

## Unions in the board room?

### Introduction

The “credit squeeze” and talk of an economic downturn are causing many employers to dust off their old redundancy policies and procedures and either make employees redundant or at least brush up on the legal basics just in case. However, getting up to speed with the law requires more than merely a memory refresher. The case law on redundancy consultation has been quietly developing in the last few years in a number of dramatically significant ways.

The latest development is *UK Coal Mining Ltd v National Union of Mineworkers (Northumberland Area) and others*, in which the Employment Appeal Tribunal confirmed the need for collective consultation on a proposal to close a business rather than merely on the consequences of that proposal. The dictum of Glidewell LJ in *R v British Coal and Secretary of State for Trade and Industry ex parte Vardy* to the effect that no such consultation was required was held to be no longer good law in the light of changes to the statutory provisions.

### Collective and individual obligations

The obligation to consult in relation to potential redundancies arises on two levels: the collective and the individual. The collective obligation is contained in section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (see boxed section). The individual obligation has developed out of the statutory right not to be unfairly dismissed - under section 98(4) of the Employment Rights Act 1996 an employer must act reasonably when treating redundancy as a sufficient reason to dismiss an employee and consultation is almost always an integral part of the process of acting reasonably.

### Penalties

There are potentially hefty penalties for an employer that fails to comply with either the collective or individual consultation obligations. The sanction for a failure to comply with the collective obligation is a protective award of up to 90 days’ pay per affected employee. Since *GMB v Susie Radin Ltd* protective awards have been recognised as punitive rather than compensatory: the starting point is the full protective award with the Tribunal having power to reduce that amount if there are circumstances justifying a reduction. A failure in respect of individual consultation risks an unfair dismissal claim with compensation of up to £60,600.

The *UK Coal Mining* case concerns collective consultation obligations. However, it may influence the attitude of Employment Tribunals to individual consultation in unfair dismissal cases.

## The UK Coal Mining case

The Tribunal had made maximum protective awards (90 days) for failure to consult properly over the redundancies of over 100 employees at the Ellington Colliery in Northumberland. The employers appealed against the Tribunal's approach. The two trade union respondents made a cross appeal that the Tribunal was wrong to take the view that there was no obligation to consult over the reason for the closure itself.

Ellington was the last deep mine in the north east coalfield. There had been a number of financial concerns over the viability of the pit over the years. At the start of 2004, the colliery was deemed not to be profitable, but after a promise of £1.8 million of Government aid and renegotiation of a contract with an Alcan smelting plant (which the colliery supplied) it remained open. On 12 January 2005 technical issues at the colliery led to major flooding and pumps were brought in to try to resolve the problem.

On 26 January 2005, representatives of the two recognised unions attended a meeting with Mr Spindler, the company's Managing Director, who indicated that the mine was to be closed on both safety and economic grounds. Full and meaningful consultations were requested, but no further meetings with the unions were held. A letter purporting to be a formal letter under section 188 was sent out citing safety reasons, and stating that there would be ongoing consultation. Some employees were dismissed only 4 days later, with no prior consultation. The rest were placed on gardening leave. Compulsory redundancies of 158 employees took place on 26 February 2005.

In the Tribunal the company sought to rely on an "exceptional circumstances" excuse for circumventing the normal consultation timeframe. The EAT expressed surprise that neither Mr Spindler nor the manager of the colliery chose to give evidence in the Tribunal. The Tribunal held there had been no consultation with the unions and that it was "blatantly untrue" that the colliery was closed on grounds of safety and not economic viability.

For our purposes it is the cross appeal which is of most interest. The EAT accepted the submission of the unions that the premise that the employer was not obliged to consult at all over the closure was wrong. The obiter comments in *Vardy* were made at a time when section 188 only required consultation "about the dismissals". This was amended in 1995 to bring in consultation on ways of avoiding dismissals. The EAT took the view that the obligation to consult over avoiding the proposed redundancies inevitably involves engaging with the reasons for the dismissals and that in turn requires consultation over the reasons for the closure.

Notwithstanding the 1995 amendments, problems still remain between Article 2(2) of Council Directive 98/59/EC and its domestic transposition in section 188. In particular, the Directive envisages consultation when redundancies are *contemplated* whereas section 188 envisages consultation only after a *proposal* has been made. Notwithstanding the obligation to interpret domestic law consistently with EU law, *Vardy* and subsequent cases have held that it is not

possible to construe “proposed” as the equivalent of “contemplated”. However, the EAT did not see the limitation imposed by the word “proposed” as being an obstacle to extending the obligation to consult over closures leading to redundancies. From a timing point of view, the obligation to consult will not arise when closure is mooted as a possibility but only when it is fixed as a clear, albeit provisional, intention. But from that point there is now an obligation to consult over the reason for the closure.

## Ramifications

It was the view of the lay members of the EAT that in practice this decision will not:

*“alter arrangements very much. Most employers will already inform union representatives why they are considering the need to close a plant and will respond to any observations, even if they do not feel themselves legally obliged to do so.”*

There is however, a considerable difference between “responding to any observations” and consulting with a view to reaching agreement as required by section 188. It seems likely that unions will seek to interpret this new obligation as widely as possible and in effect take a place in the board room of any employer contemplating business decisions that might lead to redundancies.

Whereas the obligation to provide information about the reasons for the proposed redundancies has previously been interpreted in practice as a short explanation that the employer is proposing to, for example, close a factory. For there to be effective consultation on the reason for the closure or relocation, an employer will now potentially have to produce detailed accounts information, business plans and projections for the range of options considered by the board or senior management team. Quite how much detail is involved and whether union leaders have sufficient understanding of business to analyse such information remains to be seen.

There is also no reason to assume that this decision will be limited to redundancy situations arising on the closure of an establishment. The same issues potentially arise on partial closure or on relocation. And will those involved in mergers and acquisitions now have to consult unions on whether or not to merge or acquire? Such activities inevitably result in redundancies – indeed the desire for economies of scale is a major M&A driver – so the easiest way of avoiding dismissals would be not to merge or acquire. Perhaps this is a step too far, but that is not as certain now as it was pre-*UK Coal Mining*.

## Collective consultation

Under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992:

### *Trigger*

The obligation to consult collectively arises where an employer is proposing to dismiss as redundant 20 or more employees from one establishment within a period of 90 days or less.

### *Timing*

Consultation shall begin in good time and in any event either 90 days or 30 days before the first of the dismissals takes effect depending upon whether the employer is proposing 100 or more redundancies or 20 or more, respectively.

### *Parties*

Consultation shall be with appropriate representatives of the affected employees, being either a recognised trade union or, where no union is recognised, (at the employer's choice) either (i) employee representatives who have already been appointed or elected by the affected employees separately but nevertheless have authority to represent the affected employees, or (ii) employee representatives elected by the affected employees by secret ballot.

### *Information*

For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives:

- the reasons for its proposals
- the numbers and descriptions of employees whom it is proposed to dismiss as redundant
- the total number of employees of any such description employed by the employer at the establishment in question
- the proposed method of selecting the employees who may be dismissed
- the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect
- the proposed method of calculating the amount of any redundancy payments to be

made (other than statutory redundancy pay) to employees who may be dismissed

### *Scope*

Consultation shall include ways of:

- avoiding the dismissals,
- reducing the numbers of employees to be dismissed, and
- mitigating the consequences of the dismissals

### *Objective*

Consultation shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

### Effect on unfair dismissal

The obligation to consult on an individual basis in a redundancy situation has traditionally, as with collective consultation, been focussed on the consequence for the individual of a business decision (e.g. objective selection and alternative employment), not on the decision itself.

In *Moon v Homeworthy Furniture (Northern) Ltd* unfair dismissal claims were brought on the basis that a factory was economically viable, and that the decision to close it and make the staff redundant was therefore wrong. The Employment Appeal Tribunal considered that it need only be satisfied that a redundancy situation existed. The scope of its enquiry did not extend to consider the reasons for the redundancy situation and whether or not they were appropriate or meritorious.

*Moon v Homeworthy* has been cited with approval in many subsequent cases, including in the 1990 Court of Appeal case of *James W Cook & Co (Wivenhoe) Ltd (in liquidation) v Tipper & Ors*. In this judgment it was confirmed that an Employment Tribunal is entitled to consider whether the closure of a business (or generally the alleged redundancy situation) is in fact genuine. However, it is not open to the Tribunal to investigate the commercial and economic reasons which prompted the closure. Lord Justice Neill stated that it may be that in order to ensure fairness for the workforce, the court should have the power to investigate the commercial and economic reasons which prompted a closure, but it does not have that power at present. However, since unfair dismissal law is rooted in the inherently nebulous concept of reasonableness, it is possible that a lack of consultation on the underlying reasons for the redundancy could now begin to creep into the fairness consideration.

## Conclusion

For many employers the concept of consulting unions or employee representatives on major strategic business decisions that may lead to job losses will be surprising. For others it will be an unconscionable intrusion into management's "right" to manage. However, given the risk of hefty penalties for non-compliance it is vital that an employer understands when its obligation to consult first arises and its scope. If that necessitates a change of approach to certain business decisions, employers will have to adapt or risk the consequences.

### Cases

*UK Coal Mining Ltd v National Union of Mineworkers (Northumberland Area) and others*  
EAT/0397/06/RN

*R v British Coal and Secretary of State for Trade and Industry ex parte Vardy* [1993] ICR 720

*GMB v Susie Radin Ltd* [2004] IRLR 400

*J Moon & Ors v Homeworthy Furniture (Northern) Ltd* [1977] ICR 117

*James W Cook & Co (Wivenhoe) Ltd (in liquidation) v Tipper & Ors* [1990] IRLR 386

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