Episode 15 – Performance issues in a redundancy situation with Charlotte Bray

Ellie: Hi and welcome to The Work Couch podcast. Your fortnightly deep dive into all things employment brought to you by the award winning employment team at law firm RPC. We discuss the whole spectrum of employment law with the emphasis firmly on people. Every other week we explore those thorny HR issues that people, teams and in-house counsel are facing right now, and we discuss the practical ways to tackle them.

My name is Ellie Gelder. I'm a senior editor in the Employment Equality and Engagement Team here at RPC, and I will be your host as we explore the constantly evolving and consistently challenging world of employment law and all the curveballs that it brings to businesses today. This week we're discussing the practicalities of dealing with performance issues in a redundancy context.

Now, at a time when budgets are tight, the important thing for employers when considering redundancies is to really take the time to plan the process properly and thereby avoid the potentially costly consequences of getting it wrong. But, however well-planned your redundancy process is, there are a number of issues that can really throw a spanner in the works from employees submitting grievances or making data subject access requests to historical underperformance issues that haven't been dealt with properly.

So today, as well as explaining the law around redundancy and how to ensure a fair process, we're going to flag some of the pitfalls to be aware of specifically around poor performance and give our top tips on dealing with these. And joining me to guide us through this notoriously tricky area, I am delighted to be joined by Charlotte Bray, associate in RPC's Employment engagement and equality team, who is regularly called on by clients to advise them on restructures and redundancy.

Hi, Charlotte. Thank you so much for joining us today on The Work Couch.

Charlotte: Hi Ellie, thank you for having me.

Ellie: So, first of all, before we get into those thorny aspects I just mentioned. Can we have a look at the law on redundancy? So redundancy is a potentially fair reason to dismiss somebody, and that's provided for under section 98(2)(c)of the Employment Rights Act 1996. So in other words, in a genuine redundancy situation, you may be able to dismiss somebody without incurring a legal risk for unfair dismissal.

But if we can just go back to basics, what does redundancy mean legally?

Charlotte: Thanks, Ellie. So colloquially, redundancy is often used as shorthand for a no fault exit. But this is not in line with the legal position under the law. Redundancy only applies to very specific situations. That is, dismissal of an employee where the employer has or intends to cease carrying on the business either for the purposes of which the employee was employed by them or in the place where the employee was employed or where the business no longer requires the employee to carry out work of a particular kind, or the requirement of such work has, or is expected to, cease or diminish.

Ellie: And when those specific situations are in play, then a number of obligations are triggered on the employer's part. So why is the legal definition of redundancy so important?

Charlotte: If the employee brings a claim in the employment tribunal for unfair dismissal, the employer has to be able to show that the dismissal was for a potentially fair reason. If the definition is met and there is a fair reason, for example, redundancy, then a tribunal would go on to consider whether or not the employer followed a fair redundancy procedure documentary evidence to demonstrate that would be essential. What is the work of the particular kind which has or will cease or diminish? Has this caused the employee's dismissal? And if not, there may be no fair dismissal reason.

Ellie: Okay. So that's why the reason is so important. And while I appreciate we don't have enough time to go into detail about this. Can you just explain to us what a fair redundancy procedure would normally look like?

Charlotte: Yes. There was a case in 1982 which gave important guidance on a fair redundancy procedure. That guidance includes giving employees as much warning as is practicable of redundancies, asking for volunteers for redundancy if this is appropriate, consulting with employees individually or through their union or employee representatives, identifying the selection pool for redundancy and applying appropriate selection criteria. Making sure that the selection is not for an automatically unfair reason and proactively looking into options for suitable alternative employment.

Ellie: So a number of key ingredients there to include. And there are also additional obligations, aren't there, where the employer is proposing to dismiss as redundant 20 or more employees at one establishment within any period of 90 days or less. So just sum up for us what those are.

Charlotte: Yes, so there is a statutory obligation to consult collectively. It's really important to keep an organisation wide track of this to ensure that the company's legal obligations are met, not least because failure to comply with certain collective redundancy requirements can amount to a criminal offence on the part of individual directors. The financial consequences for an employer of breaching the duty to consult collectively are also far reaching and could result in a protective award of up to 90 days' pay to each affected employee.

Ellie: So really important to be aware of those obligations. And you mentioned selection criteria. And the employer can decide on the criteria that it adopts. It often includes length of service, attendance and performance and ability, so why might employers value some criteria over others, for example, performance?

Charlotte: Performance and ability is perhaps the criterion which employers would most value being able to capture. After all, who wouldn't want to hold onto their highest performing staff? However, for most roles, performance is not easy to measure exactly, and even where output measures exist, quality is much less easy to quantify. Historic appraisals may be of some help here, provided that they have been carried out regularly. But employees should consider whether grades have been applied consistently by different managers.

Ellie: So looking at performance issues generally, what is important in a business context for employers to bear in mind?

Charlotte: It goes without saying having the right people in the right jobs is important. Employers want their employees to be performing at their best to deliver the commercial aims of the business and to make sure objectives are met at speed. When it comes to performance issues, doing nothing is not neutral. Letting matters drift is risky. It's important to avoid the ripple effect of not managing performance issues on the poor performer, their colleagues, morale, turnover, customer service and business continuity. So while the priority is to ensure performance issues do not derail restructure projects, they must be managed at the outset to limit potential exposure to time consuming litigation. Not to mention defending employment tribunal claims is costly.

Ellie: Okay, so let's look more closely then at poor performance in a redundancy context. First of all, I'd like to talk about potential discrimination risks here. So looking at protected characteristics under equality law and then also those other individual circumstances, employers need to be looking out for. So just remind us, Charlotte, what are the protected characteristics under equality law?

Charlotte: So according to the Equality Act 2010, which is the main piece of legislation governing workplace equality, there are nine protected characteristics. These are sex, age, race, religion and belief, disability, sexual orientation, pregnancy and maternity, marriage and civil partnership and transgender status. Protected characteristics may not always be obvious, and they may depend on context. Discrimination law is going to protect your employees where they have one of these characteristics, where they are associated with someone with one of these characteristics, or where they are perceived to have one of these characteristics.

Ellie: Absolutely. I think it's really important to bear that in mind. That associative and perceptive discrimination is also covered. So why are protected characteristics relevant to performance management?

Charlotte: Employers have to realise that the right not to be discriminated against applies from day one. It covers everyone. The right applies to workers, agency staff, applicants, volunteers. Discrimination claims can lead to uncapped compensation, not just for the company, but personal liability of named respondents as well. Some individuals may have specific needs and require different or additional support. For example, a disability may mean that a person needs particular adjustments to enable them to perform to their full potential. If they do not receive it, their performance may be affected and failure to account for this may be unlawful discrimination.

Ellie: And in any project you may make decisions which on the face of it, apply equally to a wide range of people. But give us an example where those decisions actually may disproportionately impact a particular protected group.

Charlotte: An example would be if you use appraisal grades in performance management or a restructuring project. But the grade took into account attendance, which means that those on maternity or sickness absence may be penalised. If you cannot justify this, it may be unlawful indirect discrimination, so any decision based on that appraisal grade is tainted.

Ellie: And we talked about other issues to be alive to. So just talk us through those key issues when considering any performance management decisions.

Charlotte: Well, there are three main issues that employers need to be aware of whistleblowing, live grievances and legacy rights. First of all, whistleblowing: UK employment law seeks to encourage people to raise concerns where there are legal breaches within their organisations. The way the law does this is by providing enhanced protection to workers who have blown the whistle against dismissal and detriment. So it's important to ensure that blowing the whistle does not lead to a detriment or exit. For example, being branded as a troublemaker or not a team player, which puts them into a performance process, but which is tainted by that complaint. Secondly, live grievances where someone has a live ongoing complaint. Be mindful of this. That's not to say they are ring-fenced from any process of performance management or restructuring, but it does add a layer of potential risk and complexity, especially where the ongoing grievance is somehow related. For example, a complaint about the manager or complaint about workplace stress. And finally legacy rights. If your business is one that has been acquisitive and has had a history of restructuring. You may have employees or groups of employees who have carried different rights with them through their employment history. Some may have legacy redundancy rights. Some may have specific contractual rights and differences. And you need to know what applies to the individual rather than assuming anything before taking any steps which may trigger or be impacted by these rights.

Ellie: And another tricky thing that we often see crop up in redundancy procedures is when an employee makes a data subject access request. We often refer to these as DSARs. So just explain what these are and what an employer's obligations are.

Charlotte: These commonly arise in the context of a redundancy situation and it is important not to ignore them. Usually a DSAR will come before any tribunal proceedings where relevant documents are disclosed. So it is important not to miss any data that should have been provided in the response of a DSAR if it will eventually come out in disclosure. The majority of DSARs, unless they are complex, have a hard deadline of one month from receipt, which includes reviewing all the data that is responsive to the DSAR, applying redactions and preparing the bundle for disclosure. With complex DSARs, the deadline is three months from receipt, but this is still often very tight so time is valuable and preparing a response to the DSAR will run simultaneously to the ongoing redundancy consultation process. A DSAR is limited only to information that contains the personal data of the person making the DSAR, but sometimes this name is mixed with other third party personal data that may be disclosable either with consent of the third party or where you decide it's reasonable to disclose without consent, or you could disclose but redact all third party personal data. You should keep records of any decision not to disclose certain data so that if you rely on this and such a decision is subsequently challenged in litigation - and you can legitimately omit information that is legally privileged, or if it contains discussions around settlement negotiations about a dispute involving the individual in question.

Ellie: And going back to discrimination risks and getting the redundancy process wrong. Let's put that into context then, give us some figures of where employers have got it wrong. What have they faced in a tribunal?

Charlotte: So to give you an idea, the highest compensatory award for unfair dismissal in 2021-2022 was £165,000. We talked about the risk of discrimination where potential discrimination claims are missed in cases of poor performance. This can lead to expensive cases where compensation is unlimited. The maximum compensation awarded in 2021-2022 was £228,117 for a race discrimination case. The second highest discrimination award was for £225,893in a disability discrimination case. Cost is not the only consideration. Tribunal proceedings are time consuming and involve staff having to give witness evidence and be cross-examined by lawyers and asked questions by the Employment Tribunal panel, which can be incredibly stressful.

Ellie: Absolutely. It's not just the financial side of things, is it? And so let's take a deep dive then into this topic. We've devised a hypothetical scenario of an underperforming employee in a redundancy situation, which I'm going to read out now. So Karl is overseeing the restructure of his team because there's been a change in website platform that means less staff are required in his team. 23 members of the team are at risk of redundancy, one of whom is Meera, who's worked for the business for ten years. Steve is Meera's team leader and he emails Karl his thoughts on who should be selected for redundancy. Steve mentions Meera has been consistently underperforming for many years and would not be up to one of the new roles. Steve has not raised this with Meera. He says, and I quote, "I worry about saying the wrong thing because Meera is

one of only three in my team who is from an ethnic minority." Based on what Steve says, Karl agrees Meera "won't fit in" to the reorganised team and should therefore be selected for redundancy. When Meera learns she's been selected for redundancy, she's incredibly upset. She raises a grievance and she complains that the process was unfair. And she also sets out a number of instances over the last year, which she says amounts to race discrimination, and she also submits a data subject access request. So an awful lot going on here. Charlotte, talk us through what the pitfalls are here.

Charlotte: It's mentioned in an email that Meera has been consistently underperforming for many years, but there is a distinct lack of evidence of Meera's poor performance. So how should Meera's capability have been managed? Well, if Steve genuinely and reasonably believed that Meera was incapable of doing her job to the required standard, this should have been dealt with at an early stage. There has been no attempt to give Meera a chance to improve or receive further training to support.

Ellie: And part of that fair capability procedure would have been to investigate the reasons why her performance was not acceptable. What would a reasonable investigation look like here?

Charlotte: Exactly. So a reasonable investigation should have been undertaken to make sure capability is the reason for the issues in question. Is anything else at play that needs to be addressed instead of or in addition to Meera's capability? For example, ill health, poor management, excessive workload, caring responsibilities, anxiety, or struggling to adapt to working from home, since the pandemic? As an example, if disability is the reason for or an exacerbating feature of Meera's poor performance, the employer will need to comply with the Equality Act to avoid a claim for disability discrimination. Steve may, for example, need to consider reasonable adjustments to remove or minimise any disadvantage suffered when assessing Meera's performance.

Ellie: Okay, so that that would have been a fair capability procedure. Let's now bring it back to the redundancy procedure then. So what's wrong here.

Charlotte: On the facts, given there has been a total lack of fair procedure, Meera's selection for redundancy has been made in the absence of applying objective criteria. And so there is a real risk that Meera will seek to issue a claim for unfair dismissal before an employment tribunal. There are definitely diversity and inclusion issues here, specifically unconscious bias and microaggressions. There is possible race discrimination. If, because of her race, Meera is treated less favourably, the Equality Act defines race as including colour, nationality and ethnic or national origin. And the less favourable treatment does not have to be because of Meera's own race. It may refer to Meera's perceived race. Whether or not that perception is correct, and as we've already mentioned, there is no limit to compensation for unlawful discrimination.

Ellie: Okay. And there's quite a few other red flags, aren't there, aside from the very obvious discrimination angle. So just tell us about those.

Charlotte: Yes. So if the employer is proposing to make more than 20 dismissals, it will need to meet its collective consultation obligations. The email from Steve to Karl will be disclosable in employment tribunal proceedings, and it is evidence of a predetermined decision by someone other than the dismissing manager. The fact that Meera has submitted a data subject access request means that she will likely receive a copy of Steve's email early in the proceedings. Lastly, Meera has raised a formal grievance. This adds a layer of potential risk and complexity, particularly when considering whether to deal with the grievance as part of the redundancy process or separately.

Ellie: And just to look at the human side of this now, Charlotte, because in factanyone really facing a potential redundancy is it's going to be a massive blow. I just wanted to get your thoughts on the mental health side of things and how employers need to factor that into their redundancy process.

Charlotte: Thanks, Ellie. And that's something that we've discussed in our team, because I recently saw an article on LinkedIn about this topic, and it raised important questions about an employer's duty of care and how to protect the health, safety and wellbeing of an employee that is faced with redundancy. With the current cost of living crisis, this is an issue that employers having to make redundancies may face more frequently. Knowing how to respond to such a sensitive situation should be an integral part of an employer's redundancy planning.

Ellie: Absolutely. We've seen some really sad things on social media about that. The impact it can have on someone's mental health and in some cases people feeling suicidal, so really important to bear that in mind.

And so if you were to give your key practical takeaways, then for listeners of the podcast, what would they be?

Charlotte:	My key practical takeaways would be to look for evidence of duties and responsibilities, to gather evidence of poor performance, be alive to potential discrimination risks, and other individual red flags that we've discussed, such as whistleblowing, live grievances and legacy rights, treat all underperforming employees with dignity at all times. And lastly, avoid written notes, emails or correspondence that you would not want to be disclosed at tribunal. It is the "would you shout it in a crowded office?" litmus test
Ellie:	Absolutely. I think that's a great phrase to end with, Charlotte! Thank you very much for joining us today and talking us through the range of potential red flags that can come up and things to be aware of right at the outset of your redundancy process.
Charlotte:	Thank you, Ellie.
Ellie:	If you would like to revisit anything we discussed today, you can access transcripts of every episode of The Work Couch podcast by going to our website www.rpc.co.uk/theworkcouch or if you have questions for me or any of our speakers or perhaps you've got suggestions of topics you'd like us to cover on a future episode, please do get in touch. You can email us at: theworkcouch@rpc.co.uk. We'd really love to hear from you. Thank you for listening and we hope you'll join us again in two weeks.

RPC is a modern, progressive and commercially focused City law firm. We are based in London, Hong Kong, Singapore and Bristol. We put our clients and our people at the heart of what we do.

© 2023 Reynolds Porter Chamberlain LLP