Failure to dispel an employee’s confusion and offering sham alternatives meant redundancy dismissal was unfair

The Employment Tribunal’s reserved judgment in *Crawford-Thomas v Collinson (Central Services) Limited* offers a useful reminder that a genuine business case for redundancy is not, on its own, sufficient. Where the consultation process is inadequate, a finding of unfair dismissal will follow.

What happened in this case?

The Claimant, Mr Crawford-Thomas, was employed as Financial Crime Manager by Collinson, a global travel benefits company, from February 2009 until his dismissal on 14 March 2024. He had approximately 40 years’ employment history in financial crime and fraud work.

In October 2023, Ms Smith joined as Vice-President of Risk and Compliance and became the Claimant’s new line manager. She was tasked with evaluating the company’s safeguarding strategy to protect against cyber-crime and emerging artificial intelligence (**AI**) risks (including anticipated compliance obligations under the EU’s AI Act) and she conducted a “gap analysis” of her team’s competencies.

As part of that exercise, she asked the Claimant to set out what elements of his role he currently performed. She concluded that of his 11 listed activities, seven could be handled by the company's existing Refinitiv automated system, two could be absorbed into her own role, and two were already performed by other colleagues. She determined that a new higher-grade role of 'Head of Risk and Assurance Manager' was required to address future AI and cyber risk and ensure compliance with the EU AI Act. She formed an early view that the Claimant was not qualified for this role.

The Claimant was placed at risk of redundancy on 31 January 2024.

The first consultation meeting was held on 7 February 2024. The Claimant said he did not understand how his role was at risk of redundancy. Ms Smith referred him to selected slides from a business-facing slide deck. She also said he would be sent the job description for the new Head of Risk role and that he could apply for any suitable roles on the company's website. The Head of Risk role was then advertised externally before the Claimant had fully considered whether to apply, and he discovered that Ms Smith had also invited a former colleague to apply for it. This discovery made the Claimant suspicious about the authenticity of the process.

The second consultation meeting was held on 26February 2024. At the meeting, the Claimant said he was still unsure why there was a need to make him redundant and little was said or done to address that concern. He also said he was interested in the Head of Risk role and asked whether he could have a trial period. Ms Smith did not agree to this (without explaining why) but said that he was at liberty to apply for the role.

The third and final consultation meeting was held on 7 March 2024. The Claimant said he was still struggling to understand why his role was at risk of redundancy and why aspects of it were no longer required. Ms Smith attempted to clarify the position, but the Claimant disagreed with her rationale, He asked further questions about the restructure but did not understand the answers given. Ms Smith referred him back to the slides he had previously been given. He asked to see the gap analysis, but Ms Smith refused and said the rationale had already been explained. He also asked whether he could be "mapped" into the new role with additional training and support. This was also refused.

The Claimant was dismissed on 14 March 2024, and his appeal was rejected. He brought claims for unfair dismissal and direct age discrimination.

What did the Employment Tribunal decide?

Unfair dismissal

The Tribunal had little difficulty finding that a genuine redundancy situation existed. The Claimant's core functions had been substantially automated by the Refinitiv system, remaining tasks had been redistributed, and there was a credible business need for a differently skilled role. The requirements of the business for work of the Claimant's particular kind had diminished within the meaning of s.139 Employment Rights Act 1996.

The Tribunal found that the Respondent had attempted a genuine redundancy consultation process: three meetings were held, HR

was present throughout, and the Claimant was offered access to job search support. However, the Tribunal identified two areas where the process fell critically short.

First, Ms Smith had formed an early view, following her very first one-to-one with the Claimant, that he lacked the skills and qualifications needed for the new Head of Risk role. Given that she was new to the company, she had little independent knowledge of his broader career or competencies. Although she reviewed his Linked In profile, the Tribunal notes that this was *"not a satisfactory way to obtain a full picture of the abilities of an employee within her own team."* The Tribunal found that once that view was formed, subsequent meetings became meaningless in respect of alternative employment. Ms Smith was holding out the Head or Risk role as a potential alternative while having already concluded that the Claimant was unsuitable for it.

However, the Tribunal accepted that the Respondent reasonably believed the new role required urgent filling by a suitably qualified candidate, and that an upskilling period was not a viable option. That was a reasonable business position. The problem was not the decision itself, it was that the consultation presented a false choice.

Second, Ms Smith's only method of explaining the restructure was to refer the Claimant back to slides that he had already said he did not understand. This was not adequate or meaningful. She made no attempt to find an alternative explanation when it became clear the slides were not adequate. She concluded that the Claimant was merely trying to elongate the process, and she effectively disengaged. As a consequence, the Claimant did not fully understand the process he was going through and this detrimentally impacted his

ability to suggest ways to mitigate the risk of his role being made redundant.

Despite upholding the unfair dismissal complaint, the Tribunal accepted the Respondent's submission that a fair process would ultimately have resulted in redundancy. A *Polkey* reduction to compensation will, therefore, be made, though remedy has not yet been determined.

Age discrimination

The Tribunal held there was no evidence suggestive of the Claimant's age being the reason for the difference in treatment compared to a hypothetical comparator. Therefore, the burden of proof did not pass to the employer. If wrong about that, the Respondent had provided reasonable and adequate explanations for its treatment of the Claimant and none of them indicated discriminatory conduct on grounds of age.

What does this mean for employers?

This decision makes it clear that managers must not approach consultation processes with a fixed mindset, particularly in respect of alternative roles. Redeployment searches based solely on a self-reported job description and a quick look at the employee's LinkedIn profile are unlikely to be sufficient, particularly for a long-serving employee.

In this case, a trial period with support and training was not viable due to the urgency involved, but in a non-urgent case

then a reasonable approach may be to allow a trial period plus training. Alternatively, where there are reasonable grounds to consider that an alternative vacancy would not be suitable for an employee, then it should not be put forward as an option during consultation.

HR and managers must also take care to ensure employees understand the process. Where an employee repeatedly says they do not understand the rationale for their redundancy, the answer is not to keep referring them back to the same document. Employers must find alternative ways to explain the position (even if where they are cynical about the employee's motives for pleading ignorance).

Crawford-Thomas v Collinson (Central Services) Limited

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Employment Rights Bill latest: important changes made to the proposals on

collective consultation

Earlier this month, the Government published its response to the consultation on strengthening remedies for breaches of the collective redundancy consultation rules. Alongside that, it published various amendments to the Employment Rights Bill, including some important amendments to the collective consultation proposals. In this briefing, we bring you up to speed on the latest developments and what they mean for employers.

What's the background?

Currently, collective redundancy consultation is triggered where there is a proposal to dismiss as redundant 20 or more employees assigned to one "establishment" within a 90-day period. In this context, "establishment" has been held by the courts to mean the local unit where the employee works, not the business as a whole. A failure by an employer to comply with these obligations may lead to a protective award of a sum not exceeding 90 days' gross pay per employee. This award is intended to penalise the employer for breaching the statutory requirements and deter others from doing so. The amount of the award is determined by the Employment Tribunal according to what is just and equitable but, usually, the more serious the breach, the higher the protective award.

Initially, the Bill proposed to change the law to trigger collective consultation where there are 20 or more proposed redundancies within 90 days across an entire business rather than in just one establishment. This would mean that collective consultation would be triggered more frequently.

This raised the question of whether the consultation would need to be conducted with all the employee representatives at the same time even where the redundancies were in different locations and unrelated. You can read more about the initial proposals in our briefing here.

Shortly after the Bill was published, the Government published a consultation looking at options for strengthening the remedies available for a breach of the collective consultation rules. The options under consideration were:

- Raising the protective award to 180 days' gross pay or removing the cap altogether. In either case, the Tribunal would retain discretion as to the amount of the protective award, based on what it determines to be just and equitable in light of the severity of the employer's breach.

- Extending the remedy of interim relief to affected workers. Where interim relief is granted by a Tribunal it will order the employer to reinstate the claimant to their previous role or re-engage them in a different role pending the determination of the unfair dismissal claim at the final hearing. Where the employer is not willing to do this, the Tribunal will make a "continuation order", meaning the employer is ordered to pay the claimant as if their employment contract was still continuing, until the final hearing. Sums paid under a continuation order are irrecoverable regardless of the outcome of the final hearing. This makes interim

relief a potentially very valuable remedy for claimants, and a burdensome one for employers.

You can read more about the consultation in our briefing here.

What's the latest?

The Government has put forward a number of key amendments to the Bill in this area.

1. Collective consultation will be triggered where there is a proposal to dismiss as redundant within a 90-day period either 20 or more employees assigned to one establishment (i.e. the current position), or a "threshold number of employees" across the wider workforce. This threshold number will be defined in regulations but may be *either* a specified number of redundancies *or* an overall percentage of the workforce. For example, if the threshold were to be set at 10% of the workforce, and the employer employed 500 employees across different sites, then a proposal of 50 or more redundancies across the whole business within a 90-day period would trigger collective consultation even where fewer than 20 redundancies were proposed at any one site.

2. Employers will be required to notify employee representatives in writing of the total number of

proposed redundancies across the business and at which establishments. However, employers will not be required to consult all such representatives together, nor undertake consultation with a view to reaching the same agreement with all of them. These changes mean that all employee representatives will be entitled to information about the proposed redundancies across the entire business, but employers will have flexibility about how the consultation process is conducted.

3. The trigger for providing the Secretary of State with advance notice of proposed collective redundancies via the HR1 form will be aligned with the new collective consultation thresholds in the Bill.

4. In terms of remedies, the maximum protective award will rise from 90 to 180 days' gross pay per employee. However, interim relief will not be extended to protective award claims.

In due course, the Government will also publish new guidance for employers on collective consultation which will reflect these changes. It also plans to consult on additional ways to strengthen employee rights in collective redundancy situations.

What does this mean for employers?

These changes represent good and bad news for employers. The retention of the words "at one establishment" is a concession

to business and means collective consultation will not be triggered where a multi-site employer proposes small pockets of redundancies at different sites *provided that* the total numbers do not exceed the new threshold. Clearly, the level at which the new threshold is set will be important – the lower it is, the more likely that collective consultation will be required.

Further, the fact that consultation will not have to be conducted with all the employee representatives at the same time, nor with a view to reaching the same agreement, means that even where collective consultation is triggered by multiple pockets of smaller redundancies across different sites, there is flexibility in how that process operates. The new guidance will be an important reference document for employers in this situation.

The doubling of the maximum protective award to 180 days' pay significantly increases the risk to employers of failing to comply with the statutory requirements for collective consultation. However, the Employment Tribunal will retain discretion to set the award at a figure which reflects the severity of the breach, which means minor breaches should not incur an award at the upper end of the scale. "Buying out" protective award claims will now be more costly and therefore less attractive for employers, meaning they may choose to comply with the statutory requirements and conduct a collective consultation process.

Government Response to Consultation on strengthening remedies against abuse of rules on collective redundancy and fire and rehire, 4 March 2025

[Employment Rights Bill: Amendment Paper, 4 March 2025]

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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

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The Employment Rights Bill: a closer look at the dismissal-related provisions

On 10 October 2024, the Government published the Employment Rights Bill, which will take forward many of its proposals for workplace reform. In the second article in our series analysing the Bill, we consider the proposals for dismissal-related reform.

Running to more than 150 pages, the **Employment Rights Bill** (**the Bill**) puts forward a vast array of reforms affecting the workplace, including family-friendly rights, dismissals, equality law, contracts and pay, trade unions and industrial action and labour market enforcement. In the second in our series of articles explaining the Bill, we consider all the proposals in the dismissal sphere.

Unfair dismissal

Abolition of the two-year qualifying service requirement

Currently, an employee must have two years' continuous service with their employer in order to bring a claim of ordinary unfair dismissal in an Employment Tribunal. There is a limited exception to this rule, where it is shown that the dismissal was for an "automatically unfair" reason, such as for having made a protected disclosure. In such cases, the employee is able to claim automatic unfair dismissal from Day 1 of their employment. However, where there are no such aggravating factors, an employer is able to dismiss an employee with under two years' service relatively easily. There is no need to identify a fair reason for the dismissal and nor does the employer need to show it acted reasonably.

The Bill proposes to remove the two-year qualifying period for ordinary unfair dismissal claims, converting it to a Day 1 employment right. To complement the abolition of the qualifying period, a new provision will be introduced preventing employees who have not yet started work from claiming unfair dismissal. However, if the reason for dismissal is automatically unfair, relates to the employee's political opinions or affiliations, or is connected to their membership of a reserve force, then an employee who *has not even started work* will be able to claim unfair dismissal.

Special rules for new employees

There has been much speculation in the press about whether the Bill will make it simpler to dismiss employees during a

probationary period. Importantly, the Bill provides that regulations may be introduced which will "modify" the standard of reasonableness that must be met to dismiss fairly during the "initial period of employment". The initial period of employment is not specified in the Bill (this will be dealt with in the regulations) however, the Government has signalled its preference for this period to be set at nine months. In practice, this will be longer than most contractual probationary periods operated by employers, which generally sit at between three to six months.

Exactly how the test will be modified remains to be seen. Currently, employers must show that they have acted reasonably in treating the reason as sufficient to dismiss, viewed in light of the size and resources of the employer. In many cases, this requires the employer to comply with the steps set out in the statutory Acas Code of Practice on Disciplinary and Grievance procedures. In the separately-published Next Steps to Make Work Pay it is suggested that, at the very least, the modified test will require employers to meet with employees to discuss proposed dismissals during an initial period of employment.

All of which will provide some reassurance for employers, however, there are some important limitations to note.

First, the modified test will *only* apply where the reason for dismissal is capability, conduct, illegality or some other substantial reason (**SOSR**) *"relating to the employee"*. It will *not* apply to redundancy dismissals during the probationary period, and nor does it seem to apply to SOSR dismissals which do *not* relate the employee. Where the dismissal is by reason of redundancy (or SOSR which does not relate to the employee), the existing reasonableness test will apply i.e. that the

employer has acted reasonably in treating the reason as sufficient to dismiss, viewed in light of the size and resources of the employer.

Second, the modified test will *only* apply where the dismissal takes effect on or before the last day of the initial period of employment, or where the employer gives notice to terminate before the end of the initial period of employment and the dismissal takes effect within three months of the end of that period.

What will these changes mean for employers in practice?

- The abolition of the qualifying period is certain to generate more grievances and Employment Tribunal claims, some of which will be justified and some not. But all of them will take time and money to deal with. Certainly, employers will wish to be more cautious when it comes to recruitment so as to limit the risk of a bad hire. And after recruitment, line managers will need to actively manage probationary periods to ensure that any performance or conduct issues are identified and dealt with at an early stage.

- Making it simpler to dismiss new employees takes some of the sting out of this reform for employers. However, care must be taken to diarise the relevant dates and ensure that notice to terminate is given before the end of the initial period of employment (which is expected

to be nine months). And in cases where the employee has a notice period in excess of three months, that notice must be given earlier so as to ensure that the termination date falls within three months of the end of the initial period. A failure to do so may mean that the employer inadvertently falls outside the modified test, making a finding of unfair dismissal more likely.

- It is also important to remember that it is not the case that new employees can *never* bring an unfair dismissal claim. Although the modified test will make it easier to dismiss them, employers will still be required to do something. Short circuiting those modified requirements could open the door to an unfair dismissal claim. When it comes to redundancy dismissals, employers must remember that the current test of reasonableness will apply. This means that in *all* redundancy dismissals employers will need to warn and consult with employees, adopt a fair basis on which to select employees for redundancy and consider suitable alternative vacancies (and, if applicable, collectively consult). Further, the reforms do not affect an employee's right to claim automatic unfair dismissal from Day 1 of their employment.

- The interplay between an employer's probationary period and the initial period of employment will need to be considered. Employers do not necessarily need to increase their contractual probationary periods in line

with the initial period. On the face of it, there is nothing to prevent an employer dismissing an employee who has already passed their probationary period during the initial period of employment and relying on the modified test. For example, an employee could pass a probationary period of three months, after which time their conduct or performance declined, or a one-off serious act of misconduct or negligence occurred. In those circumstances, the fact that the employee has passed their probationary period should not make any difference. That said, some employers may wish to consider aligning probationary periods with the initial period of employment.

- Is there any upside for employers in making ordinary unfair dismissal a Day 1 employment right? Conceivably, it could lead to some reduction in claims for automatic unfair dismissal (such as whistleblowing claims) and discriminatory dismissal claims, which are currently the only statutory claims that employees with under two years' service can bring about their dismissal. A decline in those types of claims could be a good thing for employers, not least from a reputational perspective and because the cost and complexity of defending those types of claims is higher. However, compensation is uncapped for certain automatic unfair dismissal claims and for discriminatory dismissal claims, meaning there is still an incentive for claimants to bring such claims. Therefore, in terms of impact on claims, the most likely outcome is that claimants with automatic unfair dismissal or discriminatory dismissal claims (especially if higher paid) will continue to bring those claims but will plead ordinary unfair dismissal as an

alternative claim.

Dismissal during pregnancy and following a period of statutory family leave

The Bill provides that regulations may be introduced which will provide enhanced protection from dismissal during pregnancy and following return from maternity leave, adoption leave or shared parental leave (it will also apply to return from certain other forms of leave which are not yet in force and so are not discussed in this briefing). It is not known how long the protection will apply following the return from family leave, however, the Government has previously suggested it will be six months. No further details of this proposal are given in the Bill or the Explanatory Notes to the Bill.

What will these changes mean for employers in practice?

- We must await the publication of the related regulations to understand the full extent of this proposal. However, it seems likely that the intention is to restrict the circumstances in which an employer may dismiss a pregnant employee or family leave returner fairly.

- It is *already* unlawful to dismiss an employee because of

her pregnancy or maternity leave (or for a reason related to it), by reason of redundancy during pregnancy or following the return from maternity leave, adoption leave or shared parental leave where there was a suitable alternative vacancy available. Therefore, this proposal appears to go further and suggests that even if there is a non-discriminatory and fair reason for dismissal, the dismissal would be unlawful, subject to some exceptions. Common sense would suggest that the exceptions must, at least, permit dismissal for gross misconduct, gross negligence or illegality or also where there is a large-scale redundancy such as where the whole business is closing down.

Dismissal for failing to agree a variation to a contract

"Fire and rehire" is a shorthand used to describe the practice of dismissing an employee then offering to re-engage them on inferior terms and conditions. Before the election, the Labour Party had talked about wanting to end fire and rehire practices altogether. This was slightly watered down during the General Election, with a promise to end the practice, save in exceptional circumstances.

The Bill delivers on that promise and proposes that it will be automatically unfair to dismiss an employee:

- for failing to agree to a change to their terms and conditions of employment; or

- in order to re-engage them (or someone else) under varied terms and conditions of employment, but where the role is otherwise substantially the same.

The sole exception will be where the reason for the variation was to eliminate, prevent or significantly reduce or mitigate the effect of any financial difficulties which, at the time of the dismissal, were affecting, or were likely in the *immediate future* to affect, the employer's ability to carry on its business, and there was no way the need to make the variation could reasonably have been avoided.

However, even where the exception does apply, the dismissal could still be *ordinarily* unfair, even if not automatically unfair. The Bill provides that in such cases various matters must be taken into account by an Employment Tribunal when determining whether the dismissal is fair or not, including any consultation with the employee and any trade union or employee representatives about the proposed variation and anything offered to the employee in exchange for agreeing to the variation.

What will these changes mean for employers in practice?

- It will be much riskier for employers to impose contract variations on employees by way of fire and rehire practices. Nor can employers escape the risk of automatic unfair dismissal by simply "firing" in these circumstances and not offering to rehire. This is not

to say that it will never be right to deploy fire and rehire practices – the practice may still be used but it carries a high risk of Tribunal claims. However, it is possible that the employee may relent and agree to be rehired on the varied terms. If the employee does not go on to bring a claim in time, the employer will have achieved its aim.

- Once this change comes into force, the current statutory Code of Practice on dismissal and re-engagement (which came into force on 18 July 2024) will need to be replaced. As it stands, that Code prescribes the process to be followed by employers before dismissing and offering to re-engage in any circumstances. A breach of that process does not give rise to a legal claim in itself but may lead to an uplift of 25% to any compensation awarded in related claims.

Collective redundancies

Currently, collective redundancy consultation is triggered where there is a proposal to dismiss as redundant 20 or more employees assigned to one "establishment" within a 90-day period. The question of what an "establishment" has been ventilated in litigation – with employees arguing it should mean the business as a whole rather than the local place of work. This would mean that collective consultation would be triggered more frequently as redundancy numbers would have to

be counted across the whole business. After some to-ing and fro-ing the senior courts concluded that “establishment” meant the local unit where the employee works, *not* the business as a whole.

The Bill proposes to reverse this, so that collective consultation is triggered where there are 20 proposed redundancies within 90 days *across the business* rather than in just one workplace.

What will this change mean for employers in practice?

- Collective consultation will be triggered more frequently and multi-site employers will need to have a system in place to ensure that they keep track of proposed redundancies across the whole business.

- The process will be administratively more burdensome as employers will need to have appropriate representatives in place for all affected employees no matter where they are based.

- The consultation itself will potentially be cumbersome and disjointed as employers may be consulting about several small pockets of unrelated redundancies.

- Getting it wrong will be costly: employees may claim a “protective award” capped at 90 days’ gross actual pay. The Government has also committed to consult on lifting this cap.

What are the next steps?

The Bill has just started its passage through Parliament, which will take time. Even when passed, the various dismissal provisions will not come in straight away. Indeed, in the context of dismissals alone, the Government has said it will consult on:

- the length of the initial period of employment for the purposes of unfair dismissal;
- how the initial period of employment interacts with the Acas Code of Practice on Disciplinary and Grievance procedures;
- the appropriate compensation regime for dismissal during the initial period of employment;
- lifting the cap on protective awards where an employer is found to not have properly followed a collective redundancy process; and

- what role interim relief could play in protecting workers in fire and rehire situations.

Regulations will also be needed in relation to the modified unfair dismissal test and the restriction of dismissals during pregnancy and following the return from family leave.

Next Steps to Make Work Pay states that the majority of the reforms will not come into force until 2026, with the unfair dismissal reforms taking effect *"no sooner than Autumn 2026"*.

Stay tuned for our third article in the series, where we will consider the provisions of the Bill affecting equality law.

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Redundancy dismissal was unfair because employer

failed to give meaningful consideration to alternatives to dismissal

In the recent case of *Lovingangels Care Ltd v Mhindurwa*, the EAT upheld a decision that a dismissal was unfair because the employer failed to give proper consideration to placing the employee on furlough as an alternative to redundancy.

What happened in this case?

The Claimant, Ms Mhindurwa, worked as a live-in carer for one of the Respondent's clients. In the early stages of the Covid-19 pandemic, the person she cared for went into hospital and then went to live in a care home. Ordinarily, the Claimant would have moved on to care for another client, however, this was not possible due to the pandemic restrictions.

The Coronavirus Job Retention Scheme – also known as the "furlough scheme" – came into force on 23 March 2020. This was a scheme whereby the Government paid a proportion of the wages of workers who could not work due to the pandemic restrictions. The intention was to enable employers to continue employing such workers and to avoid mass redundancies.

In May 2020, the Claimant asked the Respondent to place her on furlough. The Respondent refused on the basis that there was no job role for her. After a brief redundancy consultation process, the Claimant was given notice of dismissal on 13 July 2020. The Claimant appealed. The appeal officer dismissed

the appeal, having given no consideration to the possibility of furlough. The Claimant brought a claim of unfair dismissal.

The Employment Tribunal held that the dismissal was unfair on the basis that Respondent had failed to consider alternatives to a redundancy dismissal, namely, the possibility of placing the Claimant on furlough. The Tribunal said that in July 2020 a reasonable employer would have given consideration to whether the Claimant should be furloughed while it assessed whether the availability of work would change as the pandemic unfolded. The Tribunal also held the dismissal was procedurally unfair as the appeal was a "rubberstamp" exercise and not a proper appeal.

The Respondent appealed to the EAT.

What was decided?

The Respondent argued that the Claimant had not met the eligibility requirements of the first iteration of the furlough scheme, namely, she was not someone who had been instructed to cease work by them by reason of the circumstances arising as a result of Covid-19. The Respondent said the Claimant had not been instructed not to work, rather it was the case that there was no work available for her.

However, the EAT said it was "*strongly arguable*" that a proper consideration of the purpose of the scheme would have led to the conclusion that it applied to the claimant. In any event, the Tribunal had not said that the dismissal was unfair because the Respondent *should* have furloughed her. Rather, the Respondent had acted unreasonably by not giving proper consideration to the possibility of furloughing her. The

Tribunal Judge had been *"…entitled to apply the same approach to furlough as he would to any possible alternative to dismissal that an employer might…be expected the consider if acting reasonably".*

The Respondent also appealed on the ground that the Tribunal had been wrong to say that it had not considered the possibility of furlough. However, the EAT held that the finding was that only cursory consideration had been given to the issue. A reasonable employer would have given proper consideration of the possibility of furloughing the Claimant to allow some time for the situation in respect of the live-in carers to improve, and to obtain new clients.

The appeal was dismissed.

What does this mean for employers?

Although the furlough scheme is long gone, this case reminds employers of the need to give careful consideration to alternatives to redundancy before proceeding to dismiss. A failure to do so may mean the decision falls outside the range of reasonable responses, with the result that the dismissal is unfair.

It is well known that employers have a duty to consider whether there are any suitable alternative roles available for a potentially redundant employee. However, there are other alternatives to redundancy that should be considered including the following:

- **Reducing employee headcount:** there are various options

for reducing employee costs including freezing recruitment, withdrawing job offers, deferring start dates, reducing agency or temporary staff, seconding staff to other organisations, redeployment into alternative roles or offering early retirement.

- **Temporary stoppage of work:** this could include things like offering sabbaticals or unpaid leave, requiring staff to take holiday or temporarily laying off staff on reduced pay.

- **Reducing working hours:** the reduction of working hours will, in turn, reduce employee costs. This could include things like short-time working, offering part-time working or banning overtime.

- **Reducing remuneration:** this could include things like introducing salary sacrifice arrangements (which may save the cost of employer National Insurance contributions), freezing pay, reducing pay and/or benefits, reducing or temporarily ceasing employer pension contributions, withdrawing discretionary bonus schemes or tightening up on expenses (e.g. introducing a maximum spending limit).

Not all of these options will be appropriate for all organisations, but employers should be able to demonstrate that they have, at least, given reasonable consideration to whether such options would be achievable and help avoid the

need to make redundancies. In this context, consulting with staff about the alternatives will go some way to help demonstrate this (and, indeed, may be required depending on the option under consideration).

Lovingangels Care Ltd v Mhindurwa

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 Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

Pregnant employees and those returning from family leave to receive special protection in redundancy situations

The Government has backed a Private Members' Bill which plans to expand special protection in redundancy situations to pregnant employees and those returning from maternity, adoption and shared parental leave.

What to do if redundancy is looming

Redundancies have always been a way of life in the City, but in the current economic climate, the spectre of redundancy can be especially worrying. In the last few weeks alone, there have been reports that major employers such as Credit Suisse and Meta are restructuring. In this article we set out how to put your best foot forward in this worrying situation.

Employers must start redundancy consultation at the formative stage of the process and before dismissal becomes a foregone conclusion

In Mogane v Bradford Teaching Hospitals NHS Foundation Trust and anor the EAT held that redundancy consultation must commence at the formative stage of the process in order to be meaningful.

Acas Code applied to discriminatory sham redundancy dismissal

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.

Employees who volunteer for redundancy may be able to say they have been unfairly dismissed

The decision to make employees redundant is never easy and care needs to be taken to follow a lawful process in order to avoid the risks and costs of potential claims, particularly unfair dismissal.

Senior executive exited in

“sham” redundancy was victim of pregnancy and maternity discrimination

In the recent case of Shipp v City Sprint UK Limited an Employment Tribunal unanimously held that a senior employee was unfairly dismissed, harassed and discriminated against on the grounds of maternity/pregnancy and sex.

Does an employer’s failure to offer an appeal make a redundancy dismissal unfair?

In the recent case of Gwynedd Council v Barratt the Court of Appeal confirmed that, on its own, the absence of a right to appeal against dismissal for redundancy does not make it unfair. However, it is one of the factors to be considered when determining the overall fairness of the dismissal.