consult and the timing of the scoring. Taken as a whole (including the appeal) therefore, the tribunal was right to find that the redundancy process was fair.

So this is an important case as it effectively sets out the minimum lawful consultation requirements for smaller-scale redundancies. However, the Court of Appeal qualified this by stating that if the redundancy appeal process been less comprehensive, the claimant's claim may have been successful.

De Bank Haycocks v ADP RPO UK Ltd

This article was written with trainee solicitor Alesha Patel.

We're moving from a weekly format to a monthly edition of our Two Minute series and will continue to bring you new insights, fresh commentary and comprehensive legal updates.

RELATED PRACTICE AREAS

- Employment & Labor

MEET THE TEAM

Ellie Serridge

London

ellie.serridge@bclplaw.com
+44 (0) 20 3400 3904

David von Hagen

London

david.vonhagen@bclplaw.com
+44 (0) 20 3400 3576
