

Briefing Note



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Collective Consultation and Redundancy

A recent Court of Appeal case highlights how important it is for employers to take legal advice in collective redundancy situations and demonstrates how costly it can be when sound advice and best practice are not followed.

In the case of *Susie Radin Ltd v GMB & Others [2004]*, the employer, a clothing factory in the North, was in severe financial straits and resolved to close down the factory and make 108 employees redundant. The company had a union recognition agreement with the GMB although not all employees were GMB members. On 20 March 2000, a director of the company wrote to the GMB indicating that it was unlikely that the factory would be able to continue to function. On 6th April 2000, the company notified the GMB of impending redundancies stating that employment was likely to terminate on 14th July 2000. After a heated meeting with the GMB letters of dismissal were sent to the employees and there was no further contact between the employer and the GMB. The factory closed on the 14th July 2000. The employer had made no real attempt to inform or consult with the workers, the trade union or other representatives on the basis that there was no way in which the redundancies could be avoided and therefore no alternative to the factory shutting down.

The employees brought claims of unfair dismissal arguing that the em-

ployer's failure to consult made the dismissals procedurally unfair. They failed to establish this and the Employment Tribunal accepted the employer's argument that this was one of the rare cases where the employer is excused the need to consult with individual employees as consultation would have been futile. However, the Employment Tribunal held that the employer had breached S188 of the Trade Union and Labour Relations (Consolidation) Act 1992, which requires that where an employer proposes to dismiss 20 or more employees at one establishment within a period of 90 days or less, it must consult with the appropriate representatives of those employees who may be affected. The employees claim to a protective award entitlement succeeded. Each employee was awarded a maximum award of 90 days salary which amounted to a £250,000 bill for the employer. The company appealed and the appeal was ultimately dismissed by the Employment Appeal Tribunal but permission to appeal to the Court of Appeal was granted.

The issue for the Court of Appeal to decide was whether the protective award was intended to compensate employees for the consequences of the employers failure to consult its representatives – in which case the employees would receive little or nothing – as the consultation itself

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would have been futile and would make no difference - or whether it was to punish employers for their failure to consult - in which case the fact that consultation would have been futile was irrelevant.

The Court of Appeal held that protective awards are punitive. The fact that consultation was futile made no difference. The purpose of the protective award is to compensate for the loss of the right to be consulted and not for loss of earnings. The consultative process itself is intended to create the opportunity to change a proposed decision, and, where this is lost, the protective award should be made to compensate for the loss of such opportunity. The Court of Appeal recommended that Tribunals should make the maximum award of 90 days salary in cases where the employer has made little or no attempt to consult and is just "going through the motions".

This decision is significant not only for employers considering collective redundancies but also for a potential purchaser of all or part of a business, as where the Transfer of Undertakings (Protection of Employment) Regulations 1981 ("TUPE") apply as the purchaser may be inheriting substantial liability. In practice employers would be advised to ensure that the employee or trade union representative sign off on the consultation process.

Should you wish for more detail on the above topic either contact Dominique Torode-Parker on +44 207 404 2121 or contact us via info@key2law.co.uk

Note: this update is intended only as a general statement of the law and no action should be taken in reliance upon its contents.