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Practice Group(s):

Labor, Employment and Workplace Safety

Case Alert: Ignorance is No Defence for Failure to Collectively Consult

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What happened?

In *E Ivor Hughes Educational Foundation v Morris and others*, the Employment Appeal Tribunal (the "**EAT**") upheld the Employment Tribunal's decision to make the maximum protective award of 90 days' pay to an employee in circumstances where no collective redundancy consultation was undertaken with the employee's representatives as the employer was entirely unaware of its obligation to consult.

Under the *Trade Union and Labour Relations (Consolidation) Act 1992*, if an employer proposes to make large scale redundancies of 20 or more employees at one establishment within a period of 90 days or less, it must undertake collective consultation with elected representatives or a recognised trade union of the employees who are at risk of redundancy.

There is a limited exception to this rule, where "special circumstances render it not reasonably practicable" for an employer to comply with certain aspects of its collective consultation obligations. However, in such cases, the burden is on the employer to show that (i) special circumstances do apply; and (ii) it has taken all steps that were reasonably practicable in the circumstances.

This case concerned the closure of a school and its failure to collectively consult with its staff members. The school governors decided in February 2013 that the school would be closed, unless pupil numbers improved. By April 2013, it was evident that pupil numbers would not improve so the decision was taken to close the school and staff members were given notice of termination of employment. The obligation to collectively consult was triggered at the first meeting in February; however the school was entirely unaware of its duties and no consultation was undertaken at any stage.

In defending the employees' claims, the school sought to rely on the special circumstances exception and argued that, had consultation commenced in February, the possible closure could have been leaked which would have sealed the school's fate. However, the Employment Tribunal rejected this argument and stated that any such leaks could have been prevented by confidentiality provisions.

In any event, the EAT decided that the argument of special circumstances was "artificial", as the school had not actually evaluated whether it was practical to comply with its consulting obligations - it was not even aware that it had any. Whilst the EAT did acknowledge that the school had not deliberately breached its duty to consult, the EAT decided that this was due to a "reckless failure" to seek legal advice. Therefore, the EAT upheld the decision to make the maximum award of 90 days' pay to the staff members.

What does this mean?

Ignorance is no excuse! This case provides useful guidance on the scope of the special circumstances exception to an employer's duty to collectively consult. The EAT has made it clear that no relief will be available to employers if they are unaware of their obligations,

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and that they cannot use a hypothetical argument of special circumstances to defend their corresponding failure to implement collective consultation. It also emphasises that the protective award is meant to be punitive (rather than compensatory), meaning that it is not calculated by reference to the actual loss suffered by the employees. In this case, the same award was made as in another case where the employer deliberately misled the trade union.

What should we do?

Employers must comply with their collective consultation obligations, which are triggered once a strategic or commercial decision has been taken that compels the employer to contemplate or plan for collective redundancies. Note that, in many cases, such obligations arise before a final decision to make employees redundant has been made. An employer should seek legal advice if it is unsure of its duties during a redundancy process, as lack of knowledge does not constitute a defence in the event of non-compliance and, as shown in this case, a breach of those duties could have severe financial consequences.

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