SUMMARY

# 2015/55 Provisional decision to close school triggers collective redundancy consultation obligations (UK)

***<p><em>This case involved the closure of a private school by its owner, a registered charitable trust. In February 2013 the school governors decided they would close the school if pupil numbers did not increase. Subsequently in April 2013, they decided to close the school and all the teachers were given notice that their employment would end in July 2013.  The claimants subsequently brought a claim alleging that the school had breached its collective redundancy consultation obligations. The Employment Appeal Tribunal (EAT) upheld the Employment Tribunal’s (ET) decision that the duty to consult was triggered in February, not April.</em></p>***

**Summary**

This case involved the closure of a private school by its owner, a registered charitable trust. In February 2013 the school governors decided they would close the school if pupil numbers did not increase. Subsequently in April 2013, they decided to close the school and all the teachers were given notice that their employment would end in July 2013.  The claimants subsequently brought a claim alleging that the school had breached its collective redundancy consultation obligations. The Employment Appeal Tribunal (EAT) upheld the Employment Tribunal's (ET) decision that the duty to consult was triggered in February, not April.

**Background law**

Where an employer proposes to make large scale redundancies of 20 or more employees at one establishment within a period of 90 days or less (collective redundancies), it must consult on its proposal with representatives of the affected employees (either a recognised union or elected employee representatives). Consultation must be with a view to reaching agreement on avoiding the need for dismissals, reducing the number of employees to be dismissed, and mitigating the consequences of the dismissals (section 188, Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA)). Section 188 implements the UK's obligations under the Collective Redundancies Directive (98/59/EC).

There is a limited exception to the duty to consult where 'special circumstances' render it not reasonably practicable to comply with the obligation.

Where the duty to collectively consult has been breached, a tribunal may make a protective award. The maximum protective award is up to 90 days' actual gross pay for each dismissed employee. The award is punitive and is not based on loss of earnings.

**Facts**

The case concerned the closure of the Peterborough and St Margaret's school, operated by the E Ivor Hughes Educational Foundation (the Foundation). The number of pupils at the school had been declining for several years and the projected figures for the 2013/14 academic year indicated that there would be a sizeable deficit.

A meeting of the school governors was called in February 2013, at which the projected number of pupils was discussed and options for keeping the school open were considered. The school governors decided that it would have to close the school at year's end if pupil numbers had not increased by April 2013.

In April 2013, the number of pupils for the forthcoming academic year was confirmed as being lower than predicted. A further meeting of the governors took place and they decided that the school would close at the end of the summer term in 2013. The governors gave staff notice of dismissal on 29 April 2013, four days after the decision to close the school had been taken. The employees were entitled to one term's notice of termination and accordingly notice expired on 31 August 2013. No collective consultation was carried out. It appears that the governors had no knowledge of the legal obligations they were under. The employees brought claims for breach of section 188.

**ET decision**

The ET held that the duty to collectively consult had been triggered at the February meeting,

when the governors had decided that the school would be closed unless pupil numbers improved.

There is conflicting UK and ECJ case law on what triggers the duty to consult. In UK Coal Mining Ltd - v - National Union of Mineworkers [2008] IRLR 4, the EAT held that in the context of business closure, consultation must begin sufficiently early to include consultation about the business reasons for making the redundancies, which may be before the strategic decision is made. However, in Akavan Erityisalojen Keskusliitto AEK ry - v - Fujitsu Siemens Computers Oy [2009] IRLR 944, the ECJ decided that the duty to consult under the Directive is triggered only once a strategic or commercial decision has been taken that will foreseeably or inevitably lead to collective redundancies. The Court of Appeal recently declined to overturn UK Coal Mining in the light of Fujitsu, saying that the ECJ decision was not clear enough to warrant this (United States of America - v - Nolan [2010] EWCA Civ 1223).

The ET considered both tests, holding on the facts, that on the basis of either test, the duty to consult arose on 27 February 2013.

The Foundation argued that there were special circumstances rendering it not reasonably practicable to consult. It claimed that had consultation commenced in February 2013, the possible closure of the school would have been leaked, resulting in parents removing their children, which would have sealed the school's fate; waiting until April 2013 gave the best chance of the school's survival. The tribunal considered that any such potential leaks could have been avoided by making clear to employees that the proposal was confidential and by specifying that any breach of confidentiality would constitute gross misconduct. As to the Foundation's assertion that there was a need to give notice in April in order to avoid tripping a further term's notice which would entitle employees to be paid up until 31 December 2013, this was also rejected by the tribunal. The tribunal held that contractual obligations (in this case the employees' notice period) were not capable of amounting to special circumstances.

The tribunal concluded that there were no mitigating features and, as no consultation whatsoever had taken place, it ordered a 90 day protective award for each of the employees.

The Foundation appealed.

**EAT decision**

The EAT agreed that the ET's approach was appropriate. It noted that the decision in February to close the school unless numbers increased was either a "fixed, clear, albeit provisional intention" to close the school or amounted to a "strategic decision on changes ... compelling the employer to contemplate or plan for collective redundancies". On either analysis, the duty

to consult arose on that date. The EAT did not find it necessary to decide which test applied.

The EAT also rejected a ground of appeal that special circumstances excused a failure to consult because of the need to keep the closure plans secret for fear of confidence in the school being lost. The problem for the employer was that it had not even considered the possibility of consultation at the time ¬– that an employer which had not thought about consultation might, with hindsight, see problems with the practicalities of consultation is not a special circumstance excusing the duty to consult.

**Commentary**

The case illustrates how difficult it can be for an employer to pinpoint exactly when they are required to initiate a collective redundancy consultation. On the facts of this case it appears that the employer did not realise that it had a duty to consult but even if it had recognised this duty it may have thought that the obligation would not be triggered until a firm decision to close had been made.

Further difficulties can arise around issues of morale and the risk that the consultation process may itself trigger a decline in the business and premature staff departures.

The protective award should focus on the seriousness of the employer's default. Where there has been no consultation at all, it is appropriate for the tribunal to start with the maximum award of 90 days' pay, then examine whether there were any mitigating circumstances.

In this case, the EAT commented that the school's decision not to take legal advice was “reckless” and it is possible that the protective award imposed was a way of punishing the school for its indifference to its legal obligations. The EAT may have been more inclined to find that the duty to consult was not triggered until April 2013, if the school had at least given collective consultation some thought before it dismissed its employees. In particular, the EAT was not prepared to find that “special circumstances” prevented the school from consulting unless the school had those special circumstances in mind at the time.

This case has not done anything towards resolving the conflicting case law on when the duty to consult arises. It would be helpful if a higher court could provide further clarification on this issue. It is possible that the matter might be resolved by the Court of Appeal in Nolan which will be reconsidering the issue if the Supreme Court declines an appeal by the USA against the Court of Appeal’s decision that TULCRA does apply to the closure of a military base by the USA.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

*Subject: Collective redundancy*

*Parties: E Ivor Hughes Educational Foundation - v - Morris*

*Court: Employment Appeal Tribunal*

*Date: 19 June 2015*

*Case number: UKEAT/0023/15/LA*

*Hard copy publication:*

*Internet publication:*

---

**Creator**: Employment Appeal Tribunal
**Verdict at**: 2015-06-19
**Case number**: UKEAT/0023/15/LA