RWK Goodman

HR Hub – Legal Update

07.12.23

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The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023

Draft regulations put before Parliament on 7 November 2023 and due to come into force on 1 January 2024, include:

- simplifying holiday pay calculations by making rolled-up holiday pay (12.07% of pay) lawful for part-year workers and those who work irregular hours (permitted in leave years starting from **1 April 2024**);
- restating various pieces of retained EU case law (to make it clear it remains part of UK law, post Brexit) to allow carry over of:
  - all statutory annual leave (5.6 weeks) to the following year when a worker is unable to take their leave due to being on family related leave;
  - regulation 13 leave (4 weeks per year) for a maximum of 18 months from the end of the leave year in which entitlement arose where a worker is unable to take their leave due to sickness; and
  - regulation 13 leave (4 weeks per year) where the worker has not been given opportunity to take the leave or the employer has failed to inform them that any leave not taken and which cannot be carried over, will be lost.
- defining 'normal remuneration' for the purposes of holiday pay for Regulation 13 leave to include commission payments and other payments, such as regular overtime payments;
- removing the additional working time record keeping requirements set out in the ECJ judgment in *CCOO v Deutsche Bank* (which had held working hours and rest records

must be kept for almost all members of the workforce, even if they worked regular hours); and

- allowing small businesses (with fewer than 50 employees) doing TUPE transfers of any size, and businesses of any size undertaking a small transfer (of fewer than 10 employees) to consult their employees directly if there are no existing representatives in place. This change only applies to transfers that take place on or after **1 July 2024**.

What are irregular hours and part year workers?

"15F.—(1) For the purposes of these Regulations—

(a) a worker is an irregular hours worker, in relation to a leave year, if the number of paid hours that they will work in each pay period during the term of their contract in that year is, under the terms of their contract, wholly or mostly variable;

(b) a worker is a part-year worker, in relation to a leave year, if, under the terms of their contract, they are required to work only part of that year and there are periods within that year (during the term of the contract) of at least a week which they are not required to work and for which they are not paid."

Equality Act (Amendment) Regulations 2023

The Government has published draft legislation to amend the Equality Act 2010 which will come into effect from 1 January 2024. It codifies certain EU-derived discrimination protections which would otherwise have disappeared at the end of this year due to Brexit.

The changes that will come into effect include:

- The right to claim indirect discrimination by association;
- An amendment to guidance on the definition of disability to state that consideration of a person's ability to participate fully and effectively in working life on an equal basis with other workers is relevant when looking at 'day-to-day activities';
- A 'single source' test for establishing an equal pay comparator;
- An extension of direct discrimination protection to cover discriminatory statements made about not wanting to recruit people with certain protected characteristics even where there is no active recruitment process ongoing and no identifiable victim; and
- Confirmation that employment discrimination on grounds of breastfeeding falls under the protected characteristic of sex.

On 28 October 2023, reforms under the **Police, Crime Sentencing and Courts Act 2022 amended the Rehabilitation of Offenders Act 1974** to shorten the length of time some criminal convictions must be declared to employers came into effect.

The changes reduce the rehabilitation period for less serious offences, provided no further offence is committed in that time and introduce a rehabilitation period for custodial sentences of over four years, which were previously unable to become "spent". The reforms do not apply to serious sexual, violent, or terrorist offences which are never able to be spent. Stricter disclosure rules apply in some circumstances, including for those working with vulnerable people.

The following rehabilitation periods now apply for adult offenders. For under 18s, half the adult rehabilitation period applies:

Type of Conviction	**Previous length of time required to disclose**	**New length of time required to disclose**
Custodial sentence of over 4 years	Never spent	7 years although certain offences are exempt and never spent including offences classified in the Sentencing Code as 'serious violent, sexual and terrorism offences'
Custodial sentence of 2 ½ years - 4 years	7 years	4 years
Custodial sentence of 1 - 2 ½ years	4 years	4 years
Custodial sentence of 6 months - 1 year	4 years	1 year
Custodial sentence of up to six months	2 years	1 year

These new time periods are extended in the event of re-offending during the declaration period. Any new conviction attracts its own disclosure period and both the previous conviction and new conviction need to be declared until the end of the original conviction's active period or, if later, the end of the new disclosure period applied to the more recent conviction.

Carer's Leave Act 2023

The Carer's Leave Act 2023 (Commencement) Regulations 2023 (SI 2023/1283) bring the Carer's Leave Act 2023 into force on 4 December 2023. However, further regulations are required to bring the entitlement to take carer's leave into force.

The Carer's Leave Act 2023 (Commencement) Regulations 2023 (SI 2023/1283) have been made. The regulations bring the Carer's Leave Act 2023 into force on 4 December 2023, inserting new sections 80J to 80N into the Employment Rights Act 1996 (ERA 1996). Under section 80J of the ERA 1996, the Secretary of State will need to make further regulations to set out further detail of the right for employees to take carer's leave and bring that right into force. Once in force, UK employees will be entitled to one week's unpaid leave each year to provide or arrange care for a dependent with a long-term care need. It has previously been reported that the right to take carer's leave is not expected to be brought into force before **April 2024.**

The **Worker Protection (Amendment of Equality Act 2010) Act 2023** received Royal Assent on 26 October 2023, and will come into force in October 2024.

In short, from next year all employers will be under a statutory duty to take reasonable steps to prevent sexual harassment in the workplace. If employers fail to take reasonable steps to prevent sexual harassment, then the Equality and Human Rights Commission can take enforcement steps, plus any successful tribunal claims will be subject to a compensation uplift of up to 25%.

The **Employment Relations (Flexible Working) Act 2023** received Royal Assent on 20 July 2023. When section 1 comes into force (**expected July 2024**), sections 80F and 80G of the Employment Rights Act 1996 will be amended so that:

- Employees will no longer have to explain what effect their requested change may have on the employer and how any such effect might be dealt with.
- Employees will be entitled to make two requests (instead of one) in any 12-month period.
- Employers will not be able to refuse a request unless the employee has been consulted.
- Employers will have to decide in two months (reduced from three months), subject to agreeing a longer decision period.

The minimum service requirement (currently 26 weeks' continuous employment) is due to be removed and the right to request flexible working will become a "day one" right.

The **Workers (Predictable Terms and Conditions) Act 2023** received Royal Assent on 18 September 2023 and is expected to come into force in **September 2024**.

The Act will give workers and agency workers the right to request more predictable terms and conditions of work where there is a lack of predictability to their work pattern. It will be possible to make two applications in a 12-month period and applications may be rejected on specified grounds (see below). Applications must be dealt with in a 'reasonable manner' and outcomes notified to the applicant within one month of the application. A minimum service requirement to access the right, expected to be 26 weeks, will be specified in regulations. Claims will be possible based on procedural failings by the employer, unlawful detriment and automatic unfair dismissal. Regulations will provide further details of the statutory regime.

The process for making a request will follow a broadly similar pattern to that currently in place for flexible working requests in that requests must be in writing and may be refused on one of a series of specified grounds:

- the burden of additional costs;
- detrimental effect on ability to meet customer demand;
- detrimental impact on the recruitment of staff;
- detrimental impact on other aspects of the employer's business;
- insufficiency of work during the periods the worker proposes to work;
- planned structural changes;
- such other grounds as the Secretary of State may specify by regulations.

ACAS launched a consultation on a draft Code of Practice on handling requests for a predictable working pattern, which will sit alongside the Act.

The draft Code of Practice sets out further good practice principles including:

- allowing workers to be accompanied at meetings to discuss a request;
- that organisations should set out any additional information which is reasonable to help explain their decision; and
- that organisations should allow an appeal where a request has been rejected.

  Whilst the Code of Practice will not be legally binding, it will be taken into account by courts and employment tribunals when considering relevant cases.

The **Protection from Redundancy (Pregnancy and Family Leave) Act 2023** received Royal Assent on 24 May 2023 and came into force on 24 July 2023. The Act provides a power for regulations to be made to extend the right to be offered suitable alternative vacancies in a redundancy situation so that it will apply during pregnancy and for a period after pregnancy or maternity, adoption or shared parental leave (expected to be a period

of six months after returning to work). Regulations to implement the Act have not yet been published and are not expected to take effect before **April 2024**.

The **Neonatal Care (Leave and Pay) Act 2023** received Royal Assent on 24 May 2023. The new entitlements are expected to take effect in **April 2025**. The Act makes provision for a right to statutory neonatal care leave (expected to be capped at 12 weeks) and pay (expected to be at the statutory prescribed rate or, if lower, 90% of the employee's average weekly earnings) for employees with a parental or other personal relationship with children receiving neonatal care. The right will be available to employees from their first day of employment. The definition of neonatal care is yet to be specified but the general requirement is for the baby to receive seven days of medical or palliative care within the first 28 days of birth.

National Minimum Wage

The Government has accepted the Low Pay Commission's recommendations for the rates of the National Living Wage (NLW) and the National Minimum Wage which will come into force from **April 2024**. The NLW, for which the age threshold will be lowered to 21, will rise from £10.42 to £11.44 per hour (9.8%).

From 1 April 2024 there will be:

- a £1.02, or 9.8 per cent, increase to the NLW for those aged 21 and over (from £10.42 to £11.44 per hour)
- a £1.11, or 14.8 per cent, increase for those aged 18-20 (from £7.49 to £8.60 per hour)
- a £1.12, or 21.2 per cent, increase for those aged 16-17 and apprentices (from £5.28 to £6.40 per hour).

The NLW currently applies to workers aged 23 and over. Following LPC recommendations in 2019, the age threshold for the NLW was lowered from 25 to 23 in April 2021 and will be lowered to 21 from April 2024.

General Case Law Update

a) Was employee's opposition to critical race theory a 'protected belief'? – Corby v ACAS ET/1805305/2022

Background

The claimant was employed by the respondent as an independent conciliator. He described his race as white and the race of his wife and children as black. Throughout his life he had spent large amounts of time with black people and formed close relationships with them. He claimed to hold a philosophical belief in relation to race and sex/feminism. Regarding

race, the claimant believed that the cause of racial equality was best advanced not through separatism and segregation but by valuing people based on character rather than race. He was strongly opposed to ethnocentrism and ethnonationalism and described himself as a "traditional anti-racist" who was opposed to "wokism". The claimant also believed that it was unhelpful to view social problems through feminist eyes, such as the initial view of at least one feminist that high male suicide rates were unimportant. It was apparent from his evidence that his beliefs on race were the result of careful consideration and much thought. However, he could not explain coherently his views on sex and feminism.

Decision

Relevant test - In *Grainger Plc v Nicholson*, the EAT identified five criteria that had to be met for a belief to fall within s.10(2).

The belief had to: be genuinely held; be more than just an opinion or viewpoint; concern a weighty and substantial aspect of human life and behaviour; have cogency, seriousness, cohesion and importance; be worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others.

Application to facts - race:

- The claimant's beliefs were genuinely held.
- The claimant's beliefs were based on principle and were grounded in a philosophical system. They were deeply held and carefully considered, based on the teaching and writings of several individuals, including Martin Luther King.
- Questions of race and racial equality were clearly important. They affected large proportions, if not all of, the population, and related to equality and justice. It would be difficult to conceive of the possibility that questions of race and racial equality would not be considered as weighty and a substantial aspect of human life and behaviour. They were more than trivial.
- The claimant's beliefs were serious and important. They strongly influenced how he lived his life and related to important matters of human behaviour. The claimant was consistent in how he expressed his beliefs, and they were logical and structured, being based upon considerable thought and experience as well as lived experience. The beliefs were also coherent. The claimant had expressed them clearly and they were capable of being understood.
- The claimant's beliefs related, in essence, to the best way of eliminating racism in society, and were worthy of respect. They could not be described as incompatible with human dignity or conflicting with the fundamental rights of others, even if they

were not universally shared and were objected to by some of the claimant's colleagues.

Application to facts - sex/feminism:

- The claimant's belief was genuinely held.

- The claimant's belief was an opinion rather than based on an underlying philosophical belief. It related to a very narrow issue, namely comments made by a particular individual about male suicide, and the claimant was unable to articulate more generally his views on sex/feminism. The claimant's views on sex/feminism did not form part of the same underlying belief system as those on race.

Comment

The claimant's beliefs on race and racial equality were protected by s.10. His beliefs on sex/feminism were not.

b) Did an employee resign 'in the heat of the moment'? – Omar v Epping Forest District Citizens Advice [2023] EAT 132

Background

On 3 February 2020, the Claimant was sent a letter by the CEO about his timekeeping. The Claimant told his line manager, Ms Skinner, that he was unhappy about the letter and verbally resigned. Ms Skinner advised the Claimant to calm down and that she would not accept his resignation at that stage. On 5 February 2020 the Claimant became angry again about something else and resigned again, giving a months' notice. Again, Ms Skinner advised him to calm down and that she would not accept his resignation.

One 19 February 2020, the Claimant became angry again on being asked by Ms Skinner about his holiday dates, swore at Ms Skinner and used words of resignation. The company's case was that the Claimant said "these are f***ing bullsh*t …. That's it, from today a months' notice". The company said that this verbal resignation was accepted by Ms Skinner.

The Claimant asserted that in a subsequent meeting on the same day, the company's CEO recognised that he wished to continue in employment and had told him to consider an offer of an alternative role.

However, at a meeting on 21 February, the first thing the CEO said to the Claimant was that his line manager had decided that she no longer wanted to work with him, so his resignation would still stand. The Claimant was asked to confirm his resignation in writing, which he confirmed he would do. However, the Claimant did not confirm his resignation but instead sought formally to retract it. The company refused to accept the Claimant's retraction and treated his employment as terminating on one month's notice from 19 February.

In proceedings for unfair dismissal and wrongful dismissal the Claimant's case was that he had not resigned. He argued that the situation fell within the so-called 'special circumstances exception', which he said had been recognised in *Sothern v Franks Charlesly and Co* – namely, that although an employer is normally entitled to rely on words of resignation in accordance with their plain and natural meaning, there were 'special circumstances' that could oust the application of the general rule.

Before the tribunal, the parties agreed that there had been other altercations between the Claimant and line manager prior to 19 February and that on at least one of those occasions the Claimant had said that he was resigning but was invited to, and did, reconsider. The tribunal found that during the altercation with line manager on 19 February, the Claimant 'said words intended to convey his intention to resign' and 'that the words were so understood by [the line manager]'. It stated that while there was a dispute as to precisely what words the Claimant used, that was not relevant to the determination of the claims. The words the Claimant used were unequivocal and clearly intended to amount to a resignation. There was no immediate retraction, despite the Claimant having the opportunity to retract in meetings on the same day and two days later. Further, the Claimant had expressly agreed to put his resignation in writing. The tribunal described the 'principal issue of fact in contention' as whether the Claimant was offered a new role at the meeting on 19 February. It found that the Claimant had not been offered another position, but that he had genuinely believed that he was being offered another position, which he declined. The tribunal concluded that the Claimant had brought his employment contract to an end by his resignation on 19 February and, accordingly, there was no dismissal. The Claimant appealed to the EAT.

Decision

The EAT allowed the Claimant's appeal.

It concluded, among other things, that there is no such thing as the 'special circumstances exception'; the same rules apply in all cases where notice of dismissal or resignation is

given in the employment context. Once given, the notice cannot be unilaterally retracted; the giver of the notice cannot change their mind unless the other party agrees. Words of dismissal or resignation, or words that potentially constitute dismissal or resignation, must be construed objectively in all the circumstances of the case in accordance with normal rules of contractual interpretation. The words used are to be judged from the perspective of the reasonable bystander in the position of the recipient of those words. The subjective intention of the speaking party is not relevant, but the subjective understanding of the recipient is relevant, although not determinative. The dismissal or resignation must be 'seriously meant', or 'really intended', or 'conscious and rational'. Evidence as to what happened afterwards is admissible insofar as it is relevant and casts light, objectively, on whether the resignation/dismissal was 'really intended' at the time.

The EAT held that the tribunal had not considered whether it would have appeared to the reasonable employer that the Claimant 'really intended' to resign. Instead, the tribunal erred in law by asking itself whether there were special circumstances that justified departure from the general rule. Additionally, the tribunal had not made the findings of fact necessary to enable it properly to answer the core legal question. It had not made findings about three crucial elements of the chronology: first, the exact words the Claimant used or how he appeared at the time; secondly, what had been discussed in the meeting that same afternoon, including whether the meeting had ended with it being apparent to the CEO that the Claimant had not 'really intended' to resign; and thirdly, what the CEO had said at the beginning of the meeting on 21 February. The Claimant's assertion that he was told 'before you say anything, [the line manager] has decided that she cannot work with you and therefore your resignation will stand', was important to the question the tribunal should have considered: whether it pointed towards the Claimant's case that he had not really intended to resign and that the Respondent knew that the outcome of the meeting on the afternoon of 19 February was that he intended to stay in his job, with the consequence then being that these were effectively words of dismissal, or whether it was merely consistent with the Respondent's case that the Claimant had given an effective resignation on 19 February. Having ignored the Claimant's case about how the meeting began, the tribunal took the Claimant's agreement to put his resignation in writing at the end of the meeting as being evidence that he had really intended to resign. However, the agreement to put his resignation in writing would look very different if the situation was that the CEO had in law dismissed him at the beginning of the meeting and then 'jostled' him into resigning such that everything that followed was merely a discussion between the parties as to whether he should be allowed to retract that resignation.

Finally, the tribunal had focused on the issue of whether the Respondent had offered the Claimant a new role, an issue that the EAT held had become an unfortunate 'red herring'. If the Claimant had resigned, then the offer of a new role was simply an offer of a new contract and not capable of affecting the status of his prior resignation. If he did not resign, then whether the offer of a new role amounted to a termination of his then current contract would need to have been considered. Either way, consideration of whether the Respondent had offered the Claimant an alternative role was a side issue and could not assist much, if at all, with the question of whether the Claimant resigned on 19 February.

Comment

The EAT has ordered the case to be remitted to a fresh tribunal for a full rehearing.

c) Right to participate in share incentive plan (SIP) under TUPE - Ponticelli UK Ltd v Gallagher [2023] CSIH 32

Background

On 1 May 2020, Mr Gallagher's employment transferred from Total Exploration and Production UK Ltd (Total Exploration) to Ponticelli UK Ltd (Ponticelli) under TUPE.

Prior to the transfer, Mr Gallagher participated in a Share Incentive Plan (SIP) operated by Total Exploration. Participation in the SIP was not mentioned in Mr Gallagher's contract of employment.

Participants' shares were held in the SIP trust until they were sold or transferred out of the SIP. The SIP was operated in accordance with a trust deed and plan rules which provided that the SIP was not part of any employment contract.

Mr Gallagher joined the SIP by entering into a Partnership Share Agreement with Total Exploration and the SIP trustees.

Total Exploration's explanatory booklet about the SIP provided that:

"*If the business, or part of the business, or subsidiary company in which you are employed is sold, then your shares must be sold or transferred to you or into [Total Exploration's] vested share account within 90 days from the date of cessation of your employment*."

When Mr Gallagher's employment transferred to Ponticelli on 1 May 2020, his participation in the Total Exploration SIP ended. The shares held on his behalf within the SIP were

transferred to him. Ponticelli advised that, as compensation for the fact that it was not going to provide a SIP post-transfer, Mr Gallagher would receive a one-off payment of £1,855 (being twice his average contributions to the Total Exploration SIP over the preceding two years).

An employment tribunal held that Mr Gallagher's right to participate in the SIP was part of his overall financial "package" and was "caught by" the wording of *regulation 4(2)(a) of TUPE*. As a result, following the transfer of his contract of employment to Ponticelli on 1 May 2020, Mr Gallagher became entitled to participate in a SIP of substantive equivalence or comparable value to the SIP operated by Total Exploration.

The EAT upheld the tribunal's decision. The right to participate in the SIP arose "in connection with" the contract of employment for the purposes of *regulation 4(2)(a) of TUPE*. Applying the EAT's decision in *Mitie*, the employee was entitled to participate in a plan of substantial equivalence following his TUPE transfer to a new employer.

Ponticelli appealed to the Inner House of the Court of Session.

Decision

The Inner House of the Court of Session dismissed the appeal.

The court noted that the employment tribunal was correct to find that the SIP formed an integral part of Mr Gallagher's financial package. Contributions to the SIP were made through salary deductions. For each share purchased by salary deduction, Total Exploration contributed two further matching shares. The free shares part of the plan linked the award of further shares to the employer's bonus scheme. Mr Gallagher would be financially disadvantaged if he were unable to participate in an equivalent scheme with Ponticelli. The court found that the SIP was therefore not equivalent to a gym membership benefit, as Ponticelli suggested, unless that was also part of the employee's financial package.

Where a scheme operated by a transferor cannot transfer, a substantially equivalent scheme must be implemented by the transferee.

Comment

Employers have generally sought to ensure that share schemes are kept separate from employees' contracts of employment. Scheme rules typically state that they are not contractual and any reference to rights to participate in a share scheme are usually

specifically excluded from the employment contract. In doing so, employers attempt to both exclude a claim for damages for loss of entitlement under the scheme where an employee is dismissed and avoid participation rights passing to a buyer under TUPE. However, the court in this case found that the right to participate in a SIP was a right "in connection with" a transferring employee's employment contract, therefore bringing the scheme within the TUPE transfer.

The decision is likely to present a significant cost burden to transferees. In addition, the obligation to provide a share scheme of substantial equivalence may cause considerable practical difficulties for a transferee, particularly if it does not operate similar share schemes for its existing employees.

d) Redundancy process – De Bank Haycocks v ADP RPO UK Ltd [2023] EAT 129

A redundancy dismissal was unfair due to the absence of a meaningful consultation at the formative state of a redundancy process.

Background

Whether a dismissal for redundancy is fair:

- Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating redundancy as a sufficient reason for dismissing the employee.
- Shall be determined in accordance with equity and the substantial merits of the case. (*Section 98(4), Employment Rights Act 1996* (ERA 1996).)

The leading case on reasonableness in relation to redundancy is *Polkey v A E Dayton Services Ltd [1987] IRLR 503*, in which the House of Lords held that an employer will normally not act reasonably (and a dismissal will therefore not be fair) unless it:

- Warns and consults its employees, or their representative(s), about the proposed redundancy.
- Adopts a fair basis on which to select for redundancy by identifying an appropriate pool from which to select potentially redundant employees and to make the selection against proper criteria.
- Searches for and, if it is available, offers suitable alternative employment within its organisation.

The key components of fair consultation were identified in *R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price [1994] IRLR 72* as:

- Consultation when the proposals are still at a formative stage.
- Adequate information on which to respond.
- Adequate time in which to respond.
- Conscientious consideration of the response to the consultation.

In *Williams and others v Compair Maxam Ltd [1982] IRLR 83*, the EAT held that where employees are represented by a recognised union, reasonable employers will usually seek to act in accordance with the following principles and depart from them only with good reason:

- Early warning. The employer will give as much warning as possible of impending redundancies so that the union and potentially affected employees can take early steps to inform themselves of the relevant facts and consider possible alternative solutions.
- Consultation with union. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible.
- Fair selection criteria and fair selection. The employer will seek to establish selection criteria which, so far as possible, can be objectively verified and to ensure that the selection is made fairly in accordance with those criteria.
- Consideration of alternative employment.

In the case below, the EAT considered whether a tribunal had wrongly decided that a dismissal for redundancy was fair when, the appellant argued, it had not considered the question of consultation adequately or at all.

Facts

Mr De Bank Haycocks was one of 16 people employed by ADP RPO UK Ltd (ADP) to recruit employees for a single client company. In March 2020, due to the COVID-19 pandemic, demand for new employees at that client reduced by approximately 50%. At the end of May 2020, ADP decided to reduce the recruitment workforce.

At the beginning of June 2020, Mr De Bank Haycocks' manager was asked to assess and score her team members one to four by reference to 17 entirely subjective criteria that

had been provided by ADP's US parent company. Mr De Bank Haycocks came last in the rankings. On 18 June 2020, after the scoring exercise had been undertaken, it was decided that the team should be reduced by two.

On 19 June 2020, ADP set a timetable for the redundancy process. An initial consultation meeting, on 30 June 2020, would be followed by a consultation period of 14 days, with those leaving being informed at a meeting on 14 July 2020.

On 30 June 2020, Mr De Bank Haycocks was called to a meeting. He was told that the purpose of the meeting was to inform him of the situation and the need for redundancies, that he could ask questions and could suggest alternative approaches to the reduction in demand. He was invited to a further meeting on 8 July 2020 and to a final meeting on 14 July 2020 at which he was handed a dismissal letter. In these meetings, Mr De Bank Haycocks was unaware of how he, or his colleagues, had been scored against the selection criteria.

Mr De Bank Haycocks appealed against his dismissal. By the time of the appeal hearing, on 10 August 2020, Mr De Bank Haycocks had his scores (but not those of his colleagues). The appeal was unsuccessful, and he brought a claim for unfair dismissal.

Employment tribunal decision

The tribunal dismissed the claim. It accepted that Mr De Bank Haycocks knew nothing about his scores until his dismissal but concluded that the appeal process was carried out conscientiously. It found that Mr De Bank Haycocks had not demonstrated that his score should have resulted in a higher ranking. It also rejected his criticisms of both the pool chosen by ADP and the selection criteria.

Mr De Bank Haycocks appealed, arguing that ADP had failed to consult properly and that the tribunal had not considered the consultation issue adequately or at all.

EAT Decision

The EAT allowed the appeal, substituted a finding of unfair dismissal and remitted the case for the tribunal to deal with remedy.

The EAT undertook a thorough review of the authorities, identifying the guiding principles they established. It noted the theme that employers act within the band of reasonableness in redundancy situations when they follow what is considered to be good industrial relations practice and that a key element of this was consultation.

On the facts of this case, the EAT held that there had been a clear absence of meaningful consultation at the formative stage of the redundancy process and there was nothing in the tribunal's decision which demonstrated good reasons for this. The EAT noted that there had been no pressure of time because the numbers to be dismissed were not settled until a major part of the selection process had been concluded.

The absence of consultation at a stage when employees can discuss the possibility of avoiding redundancies by proposing a different approach to any aspect of the proposed process, at a time when they have the potential to influence the employer's decision, is indicative of an unfair process. That would be insufficient to make a dismissal unfair if the procedure was fair overall. This would generally require an appeal to fill any gaps in the earlier stages of the process. In this case, whilst the appeal could correct any missing aspect of the individual consultation process (for example, provision of Mr De Bank Haycocks' scores), it could not repair the gap of consultation in the formative stage which the EAT had identified.

Redundancy: reasonableness and good industrial relations practice

The EAT held that the ERA 1996 would always be the keystone to tribunal decision-making. The guidance provided by various authorities was intended to inform the question of reasonableness. While this was not intended to create a stricture on tribunals, if a tribunal found that the guidance did not apply in a particular case, it would be expected to explain why.

In addition to identifying guiding principles established by the authorities, the EAT found that, starting with *Compair Maxam*, the authorities established a theme that employers acting within the band of reasonableness follow what is considered to be good industrial relations practice.

Guiding principles on reasonableness

The EAT considered that the authorities established the following guiding principles:

- An employer will normally warn and consult either the employees affected or their representative (*Polkey*).
- Fair consultation occurs when proposals are at a formative stage and where adequate information and adequate time in which to respond is given along with conscientious consideration to the response (*British Coal*).
- Whether consultation is collective or individual, its purpose is to avoid dismissal or

ameliorate the impact (*Freud v Bentalls Ltd [1982] IRLR 443*).

- A redundancy process must be viewed as a whole, so an appeal may correct an earlier failing, making the process reasonable as a whole (*Lloyd v Taylor Woodrow Construction [1999] IRLR*).
- A tribunal should consider the whole process, including the reason for dismissal, when deciding whether it was reasonable to dismiss (*Taylor v OCS [2006] IRLR 613*).
- Whether consultation is adequate is a question of fact and degree, and it is not automatically unfair that there is a lack of consultation in a particular respect (*Mugford v Midland Bank [1997] IRLR 208*).
- Any particular aspect of consultation, such as the provision of scoring, is not essential to a fair process (*Camelot Group Plc v Hogg UKEAT/0019/10*).
- The use of a scoring system does not automatically make a process fair, and the relevance or otherwise of individual scores will relate to the specific complaints raised in the case (*British Aerospace PLC v Green and others [1995] IRLR 433*).

Good industrial relations practice

The EAT noted that what will amount to good industrial relations practice will vary widely depending on the type of employment, workforce and the specific circumstances giving rise to the redundancy situation. However, a key element is that a reasonable employer will engage in consultation in order to minimise the impact of a redundancy situation, whether by avoiding dismissal or by limiting numbers affected. While at one time consultation tended to relate to methods of selection, in more recent years, it has been accepted that consultation can result in a broader range of outcomes (for example, a workforce taking a pay cut to avoid redundancies).

Noting a radical change in the nature of employment since the 1980's when some of the leading cases were decided, the EAT identified two matters of particular significance affecting good industrial relations practice. The first was the reduction of trade union membership (outside the public sector) and the second was the growth in employment with employers who have an international element to their corporate structure.

Reduction of trade union membership

Compared to the 1980's, there will now be many more redundancy situations in circumstances where there is no recognised representation for employees.

In relation to large-scale redundancies, the Trade Union and Labour Relations (Consolidation) Act 1992 makes provision for the election of representatives where there is no recognised trade union. This means that the law provides for an equivalence, at least

in terms of representation for the purposes of consultation, between unionised and non-unionised workforces. This appeared to the EAT to indicate the importance (in statutory terms) of consultation as it was expressed in *Compair Maxam*.

It also appeared to the EAT that, regardless of the size of the redundancy exercise, the authorities provided that where there were representatives, they should normally be consulted at the formative stages. However, due to a distinction that has evolved between "collective" and "individual" consultation, it is less clear that this would apply when a workforce was unrepresented. The EAT opined that this may have arisen because of the use of labels, with "individual consultation" being seen as considering the particular circumstances of the specific individual, while "collective consultation" being viewed as discussions about the overall approach to the workforce at risk of redundancy. In any event, the EAT (particularly the lay members) considered that this failed to recognise the reality of good industrial relations in the modern employment environment.

Collective consultation, which should generally occur at the formative stages of a process, might be better described as "general workforce consultation" (because "collective" has connotations of union representation). It could take many forms (for example, large-scale workforce meetings), but what was important was fulfilling the principles in *British Coal* and affording an opportunity to employees to propose other means by which the employer could minimise the impact of a redundancy situation. The individual stage of consultation was more personally directed and would generally be expected to occur in addition to the workforce stage and consider such things as alternative employment.

Ultimately, a tribunal's role was to review an employer's decisions, not to substitute its own. Accordingly, a tribunal could still consider a decision reasonable in the absence of consultation (for example, where it would be futile). However, where a tribunal's decision fell outside the parameters of what would ordinarily be considered to be good industrial relations, the EAT expected the tribunal to explain why, in the particular circumstances, the employer's decision to dismiss was reasonable.

International organisations

The approach taken to employment law and to good industrial relations will vary significantly between nations and may not reflect usual practice in the UK.

In this case, a tool for selection using entirely subjective criteria was provided by a US parent company. Considering it reasonable for a UK employer to use US selection criteria solely because the organisation is a global one would not, in the EAT's view, reflect a

recognition of good industrial relations in the UK. This illustrated the significance of workforce-level consultation since, where discussions take place at an early stage, differences in good practice could be identified and an employer could take account of them.

Comment

The EAT's decision has provided a useful review of the authorities on consultation in a redundancy situation. As the EAT noted, where an employer proposes to make large-scale redundancies, of 20 or more employees within a period of 90 days or less (referred to as collective redundancies), it must consult on its proposal with representatives of the affected employees. Consultation in these circumstances must begin while the employer's proposals are still at a formative stage and involve trade union representatives or, where there is no recognised trade union in respect of the affected employees, representatives elected by the affected employees.

This decision is therefore of greater relevance to those redundancy situations involving fewer than 20 employees. The EAT highlights the need for what it terms "general workforce consultation" giving all employees the opportunity to influence the employer's decision at a formative stage of the process. While it notes that a tribunal may still conclude that a decision to dismiss was reasonable in the absence of consultation (for example, where it would be futile), the tribunal would be expected to explain why, in the particular circumstances, it had done so.

The EAT's comments on the role of an appeal against dismissal should also be noted. While an appeal can correct any missing aspect of the individual consultation process (in this case, the failure to provide the employee with their scores against the selection criteria), it cannot repair the failure to consult at the formative stage. If an employer becomes aware of such a failure, it would be faced with the need to restart its redundancy process in order to address that need to consult.