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.

De Bank Haycocks v ADP RPO UK Ltd

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.

What guidance is there for employers on complying with the new duty to prevent sexual harassment at work?

The mandatory duty on employers to take reasonable steps to prevent sexual harassment at work came into force on 26 October 2024. New and updated guidance for employers has recently been published covering both the scope of the new duty and how to manage compliance. In this briefing, we round up the key points of interest.

EHRC's sexual harassment and harassment at work

The EHRC has updated its detailed technical guidance on **Sexual Harassment and Harassment at Work** (the **Guidance**) to reflect the new duty to prevent sexual harassment at work. It is important to note that the Guidance is just that – it does not have the status of a "Statutory Code". This means that Employment Tribunals are not obliged to take it into account. That said, it may still be used as evidence in legal proceedings. For that reason, employers would be wise to apply the recommendations in the Guidance as far as possible.

It is worth reading the Guidance in full, but here is our quick guide to the key points to note from the new sections of

the Guidance:

- **The scope and nature of the duty:** the Guidance explains that all employers now have a positive duty to take reasonable steps to prevent sexual harassment at work perpetrated by co-workers and third parties. The Guidance underlines that this duty is anticipatory, and employers must not wait until a complaint of sexual harassment is made before taking action. Rather, employers must predict scenarios where workers could experience sexual harassment at work and take reasonable steps to prevent it from happening *(see 3.16 – 3.18, 3.21 – 3.26, 3.28 and 4.6).*

- **The special role of managers and senior leaders:** the Guidance stresses that managers and senior leaders play a critical role in creating respectful workplaces. They are expected to model good behaviour, promote positive and inclusive workplaces and take instances of harassment seriously *(see 4.3).*

- **Accounting for third parties:** the Guidance explains that *all* types of third parties are relevant to the duty including, for example, customers, clients, contractors and members of the public. When conducting a risk assessment, employers are expected to build in consideration of the risks that workers might be

sexually harassed by third parties *(see 3.33 – 3.34 and 3.85 – 3.86).*

- **Assessing risk in your business:** the Guidance says thatemployers should conduct risk assessments of policies, procedures and working practices. Indeed, it is said that employers are unlikely to comply with the duty without having conducted a risk assessment. Numerous examples of possible risk factors are given, such as lone and out of hours working, power imbalances and the presence of alcohol. Once the risks have been identified, employers must consider what possible steps could be taken to remove or reduce them and an action plan produced *(see 3.27 – 3.31 and 4.10 – 4.15).*

- **Taking reasonable steps:** the Guidance highlights that there is no "one-size-fits-all" and what is reasonable will vary from employer to employer. However, whether or not a step is reasonable will be assessed against an objective standard, rather than just by what the employer thinks. The Guidance sets out a non-exhaustive list of factors which are relevant to reasonableness, including things like the size and resources of the employer, the working environment, the sector the employer operates in, the level of risk present in the workplace, the degree of contact with third parties and the time, cost and benefit of implementing the step weighed against the benefit it could achieve. Examples of steps that are likely to be considered reasonable for

most employers are also given, including maintaining effective anti-harassment policies and procedures, delivering training to staff and having measures in place for detecting harassment *(see 3.32 and 4.16 – 4.41).*

- **Penalties for non-compliance:** the Guidance sets out the penalties for failing to comply with the new duty, namely that the EHRC may take different types of enforcement action against the employer, and/or that an Employment Tribunal may uplift compensation by up to 25% in a relevant harassment claim. The amount of any uplift will correspond to the severity of the employer's breach. It is also made clear that workers cannot bring standalone claims in the Employment Tribunal for breach of the preventative duty *(see 3.19-3.20, 3.36-3.43 and 3.45).*

EHRC's employer 8-step guide: preventing sexual harassment at work

To complement the detailed Guidance, the EHRC has also published a more user-friendly **8-step guide for employers** which sets out the steps that will be expected from most employers. These steps should not be viewed as exhaustive, but the EHRC says that implementing them will help employers to discharge the duty. The eight steps are:

- **Step 1 – Develop an effective anti-harassment policy:** the guide sets out in detail what a good policy should contain, including in relation to harassment by third parties. The policy should apply to all areas of the business and be reviewed regularly.

- **Step 2 – Engage with your staff:** employers are encouraged to engage with workers using a variety of methods to identify where the risks lie and whether the steps taken are working. Staff should also be made aware of the anti-harassment policy and understand how it works and the consequences of breaching it.

- **Step 3 – Assess and take steps to reduce risk in your workplace (i.e. conduct a risk assessment):** as made clear in the Guidance, a risk assessment is central to compliance with the preventative duty. The risk assessment should build in a consideration of typical risk factors.

- **Step 4 – Reporting harassment:** staff should understand how to raise concerns and multiple channels for reporting should be offered, including the option to report anonymously. Centralised and confidential records of all reports should be maintained to allow

trends to be spotted.

- **Step 5 – Training:** all staff should receive training on workplace sexual harassment and how to report it. Managers should also be trained on how to deal with such complaints. Training programmes should be reviewed regularly and refresher training should also be offered at regular intervals.

- **Step 6 – What to do when a harassment complaint is made:** employers should take prompt action when a complaint is made, and the matter should be kept confidential. Other factors to consider include protecting the complainant and witnesses from harassment or victimisation and supporting the complainant to report the matter to the police in appropriate cases.

- **Step 7 – Dealing with harassment by third parties:** it is underlined that harassment by third parties should be taken just as seriously as harassment by a colleague. Employers need to build in third party risks into their risk assessments and have appropriate reporting mechanisms in place.

- **Step 8 – Monitor and evaluate your actions:** employers must keep the steps taken under review and take further preventative steps as needed. The guide sets out different ways of evaluating the steps taken including reviewing reported complaints, conducting anonymous staff surveys and reviewing policies and training regularly.

What other guidance is available?

In addition, the EHRC has published brief guidance on **three templates** that may be used to help employers discharge the duty. Although originally designed for employers in the hospitality sector (where the risk of sexual harassment is particularly high), the EHRC says that these templates may be adapted to suit other types of workplace. The recommended templates are:

- A **checklist of questions** designed to span what happens during the working day to assist employers spot and tackle the risks of sexual harassment within their workplace.

- An **action plan** which notes the actions points emerging

from the answers to the checklist questions (as well as any additional actions that the employer considers would be reasonable to prevent sexual harassment).

- **Monitoring logs** to be used on a regular basis to track how the checklist is being used. These logs can be completed on a daily basis, with more in-depth logs completed every quarter.

Acas has also updated its **sexual harassment guidance** to cover the preventative duty.

For a refresher on all aspects of the duty and how to comply, you can watch BDBF's **recent webinar** on the topic led by Partner **Nick Wilcox** and Associate **Julia Gargan**.

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.

Failure to greet a colleague could lead to a constructive dismissal claim

In the recent case of *Hanson v Interaction Recruitment Specialists Ltd* an Employment Tribunal found that a failure to say "hello" to a colleague was conduct likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Whilst the conduct by itself was not a fundamental breach of contract, it contributed to a breach which led to an employee's constructive dismissal.

What happened in this case?

The Claimant worked for a recruitment business, which was bought by Interaction Specialists Limited (**Interaction**) on 15 September 2023 after the business went into administration. Mr Gilchrist was the owner and director of Interaction.

On 20 September 2023, Mr Gilchrist went to the office to meet the Claimant, Ms Smith and Ms Waite (who both reported to the Claimant). In response to Mr Gilchrist asking if there were any issues, Ms Smith said there were only two members of staff working in the office and they were under pressure, which sparked discussion about the Claimant's working patterns. She explained that she sometimes worked from home but would also work onsite at clients' offices, sometimes for weeks at a time. Mr Gilchrist formed the view that the Claimant was really leaving the work to Ms Smith and Ms Waite to do.

On 26 September 2023, Mr Gilchrist visited the office unannounced. The Claimant arrived late as she had been at a medical appointment. When she arrived, she said *"good morning"* to Mr Gilchrist three times, but he ignored her. Mr Gilchrist then berated her for being late. When she tried to show him her phone with the evidence of her medical appointment, he pushed the phone away and told her "*I suggest if you don't want to be here that you leave*". After this incident, Mr Gilchrist emailed Ms Smith and Ms Waite telling them that they were getting a pay rise, without having consulted the Claimant about this in advance. Later that afternoon, Mr Gilchrist sent another email to Ms Smith saying it was "*good to see* [the Claimant] *getting stuck in today*".

On 2 October 2023, the Claimant resigned saying that Mr Gilchrist had made her feel undervalued, including by ignoring her, suggesting that she should leave her job and undermining her to members of her team. She brought a claim for constructive dismissal.

What is the law?

To establish a constructive dismissal claim:

- there must be a breach of the employment contract by the employer;
- that breach must be a fundamental breach going to the root of the contract so as to entitle the employee to terminate the contract without notice; and

- the employee must resign in response to the breach, without affirming the contract.

It has been established in case law that it is an implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

It has also been established that individual actions that do not by themselves constitute fundamental breaches of any contractual term may have a cumulative effect of undermining the relationship of trust and confidence.

What was decided?

The Tribunal found that the Claimant had been constructively dismissed and that there was no reasonable and proper cause for Mr Gilchrist doing the following things:

- ignoring her when she arrived at work, despite her greeting him three times;
- refusing to look at her phone or listen to her explanations regarding her medical appointment;
- telling her to leave if she did not want to be there;

- offering pay rises to her direct reports in the way that he did; and

- sending the email to Ms Smith regarding the Claimant getting "*stuck in*".

The Tribunal found that, taken together, these matters amounted to a fundamental breach of contract and undermined the relationship of trust and confidence between the Claimant and Interaction, such that she was entitled to terminate the contract without notice.

The Tribunal accepted that the Claimant had resigned in response to the way Mr Gilchrist had treated her, and Interaction had not suggested that she had affirmed the contract.

What does this mean for employers?

This case highlights that seemingly minor incidents, such as a manager not saying *"hello"* to someone, can have a big impact. Often, situations where an individual feels that someone has behaved in a rude or disrespectful manner towards them, particularly in front of others, can be the most upsetting to them.

This case also serves as a reminder that multiple incidents of a relatively minor nature could, together, amount to a fundamental breach of the employment contract and expose the

employer to liability for constructive dismissal.

Having a positive workplace environment may largely combat this risk. It is also important to have an awareness of this risk when conducting investigations, such as grievance investigations where the employee has made multiple complaints that could be regarded as minor, or where complaints about the repeated conduct of a particular individual have been made.

Hanson v Interaction Recruitment Specialists Ltd

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