Appeal No. UKEAT/0143/07/RN

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 12 June 2007
Judgment handed down on 10 July 2007

Before

THE HONOURABLE MR JUSTICE WILKIE

DR S R CORBY

MR A E R MANNERS

OPTARE GROUP LTD — APPELLANT

TRANSPORT AND GENERAL WORKERS UNION — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS HELEN GOWER (Of Counsel) Instructed by: EEF Yorkshire & Humberside Fieldhead Thorner Leeds LS14 3DN
For the Respondent	MR MARK SUTTON (Of Counsel) Instructed by: Messrs Morrish & Co Solicitors Oxford House Oxford Row Leeds LS1 3BE

SUMMARY

TRADE UNION RIGHTS

Interim relief

Where in a redundancy situation volunteers are called for, apply and are accepted, the ET was not wrong in law to conclude as a matter of fact that they were prepared to be dismissed. This conclusion was for the purpose of deciding whether the Respondent was prepared to dismiss 20 relevant employees thus triggering the statutory consultation delegations.

THE HONOURABLE MR JUSTICE WILKIE

1. This is an appeal against findings of an Employment Tribunal held at Leeds on 4 December 2006 and 18 January 2007 (reserved judgment dated 22 January 2007) in which it concluded that the appellant proposed to dismiss as redundant 20 employees at its Leeds establishment, that it failed to comply with the requirements of section 188 of the Trade Union and Labour Relations Consolidation Act 1992 and made an award protecting the remuneration of those employees who were dismissed as redundant by the appellant for a period of 30 days commencing on 6 May 2006.

2. The facts underlying this appeal were described, in our judgment accurately, by counsel for the respondent to the appeal as "eccentric". It concerns an application by the TGWU for a protective award in respect of an alleged failure to comply with statutory consultation by the appellant in connection with redundancies at its Leeds and Rotherham sites in May 2006.

3. On 30 March 2006 the appellant's plant director and TGWU officials met and the appellant advised the TGWU that the company was proposing to announce redundancies at its Leeds and Rotherham sites. It was common ground that the union was told that the appellant proposed to make approximately 30 redundancies across two sites but the minutes recorded that the appellant stated:

> **"In the case of Leeds and employees that the union were involved with there would be no more than 19."**

The employment tribunal accepted the appellant's evidence that it was its intention to make less than 20 people redundant at Leeds. That figure was of significance as the statutory obligation to undertake consultations with the TGWU would only be triggered if they had proposed to make 20 people redundant at Leeds.

4. On that basis a truncated process of consultation was undertaken in accordance with informal procedure agreements between the appellant and the union. One of the steps in that procedure was the appellant asking for volunteers to be made redundant, though reserving its discretion to decline to accept any volunteers. In addition to seeking volunteers, there was a process of assessment conducted by human resources and supervisors following which those selected were to be notified.

5. On 6 April, an announcement of the proposals to make up to 30 redundancies across the two sites was made by the appellant to the work force. On 10 April a notice was put on works notice boards asking for applications for voluntary redundancies to be handed in by lunch time on 12 April. On 13 April the process of assessment was complete and notification was given to 17 persons that they were at risk of being made compulsorily redundant as a result of that assessment exercise. By 20 April the respondent had decided to accept each of the three volunteers for redundancy who had applied and, importantly and unusually, to make the 17 persons assessed as a result of that exercise compulsorily redundant. It was at that point that the union informed the appellant of its view that, as a result, it now proposed to dismiss 20 employees as redundant at its Leeds establishment not 19 and that, accordingly, the

statutory obligation to consult was triggered. The appellant took advice and responded to the union that, as volunteers could not be added into the calculation, it was only proposing to dismiss 17 persons by way of redundancy so that the statutory obligation to consult was still not triggered.

6. By 28 April those who had been selected to be made compulsorily redundant had been given notice and those who had volunteered to be made redundant had been put on garden leave. In fact, of the 17, fifteen were given notice of dismissal and 2 were proposed to be transferred or had been given notice of transfer to another area in circumstances which, it was common ground, did not affect the legal position.

7. The sole issue in this appeal is whether the ET was correct when it decided that the 3 volunteers for redundancy were to be included within the number of employees whom the appellant proposed to dismiss by reason of redundancy so that the number thus proposed was 20 thereby triggering the statutory consultation regime. The ET went on to find that, on that basis, the requirements of statutory consultation had not been complied with, so it made a declaration to that effect and made the protective award already referred to. None of these matters are the subject of appeal. If, of course, the appellant is correct in its appeal then the statutory obligation to consult was not triggered and so the other conclusions of the ET would also fall.

8. The ET addressed the issue under appeal in paragraphs 5.1 and 5.4 of its decision. It said as follows:

> **"We find that the three volunteers are persons whom the respondent proposed to dismiss as redundant. They are not people who volunteered to leave prior to the redundancy selection exercise occurring. The only reason they volunteered is because they had been invited to do so when the respondent followed its obligations to try to mitigate the impact of the redundancies. Whilst we accept that neither (*sic)* of these men would be likely to have been selected for compulsory redundancy, with respect to the respondent we do not think that is the issue. The respondent told its workforce it was proposing to dismiss, and it asked for volunteers. The fact that the three men volunteered does not mean that they were not dismissed, neither does it mean they were not dismissed by reason of redundancy. The issue is not whether they themselves would have been selected had they not volunteered, but whether there was any prospect of the men asking to leave if there had been no redundancy declared of which we have had no evidence. To find otherwise would in our view potentially prejudice future attempts to mitigate the impact of redundancies, because it may deter other people from volunteering for fear of losing their entitlements to a statutory redundancy payment.**
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> **5.4. We have carefully considered the respondent's written submission, but have not accepted its interpretation of *Pearl Insurance* or *Birch and Humber* and not found that there was a termination by agreement, as we consider that this case is very similar to the guidance given in *Peck*. The fact that the volunteers could withdraw their applications at any time is neither here nor there. What we have to consider is the proposal of the 20th…We do not find, as the respondent submits, that the fact that Mr Townend, Mr Herrier and the other volunteer may not have been likely to have been selected for compulsory redundancy impacts on the fact that each man was being dismissed. The reason was because the respondent had declared a redundancy situation and had asked for people to volunteer."**

The law

9. Section 188 of the TULRCA 1992 obliges an employer who is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less to consult about the dismissals of all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals.

10. Section 189 of the TULRCA 1992 gives the tribunal jurisdiction to hear a claim that an employer has failed to comply with section 188.

11. Section 298 of the 1992 Act states that "dismissal" is to be construed accordance with part 10 of the Employment Rights Act 1996. The relevant

section in part 10 of the 1996 Act is section 95 and is the same definition as applies in respect of unfair dismissal claims.

12. The issue in the appeal is whether, in the circumstances of this case, the termination of employment of the three employees who volunteered for redundancy and whose applications were accepted was a dismissal by the appellant or was a termination by mutual agreement. The question whether a resignation or a consensual termination may amount to a dismissal is one which has arisen both in the context of redundancy and in the context of unfair dismissal. The ET was referred to a number of authorities and we too have been referred to them and to certain recent authorities.

13. The first in time was the case of **Burton Allton and Johnson Ltd v RRV Peck** [1975] IRLR 87. Mr Peck was employed by a company which was taken over by new owners. They thought it would be in his interests to accept redundancy but that this could not be done whilst he was off sick. On his return to work he was seen by the area supervisor and was told there was no work for him but that a meeting would be arranged. The tribunal found that Mr Peck had been dismissed by reason of redundancy. The respondent appealed to the High Court (Mr Justice Griffiths) who dismissed the appeal. In the course of so doing at paragraph 13 he said as follows:

> **"It must be appreciated that it is to be hoped that in the large majority of cases where a man is made redundant it will be effected after discussions and where both parties are in agreement that that is the best course to take. In any large organisation one expects to find that there are consultations between management and unions to thrash out the whole redundancy situation, but the employees are then brought into the discussions and that the first to be made redundant are those who volunteer for it. One also hopes that before they are made redundant very serious attempts will have been made to have other employment ready for them. But the fact that all that is done does not prevent the dismissal being a dismissal within the terms of… (the then relevant statutory definition of dismissal)."**

14. The next case concerning redundancy was **Birch and Humber v the University of Liverpool** [1985] IRLR 165. The appellants were employed by the university. In March 1981 a premature retirement compensation scheme was adopted which stated in terms that it was not a redundancy scheme. In July 1981 the university wrote to all its employees telling them that as a result of reduction in funds the workforce would have to be cut back over the next few years. It was hoped that a substantial reduction could be achieved through normal retirement, early retirement and resignations. The possibility of some redundancies in future years was not ruled out. In January 1982 the University sent a letter to all members of staff eligible to apply for retirement under the premature retirement compensation scheme drawing their attention to its terms. The appellants both requested retirement under the scheme. Those requests were agreed and their premature retirements were processed. Subsequently each of them applied for a redundancy payment. The preliminary issue was whether the termination of their employment was a dismissal or by mutual agreement. The EAT and thereafter the Court of Appeal decided that neither of them had been dismissed.

15. Lord Justice Ackner in the leading judgment recorded the appellants as having submitted that there cannot, as a matter of law, exist a determination by mutual consent where there is a redundancy situation namely that the requirements of the business for employees to carry out work of a particular kind in the place where he was so employed have ceased or diminished or are expected to cease or diminish. They further contended that there was such a situation arising by virtue of the letter of July 1981 that there was a need to

slim down the workforce by about 300 posts. Lord Justice Ackner in paragraph 28 said as follows:

> **"The decision whether or not there has been a dismissal within the meaning of section 83 has to be decided before one considers whether the result of that dismissal is to entitle the employee to make a claim for redundancy payments. The two are disassociated. Miss Cotton has shown us no authority for the proposition, which I find a strange one, that the mere fact that the requirement of the business for employees is expected to diminish, should make it in law not possible to have a determination of the contract by mutual consent. I put to her the simple example of the employer who envisages some time in the future, eg because of new technology, the need to slim down his workforce and makes an offer to those who are prepared to resign rather than to wait to volunteer for redundancy and support that offer with a financial inducement which is far in excess of what is likely to be obtained under the redundancy legislation. It seemed to me clear that in such a situation, assuming no question of any coercion of any kind, that if that offer is accepted there can be no question of there having been a dismissal. Yet that is a situation which presupposes what has been referred to conveniently as a redundancy situation…"**

16. Lord Justice Ackner then referred to the case of **Peck** and the passage from Mr Justice Griffiths judgment to which we have referred. He referred to the fact that that case had been cited before the Employment Appeal Tribunal and he cited what Mr Justice Nolan in the judgment of the EAT had said about it:

> **"As we understand that decision, it was based upon the finding by the majority of the Industrial Tribunal that Mr Peck's contract of employment had been terminated by his dismissal. The passages in the judgment of the learned judge which we have quoted are designed to make it clear that the fact that an employee has no objection to being dismissed, or even volunteers to be dismissed, does not prevent his dismissal, when it occurs, from being a dismissal within the meaning of the Act. We do not read the judgment as encroaching in any way upon the distinction which exists in law between a contract which is terminated unilaterally (albeit without objection, and perhaps even with encouragement from the other party,) and a contract which is terminated by mutual agreement. The phrase "consensual dismissal" which the Industrial Tribunal used seems to us, with respect, to blur this critical distinction. In every case it will be necessary to determine what it is that has had the effect, as a matter of law, of terminating the particular contract, and on the undisputed facts of the present case it seems to us clear for the reasons already given that the termination was effected by mutual agreement and not by dismissal."**

Lord Justice Ackner endorsed wholeheartedly those observations.

17. Lord Justice Slade at paragraph 43 said as follows:

> **"I would agree with the Industrial Tribunal that the fact that an employee may agree to his dismissal for redundancy does not necessarily prevent dismissal taking place within the meaning of (the relevant statutory provision), in a case where there has in truth been a dismissal for redundancy. I also accept, of**

> **course, that as the tribunal found as fact, the appellants in the present case made applications to retire because of the cut back in funds and the university's need to lose some 300 jobs, and that there was a redundancy situation in the sense defined by the Industrial Tribunal – that is to say, it was being made known by the university that their requirements for employees to carry out work were expected to diminish. However, the highest that it can be put on the facts of the present case is that the university had given implicit warnings of possible redundancies to come. This is not on its agreed facts a case where the employees had been told that they were personally no longer required in their employment, or where they had been expressly invited or placed under pressure to resign…"**

18. Lord Justice Purchas at paragraph 52 said as follows:

> **"…In my judgment dismissal, as it is defined in that section, is not consistent with free, mutual consent, bringing a contract of employment to an end. I add the word "free" in recognition of the authorities where it has been held to have been a dismissal when an employee has resigned, or agreed to voluntary redundancy under what has been described as threat, or perhaps even in the anticipation of dismissal. These cases have already been mentioned by my Lords…**
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> **53. For those reasons therefore I consider that where there is a mutual consent established and freely reached between the parties, this is inconsistent with the word "dismissal" as defined in (the statutory provision) and indeed its ordinary usage.**
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> **54. Miss Cotton has strenuously submitted that where there is what she describes as a redundancy situation, it is not possible to have a mutual determination of a contract of employment. With great respect I find myself unable to agree with that contention. One must in my judgment look at the substance of the matter and if there is no dismissal in the sense which I have described then one does not move further than (the statutory provision defining dismissal)… "**

19. The next case concerning redundancy was the case of **Morley v CT Morley Ltd** [1985] ICR 499. In that case there were three employees of a family business. It was agreed that because of financial difficulties one of the three would leave and be treated as redundant. The other two continued to carry on the business until some months later it ceased trading. A claim was made for a redundancy payment which was rejected by the Industrial Tribunal on the grounds that the applicants had not been dismissed. The EAT allowed the appeal on the basis that the fact that one of the applicants had volunteered for redundancy and his offer had been accepted by the others did not mean that their contracts of employment were not terminated by the company so as to be a dismissal.

20. We were also referred to a very early case, in 1972, of **East Sussex County Council v Walker** in which an employee, who was told that he was no longer required in the employer's employment and was expressly invited to resign, was regarded as having been dismissed for the purposes of the then Redundancy Payments Act 1965.

21. We were also referred to authorities which did not arise in the context of redundancy but in the context of unfair dismissal. In the case of **Sheffield v Oxford Controls Company Ltd** [1979 IRLR] 133 the question of dismissal or resignation arose in the context of unfair dismissal. The EAT in a judgment given by Mr Justice Arnold at paragraph 20:

> **"It is plain, we think, that there must exist a principle, exemplified by the four cases to which we have referred, that where an employee resigns and that resignation is determined upon by him because he prefers to resign rather than be dismissed (the alternative having been expressed to him by the employer in terms of the threat that if he does not resign he will be dismissed), the mechanics of the resignation do not cause that to be other than a dismissal. The cases do not in terms go further than that. We find the principle to be one of causation. In cases such as that we have just hypothesised, and those reported, the causation is the threat. It is the existence of the threat which causes the employee to be willing to sign, and to sign, a resignation letter or to be willing to give and to give the oral resignation. But where that willingness is brought about by other considerations and the actual causation of the resignation is no longer the threat which has been made but is the state of mind of the resigning employee, that he is willing and content to resign on the terms which he has negotiated and which are satisfactory to him, then we think there is no room for the principle to be derived from the decided cases. In such a case he resigns because he is willing to resign as a result of being offered terms which are to him satisfactory terms on which to resign. He is no longer impelled or compelled by the threat of dismissal to resign, but a new matter has come into the history, namely that he has been brought into a condition of mind in which the threat is no longer the operative factor of his decision; it has been replaced by the emergence of terms which are satisfactory…."**

22. We have also been referred to the case of **Sandhu v Jan de Rijk Transport Ltd** [2007] EWCA Civ 430. The issue in that case was dismissal or resignation in the context of unfair dismissal. Various authorities were cited including **Birch, East Sussex County Council and Walker, Sheffield and Oxford Controls Company Ltd and Spencer Jones v Timmons Freeman**

[1974] IRLR 3254. At paragraph 37 in the judgment of the Court of Appeal delivered by Lord Justice Wall he said as follows:

> **"What is striking in the authorities…is that in none of the cases in which the employee has been held to resign has a resignation occurred during the same interview/discussion in which the question of dismissal has been raised, and in no case in which the termination of the employee's employment has occurred in a single interview has a resignation been found to have taken place. The reason for this, I venture to think, is not far to seek. Resignation, as the authorities indicate, implies some form of negotiation and discussion; it predicates a result which is a genuine choice on the part of the employee. Plainly if the employee has had the opportunity to take independent advice and then offers to resign, that fact would be powerful evidence pointing towards resignation rather than dismissal."**

In paragraph 44 there was a lengthy citation from the judgment of Lord Justice Waite in the case of **Spencer Jones** in which he had said as follows:

> **"…The principle itself…is well settled. It is a principle of the utmost flexibility which is willing in all instances of apparent voluntary retirement to recognise a dismissal when it sees it, but it is by no means prepared to assume that every resignation influenced by pressure or inducement on the part of the employer falls to be so treated. At one end of the scale is the blatant instance of a resignation preceded by the employer's ultimatum "retire on my terms or be fired" where it would not be surprising to find the Industrial Tribunal drawing the inference that what had occurred was a dismissal. At the other extreme is the instance of the long serving employee who is attracted to early retirement by benevolent terms of acceptance offered by grateful employers as a reward for loyalty – where one would expect the industrial tribunal to draw the contrary inference of termination by mutual agreement. Between these two extremes there are bound to lie much more debateable cases to which, according to their particular circumstances, the Industrial Tribunals are required to apply their expertise in determining whether the borderline has been crossed between a resignation that is truly voluntary and a retirement unwillingly made in response to a threat. I doubt myself whether, given the infinite variety of circumstance, there can be much scope for assistance from authority in discharging that task: indeed, attempts to draw analogies from other cases may provide more confusion than guidance. In cases where precedence is nevertheless thought to be of value, the authority that no doubt will continue to be cited is *Sheffield v Oxford Controls Company Ltd***
>
> **45. The only other case to which we were referred to on this point and which I have not discussed is *Birch.* However, in my judgment, it does not advance the argument. It concerned a premature retirement compensation scheme and its inter relationship with redundancy payments. It is far removed from the facts of the instant case."**

The grounds of appeal

Ground 1

23. The first ground of appeal is that the tribunal erred in law by having regard to a policy consideration namely that to find other than that there had been a dismissal would potentially prejudice future attempts to mitigate the impact of redundancies because it may deter other people from volunteering for fear of losing their entitlements to a statutory redundancy payment. It is said that the ET erred in law in placing this policy at the centre of its reasoning. It is said that it ignored the fact that, as was said in **Birch and Humber**, the question of dismissal is to be disassociated from the question of redundancy. It also ignores the stricture in **Birch** that the tribunal look at the realities of each case and that there is no rule of law that, in a redundancy situation, it is not possible to have a mutually agreed determination of the contract of employment. The union contends that the appellant has misread paragraph 5.1 of the ETs decision. The policy statement was not instrumental in the tribunal reaching its decision but, rather, was an expression of satisfaction that the view to which it had come, approaching the matter properly, was consonant with what it saw as the desirability of doing nothing which might deter others in the future from volunteering to be made redundant. We agree with that textual analysis of the decision. In our judgment it may have been better for the tribunal not to have strayed into areas of policy but to have limited itself to its statutory function. Nonetheless, in our judgment it was not a part of its process of reasoning.

Ground 2

24. The second ground it is that wrongly failed to take into account the realities of the facts. The appellant relies principally on **Sheffield v Oxford Controls**

Ltd as establishing the proposition that the test is one of causation. It says that the tribunal failed, in considering causation, to take into account the subjective reasons of one of the volunteers, Mr Townend, applying for voluntary redundancy namely - the death of his father and his diagnosis of diabetes. It was these rather than any risk that he might be made redundant compulsorily which "caused" him to apply for voluntary redundancy and to maintain that application in the face of the selection of others to be made compulsorily redundant. The tribunal was criticised as having said at paragraph 5.4 that:

> **"The fact that the volunteers could withdraw their applications at any time is neither here nor there".**

It is said that there was no risk nor any pressure on Mr Townend to volunteer for redundancy and that, in the absence of this, the tribunal erred in law in concluding that he had been dismissed.

25. The union does not dispute that the question is one of causation nor that there is no rule of law, that a person who resigns may not be regarded as having been dismissed nor, conversely, that a person who opts for voluntary redundancy in a redundancy situation must always be regarded as having been dismissed. The union says that at the heart of a tribunal's requirement to consider the realities is for it to consider the context in which the resignation occurred, the nature of the scheme of which the resignation is a part, and the documentation which reflects what the parties believed they were doing. It points to the fact that, in the case of **Peck**, Mr Justice Griffiths envisages that, within the operation of a redundancy procedure, those who volunteer for

redundancy will normally be regarded as having volunteered to being dismissed and so will have been dismissed. It points out that this analysis was commented favourably upon by the EAT in **Birch** and was, in turn, approved and adopted by Lord Justice Ackner in the Court of Appeal.

26. The question of causation, the union argues, can properly be expressed as being "who really terminated the employment" or "who was responsible for instigating the process resulting in the termination of employment". The ET addressed this in paragraph 5.1. It pointed out that the three men had not volunteered prior to the redundancy selection exercise occurring but had volunteered because invited to do so when the respondent sought volunteers to mitigate the impact of the redundancies. The union argues that it would be wrong, where such facts have been established, to go further and to investigate of each individual who has volunteered pursuant to that process their individual psychological process and/or motives for volunteering. If it is clear, as it was here, that the employer in an existing redundancy situation has issued an invitation to employees to volunteer for redundancy, that certain of them did so and that, as a result, their employments terminated then that is enough, having regard to the guidance in **Peck** approved in **Birch**, to enable the tribunal properly to conclude that the cause of the termination was their volunteering to be dismissed. This is not identifying and applying a rule of law but is a common sense application of the principle of causation to factual situations which arise repeatedly in industry and are well understood to have that effect. It may, of course, be that there are situations, even within a

redundancy situation, where there are additional facts which point the other way but that was not the case here.

27. In our judgment the union's contention in this regard is correct. The ET addressed itself to the question of causation and correctly analysed what was going on when the three volunteers put themselves forward for redundancy. The statements by the tribunal in paragraphs 5.1 and 5.4, that the issue is not whether the volunteers would have been selected and that the fact that they could have withdrawn their applications was neither here nor there, do not amount to ignoring relevant factors but simply reflect the fact that the tribunal was focussing correctly on the real issue in the case. What was the cause of the termination of their employment? If it was that they volunteered to be made redundant, what was it that the volunteers were volunteering for? Was it to be dismissed as part of the redundancy exercise or was it, in some way separate from that exercise, their agreeing to a consensual termination of their employment which might have a knock on effect on the redundancy exercise? In our judgment the ET, in concluding that they had volunteered to be dismissed as part of the redundancy exercise, did not err in law.

Ground 3

28. The third ground of appeal raises the issue of perversity. It is said that the tribunal was perverse in concluding that there was no evidence that there was any prospect of men asking to leave if there had been no redundancy declared. It is said that there was such evidence, in the form of an answer given by Mr Townend in cross-examination that, if there had not been a redundancy

situation he would have taken a similar financial package if offered for termination of his employment. The note evidencing this reply was taken by the appellant's solicitor but does not appear in the note taken by the chairman of the tribunal nor that of the solicitor to the respondent. Nonetheless we consider this point on the basis that such a note was accurate and such an answer given.

29. In our judgment there is nothing in this point. The fact is that there was a redundancy exercise going on. Mr Townend volunteered to be made redundant pursuant to it. There had been no prior offer made for him to terminate his employment on terms. The fact that a hypothetical situation was raised whether he would have accepted a similar package, even in the absence of a redundancy situation, is, in our judgment, irrelevant. It would have been quite different had there been evidence that he was anxious to leave and had expressed this wish independently of, or prior to, a redundancy situation arising. That would have provided a potential basis for concluding that the eventual termination was consensual rather than Mr Townend volunteering to be dismissed. But that was not the case, nor was there any evidence of that. Accordingly, the tribunal was entitled, in our judgment, to conclude that there was no evidence that there was any prospect of the men asking to leave if there had been no redundancy declared which would affect the conclusion that the cause of the termination was that they had volunteered to be dismissed by way of redundancy pursuant to the redundancy procedure being undertaken by the appellant.

30. We do not accept that any of the grounds advanced by the appellant cast doubt on the correctness as a matter of law of the tribunal's conclusion that by 20 April there was a proposal to dismiss 20 employees at the same establishment giving rise to the statutory obligations to consult with which, it was common ground, they did not comply.

31. This appeal is dismissed.