Appeal No. UKEAT/0411/09/DM

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 22 February 2010

Before

HIS HONOUR JUDGE RICHARDSON

MR T HARRIS

MRS J M MATTHIAS

SHANAHAN ENGINEERING LTD — APPELLANT

UNITE THE UNION — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MICHAEL DUGGAN (of Counsel) Instructed by: Nabarro Nathanson Solicitors 1 South Quay Victoria Quays Sheffield West Yorkshire S2 5SY
For the Respondent	MR MARK WHITCOMBE (of Counsel) Instructed by: Messrs Thompsons Solicitors Agincourt 14-18 Newport Road Cardiff Glamorgan CF24 0SW

SUMMARY

REDUNDANCY

Collective Consultation and Information

Protective Award

1. Section 188 **Trade Union and Labour Relations (Consolidation) Act 1992** (TULRA) – whether and to what extent special circumstances rendered it not reasonably practicable to comply – no error of law in the reasoning of the Tribunal – appeal on this ground dismissed.

2. Section 189 **TULRA** – length of protected award – special circumstance, even if not sufficient to excuse compliance, capable of being mitigating factor – observations on approach of Tribunal to assessment of protected award – appeal on this ground allowed and matter remitted for assessment of protected award.

HIS HONOUR JUDGE RICHARDSON

1. This is an appeal by Shanahan Engineering Ltd ("Shanahan") against a judgment of the Employment Tribunal (Employment Judge Hollow presiding) dated 18 June 2009.

2. By its judgment the Tribunal held that Shanahan was in breach of its duty under section 188 of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRA") by failing to consult with the appropriate trade union representatives when proposing to make more than 20 employees redundant. Shanahan appeals against this finding on the ground that the Tribunal ought to have held that there were special circumstances by reason of which it was not reasonably practicable to comply with the requirements of the legislation: section 188(7).

3. Further, the Tribunal ordered Shanahan to pay remuneration by way of a protected award to those employees dismissed as redundant by it. The protected period was 90 days. In all some 50 employees were made redundant with one week's pay in lieu of notice. Shanahan appeals against this finding on the ground that, even if it was in breach of its duty, there were substantial mitigating factors which the Tribunal was not entitled to ignore.

The Facts

4. Shanahan is an engineering construction contractor based in Dublin. In 2007 it won a contract for work on a power station at Langage near Plymouth which was being constructed by Alstom. The contract work involved the construction of two heat recovery steam generators, which were being built simultaneously on a busy site. Under the contract Shanahan was in effect being paid the costs of the labour it used together with a fee; it is therefore not surprising that the project manager on behalf of Alstom had wide powers, including a power to –

"..instruct the Contractor to stop or not to start any work and .. later instruct him that he may re-start or start it"

5. By April 2008 Shanahan was employing some 145 craft employees at the site. Unite the Union ("the union") was recognised by Shanahan in respect of these employees. Since the work was by its nature short-term it was inevitable that redundancies would arise; Shanahan and Unite had reached agreement in advance as to the selection process. Some redundancies were expected between 10 May and 10 August – Shanahan had notified the Insolvency Service that there might be 30-40 all told. But, in April, redundancies were not expected imminently.

6. It seems that there was a problem on site caused by congestion and ground conditions as a result of which several days had been lost. At a meeting on 28 April Alstom expressed concern and asked Shanahan to put forward proposals to eliminate the difficulties which had arisen, particularly with regard to health and safety issues. A meeting was arranged for the evening of 30 April. Shanahan put forward alternative proposals. Under one proposal they would continue to build the generators simultaneously. Under the other proposal they would build them one after the other, reducing safety risks but prolonging completion until later in the year. Alstom immediately accepted the latter proposal and gave a written instruction the following morning:

"....you are hereby directed to reschedule your remaining works with immediate effect to complete the HSRG contract sequentially rather than in parallel. The schedule dates in your contract will be extended accordingly to allow for this change. We request that Shanahan Engineering review the resources on site and optimise those resources in line with the new schedule.

It is Alstom's expectation that this will result in an immediate reduction of both indirect and craft labour whilst maintaining compliance with the NAECI Agreement.

Please confirm that the required actions have been implemented by close of business on 1st May 2008"

7. On 1 May (which was a Thursday before the Bank Holiday weekend) Shanahan's UK operations manager decided how many individuals would have to be made redundant and selected them in accordance with the agreed method. As Mr Mullins himself accepted, he

effectively presented the union with a fait accompli. Altogether about 50 individuals were made redundant. Their employment was terminated with effect from Friday 2 May and they were given a week's pay in lieu of notice.

The Legislation

8. Section 188 of **TULRA** finds its place within a group of sections in a chapter entitled "Procedure for Handling Redundancies". These provisions, which originated in the **Employment Protection Act 1975**, were enacted to give effect to **Council Directive 75/129/EEC**, now replaced by **Council Directive 98/59/EC**.

9. The core provisions laying down the requirement to consult are sections 188(1), (1A), (2) and (4):

> **"188 Duty of employer to consult … representatives**
>
> **(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.**
>
> **(1A) The consultation shall begin in good time and in any event-**
>
> **(a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least 90 days, and**
>
> **(b) otherwise, at least 30 days,**
>
> **before the first of the dismissals takes effect.**
>
> **(2) The consultation shall include consultation about ways of-**
>
> **(a) avoiding the dismissals,**
>
> **(b) reducing the numbers of employees to be dismissed, and**
>
> **(c) mitigating the consequences of the dismissals,**
>
> **and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.**
>
> **(4) For the purposes of consultation the employer shall disclose in writing to the appropriate representatives-**
>
> **(a) the reasons for his proposals,**
>
> **(b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant,**

(c) the total number of employees of any such description employed by the employer at the establishment in question,

(d) the proposed method of selecting the employees who may be dismissed…

(e) 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 and

(f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be dismissed."

10. The duty to consult is not absolute. Section 188(7) provides in part:

> **"(7) If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection (1A), (2) or (4), the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances."**

11. Section 188(7) also makes provision for cases where the decision leading to the proposed dismissal is that of a "person controlling the employer (directly or indirectly)". A failure by that person to provide information to the employer shall not constitute special circumstances for the purposes of section 188(7). No reliance has been placed by either party on that provision in this case – no doubt because, although Alstom controlled the contract and the work, Alstom did not control Shanahan.

12. Section 189 provides for the making of a protective award where a breach of section 188 is established on a complaint to an employment tribunal.

"(2) If the tribunal finds the complaint well-founded it shall make a declaration to that effect and may also make a protective award.

(3) A protective award is an award in respect of one or more descriptions of employees-

(a) who have been dismissed as redundant, or whom it is proposed to dismiss as redundant, and

(b) in respect of whose dismissal or proposed dismissal the employer has failed to comply with a requirement of section 188,

ordering the employer to pay remuneration for the protected period.

(4) The protected period-

(a) begins with the date on which the first of the dismissals to which the complaint relates takes effect, or the date of the award, whichever is the earlier, and

(b) is of such length as the tribunal determines to be just and equitable in all the circumstances having regard to the seriousness of the employer's default in complying with any requirement of section 188;

but shall not exceed 90 days…"

13. Section 189(6) provides:

"(6) If on a complaint under this section a question arises-

(a) whether there were special circumstances which rendered it not reasonably practicable for the employer to comply with any requirement of section 188, or

(b) whether he took all such steps towards compliance with that requirement as were reasonably practicable in those circumstances,

it is for the employer to show that there were and that he did."

The Tribunal's Reasons

14. The Tribunal began its reasons with a summary of the issues, noting correctly that the defence was that there were special circumstances which rendered it not reasonably practicable to comply with the statutory requirement. The Tribunal made reference, appropriately, to **Clarks of Hove Ltd v The Bakers Union** [1978] IRLR 366 for the meaning of "special circumstances".

15. After referring to relevant provisions of section 188 and 189, the Tribunal said:

"11. If there are special circumstances which render it not reasonably practicable to comply it is for the employer to establish that to the tribunal. It seems to us, that depending on the precise nature of the special circumstances, they may relieve the employer of the obligation to consult altogether. They may relieve the employer of the obligation to consult in respect of any of the requirements but still leave him under the duty to consult in relation to others. S.188(6) says: "..not reasonably practicable for the employer to comply with any [our emphasis] requirement of s.188.." It does not necessarily absolve the employer from all responsibility to consult."

16. This is a correct statement of the law.

17. On the question of the protective award, the Tribunal reminded themselves, correctly, that the award is punitive in nature rather than compensatory. It went on:

"12. There is no link to be drawn between the period of 30 days specified in s.188(1A), being the period before which consultation must normally commence, and the protected period or any loss which may have been sustained by any particular individual."

18. The Tribunal then summarised the facts. After doing so, it turned to its conclusions. It held that the key passage in the Tribunal's reasons begins at paragraph 24.

"24. We do not interpret the letter from Alstom as expressly instructing Shanahan to dismiss employees. Quite plainly, however, the respondent was faced with the situation whereby all of a sudden, they no longer required as many employees as they had previously working on the site. It would be unrealistic to expect them to continue to employ 50 or thereabouts employees for whom they had no work. There was plainly a redundancy situation.

25. Did the duty to consult arise? The fact that a sudden situation arises may or may not, depending on its circumstances, amount to special circumstances relieving the employer of the duty to consult, either entirely or in part. We are satisfied that the respondents were faced with this sudden situation. Why it may have been that Alstom chose to drop this bombshell quite as quickly and suddenly as it did is a matter upon which we can only speculate, since we have had no evidence from them, but we are satisfied that in those circumstances, it was sufficient to relieve the respondent from the obligation to consent to start consultation at least 30 days before the dismissals took effect."

19. Thus far the Tribunal was sympathetic to Shanahan. Then, however, the Tribunal continued:

"26. We are not satisfied, however, that it relieved the respondent in any other respect from the obligation to consult. Quite plainly the situation of 50 or so employees for whom there was no work is not something an employer could countenance for very long. We are not blind to the economic realities of life, but on the other hand we have no evidence before us that the respondent's financial position was such that it had to dispense with the services of these individuals quite as quickly as it did. We see no reason why it would not have been open to the respondents to have carried out some consultation with the appropriate representatives so as to comply with the other requirements of s.188. Although the ordinary requirement would be that the consultation should start at least 30 days beforehand, there is no requirement that it should last for 30 days. Consultation may be quite adequately completed within a matter of only a few days, depending on the circumstances and we see no reason why in this situation, this respondent could not have consulted with the Union representatives commencing on 1 May and continuing perhaps only for a very few days thereafter, taking account of the fact that there was Bank Holiday. In the event the respondent was accepting liability to pay a week's wages in lieu of notice. We have no evidence to suggest that would have placed them in any great difficulty if that period has been extended, perhaps by no more than 2 or 3 days, whilst consultation took place. There was an agreed selection procedure in place and we do not think that the consultation process would have taken very long… certainly no more than a few days.

27. We have come to the conclusion that this was a failure on the part of the respondents to comply with their obligations to consult in respect of consultation as required by s.188(2) and (4). We are satisfied that this was a serious failure. It had the impact of reducing the respondent's work force very substantially and we see no justification for failing to carry out such consultation as it was reasonably practicable, allowing for the fact that they were unable to commence at least 30 days before the first of the dismissals took place.

28. We declare that there was a failure to comply with the requirements of s.188 and make a protective award in respect of those individuals concerned for the protected period of 90 days. We see nothing in the evidence as put before us which would justify us in concluding that it should be any lesser period."

Submissions

20. On behalf of Shanahan, Mr Duggan submits that, given its findings of fact, the Tribunal ought to have held that it was not reasonably practicable to have consulted at all. It was not reasonably practicable to consult before 1 May, given the sudden nature of the change of plan by Alstom. Thereafter it was not reasonably practicable to consult given the explicit direction of Alstom and the urgency of implementing its directive. Mr Duggan says that the directive from Alstom was tantamount to ordering immediate dismissals on 1 May.

21. Mr Duggan refers to and relies on **Howlett Marine Services v AEEU** [1998] UKEAT/253/98. The circumstances were not dissimilar to this case. The employer had a contract with Swan Hunter to provide scaffolders. The contract had a clause which allowed Swan Hunter to suspend work wholly or in part and direct reductions in manning levels. Swan Hunter unexpectedly instructed the employer to reduce the scaffolders by 15 within 2 days. It was held that special circumstances existed and relieved the employer altogether from the duty to consult (though subsequent similar instructions did not). Mr Duggan says the result should be the same here.

22. Mr Duggan complains that the Tribunal took into account irrelevant matters in reaching its decision. He criticises the Tribunal for its reference to the financial position of Shanahan. This, he pointed out, was not a "financial exigencies" case; it was a case where the work was reduced under the contract. He submits that the judgment is tantamount to saying that the employees should have been retained because Shanahan could afford to do so. He criticises the Tribunal for failing to take into account that Alstom had ordered the reductions in resources to take place immediately – by 1 May.

23. On the question of the protective award, Mr Duggan submits that the Tribunal was wrong to say that there was no evidence of mitigating circumstances, and failed to give effect to its own findings. He submits that, applying the approach in **Susie Radin Ltd v GMB** [2004] IRLR 400, the Tribunal ought to have found that there were mitigating circumstances. He goes further and submits that the Tribunal ought to have made a protective award for no more than 2 or 3 days, having regard to its finding that any period of consultation would have been short.

24. On behalf of the Union, Mr Whitcombe submits that the Tribunal applied the correct legal principles and that there is no error of law in its reasoning. It had the classic case of **Clarks of Hove Ltd v The Bakers Union** well in mind. The Tribunal approached the matter on the basis that Alstom had no power to require Shanahan to dismiss anyone, still less to dismiss them at any particular time or in any particular way. This was correct. Alstom's decision was no more than the background to a situation where Shanahan found itself with employees for whom it had no work. The Tribunal did not err in law in having regard to the financial circumstances of Shanahan – it had specifically invited the Tribunal to do so. Ongoing payroll costs will be a factor for consideration.

25. Mr Whitcombe further submits that the Tribunal did not err in law in holding that there should be a 90 day protective award. Not only was this the starting point (see **Susie Radin Ltd v GMB**) but, since there was no consultation at all, it should also be the finishing point. As the Tribunal found, it would have been straightforward enough to consult in a few days. On the authorities there is no link between the length of the consultation period and the length of any protective award. The fixing of the award is classically a matter for the Tribunal, and there is no basis for interfering with the award of the Tribunal.

Conclusions

26. When applying section 188(7) it is well established that the Tribunal must keep three stages in mind. (1) Were there special circumstances? (2) Did they render compliance with section 188(1A), (2) and (4) not reasonably practicable? (3) If so, did the employer take all such steps towards compliance with these provisions as were reasonably practicable? See **Clarks of Hove Ltd v The Bakers Union** (supra) at paragraph 14 (Geoffrey Lane LJ).

27. It is also well established that special circumstances connote "something out of the ordinary, something uncommon":see paragraph 16.

28. The phrase "reasonably practicable" is a well-known phrase often adopted to define the scope of a requirement or obligation. Where requirements are placed upon an employer subject to these limiting words, an employer does not have to prove that it was impossible to comply with the requirements, or even that it was physically impracticable to do so. Rather, as Potter LJ said in **Schultz v Esso Petroleum** [1999] 3 All ER 338 at 345 -

> **"Whenever a question arises as to whether a particular step or action was reasonably practicable or feasible, the injection of the qualification of reasonableness requires the answer to be given against the background of the surrounding circumstances and the aim to be achieved."**

29. The aims of consultation, in the context of the 1992 Act and the underlying Directive, are plain enough from section 188(2). The aims are that there should be discussion with employee representatives, and if possible agreement, on avoiding dismissals, reducing the number of dismissals, and mitigating the consequences of dismissals.

30. It is plain that the Tribunal had the correct legal test well in mind: see paragraph 11 of its reasons. Although it has not framed its conclusions precisely in the terms of the statute we see no reason to suppose that it has applied the law incorrectly. We think it is plain from the

Tribunal's reasons that it found special circumstances to exist, and those special circumstances rendered it not reasonably practicable to comply with section 188(1A) by consulting in good time at least 30 days in advance. However it remained reasonably practicable to consult and consultation should have been undertaken.

31. We do not think the Tribunal erred in law in reaching this conclusion. The instructions given by Alstom made it inevitable that the workforce on the contract would have to be reduced; but it remained for Shanahan to decide whether employees should be dismissed for redundancy, how many employees should be dismissed, when they should be dismissed, and what if anything ought to be done to mitigate the consequences of dismissal. These were proper matters for consultation; it was the aim of the legislation that there should be consultation with a view to agreement if possible on these issues.

32. We would add, although this does not seem to be a matter on which the Tribunal placed reliance, that Alstom's instruction was to reduce labour "in accordance with the NAECI agreement". The relevant portion of that agreement is in our papers. It provides for consultation to take place in the event of redundancies:

> **"16.3 Redundancy Consultation**
>
> **(a) Where a redundancy situation arises the employer shall commence consultation with the relevant signatory trades unions in line with statutory requirements, or as soon as reasonable practicable thereafter given the short-term changes in circumstances commonly experienced in engineering construction."**

33. It is difficult to see how, in these circumstances, the instruction from Alstom can be read as an instruction immediately to dismiss regardless of a duty to consult.

34. We do not derive any particular assistance from **Howlett Marine Services v AEEU**, on which Mr Duggan relied. The finding of the Tribunal in that case on which he relies was not a

subject of appeal; and no principle of law emerges from the case which is of any importance to the present appeal.

35. Nor do we see any error of law in the way in which the Tribunal approached financial issues. The Tribunal only said that there was nothing in the financial circumstances of Shanahan which rendered it not reasonably practicable to consult. In some cases, special circumstances coupled with the financial exigencies caused by them may render it not reasonably practicable to consult; but this was not such a case.

36. We therefore reject the appeal, and uphold the finding of the Tribunal that Shanahan was in breach of its duty under section 188 of TULRA.

37. However, we part company with the Tribunal on its reasoning for awarding a 90 day protected period. We do not agree that there was "nothing in the evidence as put before us which would justify us in concluding that it should be any lesser period". At this point either the Tribunal has misunderstood the law; or its reasoning is inadequate.

38. On this question, the starting point is the well known summary of the applicable principles in **Susie Radin Ltd v GMB** at paragraph 45 (Peter Gibson LJ):

> **"45. I suggest that ETs, in deciding in the exercise of their discretion whether to make a protective award and for what period, should have the following matters in mind:**
>
> **(1) The purpose of the award is to provide a sanction for breach by the employer of the obligations in s.188: it is not to compensate the employees for loss which they have suffered in consequence of the breach.**
>
> **(2) The ET have a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employer's default.**
>
> **(3) The default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult.**
>
> **(4) The deliberateness of the failure may be relevant, as may the availability to the employer of legal advice about his obligations under s.188.**
>
> **(5) How the ET assesses the length of the protected period is a matter for the ET, but a proper approach in a case where there has been no consultation is to start with the maximum**

period and reduce it only if there are mitigating circumstances justifying a reduction to an extent which the ET consider appropriate."

39. In this case, while there was a complete failure to consult, there was material in the Tribunal's own findings which would justify a lesser protected period. There were, as the Tribunal found, special circumstances lying behind that failure – namely, the sudden and unexpected direction by Alstom to cease work on one of two generators and to reduce resources on the site. That, to our mind, is at least potentially a mitigating circumstance of considerable power and importance. In an ordinary case of complete failure to consult there will not be a special circumstance brought about by an outside agency. In the ordinary case where there has been no consultation at all there will have been "good time" to consult; and the failure of the employer to do so will have extended over a substantial period. Not so in this case.

40. It is true, of course, that the Tribunal found the special circumstance not to excuse the failure to consult; but that does not necessarily deprive it of its power as a mitigating factor. The Tribunal ought to weigh carefully in the balance the special circumstance which it has found to exist. If it is not a mitigating factor, it ought to say why. If it is a mitigating factor, it should give effect to it.

41. We would make the following further observations on the question of assessing a protective award.

42. It is now well established that the purpose of the protected award is to provide a sanction for breach of an employer's obligations under section 188, not to compensate employees; and that the focus should be on the seriousness of the employer's default. Thus there is no linkage between the 90 day maximum award and the length of time consultation would have taken.

43. However, when assessing the seriousness of a default, it is relevant both to consider the culpability of the employer and the harm or potential for harm of the default. The Tribunal should take into account all the circumstances and make such award as is just and equitable. It is relevant that no consultation took place at all. It is also relevant (for example) that the consultation could in any event have taken place over a short period by reason of the special circumstances of this case; and that there was already an agreed redundancy selection procedure which the employer operated. Taking into account such factors does not, we emphasise, mean that the award should be tailored to the length of time consultation would have taken. It should not. But the Tribunal in assessing the seriousness of the default should take into account all the circumstances in order to reach a rounded judgment as to what is just and equitable.

44. We will therefore remit this case to the Tribunal to reconsider the length of the protected award in the light of this guidance. It was submitted on behalf of Shanahan that the Appeal Tribunal ought itself to decide the question of the protected award; but it is the role of the Tribunal to find facts and evaluate the length of a protected period, and the role of this Appeal Tribunal to determine questions of law. We have considered the well known guidance on remission given in **Sinclair Roche &.Temperley v Heard** [2004] IRLR 763 at paragraph 46. We are confident that the same Tribunal, which has had the advantage of hearing the principal issues in the case, will apply the guidance given in this judgment, listen to further submissions and evidence if any on the question of mitigation, and consider the length of the protective award afresh.