The Court of Appeal rules on the meaning of a fair redundancy process

The Court of Appeal has held that a fair redundancy process requires individual consultation to take place at a point when the employee still has a chance to influence the outcome. However, consultation with the wider workforce is not usually required in small-scale redundancy exercises.

What happened in this case?

The Claimant worked for ADP as a recruitment consultant in a team made up of 16 people serving a single client. When the client's recruitment needs declined due to the Covid pandemic, ADP decided to make redundancies. A manager scored each member of the recruitment team according to 17 selection criteria. The Claimant received the lowest score and was one of two selected for redundancy.

After this exercise had taken place, ADP began a two-week individual consultation period with the Claimant and the other lowest scoring employee, which culminated in the Claimant being told that he was to be made redundant. At this point, the Claimant had not had sight of his own scores against the selection criteria.

The Claimant appealed the decision and was given his own scoring sheet (but not the scores of the others in the team). At the appeal hearing, he argued that his scores were too low,

and he challenged the criteria used and lack of consultation about the scoring process. His representations were considered but, ultimately, rejected. He went on to bring an unfair dismissal claim, arguing that his selection for redundancy was unfair.

The decisions of the Employment Tribunal and EAT

The Employment Tribunal found that ADP had failed to provide the Claimant with information about the selection criteria or his scores until the appeal stage. However, once he had raised concerns about his scores, ADP gave due consideration to those concerns, but were unpersuaded that he had been scored too low. Overall, the Tribunal considered the Claimant had failed to show that the process was unfair, and the claim was dismissed.

The Claimant appealed to the EAT arguing that the process was unfair because no meaningful consultation was possible by the time ADP had started speaking to him – the decision had already been taken to make him redundant. The EAT upheld the appeal on the basis that there had been a lack of *"general workforce consultation"* at the formative stage of the process. This was said to be a requirement of good industrial relations practice, regardless of the numbers being made redundant. ADP had failed to do this, and the steps taken following the appeal were not capable of remedying that failure.

ADP appealed to the Court of Appeal, arguing the EAT was wrong to say they had been required to consult generally with the workforce.

What did the Court of Appeal decide?

The Court of Appeal upheld the appeal. It disagreed with the EAT that *"general workforce consultation"* with the wider workforce is required in small scale redundancies (i.e. those where collective consultation obligations do not apply). Ultimately, the question will be fact specific. Such consultation may be appropriate in a unionised workforce, however, it is *not* typical in non-unionised workforces.

Nevertheless, individual consultation with affected employees at a formative stage *is* still needed in small scale redundancies. This means that consultation should take place at a stage where the employee can influence the overall decision. Although there is no specific point in time that this must occur, the later in the process, the less likely it is that the employee will be able to exert influence over the employer.

Starting consultation after the scoring exercise was complete was said to be *"bad practice"* but this did not necessarily mean that the process was unfair. Here, the employer had provided the scoring sheet to the Claimant and afforded him the chance to challenge his scores at the appeal stage. This meant that he did have the opportunity to influence the outcome and, as such, the consultation was conducted at a formative stage.

What does this mean for employers?

This decision will reassure employers that consultation with the wider workforce is not necessary in small scale redundancy

situations falling outside the collective consultation rules (or where the workforce is not unionised). Had the Court of Appeal agreed with the EAT, this would have resulted in an additional burden on employers.

Crucially, the consultation process must still be meaningful and afford the employee the chance to change the outcome. Here, the employer had selected the two employees for redundancy before any consultation had started, which, on its face, suggests there was little scope for the Claimant to change the outcome. However, the appeal process came to the employer's rescue in this case.

The Court of Appeal refers to this as "bad practice". To minimise the risk of claims arising from failure to consult, employers should aim to consult with at risk employees on both the appropriate pool for selection and the proposed selection criteria before making the selection. Once chosen, the selection criteria should be applied fairly. At the very least, employees should be given the opportunity to make representations on their own scores before any final decision is made. Although this may mean the process is slightly more burdensome, it will help employees have confidence in the process and limit the risk of challenges and claims.

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BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.