Lightfoots SOLICITORS

JULY, 2025

EMPLOYMENT NEWSLETTER

Welcome to the latest addition of our employment law newsletter.

In this issue we continue to focus on planned changes under the Employment Rights Bill, this time in relation to flexible working.

Another hot topic for 2025 remains the use of AI in the workplace. We look at key issues for employers in this fast developing area.

Finally, we also explore the redundancy case of De Banks Haycocks v ADP RPO UK limited.

So grab yourself a cooling refreshment and enjoy the read.

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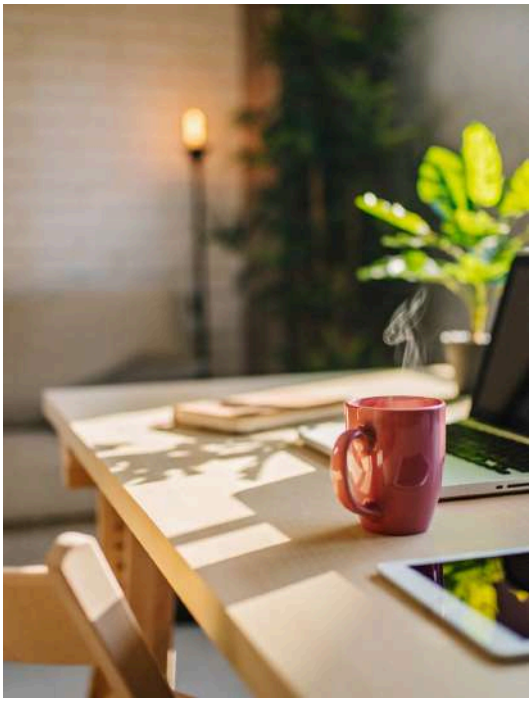
THE RIGHT TO FLEXIBLE WORKING

All employees have the right to make a flexible working request, indeed two formal requests in any 12-month period. This could include requesting a change to the number of hours worked, when hours are worked, or even work location. The request could be for either a permanent or temporary change.



To take advantage of this statutory right, employees should make their request on a formal basis. The request must be in writing and confirm it is being made as a statutory request. It must specify the change(s) requested and when they wish them to take effect. They must also state if they have made any previous requests in the last 12 months.

When receiving such a request there are then statutory obligations on you as the employer. You must respond to the request (including holding any appeal) within two months of the date of the request, unless an extension is agreed. If you cannot easily agree the request, you will need to consult before rejecting it. Requests can also only be rejected on one or more of eight permitted business reasons.

If a flexible working request is ignored, not dealt with in time or wrongly refused, the disgruntled employee will have a right to make an employment tribunal claim for a declaration and compensation. Depending on the circumstances an employer may also inadvertently open itself up to other claims, such as discrimination or constructive dismissal.

So how is this current process going to change under the Employment Rights Bill?

Presently whether or not an employer can refuse a request depends on the subjective views of the employer. If they consider one or more of the permitted business reasons apply, they can refuse the request.

When the relevant section of the Employment Rights Bill becomes law, a test of reasonableness will kick in. So not only will the employer need to show that they believe one of the permitted business reasons for refusal apply, but that it is reasonable for them to form that view which will need to be set out in the refusal letter. We may also see further legislation setting out a specified consultation process for employers to follow before refusing a request.

In their Manifesto and Plan to Make Work Pay prior to the General Election, Labour pledged to make flexible working the default position, albeit appreciating there may be circumstances where this is “not reasonably feasible”. Whilst the above change will not actually make flexible working the “default”, it will become harder to refuse a request in the future. Employers should expect their decisions to be subject to greater scrutiny.

For any employers not familiar with their obligations when it comes to flexible working requests, do get in touch. We can offer a handy guide, template letters, plus any other support required to help you limit your risk of being on the receiving end of a tribunal claim.

AI IN THE WORKPLACE – WHAT ALL EMPLOYERS NEED TO KNOW

Use of artificial intelligence (AI) in the workplace is becoming increasingly common. A survey conducted by Software AG last year found that 75% of employees who are primarily office-based use non-company issued AI tools in their employment, with this figure predicted to rise to 90% in the near future.

Using AI tools can help streamline processes, as well as save time and costs, but it becomes problematic when used inappropriately.

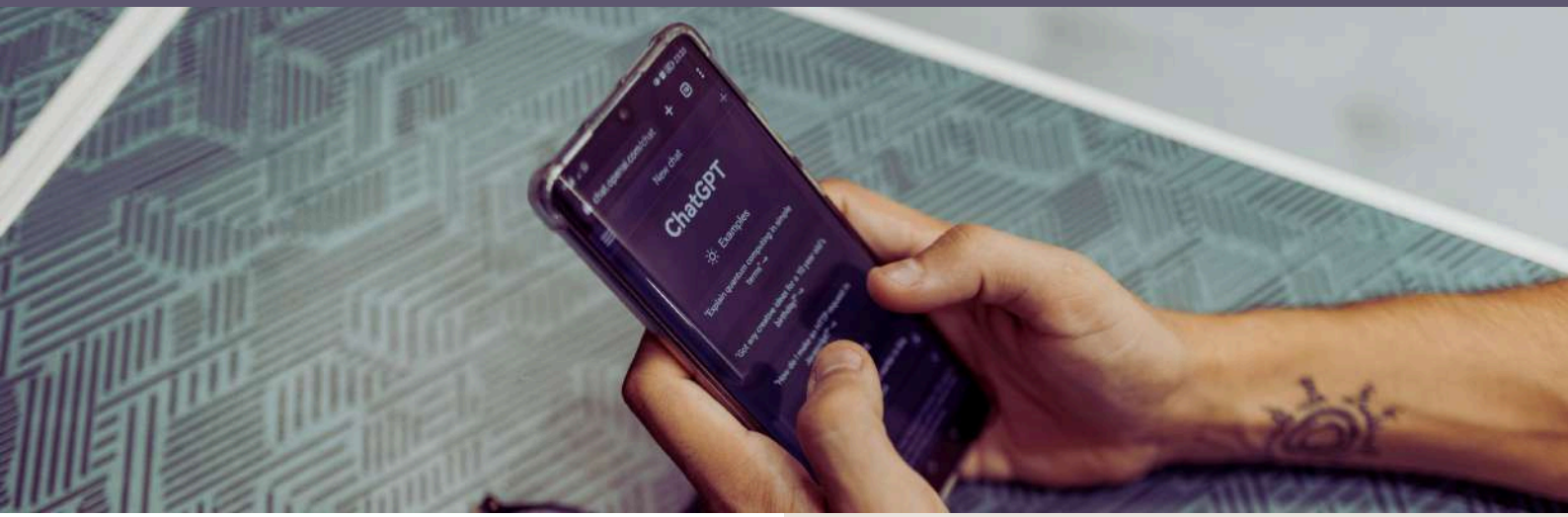
A survey carried out by The Conversation UK found that 48% of employees surveyed had uploaded sensitive company or customer information into public generative AI tools at some point during employment. This is especially concerning given AI tools normally work by storing the information fed into it, which becomes part of the algorithms the tool trains itself on, so that information can then be utilised and shared with other users.

This leaves businesses vulnerable to data breaches, as well as risking damage to reputation and wider legal consequences if the confidential data of clients, customers, suppliers or employees is input into AI tools. Samsung experienced this issue in 2023 when employees came under fire for feeding highly confidential information into ChatGPT, which was subsequently output to other users of the tool. Given Samsung operates in such highly competitive industries the potential consequences were disastrous, and they banned their employees from using AI tools altogether.

BBC News reported on an interesting incident last year where a business (identity not disclosed) hired an individual for a remote developer role. His CV was meticulous, he performed well in the virtual interviews, he passed the necessary onboarding checks and was subsequently hired. Around four months into his employment the business dismissed him due to poor performance.

They then received ransom emails revealing that he had stolen company software and data, and demanding a six-figure sum otherwise the information would be sold. After investigation, the business discovered that this "employee" never actually existed – the CV was produced by AI, the interviews were conducted using deepfake AI technology, and the onboarding checks were bogus. A cyber criminal based in North Korea had used AI to create an entirely fake person with the intention of infiltrating the business to steal their data. Whilst this is an extreme example of how AI could be used to harm a business, employers need to be alive to the abilities of AI and the ways in which it can be utilised by individuals.

Employers should also be careful when using AI for their own internal purposes such as screening job candidates or ranking employees in a redundancy scenario. A few years ago Amazon came under fire when the AI tool they used to vet job candidates' CVs was unintentionally downgrading female applicants. The algorithms developed over a ten-year period saw more data from male applicants, so the AI tool had effectively trained itself to unconsciously favour male job applicants, which left Amazon open to potential claims for sex discrimination. Where AI use is permitted in the workplace it is crucial to recognise that it's an ever developing and self-training tool, and manipulation of the output is possible.



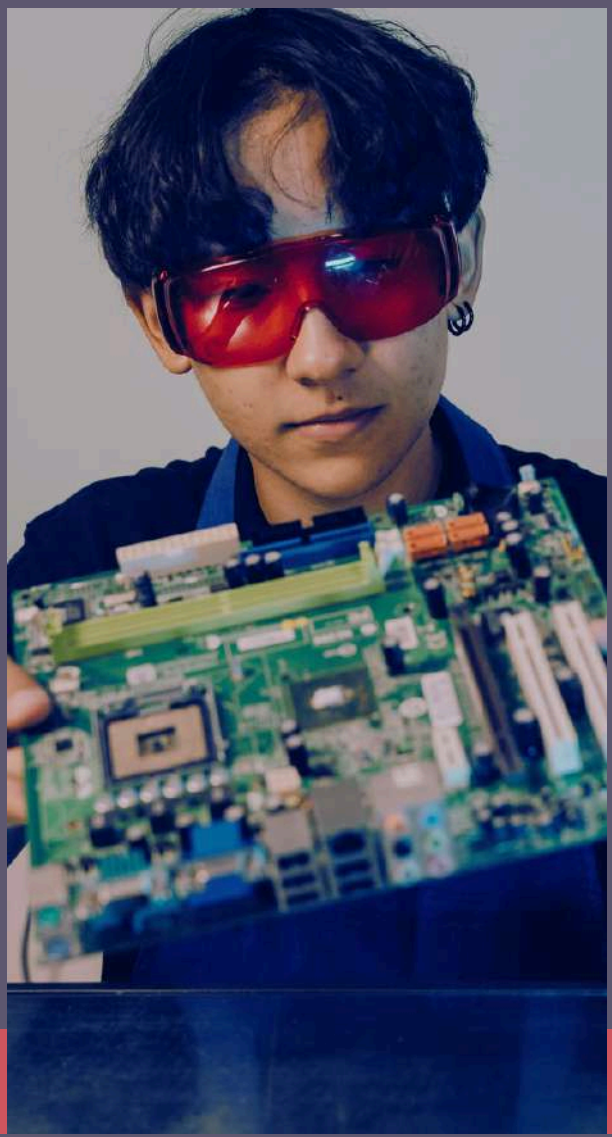
"AI error" is not an employment tribunal defence and will not cut it in front of a judge. You, as the employer, are ultimately responsible for auditing the systems you choose to implement and how any output is used. Human review remains an important aspect of AI use to ensure the content produced is appropriate and not in breach of any regulatory or legal obligations.

We are also seeing an increasing number of situations where AI is taking over the job of human employees, inevitably resulting in redundancies. It remains crucial for employers to follow a redundancy process to ensure any dismissal is fair, and redundancies should only be made where there is a genuine business need to do so, or you risk tribunal claims.

Employers should also prepare for AI to be used more frequently when raising grievances. The Harvard Business Review recently reported that using AI to make a complaint ranked number 23 out of a top 100 uses for the technology.

In practical terms, it's now easier than ever for employees to produce a grievance via AI. Additionally, if your business uses AI then you may see a trend in grievances being raised to challenge any influence AI has over a scenario or decision.

Whether or not you permit the use of AI by employees at work we strongly encourage getting an AI usage policy in place to set out the scope of use and any limitations, tailored to your business and industry specifically. Having company-approved AI tools can help employers to safely manage use.



We would also recommend updating your employment contract templates and employee handbooks to reflect the confidentiality and intellectual property obligations for any permitted AI usage. If your business uses AI for internal purposes, e.g. to assist with recruitment and onboarding, then your privacy notices and data protection policies should also be updated to reflect this.

If your business does not permit employees to use AI you may want to consider incorporating this into your disciplinary policy as an example of misconduct and / or gross misconduct depending on the seriousness of actions.

As an employer it is simply not possible to ignore AI. For a bespoke AI policy tailored to your needs, or any other support required, get in touch.

THE REDUNDANCY CASE OF DE BANK HAYCOCKS V ADP RPO UK LTD

The Employment Rights Act 1998 sets out five potential grounds where it can be fair for an employer to dismiss one of their employees (those who currently have two or more years' service). One such ground is redundancy. For any redundancy dismissal to be fair an employer also firstly needs to follow a fair process. For 20 or more redundancies a collective consultation process also applies.

The facts of Mr De Bank Haycock's case

Mr De Bank Haycocks was part of a 16-person team from which redundancies were required. Before any redundancy consultation commenced scoring of the team against a standard matrix took place. Mr De Bank Haycocks scored lowest. Once the number of redundancies had been decided, consultation commenced.

Following two consultation meetings Mr De Bank Haycock's redundancy was confirmed. During the consultation process Mr De Bank Haycocks was given details of the scoring matrix used but, due to oversight by the employer, not his actual scores. The script used at the start of the consultation process inferred scoring was yet to take place.

Mr De Bank Haycocks appealed. It was only at that point he was given his scores. The appeal raised concerns about the pool chosen, the matrix used and scores received, including the lack of opportunity to challenge the pool or scoring result. He also raised other concerns, namely that he believed someone he had fallen out with had interfered with the selection process.

Following the appeal meeting, the scoring manager was asked to reassess Mr De Bank Haycocks against the criteria as well as asked about the potential input of others, which was denied. No changes to his score were made, with the appeal dismissed.

Mr De Bank Haycocks presented an unfair dismissal claim. He both challenged whether redundancy was the real reason for his dismissal and, if so, the fairness of the selection process including the fact his scores were not shared prior to his dismissal so he did not have the chance to challenge them.

The tribunal's original decision

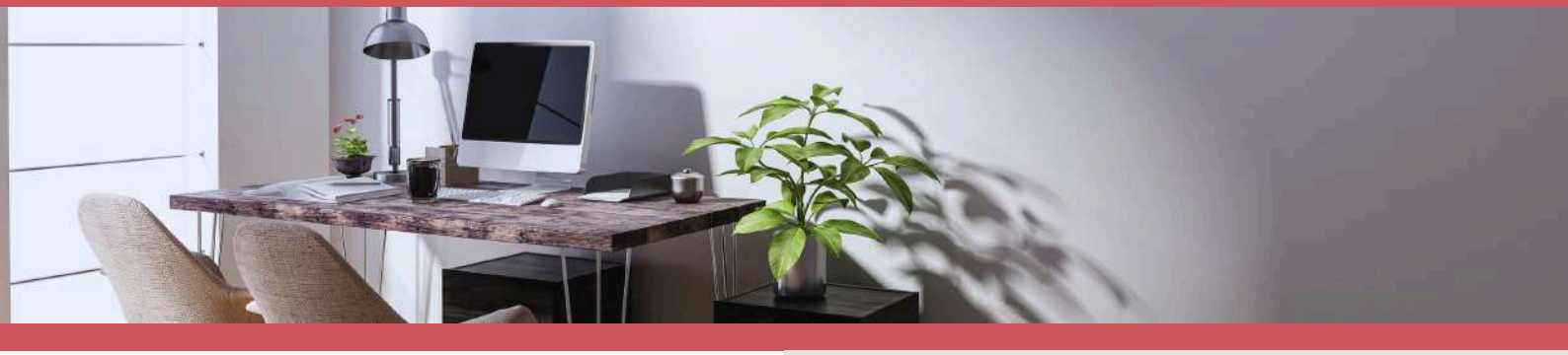
After hearing all the evidence Mr De Bank Haycock's claim was dismissed. Whilst Mr De Bank Haycocks was only provided his scores late in the process the tribunal found there had been a "conscientious investigation" into his concerns at the appeal stage. He was also unable to establish that he should have scored higher, or sufficiently so to make any difference to the outcome.

Subsequent appeals

The Employment Appeal Tribunal (EAT) disagreed with the tribunal judge and substituted a finding of unfair dismissal. The EAT took issue with the fact consultation did not take place at a formative stage, so before any scoring took place. An employee should be given adequate information and time to respond, with genuine consideration given to any matters raised by the employee. The EAT also felt the appeal process did not correct this failure.

However, on further appeal the Court of Appeal upheld the original decision and dismissal of Mr De Bank Haycocks' claim. Whilst acknowledging matters of best practice when it comes to redundancy consultation, even small-scale ones, it was felt that the original tribunal's failure to consider Mr De Bank Haycock's concerns regarding the timing of the scoring did not render the original decision unsound, given its findings in relation to the employer's handling of Mr De Bank Haycock's appeal against his dismissal. The tribunal judge was therefore entitled to find, overall, that the employer had conducted a fair redundancy process.

Mr De Bank Haycocks has since sought permission to appeal to the Supreme Court. This has, however, recently been refused.



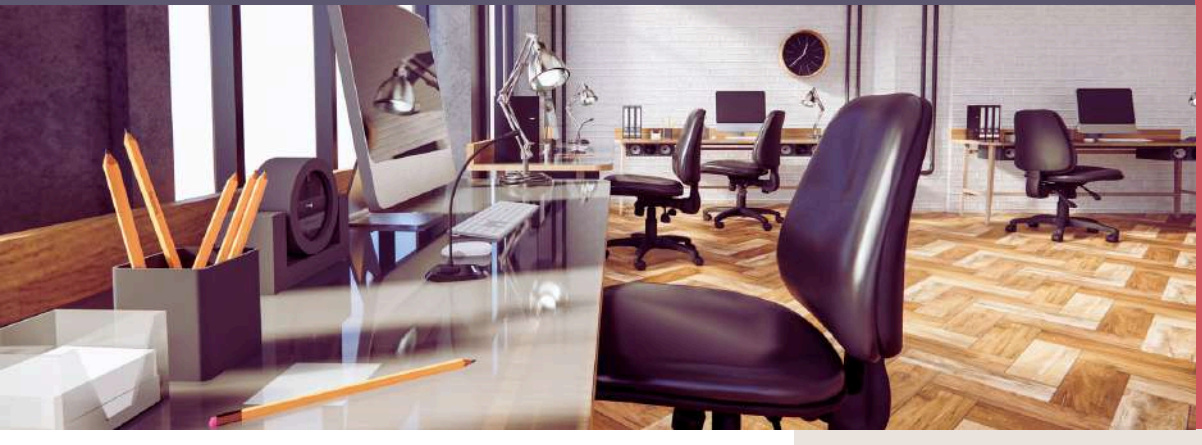
Key points for employers

Whilst this case confirms that scoring before any form of consultation has started will not automatically render a dismissal unfair, such actions should still be approached with caution. Whilst upholding the dismissal of Mr De Bank Haycock's claim the Court of Appeal acknowledged such a step as bad practice.

It also needs to be appreciated that the employer here, in effect, only avoided a finding of unfair dismissal because of the steps they took on appeal. Mr De Bank Haycock was also unable to establish that he should have scored higher, or sufficiently so to make any difference.

Where there has been a scoring exercise to determine who should be provisionally selected for redundancy, it clearly remains best practice to share those scores before taking the decision to dismiss, not just at an appeal stage! You do not, however, need to share everyone else's scores.

As the Court of Appeal acknowledged consultation should take place at a point when "the employee can realistically still influence the decision".Ultimately significant risks remain if employers get it wrong, and early legal advice should always be taken.



HOW CAN WE HELP?

We can help with any employment law needs, but we thought it would be useful to summarise some specific assistance we can provide if you come across any issues or needs relating to the content of this newsletter. Please do get in touch with us if that's the case (contact details below):

- We can provide guidance and support when it comes to flexible working requests, including helpful "How To" guides and template letters;
- We can help you successfully navigate the complexities of employment law should you unfortunately need to make redundancies;
- We can help you put in place an AI policy for your staff protecting you from the issues highlighted above, as well as updating your employment contracts and privacy notices; and
- We offer a full legal representation service if tribunal proceedings need to be issued or defended, providing straight forward pragmatic advice on your options.

You should seek legal advice before relying on the content of this newsletter as every situation is different and employment law is ever changing.

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