Sham Redundancy justifies the maximum 25% ACAS uplift

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***Rentplus UK Ltd v Coulson* [2022] EAT 81**

Background

Susan Coulson was employed by housing provider Rentplus from 2015 until August 2018, when she was dismissed. She had enjoyed a senior management position. However, her working life changed following the appointment of a new chief executive, Mr Collins, in 2017. Ms Coulson states that after this appointment, she was 'frozen out', and was 'marginalised'. What Ms Coulson did not know was that a decision had been taken in March 2017 to dismiss her.

Despite new funding, which led to an increase in the size of the Rentplus workforce, the company commenced a reorganisation, describing it as a redundancy exercise. There were consultation meetings in April and May 2018. However, in June 2018, Ms Coulson submitted a grievance complaining that given the overall proposals it was inaccurate to say she was redundant, and that she had been marginalised from December 2017.

Her grievance was not upheld, nor was her appeal. Finally in August 2018, Ms Coulson was dismissed, with Rentplus claiming that she was redundant.

Employment Tribunal Claim

Ms Coulson brought claims in the employment tribunal. She claimed unfair dismissal and sex discrimination. The employment tribunal found in her favour. It determined that the redundancy exercise had been a sham because the decision to dismiss had been taken long before the process had started, and that nothing she said would have made a difference to the outcome. Rather than there being a redundancy, the dismissal had been the product of a desire to remove her from her role.

The employment tribunal concluded the process of dealing with the grievance raised was just as much a sham as the redundancy.

It also upheld the sex discrimination claim.

Applying s207A of the Trade Union Labour Relations Act 1992, it uplifted Ms Coulson's compensation award by 25% as a result of a failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures ('the Code'). While the reasoning for this decision is brief, the uplift applied to the dismissal and was due to the egregious nature of the dismissal process.

Employment Appeal Tribunal

Rentplus appealed to the Employment Appeal Tribunal (EAT). It argued the Code could not apply where its own reason for dismissal had been redundancy. It also said that the employment tribunal had found the dismissal to be discriminatory on grounds of sex and that also meant the Code would not apply.

Additionally, it complained that even if the ACAS uplift applied, it was not clear from the Tribunal's judgment which aspects of the Code were said to have been neglected.

The appeal was heard by HHJ Tayler sitting alone. His decision sets out guidance on the circumstances in which the Code applies. The questions posed and addressed by the EAT were formulated as follows –

1. Is the claim one which raises a matter to which the ACAS Code applies?
2. Has there been a failure to comply with the Code in relation to that matter?
3. Was the failure to comply with the Code unreasonable?
4. Is it just and equitable to award an uplift because of the failure and if so, by what percentage (up to 25%)?

Having set these questions for itself, the EAT answered each in turn.

Question 1 - Does the Code apply?

Quoting directly from the foreword to the Code itself, HHJ Tayler noted that it applies to 'disciplinary situations'. It applies to grievance situations as well, but it doesn't apply to redundancies.

HHJ Tayler referred to *Holmes v Qinetiq Limited [2016] ICR 1016*, noting in particular the reasoning of Simler J - "*an employer may have expectations about the way in which a job is to be performed and the minimum standards to be maintained. Where those expectations or standards are not met, that also gives rise to a disciplinary situation in respect of the poor or inadequate performance that arises"*

Applying this to the Rentplus appeal, the EAT noted that a 'disciplinary situation' will arise where the employer considers it necessary to address potential misconduct or poor performance. The EAT's interpretation of the employment tribunal's judgment was that the reason behind the decision to dismiss was due to a dissatisfaction with Ms Coulson personally and/or her performance. It was also implicit in the reasoning of the employment tribunal that it regarded Ms Coulson to be in a 'disciplinary situation' to which a fair procedure should have applied.

It was importantly noted that employers cannot by-pass the Code by disguising misconduct or poor performance dismissal as a something else. In concluding his analysis of the relevant case law HHJ Tayler said at paragraph34 of the decision *"I do not consider that an employer can sidestep the application of the Acas Code by dressing up a dismissal that results from concerns that an employee is guilty of misconduct, or is rendering poor performance, by pretending that it is for some other reason such as redundancy."*

In its appeal, Rentplus argued that as the employment tribunal had made a finding of sex discrimination the code could not apply. In dismissing this argument, HHJ Tayler noted that *"in a dismissal case, the principle [sic] reason for the dismissal could be conduct or capability, but nonetheless direct discrimination would be established if it was a material factor in the treatment".*

The employment tribunal had not found that Rentplus had wanted to dismiss Ms Coulson because she was a woman; it found a desire to dismiss based on a belief, which was tainted by discrimination, that there were problems with her capability and/or conduct. As such a finding of discrimination was not inconsistent with a finding that the Code applied.

Notably the Code does also apply to grievances and while the brief reasoning of the employment tribunal on the issue was contained in the part of the judgement dealing with dismissal, it was noted that there had also been a finding that the grievance process had been just as flawed as the purported redundancy.

Question 2 - Was there a failure to follow the code?

The employment tribunal found that Ms Coulson's dismissal was predetermined and a sham, and as such there had been a total failure to comply with the Code.

In addressing the second limb of the appeal (namely that Rentplus was unable to identify in what way it had not complied with the Code) the EAT interpreted the tribunal's decision as being that it had not been followed at all. While generally, when awarding an uplift, a tribunal should identify the parts of the Code where the employer failed, the employment tribunal's decision in the current matter was that there was a total failure.

Question 3 – Was that failure unreasonable?

The employment tribunal judgment cited the breach as egregious, which the EAT concluded as meaning beyond unreasonable. That being so, it was entitled to uplift Ms Coulson's compensation.

Question 4 - Is it just and equitable to award an uplift because of a failure to comply with the Code, and if so by what percentage?

Referring to the decision in *Slade v Biggs & Ors EA-2019-000687,* the EAT concluded that the employment tribunal had been entitled to award the maximum uplift in the face of a complete failure to follow the Code.

Decision

Based on the analysis applied by the EAT and notwithstanding the shortcomings in the wording of the judgement, Rentplus' appeal failed. The employment tribunal was entitled to find that the Code applied, and this was unaffected by the finding of discrimination. The failure to comply with the Code was total, and while it would be desirable to refer to a specific failure in other cases, the employment tribunal's decision in the current matter did not amount to an error of law.

Comment

This is a very useful decision which helpfully draws together the authorities in relation to the application of the Code. It is also a very sound reminder that an employer can't avoid the protections required by the Code by renaming the process.

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