The Agenda podcast by Lewis Silkin: In-House Employment Lawyers Coffee Break

Episode 4: Workforce consultation in the EAT and redundancy protection legislation

Sally — Hello and welcome to our Coffee Break podcast for In-House Employment Lawyers. I'm Sally Hulston.

David — And I'm David Lorimer.

Sally — So, over the next ten minutes or so, we're going to take you through some of the latest developments and practical takeaways for this month.

Today we're going to cover two topics. First, an EAT decision on workforce consultation in small-scale redundancies, which it's fair to say, has caused some concern amongst employment lawyers. Second, the new regulations extending priority status in redundancy scenarios to employees who are pregnant or have recently returned from family leave. So, starting with the EAT case, that's the case of *DeBank v Haycocks.* So, David, do you want to tell us why that case is causing some concern?

David — Absolutely, thank you Sally. So, as you said this is an EAT decision, where it was held that a lack of "general workforce consultation" (I'm using air quotes), at a formative stage in a small-scale redundancy exercise could taint the fairness of the entire process. So, just to be clear about this, we're talking about a case here, which didn't meet the threshold for collective consultation. That's obviously 20 or more redundancies at one establishment in a 90-day period. We're talking about what we might normally describe as an "individual consultation" case.

I'll give a very brief overview of the relevant facts, but I think we should get into the meaning more. There are 16 members in the claimant's team. They were all scored using subjective criteria (that's red flag number one), before any consultation took place. The claimant scored lowest, so he was invited to an at-risk meeting, and they had two consultation meetings, before finally he was dismissed at a last meeting.

Some of our listeners are probably thinking, well there isn't much that's particularly unusual so far, and I think that's fair, except of course, for the subjective criteria. The claimant was, we would say, unsurprisingly unsuccessful at tribunal stage because the appeal process fixed some of the issues with the original process, like they hadn't told him his scores. Nevertheless, the claimant appealed to the EAT and he argued that all the important decisions in relation to his redundancy, they'd been made by the time he was consulted with, so there was no meaningful consultation.

The EAT's view, perhaps surprisingly, was that a reasonable dismissal should reflect good industrial relations - that's not the surprising bit. But, where there are reps involved, the EAT said consultation would usually take place at an early stage in respect of the proposed selection criteria, the scoring methods, all of the usual stuff. But they held here, even though it wasn't a collective consultation, that the dismissal was procedurally unfair because there was no consultation on those types of things at a formative stage. And the tribunal judgment didn't indicate that there were good reasons not to consult at what they called a workforce level.

The EAT specifically held that an important general principle in consultation is that it should take place at a formative stage where an employee or a rep is given adequate information and time to respond, and where genuine consideration is given to the response. I think it possibly merits a mention in the 'facts' bit that this was a covid induced consultation

exercise. The claimant was a recruiter and the need for recruitment in their area had dropped off a cliff by about 50%, so it was about a relatively urgent need to achieve cost reductions. Although that's not relied on heavily in the judgment, it might be a point of difference when we compare it with terminations arising from perhaps more ordinary course restructures.

So, more importantly, where does this leave us going forward? Broadly, I think it leaves employers with one-million-dollar question. What is “general workforce consultation”? (and the air quotes are back) Especially where collective consultation hasn't been triggered? Who should be consulted, how and about what? Cynics would say that a follow up question is, what's the point in having the distinction at law between redundancy exercises impacting 20 or more, and fewer than 20? But I'm not a cynic, so I'm going to leave that there.

So, how does general workforce consultation fit in, when you aren't at the threshold for collective consultation? This case seems to suggest that consultations should take place with a wider group of employees than just those who would be selected after scoring. In some ways, that's not really anything new; starting consultation only with those who've been provisionally selected for redundancy has always been a bit risky. And it is contrary to ACAS guidance, which calls for wider notification and consultation pre-scoring. Obviously, though, we know that in practice, the main reason employers choose to score before they consult is to avoid causing upset amongst half the workforce when there's only going to be a handful of redundancies at the end of the day. It's therefore going to be up to individual employers to decide whether they want to take some measured risk here in future, bearing in mind that this case probably does shift the dial towards a tribunal asking, why didn't you do broader consultation before you scored?

Sally — Exactly, David. But I suppose there's some comfort, isn't there, that there's always going to be the *Polkey* argument to rely on, to argue that it would have made no difference to the outcome, even if consultation had been wider?

David — Absolutely, that's a great point. So, if that was the case with a successful *Polkey* argument, any award to the employee would be pretty modest, and likely one you could settle off quite cheaply. Whatever employers decide, is going to depend, of course as well, on the proportion of the workforce affected. So, for instance, if there are 15 redundancies proposed across a workforce of about 3,000, it's less likely that other employees will be particularly concerned or have anything to offer in consultation. But if those 15 redundancies were in a workforce or a team of 30, there's a large group of affected employees in pools for selection, then that's a different matter altogether.

If you are going to notify the wider workforce, taking account of this case or part of it, you also need to think about how you go about it. So, for instance, if you already have regular town hall meetings or regular comms, those could be a good forum for it. Or if you have an employee forum set up, again, that might be a good group to consult with or notify.

Sally — And of course, just trying to think of other practical hints and tips, if you've got a policy of offering generous redundancy packages anyway, I guess the risk of not consulting more widely is going to be much reduced, particularly if you're using settlement agreements.

David — Absolutely! If you're only offering statutory redundancy payments, then you probably ought to think more carefully about this case and the risk it represents, and then what you decide.

Sally — Okay, thanks David. I love your talk of the air quotes. Moving on to the second, and the last thing that we're going to talk about today, and that's the extension of priority status in redundancy situations. And that's to employees who are pregnant or returning from parental leave. So just to recap, at the moment, if you've got a redundancy scenario, then those employees off on maternity leave get priority for the job vacancies. So, we're just talking about priority for job vacancies here. Well, the new regulations are going to give a pregnant employee protection from the moment they inform their employer that they're pregnant, until 18 months from the child's date of birth, or the date of placement if the child is adopted. In

the sad case of a miscarriage, the employee will be protected for two weeks from the end of the pregnancy, and that's assuming the loss occurred before 24 weeks of pregnancy. If an individual is taking shared parental leave, they must take at least six weeks of shared parental leave in order to receive that 18 months of protection, from the date to the child's birth.

David — Yeah, and that's a bit of a surprise, isn't it Sally? Just having to qualify with six weeks of shared parental leave being the trigger point that the government decided upon. Earlier on in consultation, I think it was suggested that the protection would be proportionate to the risk of discrimination. I think it's fair to say that most people would say that someone who's back at work by the time the baby's six weeks old, isn't going to be at the risk of discrimination in the same way that someone who's taken, say, six months or a year would be.

Sally — Yes, I totally agree with you there, David. . Also, there's a slight oddity that a father or partner returning from paternity leave, does not get any priority status upon return. They have to have taken the leave under the banner of shared parental leave to qualify.

So, what does all this mean for in-house employment lawyers? Well simply, you will have to get your policies in order and consider if this changes anything for your business. If, for example, you offer enhanced family leave policies. It does make you think that employees will be better off making use of the statutory shared parental leave scheme, to gain this protection.

So other practical issues for in-house employment lawyers? First, businesses are going to have a significantly increased number of employees with priority status. And so, one question is, how are you going to select between individuals with priority status? I mean I guess, you're going to have to adopt a kind of selection process between those, but there's no legal precedent for deciding. Businesses will also need to have much greater oversight of vacancies. Covid means lots of roles can be done remotely, and so this opens this area up. There's not been much information about what it means to inform your employer of your pregnancy, and so it may be hard to keep track of notifications, not to mention the particularly sensitive issue of an employee confirming the date of a miscarriage, so that you can calculate the further two weeks to the end of the priority period.

David — Yes, I guess the other thing that it's going to cause problems for our HR colleagues, is that people misunderstand what the law's doing. The Act is called "Protection from Redundancy" or has that in the title, so people understandably interpret that as a kind of blanket protection from being made redundant, and I think we can expect to see employees raising concerns on that basis.

Sally — Absolutely, yes! So it's just explaining the law, and how it works in practice - that's just going to be key, isn't it, at an early stage in the consultation process.

Well, there's two interesting updates for you! Thank you so much for joining us today. The In-House Employment Lawyers Coffee Break will be back on the agenda in March, and if you want to be part of our In-House Employment Lawyers Community, do get in touch with us. We would also love to know what you thought of today's episode, so please leave us a review if you can. Thanks so much!