REDUNDANCY

Collective Consultation – An Update

June 2011

1. 2010 proved to be an interesting year for employment lawyers advising on the application of the collective redundancy procedures under the *Trade Union and Labour Relations (Consolidation) Act 1992* ("TULRCA"). The EAT, the Court of Appeal and, indeed, the ECJ have all considered issues arising in connection with collective consultation, both domestically and under the *Collective Redundancies Directive (No. 98/59)* (the "Directive). And 2011, thus far, has also seen tribunals and appellate courts grappling with the meaning and effect of the collective consultation obligations in UK and EU law.

2. This paper, therefore, focuses on some of the recent developments in the case law about collective consultation. And it refers to aspects of the collective consultation framework, highlighting certain of the requirements which have triggered debate as to both scope and interpretation.

Background:

3. The statutory duties on employers to inform and consult the workforce about proposed redundancies, which are now contained in Part IV, Chapter II of TULRCA, were introduced in order to implement the mandatory provisions of the EU Collective Redundancies Directive (No.75/129), since replaced by the Collective Redundancies Directive (No.98/59). The provisions were amended on various occasions during the 1990s as a result of challenges as to whether they properly implemented the 1975

Directive. The position now is that, where the employer is proposing to dismiss as redundant at least 20 employees, it must consult a recognised trade union where there is one. If there is no recognised union, the employer must consult instead with "employee representatives" who may have to be elected especially for the purpose of redundancy consultation if not already in existence. Failing any election of employee representatives, the long-stop duty is for an employer to provide certain prescribed information to all the individual "affected" employees. This means that the consultation duty encompasses any employees who are directly or indirectly affected by the proposed redundancies (including any measures taken in connection with those redundancies), rather than just those employees who might be dismissed as redundant. So it may well extend to those employees who will not be dismissed but whose jobs may otherwise be affected by the redundancy exercise.

Dismissal by reason of redundancy:

4. Dismissal is to be construed in accordance with the Employment Rights Act 1996 ("ERA") and so covers the expiry of fixed term contracts and constructive dismissals but not short-time or lay-off situations. The fact that "dismissal as redundant" encompasses those dismissals which are effected as a result of non-renewal of fixed-term contracts was made clear in the case of *Lancaster University v The University and College Union UKEAT/0278/10 (unreported, 27th October 2010)*.

5. Redeployment[1] may amount to a "dismissal" for the purposes of the collective consultation provisions as does voluntary redundancy[2] as illustrated by a very recent EAT case which demonstrates the importance of looking at the real reason for the dismissals of employees which take effect at about the same time as a redundancy exercise[3]:

Graff Diamonds Ltd v Boatwright UKEAT/0148/10/RN (unreported, 4th February 2011)

6. The appellant employer (G) had embarked on a programme of redundancies during the economic downturn. It had sought to make 19 of its employees redundant, having

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[1] *Hardy v Tourism South East [2005] IRLR 242 EAT*
[2] *Optare Group Ltd v Transport and General Workers' Union [2007] IRLR 931 EAT*
[3] Note that s.195(2) of TULRCA imposes a presumption that a dismissal or proposed dismissal is for redundancy (so an employer has the burden of proving what the real reason is)

chosen that number so as to stay below the 20 employee threshold and so avoid the consultation duties under s.188 of TULRCA. A total of 20 employees, however, left G's employment. While it was common ground that 19 employees had been made redundant, there was a dispute about the twentieth employee (X). The claimant (B) believed that X had also been made redundant, while G asserted that he had taken early retirement. The tribunal heard evidence from B and from G's chief financial officer (P). It found that X had taken voluntary redundancy but that G had labelled it "early retirement" in order to avoid its collective consultation obligations. It made an award of one month's pay, calculated by reference to the minimum consultation period of 30 days. G submitted that the tribunal's decision was either perverse or insufficiently reasoned. B cross-appealed in respect of the protective award.

7. The EAT allowed G’s appeal on the basis that the tribunal's decision was insufficiently reasoned. There was material on which it could reach the conclusion that X had taken voluntary redundancy because it had not been bound to accept P as a truthful witness and, in those circumstances, it would have been entitled to draw adverse conclusions in respect of the real reason for X’s dismissal. However, from the tribunal’s reasoning, it was difficult to see whether that was the course it had taken. While it had clearly not accepted P’s evidence, it had not said to what extent or why. The EAT, therefore remitted the issue to the same tribunal. G was to provide proper disclosure of the documents relating to the run-up to X's dismissal, and the tribunal was to accept further evidence on the issue. In its decision it was to make it clear what evidence it accepted and why, what evidence it rejected and why, and what inferences it had drawn. On the protective award issue, the cross-appeal was allowed. It was wrong to make a connection between the length of the minimum period for consultation and the amount of the protective award[4].

8. This case well illustrates that it is for tribunals to decide as a matter of fact whether there has been a truly consensual termination of employment and, so, no proposal to dismiss, or whether an employee has volunteered to be dismissed as redundant and so included in the calculation under s.188.

[4] *Susie Radin Ltd v GMB [2004] 2 All ER 279 CA*

9. The duty to consult is triggered in respect of the proposed dismissals of at least 20 employees on the ground of "redundancy" which is defined by s.195(1) of TULRCA. The definition of redundancy for collective consultation purposes differs significantly from the definition in the ERA. S.195(1) provides that:

> **"references to dismissal as redundancy are references to dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related."**

10. This wider definition of redundancy will have important implications. For example, if an employer wishes to introduce fundamental changes to the terms and conditions of potentially 20 or more employees which may lead to the termination of their existing contracts of employment and the issue of new contracts incorporating the proposed variations, then this would be likely to fall within the s.195 definition of redundancy (because the dismissals were not related to the individual(s) concerned), though not satisfying the usually understood meaning of redundancy in the ERA. The consultation procedure in TULRCA would be triggered where the employer was proposing fundamentally to change the contractual terms of more than 20 employees even if the process of varying the employees' terms and conditions, in fact, led to fewer than 20 employees being dismissed and offered re-engagement on the new terms[5].

Timing of the collective consultation procedure:

11. Where an employer is "proposing to dismiss as redundant" 20 or more employees at one establishment within a period of 90 days or less, s.188(1) provides that the employer must consult the appropriate representatives of the employees affected by the redundancies. The consultation must begin "in good time" and, in any event, at least 90 days before the first dismissals take effect where 100 or more redundancies are proposed and, otherwise, at least 30 days before[6]. The requirement to begin consultation "in good time" derives from Article 2(1) of the Directive which does not otherwise set out any specific time limits. This may mean that more than 90 days (or 30 days) of consultation is required, depending on the facts of the particular case[7].

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[5] *GMB v Man Truck and Bus UK Ltd [2000] ICR 1101 EAT*
[6] Section 188(1A) of TULRCA
[7] *Amicus v Nissan Motor Manufacturing (UK) Ltd UKEAT/0184/05 (unreported)*

12. One of the trickier aspects of the timing of the consultation procedure arises in respect of the interpretation given to the phrase “proposing to dismiss”. This has exercised courts and tribunals for a number of years. Historically, it has been decided that the phrase “proposing to dismiss” connotes a degree of decision having been taken[8]. But since then, there has been a recognition that s.188 of TULRCA might be too restrictive given that Article 2(1) of the Directive requires consultation where an employer is “contemplating” collective redundancies.

13. In *MSF v Refuge Assurance plc & Another [2002] ICR 1365*, the EAT accepted that “proposing to dismiss” in s.188 refers to a much more certain state of mind (ie, further along the decision-making process) than is denoted by the word “contemplating” in the Directive and that s.188, therefore, did not properly implement the Directive. In *Junk v Kühnel [2005] IRLR 310*, the ECJ considered the timing of consultation in relation to notices of dismissal but also noted that an employer is taken to be “contemplating” collective redundancies at a point in time when it has drawn up a proposal but no decision has yet been taken. Therefore, the EU consultation obligation arises before an employer has set its mind on dismissal. There is good industrial practice to support such an interpretation – how can consultation be meaningful if an employer has already decided to dismiss?

14. After *Junk*, the EAT has applied a somewhat purposive construction to s.188 by holding that, where a company is proposing one of two possible courses of action, only one of which would involve redundancies, this nevertheless meant it was “proposing to dismiss” under s.188[9]. However, in *UK Coal Mining Ltd v National Union of Mineworkers (Northumberland Area) and Another [2008] ICR 163*, Elias J (then President of the EAT) held that the collective consultation duty will not arise when closure is “mooted as a possibility” but only when “it is fixed as a clear, albeit provisional, intention”. Whilst Elias J considered *Junk* in his judgment, it appears that his construction of “proposing to dismiss” is closer to the actual wording of s.188 and,

[8] *APAC v Kirvin Ltd [1978] IRLR 318 EAT* in which the employer (Kirvin Ltd) was in financial difficulties and attempted to sell its business. When the last potential purchaser withdrew, a receiver was appointed who immediately gave notices of redundancy to the workforce. The issue arose as to whether the duty to consult arose when the employer first contemplated, or ought reasonably to have contemplated, that redundancies would have to occur. The EAT disagreed and held that the employer only proposed to dismiss on the day the receiver was appointed. It stated “*the employer must have formed some view as to how many are to be dismissed, when this is to take place and how it is to be arranged*”.

[9] *Scotch Premier Meat Ltd v Burns and Others UKEAT/1151/99 (unreported)*

therefore, more restrictive than the Directive might require. However, the ECJ judgment in *Akavan* has now thrown into doubt the interpretation of "contemplating" in the Directive and suggests that its meaning is more restrictive than previously thought.

***Akavan Erityisalojen Keskusliitto AEK ry and Others v Fujitsu Siemens Computers Oy [2010] ICR 444 ECJ*:**

15. Although in *Junk*, the ECJ had given consideration to the point in time at which the duty to consult arises under the Directive, it was not until last year, in *Akavan*, that it considered in depth the meaning of the phrase "*contemplating collective redundancies*". Regrettably, however, the decision is not a model of clarity and is somewhat conflicting in places.

16. FSC, the Finnish subsidiary of FSC BV, operated a factory in Kilo, Finland. On 7 December 1999, the executives of FSC BV decided to make a proposal to its directors that the Kilo plant be closed or sold. On 14 December, the directors expressed support for the proposal, but no specific decision on the future of the factory was taken. That same day, FSC proposed consultations with staff, which took place between 20 December 1999 and 31 January 2000. On 1 February 2000 FSC's directors reached a decision to terminate its manufacturing operation in Finland, and it began to make employees redundant a week later.

17. Some of FSC's employees took the view that it had breached the consultation requirements of the Finnish Law on cooperation within undertakings, which implemented the Directive. Their argument was that the final decision in respect of the closure was taken by the parent company on 14 December 1999 – i.e. before consultation began on 20 December 1999. Their claims were rejected all the way up to the Finnish Supreme Court which decided to make a reference to the ECJ.

18. The ECJ began by noting that it was necessary to define the phrase "*contemplating collective redundancies*" in order to ascertain when the obligation to consult over such redundancies is triggered. It was clear from *Junk* that the obligation comes into existence before the decision to dismiss the employees as redundant is taken. However, the ECJ decided that it was also clear that some form of intention to make collective redundancies on the employer's part is necessary to trigger the obligation.

19. In the ECJ's view, there were clear disadvantages to a premature triggering of the obligation, such as restricting the flexibility available to undertakings when restructuring; creating heavier administrative burdens; and causing unnecessary uncertainty for workers about the safety of their jobs. The ECJ also considered that, should consultation begin when decisions that may lead to redundancies are merely contemplated, the relevant factors to be taken into account during the course of that consultation would not be known. In such circumstances, the objectives found in Article 2(2) of the Directive – avoiding termination of employment contracts, reducing the number of workers affected, and mitigating the consequences – could not be achieved.

20. The ECJ, therefore, concluded that the consultation procedure must be started by the employer once a strategic or commercial decision compelling it to contemplate or to plan for collective redundancies has been taken and not when such a decision is merely contemplated. Notably, the ECJ did not consider that the obligation to start consultation depended on the employer being able to supply to workers' representatives information of the type listed in Article 2(3)(b) of the Directive. This was because the wording of the Directive clearly envisioned such information being provided <u>during</u> the consultation process, and not necessarily at the start of that process.

21. The ECJ also had to consider how a parent company's involvement in the process that leads to collective redundancies can impact on the actual employer's obligation to consult. The ECJ noted that under Article 2(4), the obligation only applies to the employer and not the parent company controlling the employer. Where the decision that will lead to redundancies is taken by the parent company, the obligation to consult is triggered when the parent company identifies the subsidiary which will be affected by the redundancies. In the ECJ's view, to conclude otherwise would be to strip the obligation to consult of any meaning: until the subsidiary is identified, it is not possible to identify means of avoiding, reducing the number of, and mitigating the consequences of, collective redundancies.

22. The ECJ then went on to consider the point by which an employer must conclude consultation in circumstances where the decision on collective redundancies is taken by the parent company. The ECJ stressed that the subsidiary must bear the

consequences if a parent company fails immediately and properly to inform it of a decision that may or will lead to collective redundancies. Furthermore, the *Junk* case established that the consultation process must be completed prior to the decision to dismiss the employees. Mindful of this, the ECJ held that, in the case of a group of undertakings, the consultation procedure must be concluded by the subsidiary affected by the collective redundancies before that subsidiary, on the direct instructions of its parent company or otherwise, terminates the contracts of the employees who are to be affected by those redundancies.

23. Parent companies must not, therefore, sit on their hands having made a decision which is likely to lead to collective redundancies in respect of a subsidiary company. Otherwise, a subsidiary will be left with substantial financial penalties for breaching its consultation duties. Interestingly, this principle was already enacted domestically in the UK in connection with the "special circumstances" defence in s.188(7) of TULRCA. This provision provides that, where the decision leading to the proposed dismissals is taken by a person controlling the employer (either directly or indirectly) and that person fails to provide "information" to the employer, then the employer cannot rely on that failure as a special circumstances excusing a lack of compliance with s.188[10].

24. Given that the ECJ in *Akavan* has suggested that the contemplation of redundancies under the Directive requires an *intention* or a plan on the part of the employer to make collective redundancies, some commentators have suggested that this is consistent with the phrase "proposing to dismiss" in s.188 of TULRCA – ie, both the Directive and TULRCA appear to require a clear (albeit) provisional intention (as per Elias J in the *UK Coal Mining* case). However, such optimism has been short lived, given the Court of Appeal's judgment in the *Nolan* case and its view that the decision in *Akavan* was unclear such that a reference to the ECJ was necessary.

***United States of America v Nolan [2011] IRLR 40 CA*:**

25. The short facts of this case are as follows: in March 2006, the US army decided to close its base at RSA Hythe in Hampshire, where about 200 civilians were employed. Consultation with the Local National Executive Council (ie, the employee

[10] *GMB v Amicus and Others [2003] ICR 1396 EAT*

representatives) commenced on 5 June 2006 and dismissal notices were issued on 30 June 2006 with dismissals taking effect on 29 September 2006. Mrs Nolan (who was elected as a representative to the LNEC when the proposed closure was discovered) made a claim to the tribunal for a protective award, alleging that the USA had failed to consult employee representatives as required by s.188.

26. On the first issue as to whether the LNEC members were the "appropriate representatives" for the purposes of s.188(1), the tribunal found that they were and that Mrs Nolan, as an LNEC member, was entitled to bring the protective award claim on behalf of the affected employees under s.188(1)(b).

27. On the second issue as to when consultation should have commenced, the tribunal concluded that, by 5 June 2006, it was too late for any meaningful consultation, the decision to close the base having already been made. The tribunal considered that the collective consultation duty should have been triggered when closure was "fixed as a clear, albeit provision, intention" (as per Elias J in the *UK Coal Mining* case).

28. On appeal by the USA, on the first issue as to whether Mrs Nolan was an "appropriate representative", the EAT concluded that the key question was whether she was elected by the employees affected by redundancy "otherwise than for the purposes of s.188" (so coming within s.188(1B)(b)(i) of TULRCA). If so, then she was an employee representative entitled to be consulted and had standing to bring a claim under s.189. However, if Mrs Nolan had been elected specifically for the purposes of s.188 consultation, then her election would have to satisfy the detailed requirements of s.188A which had not been met in her case. Her consequent lack of standing would invalidate the protective award claim. The EAT concluded that the ET had not made the necessary findings of fact to determine whether Mrs Nolan was elected to the LNEC "otherwise then for the purposes of s.188" and, therefore, remitted this issue to the tribunal.

29. On the second issue, the EAT rejected an argument that the *UK Coal Mining* case only applied to commercial decisions to close a workplace and not to acts of state involving questions of public policy. The EAT pointed out that it had been open to the USA to avoid or defend the claim either by pleading state immunity or the "special circumstances" defence (under s.189) but it had failed to use either of these possible routes. The EAT, therefore, upheld the tribunal's decision on the second issue.

30. The USA appealed to the Court of Appeal which rejected its contention that a foreign sovereign state is impliedly exempt from the s.188 collective consultation duty. The CA observed that there was no indication in TULRCA that an exemption for foreign states existed and, in any event, such an exemption was not necessary since a state's interests are fully protected by a claim for sovereign immunity. The CA held that the USA was now estopped from claiming state immunity because it had unequivocally submitted to the tribunal's jurisdiction over the claim. It is also notable that the CA commented that a decision not to consult over an operational decision of military sensitivity would probably also enable the sovereign state to rely on the "special circumstances" defence (in s.188(7) of TULRCA). However, as the USA had failed to plead this defence, this observation was only *obiter*.

31. On the first issue, as to whether Mrs Nolan was an "appropriate representative", the CA agreed with the EAT that the tribunal needed to make further findings of fact on this matter and so that issue should be remitted.

32. On the second issue, as to when consultation should have commenced, the CA grappled with the ECJ judgment in *Akavan*. It noted that the EAT in the *UK Coal Mining* case had held that both the Directive and s.188 required collective consultation once a clear, albeit provisional, intention to close a plant had been formed. However, the CA considered that the ECJ in *Akavan* may have concluded that the Directive should be interpreted more narrowly than had previously been understood such that the collective consultation duty was only triggered once a decision had actually been made and the employer was proposing consequential redundancies. This would be a later point in time than when an employer proposes, but has not yet made a decision that will foreseeably or inevitably lead to collective redundancies. The CA was able to cite parts of the ECJ's judgment supporting both interpretations. It concluded that it could only decide the issue on appeal with the benefit of further guidance from the ECJ as to the point at which the consultation duty arises under the Directive.

33. The key issue as to the timing of collective consultation is, therefore, still in doubt and the ECJ is unlikely to consider the CA's reference in *Nolan* until late 2011 or 2012. In the meantime, employers should be advised to follow Elias J's guidance in the *UK Coal Mining* case and commence collective consultations at an earlier point in time

(ie, where there are clear, albeit provisional, proposals that, if implemented, will almost inevitably result in redundancies).

Appropriate representatives:

34. Section 188(1B) defines the "appropriate representatives" of the affected employees with whom the employer must consult.

Phillips v Xtera Communications Ltd UKEAT/0244/DM (unreported, 17th June 2011)**:**

35. As is clear from the *Nolan* case, the question of whether employee representatives have been properly elected can be a key issue. A very recent judgment in the EAT considered the meaning of "election" and "elected" in ss.188 and 188A of TULRCA. Briefly, the respondent employer announced the closure of one of its sites with the likelihood of more than 20 employees being dismissed as redundant. Further, the employer noted the need to negotiate with employee representatives and suggested that two representatives would be sufficient. The employees met amongst themselves and nominated two employees to act as their representatives. The employer was notified of the names of the nominees and it sent a communication to all UK staff asking if there was any objection to them being the elected representatives. No objections were made. However, later on the same day, one of the two nominees stepped down and a replacement came forward. Also, a third representative volunteered. The company agreed to a third representative and no objection was made by any employee to these adjustments.

36. Mr Phillips was one of the employees who was subsequently dismissed for redundancy. He made various claims to the tribunal, including for a protective award on the basis that there had been a failure to elect employee representatives under s.188. He contended that there were no elected employee representatives because there had been no election, let alone an election complying with s.188A. The tribunal held that there had been no failure in the election of employee representatives and the claim for a protective award failed.

37. One of the issues in the claimant's appeal to the EAT was whether the provisions of sections 188 - 188A would force an employer to hold a ballot of employees in circumstances where the number of candidates precisely matches the number of

vacancies for elected representatives. On behalf of the Claimant, it was argued that, if Parliament had intended that affected employees could *nominate* or *appoint* employee representatives, then it would have used the words ‘appoint’ or ‘nominate’ in the provisions rather than the word ‘elect’. Indeed, in that respect the Claimant’s counsel drew attention to the distinction between the use of “appointed or elected” in s.188(1B)(b)(i) and the exclusive use of “elected” in section 188(1B)(b)(ii).

38. The EAT accepted that there had been no ballot, vote or counting. It considered the purpose of the provisions in ss.188 – 188A and observed that the aim of the statutory scheme was to ensure that, in larger scale redundancy situations, the interests of the employees were collectively represented by those of their number whom they had chosen to represent them. It noted that s.188A did not expressly require a ballot conducted or a vote undertaken in every circumstance. The EAT did not consider that the statutory language had to be interpreted so as to require a ballot and voting opportunity in circumstances where the number of persons putting themselves forward for election precisely matched the number of representatives. In other words, where there is no contest, there would be no absolute requirement for a ballot.

39. Whilst the EAT’s conclusion is a victory for common sense, it does not sit easily with the natural meaning of the words in s.188(1B)(b)(ii) that the employee representatives should be “elected” by the affected employees in an election satisfying the requirement of section 188A(1). It is not known whether Mr Phillips intends to appeal to the Court of Appeal. But that would seem unlikely given the EAT’s observation that, even if it were wrong on the issue of whether there had been a failure in the election of employee representatives, this would be a case where a tribunal would be unlikely to exercise its discretion to order a protective award in any case.

Afterword on the *UK Coal Mining* case – the substance of collective consultation: does an employer have to consult about the reasons for the dismissals?

40. Section 188(2) of TULRCA provides that consultation must be about ways of avoiding the dismissals; reducing the number of employees dismissed; and ways of mitigating the consequences of the dismissals. The first of these consultation obligations was at issue in the *UK Coal Mining* case. This obligation was not contained in the original enactment of s.188 which only required the employer to consult representatives

about the dismissals. Section 188 was amended in 1995 following the case of *R v British Coal Corporation and Another ex parte Vardy [1993] IRLR 104* in which the Court of Appeal held that the employer was not obliged to consult about the reasons for the decision to close the mine.

41. The facts of the *UK Coal Mining* case are as follows: UK coal owned Ellington colliery in Northumberland. On 12 January 2005, water began to rise quickly at a coal seam. The managing director told NUM representatives at a meeting on 26 January that the mine would be closed on both safety and economic grounds. The NUM requested a full 90 day consultation period. A report which was not shown to the NUM stated that the water did not, in fact, pose any danger to the miners. On 16 February, the Unions were told that the full 90 day consultation period would not be complied with because the closure resulted from the inrush of water which could not have been foreseen and 150 men were made compulsorily redundancy on 26 February 2005.

42. The tribunal found that there was no credible evidence that the reason for the dismissals was safety and, rather, the real reason was economic. Therefore, there had been a breach of s.188(4)(a) which required the employer to disclose in writing the reasons for its proposal to dismiss. However, the tribunal held that it was bound by the dictum in *ex parte Vardy* that the employer was not obliged to consult about the reasons for the closure of the mine. The employers appealed and the Unions cross-appealed on the *Vardy* point.

43. The EAT dismissed the employer's appeal and allowed the cross-appeal. The EAT accepted that s.188 had been amended since *Vardy* and now imposed an obligation on the employer to consult about ways of avoiding the dismissals. This inevitably involved engaging with the reasons for the dismissals which, in turn, in this case required consultation over the reasons for the closure of the mine. The EAT pointed out that strictly speaking s.188 required consultation about the proposed dismissals, not the closure leading to the dismissals. Therefore, where an employer planned a closure but did not believe that this would result in redundancies, then there would be no need to consult over the closure itself. However, this would be extremely rare as most closures would involve redundancies.

44. Consequently, according to the EAT, the extent of the duty to consult under s.188(2) about the reasons for a proposed closure will arise when dismissals will "*almost inevitably result from the closure*". The concept of 'dismiss as redundant', of course, includes dismissal and re-engagement on new terms and conditions or redeployment (ie, termination of an existing contract and re-engagement under a new contract). Therefore, it is to be anticipated that most workplace closures will inevitably lead to dismissals, given the wide construction given to that term.

45. Given that the reasons for a workplace closure will now, in many cases, form part of the substance of the consultation duty, it begs the question as to what depth of information and consultation is needed to satisfy the requirements of s.188. For example, will the "appropriate representatives" be entitled to the same sort of information as would be given to an internal decision-making body? If so, employers will understandably be concerned about disclosing commercially sensitive information. There is no equivalent in TULRCA to the statutory duty of confidentiality contained in the *Information and Consultation of Employees Regulations 2004* and, of course, the obligations under the *ICE Regs 2004* cease once an employer is under a duty to consult under s.188 of TULRCA[11]. This only leaves the common law to protect an employer in respect of confidential information given in pursuance of the s.188 duty.

Timing of dismissal notices:

46. Courts and tribunals in the UK have consistently emphasised that consultation must begin before dismissal notices are sent out and that an employer could not legitimately send out dismissal notices the day after consultation began. This is because consultation must be sufficient and meaningful. If notices of dismissal can be issued at the start of the consultation process, then that process is likely to be a sham exercise[12]. However, this suggested that in a 90 day consultation process, so long as the consultations had reached a meaningful stage, notice of dismissal could be given towards the end of the consultation process (eg, after 60 days) but before the 90 days were completed.

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[11] See Regulation 20(5)(a) of the Information & Consultation of Employees Regulations 2004 and Elias J's comment to that effect in the *UK Coal Mining* case.

[12] *NUT v Avon County Council [1978] ICR 626 EAT* and *TGWU v Ledbury Preserves (1928) Ltd [1985] IRLR 412 EAT*

47. In *Junk*, the ECJ held that an employer was not entitled to give notice of termination until after the conclusion of the consultation procedure set out in Article 2 of the Directive. The ECJ considered that notification to a worker that his contract of employment has been terminated (though with notice) is a communication of a decision to sever the employment relationship and the actual cessation of that relationship on the expiry of the notice period is no more than giving effect to that decision. Therefore, for the purposes of the Directive, running the consultation period alongside the notice period was incompatible with the Directive.

48. Employment advisers initially considered that *Junk* meant that notices of dismissal had to be served at the conclusion of the 90 (or 30) day consultation period. However, that is probably not correct. Whilst TULRCA lays down minimum consultation periods of 30 or 90 days, the Directive does not, only requiring that consultation begins “in good time” and with a view to reaching an agreement. Therefore, so long as the consultation has either resulted in agreement with the employee representatives or has otherwise reached its conclusion, then there is no reason why an employer cannot give notice of dismissal during the 30 or 90 day period, but taking effect at the end of the minimum consultation period. The BIS Guidance replicates this position[13]. It should be pointed out that, in a 30 day consultation period, it is more likely that notices of dismissal will need to be issued at the end of the period as it is unlikely that substantive consultation will have taken place before the end of that period. If there is any overlap between the notice period and the substantive (ie, meaningful) consultation, then the process is likely to be incompatible with the Directive, and this risks a protective award being ordered which can prove very costly. Therefore, in 30 day consultations, it is best to err on the side of caution and advise employers to issue their dismissal notices at the end of the 30 day period.

49. The consultation must be meaningful and with a view to reaching agreement with the employee representatives. This requires employers to engage actively with employee representatives when discussing options such as alternative work patterns, job share proposals and other voluntary measures. The process should continue until the issues have been aired and the parties have had a reasonable amount of

[13] See BIS Guidance “*Redundancy Consultation and Notification”* (URN 06/1965Y)

time to comment on information provided and the proposals or counter-proposals which have been made[14].

Who has standing to bring a claim under s.189 of TULRCA?

50. A complaint that an employer has failed to comply with s.188 must be brought under s.189 of TULRCA which sets out the category of persons entitled to bring a complaint seeking a declaration and a protective award. A complaint under s.189 must be brought before the date on which the last of the dismissals takes effect or during the period of three months beginning with that date, although tribunals have a discretion to allow complaints within such further period as they consider reasonable if it was not reasonably practicable to present the complaint within three months.

51. It should be noted that s.189(1) which sets out the category of persons who may bring a complaint is also relevant to the extent of the tribunal's power to make an award for breach of s.188. Therefore, since a trade union can only bring a claim in respect of those employees it represents, the protective award will only be payable in respect of those employees represented by the Union in its bargaining unit (whether or not actually members of the Union)[15]. The employees not represented by that Union must bring claims through their employee representatives or, if there has been a failure to elect employee representatives, by the affected employees themselves.

52. Whether or not an individual has standing to bring a claim depends on the kind of failure at issue. This was considered by the Court of Appeal in *Mercy v Northgate HR Ltd [2008] ICR 410*. The claimant, who was dismissed as redundant, brought a claim for a protective award in respect of the employer's failure to provide information to the elected employee representatives. The tribunal made the award but, on appeal, the EAT overturned that decision on the basis that the claimant had no standing to claim under s.189 because the failure related to employee representatives and so had to be brought by one of those representatives and not just an affected employee who was not an employee representative. The Court of Appeal's approach would not appear to contravene the Directive, as is apparent from the *Mono Car Styling* case in the ECJ (see below).

[14] Again, see BIS Guidance (as above)
[15] *Transport and General Workers' Union v Brauer Coley Ltd [2007] ICR 226 EAT*

53. A recent case in the EAT came to the same conclusion in respect of individual employees' standing to bring claims for failure to consult under TUPE: *Nationwide Building Society v Benn UKEAT/0273/09 (unreported, 27th July 2010)*. The EAT held that the individual employees had no entitlement to bring a claim for a failure to consult in a case in which employee representatives had been elected.

***Mono Car Styling SA v Odemis and Others [2009] 3 CMLR 47 ECJ*:**

54. The ECJ held that the Directive's provisions on consultation were collective in nature and, therefore, intended to be enforced by employee representatives rather than by the employees themselves. Consequently, where national provisions limit or set conditions on an individual employee's right to make a claim, this will not contravene the Directive. Therefore, the only way an individual employee can bring a claim is where there is no recognised Union and no employee representatives have been elected.

"Special circumstances" defence:

55. There is a defence open to employers who have failed fully to comply with the consultation and information procedure in s.188. If there are "special circumstances which render it not reasonably practicable" for an employer to comply with the requirements of s.188(1), (2) or (4), the employer need only take such steps towards compliance with that requirement as are reasonably practicable in the circumstances (s.188(7) of TULRCA). The employer has the burden of proving that it took all reasonably practicable steps (s.188(9) of TULRCA). However, there is no definition of "special circumstances" in TULRCA and it has been left to the courts and tribunals to define the scope of the defence.

***Shanahan Engineering Ltd v Unite the Union UKEAT/0411/09 (unreported, 22nd February 2010)*:**

56. An engineering construction firm which had contracted to work on a new power station was urgently required to reduce the number of workers it had on site to alleviate health and safety concerns caused by congestion and ground conditions. Within three days, it selected 50 employees for redundancy according to agreed selection criteria and dismissed them with one week's notice. The EAT agreed with

the tribunal that “special circumstances” applied to release the employer from the obligation to undertake the full 30 day consultation but that it should still have made some attempt at consultation. Therefore, the “special circumstances” did not constitute an absolute defence in the claim for a protective award. However, the EAT held that the tribunal should have taken into account the existence of the “special circumstances” which existed during part of the 30 day consultation period when assessing the amount of the protective award. In other word, the “special circumstances” whilst not a defence to the failure to comply with s.188 could nevertheless justify an award for a shorter period.

Protective award:

57. If a tribunal finds that an employer has acted in breach of s.188, it must make a declaration to that effect and “may” make a protective award under s.189(2) of TULRCA. A protective award is an award of pay to one or more descriptions of employees who have been dismissed as redundant, or whom it is proposed to dismiss as redundant and in relation to whom the employer has failed to comply with the requirements of s.188 (see s.189(3) of TULRCA). However, this would appear to mean that whilst an employer is now required to consult with all “affected” employees (including those the employer does not intend to dismiss as redundant), and those employees are entitled to bring a complaint of failure to consult, they have no right to receive a protective award. This would seem anomalous but has not been challenged.

58. The award is for a “protected period”, beginning with the date on which the first of the dismissals take effect or the date of the award whichever is the earlier and continuing for as long as the tribunal decides is “just and equitable”, subject to a maximum of 90 days and having regard to the “seriousness of the employer’s default”.

59. Previously, s.189(4) related the protected period to the number of employees that the employer proposed to dismiss, so that an award of 90 days was only possible in cases where 100 or more employees were to be dismissed. That is no longer the case.

60. In *Newage Transmission Ltd v TGWU UKEAT/0131-32/05 (unreported, 25th May 2005)*, the EAT rejected an argument that, despite the amendment to s.189(4), the maximum award in a 30 day consultation period should still be 30 days. The EAT held that a protective award is punitive rather than compensatory and so should be subject to the maximum compensation permitted by Parliament. The correct approach, where there has been no consultation, is to start with the maximum period of 90 days and reduce it only if there are mitigating circumstances justifying a reduction to an extent to which the tribunal considers appropriate. Therefore, an employer who proposes to dismiss between 20 and 100 employees as redundant and who fails to consult will be likely to have to pay protective awards of 90 days' pay, even though the consultation period would only have been 30 days[16].

***Lancaster University v The University and College Union UKEAT/0278/10 (unreported, 27th October 2010)*:**

61. In this case, the EAT upheld a tribunal's decision to reduce a protective award from the 90 day maximum to 60 days' pay in respect of the University's failure to undertake collective redundancy consultation where the failure had effectively been condoned by the recognised trade union. The redundancies (which arose from the non-renewal of fixed term contracts) had happened regularly for over 10 years and the Union had only complained about the consultation procedure when a new branch officer took up post. The EAT placed weight on the fact that, in this case, the University's failure to consult was not deliberate. The EAT was less convinced that a union's previous acceptance of a failure to consult could be a mitigating factor where the employer was aware of its obligation to consult.

Independent Insurance Co Ltd (in provisional liquidation) v Aspinall & O'Callaghan UKEAT/0051/11 (unreported, 2nd June 2011):

62. Where a protective award has been made, remuneration must be paid to all employees who have been or are proposed to be made redundant (and who are covered by the category of person bringing the complaint). This means that where the claim is brought by the Trade Union, the protective award will be in relation to all those in the bargaining unit represented by the Union for the purposes of the

[16] See *Susie Radin Ltd v GMB and Others [2004] ICR 893 CA*

collective consultation process. And where the claim is brought by employee representative(s), the protective award will be in respect of all those represented by the elected or appointed representative(s). But where the claim is brought by an individual claimant, a protective award can only inure for the benefit of that individual claimant (not all affected employees).

63. This was confirmed very recently by the EAT in the *Independent Insurance Co Ltd v Aspinall* case relying on the EAT Judgment (Burton J) in *Transport & General Workers' Union v Brauer Coley Ltd [2007] ICR 226*. The EAT in both these cases rejected a purely literal construction of the words "*in respect of one or more descriptions of employees*" (in s.189(3)) which would seem (on the face of it) to entitle *any* claimant to seek a protective award covering *every* employee in respect of whom the employer has failed to consult. Instead, the EAT concluded that the words in s.189(3) had to be read in their specific statutory context such that a representative claimant could obtain a protective award in respect of all those whom it represents in the litigation whilst a personal claimant could only obtain a protective award for himself. In other words, the EAT was convinced that the gateway through which a protective award was obtained also determined the parameters of the remedy (ie, the class of employee who could benefit from the protective award).

***Canadian Imperial Bank of Commerce v Beck UKEAT/0141/10 (unreported, 24th August 2010*):**

64. The rate of remuneration is one week's pay for each week of the protected period (s.190(2) of TULRCA). A week's pay is defined by ss.220 – 229 of ERA and there is no statutory cap to a week's pay for the purposes of a protective award. If an employee would not have received any pay under the contract whilst employed, s/he is not entitled to anything under the protective award (s.190(4) of TULRCA).

65. In *Canadian Imperial Bank of Commerce v Beck*, the EAT held that, for the purpose of calculating a protective award, a week's pay should refer only to the employee's basic salary and not to any discretionary bonus, unless the bonus has become payable under the contract of employment. Mr Beck contended that the bulk of his remuneration package depended on a discretionary bonus and to exclude the bonus from a week's pay would be to deprive the protective award of its punitive and deterrent effect and would fail to guarantee the effectiveness of EU law. The EAT did

accept that there might be cases in which an employee's basic salary is so small that excluding a discretionary bonus etc from a week's pay might deprive a protective award of its deterrent effect. But this was not the case with Mr Beck whose annual salary was £125,000. Furthermore, at the time of his dismissal, he had not yet become entitled to any decision about his bonus, let alone the value of that bonus.

Cross-over with unfair dismissal law:

66. The extent to which compliance with the collective consultation procedure impacts on the fairness of an individual's dismissal in respect of an ordinary unfair dismissal claim under s.98 of ERA is not a novel issue – see *Mugford v Midland Bank plc [1997] ICR 399* in which the EAT observed that consultation with a trade union did not, of itself, release an employer from consulting with the employee individually (although in that case the claimant's unfair dismissal claim failed because the consultation overall had been sufficient).

***Hammonds LLP v Mwitta UKEAT/0026/10 (unreported, 1st October 2010)*:**

67. The EAT (Slade J) in *Hammonds LLP v Mwitta* considered whether non-compliance with s.188 of TULRCA would render a dismissal for redundancy unfair in a claim under s.98 of ERA.

68. The material facts are as follows: part way through the consultation process, Hammonds decided to offer an enhanced redundancy package if the affected employee agreed to bring forward the date of termination of employment. This had the effect of curtailing the statutory consultation period such that Hammonds failed to commence the collective consultation 30 days before the first dismissal took effect. There was, therefore, a technical breach of s.188 of TULRCA, although (as the ET observed), this was a substantially less serious default than many. The ET made a protective award for a period of 30 days. Furthermore, it concluded that the breach of s.188 had the effect of rendering an otherwise fair dismissal unfair under s.98 of ERA.

69. The EAT disagreed. It observed that s.188(8) makes it clear that the section does not confer any rights on an employee other than as provided by sections 189 to 192 of TULRCA (for which Ms Mwitta had obtained a remedy – namely, a protective

award). Specifically, there was no automatic unfair dismissal claim where there had been a breach of the collective consultation procedure. Therefore, the sole issue was whether or not Hammonds had acted reasonably or unreasonably in treating redundancy as a sufficient reason to dismiss Ms Mwitta in all the circumstances. Conduct which breached s.188 might be relevant to the question of reasonableness under s.98 of ERA but was by no means determinative of the issue. And in the case of Ms Mwitta, there had been no prejudice at all caused by the breach of s.188. In the circumstances, the tribunal's finding of unfair dismissal was set aside.

70. Consequently, whilst a failure to comply with s.188 (or, conversely, full compliance with s.188) might be a factor which could be relevant to the question of fairness under s.98(4) of ERA it did not necessarily render a dismissal either fair or unfair.

Where to next?

71. Despite having been around for over 35 years, the collective consultation procedure now contained in TULRCA and the Directive is still debated and litigated as is clear from the case law referred to above. The ECJ judgment in *Nolan* is eagerly awaited and it is to be hoped that it will provide the much needed clarification as to when a collective consultation process should actually commence.

CLAIRE McCANN
Cloisters
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