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In this edition we cover:

Can a redundancy process be considered fair when an employer assesses and scores the employee(s) in question before the consultation process begins?

Yes, said the Court of Appeal in its decision in *ADP RPO UK v Haycocks*, a position now final after the Supreme Court declined permission to appeal.

Background

The claimant, Mr De Bank Haycocks (Mr Haycocks) was employed as a recruitment consultant by ADP RPO UK (ADP). He was one of 16 people employed to recruit employees for a single client company. In March 2020, demand for new employees by the client company reduced due to the Covid-19 pandemic and as a result, ADP decided to make redundancies.

At the beginning of June 2020, ADP's HR department asked Mr Haycocks' manager to assess and score all of her team by reference to redundancy selection criteria. This was completed on 10 or 11 June 2020, and Mr Haycocks was the lowest scoring employee.

On 30 June 2020, Mr Haycocks was called to a meeting, and it was explained to him that the purpose of the meeting was to inform him of the situation and that he was at risk of redundancy. At the meeting, he was offered the opportunity to ask questions and suggest alternative approaches to the proposed redundancies.

He was invited to a further meeting on 8 July 2020, and then to a final meeting on 14 July 2020 at which he was informed of his dismissal. He was not informed of his scores prior to his dismissal, and he was not advised that scoring had occurred before the consultation began.

Mr Haycocks appealed against his dismissal and an appeal hearing took place in August 2020. He had received his scores against the selection criteria by the appeal hearing, and he argued that his scores were too low and complained about the lack of consultation in respect of his scores.

Following the appeal hearing, ADP confirmed that his appeal had been rejected. Mr Haycocks brought a claim for unfair dismissal at the Employment Tribunal (ET).

The ET dismissed his claim. The ET accepted that Mr Haycocks had not known about his scores until the point of appeal but found that ADP had carried out a conscientious investigation into the concerns he had raised in relation to his scoring during the appeal and that the redundancy process followed was fair overall.

Mr Haycocks then appealed to the Employment Appeal Tribunal (EAT), which upheld his appeal. The EAT held that Mr Haycocks dismissal was procedurally unfair because there had been a lack of consultation by ADP at a formative stage of the process, and that this was a requirement in redundancy situations, in addition to individual consultations.

ADP then appealed to the Court of Appeal and argued that the EAT was wrong to find that there was a requirement for general workforce consultation.

Applicable Law

As per Section 98(4) of the Employment Rights Act 1996 (ERA 1996), dismissal for redundancy is fair if:

a) Considering the circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably in treating redundancy as a sufficient reason for dismissing the employee; and

b) The fairness shall be determined in accordance with equity and the substantial merits of the case.

The leading case on reasonableness regarding redundancy is *Polkey v A E Dayton Services Ltd*, which provides that an employer will not normally act reasonably unless it:

- Warns and consults employees, or their representatives, about the proposed redundancy.
- Adopts a fair basis on which to select redundancy by identifying an appropriate pool of employees at risk of redundancy and makes selection against proper criteria.
- Searches for and offers (if available) alternative employment.

Decision

The Court of Appeal (CA) allowed the appeal and found that the redundancy process had been fair.

The CA disagreed with the EAT's suggestion that general workforce consultations are required for good industrial relations practice in smaller scale redundancies.

It confirmed that a fair consultation must happen when proposals are at a formative stage, which does not necessarily mean early, but that consultation must take place when the employer has an open mind and when the employee is able to realistically influence the outcome.

The CA also found that the decision to dismiss would only be unfair if Mr Haycocks had been denied a genuine opportunity to ask ADP to redo the exercise. However, in this case, he had the opportunity to challenge his scores during the internal appeal process, which had been conscientiously addressed by ADP.

Therefore, the CA held that although ADP had not adhered to best practice in respect of carrying out the scoring exercise before consultation and failing to consult with Mr Haycocks about his scores, these issues were addressed within the appeal process, which made the redundancy process fair.

Comment

Carla Codona, Solicitor in our Employment team, comments:

"This case confirms that general workforce consultation regarding smaller scale redundancies (of less than 20 employees in non-unionised workforces) is not compulsory.

"It is a useful reminder that whilst procedural errors can be rectified during a comprehensive internal appeal process, a fair and well-planned consultation process should be the starting point when dealing with a redundancy situation.

"To minimise the risk of successful claims, employers should ensure that selection criteria are shared with employees during the consultation process, and that employees are given the opportunity to comment on the criteria before redundancies are confirmed.

"Importantly, what constitutes a fair redundancy procedure will be dependent on a case-by-case analysis of the circumstances at hand."

If you require assistance with any redundancy matters, please get in touch with a member of the Employment team.

UPDATE: Higgs v Farmor's School

Following the Supreme Court's refusal to grant permission to appeal in *Higgs v Farmor's* School, the Court of Appeal's ruling stands, as outlined in the February 2025 issue of *Prism Bulletin*.

You can read the article here.

The Data (Use and Access) Act 2025

The Data (Use and Access) Act 2025 has now become law. While the Act doesn't introduce significant change, it makes a number of adjustments and changes designed to clarify the law on data protection and better balance the compliance burden on organisations while adequately protecting individuals.

Most of the Act's provisions will come into effect gradually, through regulations made between now and June 2026. However, clarification on what employers (and other data controllers) must do in response to a data subject access request is now in force, whereby controllers are only required to carry out *reasonable and proportionate* searches when responding to a data subject access request. This reflects existing case law but provides helpful clarification.

Upcoming changes to be aware of

Further changes of interest to employers will come into force at a later date. These include additional clarity on and codification of the legitimate interest basis for processing personal data.

The Act provides for a new lawful basis where processing is for the purposes of a *'recognised legitimate interest'*. This category will include:

- Disclosure to a person carrying out a public interest task

- Detecting, investigating or preventing crime, or apprehending offenders; and
- Safeguarding vulnerable individuals

Where a recognised legitimate interest is relied on, no balancing assessment is required.

The Act also sets out a non-exhaustive list of examples that can amount to a 'standard' (i.e. non-recognised) legitimate interest for the purposes of the UK GDPR which includes:

- Processing necessary for the purposes of direct marketing; and
- Intra group transmission of client, employee or other individuals' personal data for internal administrative purposes

Where the standard legitimate interest basis is used – even if it falls within one of these examples – employers will still need to assess whether their interests are outweighed by those of the employee or data subject.

The circumstances in which significant decisions may be made about an individual based solely on automated processing will be expanded to allow such decisions to be made in a wider range of situations, provided appropriate safeguards are implemented – such as the opportunity to obtain human intervention in the decision.

Organisations will be required to have a data protection complaints procedure in place, acknowledge complaints within 30 days, and respond without undue delay.

What employers should do now

Although only a few of the Act's changes are in force, this is a good opportunity for businesses to review their data processing activities and policies. Ensuring these are up to date will help ease the transition when the remaining provisions take effect.

If you do not already have one, now is a good time to develop a data protection complaints process.

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