Acas Code applied to discriminatory sham redundancy dismissal

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In the recent case of Coulson v Rentplus Ltd, the Employment Appeal Tribunal upheld a decision that the Acas Code of Practice on Disciplinary and Grievance Procedures applied to a sham redundancy dismissal that was tainted by discrimination. The Code had been completely disregarded, meaning that a maximum 25% uplift to the compensation was justified.

What happened in this case?

Ms Coulson was employed by Rentplus from 2015 as its Director of Partnerships. In Spring 2017, Mr Collins was appointed as a consultant, with a view to him taking over as CEO later in the year. Around this time, a decision was taken to dismiss Ms Coulson, albeit not immediately. Mr Collins duly took over as CEO in the Autumn and, from that point onwards, Ms Coulson said she felt that she was being "frozen out".

In early 2018, Rentplus embarked on what they badged as a redundancy exercise, despite the fact that the number of job roles were due to increase. Ms Coulson attended redundancy consultation meetings in April and May 2018. She also submitted a grievance alleging that she had been marginalised by Mr Collins, and that her role was not genuinely redundant. Her grievance (and subsequent appeal) was rejected, and Ms Coulson was eventually dismissed by reason of redundancy.

She brought claims for unfair dismissal and direct sex discrimination. The Employment Tribunal decided that the dismissal was unfair on the basis that the decision to dismiss had been taken in Spring 2017, meaning the redundancy consultation process was a "total sham". The Tribunal also said the dismissal was tainted by sex discrimination. Separately, the Tribunal found the grievance process to be

just as much of a sham as the redundancy process.

When awarding compensation for the unfair dismissal, the Tribunal awarded an uplift of 25% due to the company's "egregious failures" to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures (the **Code**). However, this issue was only dealt with very briefly in the judgment.

Rentplus appealed, arguing that the Tribunal had been wrong to say the Code applied where the reason for dismissal was either redundancy or sex discrimination. Further, even if the Code did apply, the Tribunal had not identified the failings for which the uplift was being made and did not explain the basis on which it had determined the amount of the uplift.

What did the EAT decide?

The EAT noted that the Tribunal's decision on the uplift would have benefited from a more detailed approach. However, the EAT was prepared to look at the judgment overall and consider whether, on a fair reading, the Tribunal judge had considered the four key issues.

Is the claim one which raises a matter to which the Code applies?

The EAT noted the Code applies to "disciplinary situations". This means that there is an issue of potential misconduct or poor performance to be addressed, regardless of how it is badged by the employer. The EAT highlighted that employers cannot sidestep the Code by dressing up a dismissal that flows from one of these things by pretending it is something else, for example, a redundancy. It was also noted that a finding of discrimination does not preclude the application of the Code. For example, if an employer dismisses for perceived poor performance, which is partly a result of discriminatory assumptions, there will still be a disciplinary situation and the Code will apply.

In Ms Coulson's case, redundancy had been rejected as the true reason for dismissal. She had been dismissed because there was a belief that there were problems with her capability and/or conduct and that belief was tainted by sex discrimination. As such, this was a disciplinary situation to which the Code applied.

<u>If yes, has there been a failure to comply with the Code in relation to that matter?</u>

The EAT drew a distinction between employers who attempt to comply with the Code but fall short, and those who act in bad faith and pretend to apply the letter of the Code but have already made their decision. In the former scenario, it may not be appropriate to award an uplift, whereas it may be appropriate to do so in the latter. In Ms Coulson's case, it was clear that the Tribunal had concluded that the dismissal process was a sham, the dismissal was pre-determined and there had been a total failure to comply with the Code.

<u>If yes, was the failure to comply with the Code unreasonable?</u>

The EAT noted that in order for an uplift to apply, it is not enough that there has been a failure to comply with the Code, the failure must also be unreasonable. In Ms Coulson's case the Tribunal had said the breaches were "egregious". Therefore, it was clear that the failures in this case went beyond being merely unreasonable.

<u>If yes, is it just and equitable to award an uplift because of the failure to comply with the Code and, if so, by what percentage?</u>

The EAT noted that Tribunals must apply the four-stage test set out in the case of Slade v Briggs to decide whether it is right to award an uplift and, if so, by how much. Generally, Tribunals should identify the failings for which the uplift is being made by reference to the relevant parts of the Code. However, in Ms Coulson's case, the Tribunal had said the

dismissal process was a “complete sham” and Rentplus had acted in bad faith such that there was a total failure to apply the Code. Therefore, they had been entitled to award a 25% uplift.

What does this mean for employers?

This decision reminds us that the question of whether the Code applies is one of substance and not form. The key question you should ask is: do we consider the employee to be culpable for something that we wish to address in a formal process? If yes, the chances are that the Code will apply. Given the risk of an uplift, the safest course of action will be to observe the principles set out in the Code.

The decision also tells us that even if discrimination is present, there may still be a “disciplinary situation” meaning the Code applies. This is important because where action is tainted by discrimination, the usual cap on compensation is lifted. This means that the uplift for breaching the Code may be applied to a higher sum than would have otherwise been the case. Indeed, in one recent discrimination case, a 20% uplift of over £317,000 was awarded, because the overall compensation was so high.

Rentplus UK Ltd v Coulson

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.

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