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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 69 April 2002

# Fittingly appropriate

## R v Central Arbitration Committee ex parte Qwik-Fit (CA unreported)

**IN A landmark judgment, a decision from the CAC has been upheld in the first case on statutory recognition to reach the Court of Appeal. The Court of Appeal has overturned the High Court judgment in the judicial review case brought by Kwik-Fit Ltd against a CAC decision on the bargaining unit in a claim by the TGWU for recognition.**

One of the key stages in an application to the CAC for statutory trade union recognition is deciding the bargaining unit. If the parties are unable to agree a bargaining unit for themselves, the CAC will decide it. The scope of the bargaining unit in turn determines the balloting constituency – only those in it can vote for or against recognition. So the precise delineation of the bargaining unit can be crucial as to whether a trade union can win a recognition ballot or show that 50% plus of the bargaining unit are trade union members and get recognition without a ballot.

So how does the CAC decide "the appropriate bargaining unit" if the parties fail to agree? The law says that the CAC must take account of the need for the bargaining unit to be compatible with effective management taking into account a number of factors such as the views of the employer and of the union; existing bargaining arrangements; the characteristics and location of the workers (para 19(5)).

There are two big issues bound up in this decision making process – firstly what is really meant by appropriate – does it mean the best or most appropriate bargaining unit. Secondly, if "appropriate" does not have to be the best bargaining unit, then obviously more than one unit could be appropriate - possibly the union's proposal, the company's suggestion and any one or more possible units thought up by the CAC. How should the CAC decide between them and does one pull rank over any other?

In this case the TGWU had proposed the bargaining unit should comprise Kwik-Fit employees in their London divisions. Kwik-Fit argued that a national bargaining unit was appropriate.

The CAC decided that their task was not to decide what bargaining unit would be the most effective form of management, but merely to ensure that what is decided is compatible with effective management. They considered that they should examine whether the union's proposed bargaining unit is found wanting and does conflict with effective management. On that basis, the CAC found the TGWU's proposed bargaining unit was appropriate.

Kwik-Fit won a judicial review against the CAC and got an order to stop the ballot taking place which has now been overturned by the Court of Appeal. The Court of Appeal have ruled that the CAC panel had acted entirely in accordance with the law. The CAC must start with the union's proposed bargaining unit and determine whether that unit was appropriate. The CAC is not excluded from considering other bargaining units, but it is a two stage process – to test the union's proposed unit in light of the company's argument that a different unit is appropriate, and only as an alternative if the CAC considers the union's proposal to be inappropriate. So the union and the employer's suggestions are not on an equal footing – the union's unit takes priority

To determine what is "appropriate" the Court also said is a modest test and does not mean the optimal unit.

# After the job is too late for protection

**Jones v 3M Health Care Limited and other appeals (2001)**
**EAT 11 December 2001**
**Fadipe v Reed Nursing Personnel**
**IDS Brief 702 February 2002**

**RECENTLY THERE have been a number of cases which have considered whether Employment Tribunals have jurisdiction to deal with post employment discrimination.**

In Jones v 3M Healthcare Limited & Others, the Employment Appeal Tribunal was asked to consider whether Employment Tribunals had jurisdiction to hear complaints in a number of cases of disability discrimination or victimisation falling within the provisions of the Disability Discrimination Act 1995 (DDA), where the events complained of occurred after the relationship of employer and employee had ceased.

Mr Jones suffered severe clinical depression. His employment with 3M Healthcare Limited ended in November 1997. He lodged his IT1 claiming disability discrimination and victimisation had occurred on or after 12 January 2000. In another case, Mr Kirker, who was blind, lodged an IT1 alleging victimisation on 10 November 1999. He stopped working for the Respondent, British Sugar Plc in March 1997. British Sugar had been asked to provide a reference. They did not and as a result a prospective application failed because of lack of information on his recent work history. Similarly Ms Bond, another Applicant, was not provided a reference by her former employer. In the matter of Mrs Angel, she believed she had been victimised as her former employer allegedly gave her adverse references. These Applicants all brought claims under the DDA.

Although the EAT admitted that the relevant provisions in the SDA and RRA were ambiguous, they concluded that claims could only be made by persons employed by the Respondent employers at the date of the discriminatory event. The only exception stemmed from Coote v Granada Hospitality Limited [1999] IRLR 452, in which the European Court of Justice held that an employer cannot refuse to grant a reference where this amounts to victimisation following a complaint of Sex Discrimination.

The EAT decided in these cases that there was no such ambiguity in the DDA. The EAT concluded that the DDA had never been intended to cover post termination events and that if it did it would be reasonable to expect to find some provision in the DDA to ensure that post termination events referable to an early employer-employee relationship can be asserted as discrimination.

The EAT further stated that an employee who has either denied a reference despite asking for one after his employment has ceased or been given a false and misleading one, was not bereft of a remedy: there is a duty of care on the employer's part to provide a reference which is neither false nor misleading, a breach which is actionable in the ordinary courts as negligence. The EAT was also asked to consider the effect of the European Convention on Human Rights, but they stated that the obligation was not in absolute terms to read and give effect to domestic legislation in a way which was compatible with convention rights but to do so only "so far as it was possible to do so".

In Fadipe v Reed Nursing Personnel, the Court of Appeal held that an employee who made a complaint to his employer concerning health and safety at the workplace could not later complain when his employment had ended, that he had been subjected to a detriment because his employer provided him with an unsatisfactory reference. It is stated in Section 44 of the Employment Rights Act 1996 protects employees from being subjected to detriment only while their employment continues.

Unfortunately, for now, there is very little former employees can do to address discrimination that occurs after their employment has ceased with an employer. But the House of Lords will hear appeals on the issue this year and the government will change the law in line with sex discrimination to comply with the Race and Employment Directives

# Discrimeination and punishment

## Kuddus v Chief Constable of Leicestershire Constabulary IDS – Brief 690 August 2001

**FINALLY THE law may now have changed to allow Claimants to bring claims for exemplary damages for the statutory tort of race discrimination, following this case in the House of Lords.**

The significance of exemplary damages is that they are aimed at punishing the wrongdoer. They operate on a completely different principle to compensation under employment statutes which is to compensate for the actual losses. The level of damages in discrimination cases can bear little relation to the seriousness of the discrimination – if, for example a low paid worker has, through economic necessity to get another job soon after a discriminatory dismissal, his or her award for loss of earnings is likely to be very small no matter how appalling the treatment. Exemplary damages – literally meaning to make an example – would allow a Tribunal to award damages to punish the discriminatory employer. However, in 1993 the Court of Appeal in AB and others v South West Water Services Ltd [1993] All ER 609 held that exemplary damages were not available for torts created after 1964 – which effectively ruled out all employment cases.

Now the House of Lords seems to have changed that in the case of Kuddus. Mr. Kuddus made a complaint to the Police that he had suffered a theft from his property. He later discovered that a Police Officer had forged his signature on a document purporting to withdraw that complaint. He brought a High Court claim for exemplary damages against the Chief Constable of that force, on the basis that the Officer's actions amounted to the tort of misfeasance in public office for which the Chief Constable was vicariously liable.

The Chief Constable accepted that there had been a forgery and that the officer's conduct amounted to a misfeasance in public office. Since the tort of misfeasance in public office was not a tort for which exemplary damages were available prior to 1964, his claim was struck out. Mr Kuddus appealed. The House of Lords reinstated his claim doubting whether earlier House of Lords judgments that restricted exemplary damages to torts where these type of damages were available before 1964.

Although not entirely clear on the point, the judgment appears to open the door for exemplary damages in discrimination and employment claims. In order to claim exemplary damages a case must fall within one of three categories. The most relevant is where there has been oppressive, arbitrary or unconstitutional action by servants of the Government since that may often be the case in a discrimination claim of harassment and victimisation.

# Fairly trying times for Human Rights Act

**Preiss v General Dental Council [2001] IRLR 696**
**Fogarty v United Kingdom [2002] IRLR 148**
**Devlin v United Kingdom [2002] IRLR 155**
**Albion Hotel v Maia e Silvo [2002] IRLR 200**
**Whittaker v P and D Watson EAT 2.7.02, Times Law Report, 26.3.02**

This month's guest author is Professor Brian Bercusson, Professor of Law at King's College London and Director of the European Law Unit at Thompsons Solicitors

**IT IS fair to say that the Human Rights Act has not, so far, had a radical impact on employment law in the UK. However, claims under Article 6 of the European Convention – the right to a fair trial – are keeping the courts busy, both at home and in Strasbourg. In the UK, the cases centre on the application of Article 6 to professional disciplinary proceedings. In Strasbourg, recent cases have looked at the interplay between Article 6 and various forms of immunity from discrimination claims asserted by Government agencies. Later this year, the Court of Appeal is to rule on whether the small employer exemption in the Disability Discrimination Act 1995 breaches Article 6.**

Article 6 of the Convention guarantees the right to a fair trial, within a reasonable time, before an impartial and independent Tribunal. The right is a so-called "qualified right". There are circumstances in which a public authority can restrict the right to a fair trial-where the restriction on the right pursues a "legitimate aim", is "in accordance with the law", is "proportionate" and is "necessary in a democratic society".

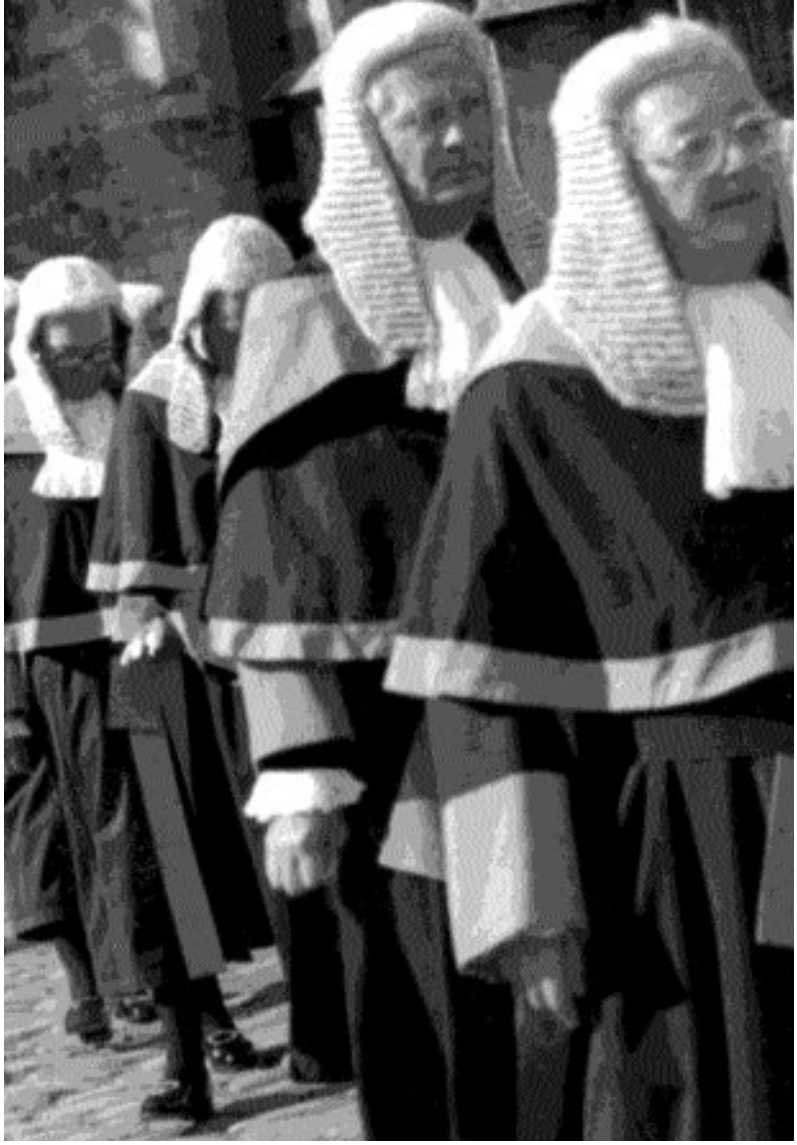
In disciplinary proceedings, Article 6 does not require each stage of the disciplinary process to comply with all the components of a fair trial. The procedure will comply with Article 6 if there is a right of appeal from a stage in the process which does not comply with Article 6 to a forum which does comply with Article 6, provided that the appeal forum has full and competent jurisdiction.

In Preiss v General Dental Council [2001], a dentist who had been struck off the register appealed to the Privy Council, claiming that the General Dental Council's procedures failed to comply with Article 6. Whilst finding that the procedure did technically comply with Article 6 because of the availability of a full right of appeal to the Privy Council, which could re-hear the case, the Privy Council did express concern at the apparent lack of impartiality inherent in the procedure.

The President of the GDC carried out preliminary screenings of cases and then sat on the disciplinary committee. GDC members sat on both the preliminary proceedings committee (which decided if cases should proceed) and then the disciplinary committee itself. Charges were also brought in the name of the GDC, which was also the body with responsibility for the conduct of the disciplinary procedure.

In Albion Hotel v Maia e Silvo [2002], the Employment Appeal Tribunal had to consider the somewhat esoteric point of whether or not an Employment Tribunal had been entitled to decide the case on the basis of three decisions which had not been referred to by the parties (or the Tribunal) during the hearing. The EAT said that ordinary principles of natural justice meant that it had not. Although the EAT did not refer specifically to the Human Rights Act, it is likely that it had Article 6 well in mind in reaching this conclusion. (Perhaps the EAT itself should have referred to Article 6 in reaching its decision!)

In Fogarty v United States of America, the applicant brought a complaint of sex discrimination against the US Embassy. At the Employment Tribunal, the Embassy claimed state immunity under the Immunity Act 1978. This meant that Ms Fogarty could not proceed with her tribunal claim. She complained to the European Court of Human Rights, saying that the operation of the Immunity Act prevented



her from exercising her right to a fair trial.

The ECHR gave short shrift to the Government's argument that Ms Fogarty could not, in effect use Article 6 to give her a right she would not otherwise have had. Had it not been for the plea of immunity she would have had the right to pursue a discrimination claim. However, the availability of immunity was within the so-called "margin of appreciation" conferred on States. The provisions of the Immunity Act pursued a legitimate aim, and were in accordance both with international law and the principle of proportionality. Ms Fogarty's challenge therefore failed.

Finally, in Devlin v UK, an unsuccessful applicant for the post of administrative assistant in the Northern Ireland Civil Service brought a complaint to an Employment Tribunal that he had been discriminated against on religious grounds. The Civil Service issued a certificate saying that he had been unsuccessful on grounds of national security, which meant that it had immunity from suit in a discrimination claim. Mr Devlin complained to the European Court of Human Rights that the operation of immunity deprived him of his right to a fair trial.

The ECHR found that Mr Devlin's rights under Article 6 had been infringed. Although the concept of national security could potentially be relied upon as a legitimate ground for restricting the operation of Article 6, the Government could not rely on it in Mr Devlin's case because there was no evidence of any investigation as to whether or not he would have presented a security risk.

When reviewing professional disciplinary proceedings, the availability of a full right of appeal to a forum which does comply with Article 6 is all important. If that appeal forum does comply with Article 6, and has the power to determine the proceedings in full (as opposed to a limited right of review over a the decision at an earlier stage in the stage which is not Article 6 compliant), then the right to a fair trial will have been preserved. But the Courts, in the UK at least, seem perfectly prepared to criticise professional disciplinary procedures that lack the appearance of impartiality even if there is a right of appeal to a forum which is fully compliant with Article 6. This willingness may well be of use in negotiating changes to procedures.

In Whittaker v P and D Watson, it is being argued that Whittaker is being denied the right to a fair hearing because he cannot have a hearing for his complaint of disability discrimination as his employer is exempt from the DDA by dint of employing fewer than 15 people. The EAT have granted leave to the Court of Appeal, since the EAT is not on the list of courts able to make a declaration that the law is incompatible with the Human Rights Act.

# Picking up information and consultation

## A FISHY RESULT

**A COUNCIL meeting of Ministers of Agriculture (including fisheries) on 18 February 2002 finally adopted the directive establishing a general framework for improving information and consultation rights of employees in the European Community.**

### UK can run but cannot hide...

As recounted in Thompsons LELR of September 2001, the United Kingdom government had been actively blocking adoption of the directive in the Council. One result was the joint declaration of the European Parliament, the Council and the Commission attached to the Minutes of the Council which adopted the directive on 18 February. The declaration recalled the judgements of the European Court of Justice of 8 June 1994 (Cases C-382/92 and C-383/92) which condemned the then UK Conservative government for its failure to provide for information and consultation of employee representatives under directives of 1975 and 1977. The declaration is a sharp reminder that the new directive's obligation to inform and consult employee representatives applies to Labour governments as well. At the end of the day, the UK government cannot escape the EU model of mandatory employee representation, and information and consultation of employee representatives.

### Timing of information and consultation

Early drafts of the directive indicated clearly that employee representatives were to be informed and consulted prior to decisions being made. The final text remains ambivalent. Article 4(4)(e) defines "consultation" as taking place "with a view to reaching an agreement on decisions", but without any clearer indication of timing. However, the Preamble to the directive does contain a number of indications that the directive is to be interpreted to preclude "serious decisions affecting employees from being taken and made public without adequate procedures having been implemented beforehand to inform and consult them" (Recital 6). There is every reason to expect that the European Court would uphold an interpretation of the directive consistent with this clear indication in the Preamble.

### Sanctions for breach

Article 7(3) originally provided a sanction for serious breach. Under pressure from the UK, this was deleted. A report by the European Parliament's Employment and Social Affairs Committee on second reading on 10 October 2001 proposed an Amendment 12 imposing stringent sanctions and suspension of employer decisions in cases of serious breach. However, at a plenary session on 23 October 2001, while this amendment achieved a majority of those voting, it failed to obtain the required absolute majority of 313 of the 625 MEPs. A compromise was reached in the form of Recital 28 in the Preamble: "Administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations based on this Directive". It is open to the European Court to condemn a Member State, as it did the UK in Cases C-382/92 and C-383/92 of 8 June 1994, for failing to provide adequate penalties in cases of violation of the information and consultation requirements. But, not least in the aftermath of the Enron scandal in the USA, this is a bitter disappointment.

### A minefield of ambiguities

The final tortured text of the directive, reflecting the UK's government's unrelenting campaign, is a minefield of ambiguities. Four will be highlighted briefly here, and, with others, will attract much litigation.

**– different negotiated arrangements**

Article 5 allows management and labour to negotiate "provisions which are different" from the directive. Unlike the Article 13 agreements in the European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Works Councils (EWC) Directive, such agreements may be made "at any time". But Article 13 agreements could only be negotiated by the special negotiating body, subject to specific representation and voting requirements. The European Parliament attempted in Amendment 3 on second reading of this directive to specify that the "social partners" eligible to negotiate different agreements on behalf of employees were "the competent representative organisation of the trade unions, the employee representatives of the undertaking, as provided by law". Though supported by the Commission, this proposal failed. Again, in the event of failure to reach agreement, the EWC directive prescribed a set of minimum standards (the "subsidiary requirements") laid down in an Annex. No such standards are provided for in the present Directive. Instead, the agreements are subject only to the principles set out in Article 1, and exposed to challenge.

**– effects on other directives**

Earlier drafts of the directive provided clearly that it "also applies" to the Collective Dismissals and Acquired Rights Directives. Instead, the final text states: "This Directive should not affect the provisions, where these are more specific" of those directives. This presumably means it does affect those directives where they are "less specific". The outcome is considerable uncertainty as to whether, and if so how, those other directives are affected

**– practical arrangements and national law and practices**

Article 1(2) provides: "The practical arrangements for information and consultation shall be defined and implemented in accordance with national law and industrial relations practices in individual Member States in such a way as to ensure their effectiveness". Article 2(b-e) allows for national law and practice to define "establishment", "employer', "employee" and "employees' representatives". But not "information" and "consultation". The substantive elements of the general framework of the right to information and consultation may not be defined by national law and practices; only the practical arrangements to assure their effectiveness.

Some Member States may be tempted to trespass on the requirements of the "general framework". It will be up to litigants to bring them before the courts. Only if the practical arrangements ensure effectiveness of the right to information and consultation should they be upheld, an open invitation to litigation.

**– thresholds and transposition**

The directive applies to all undertakings employing at least 50 employees or establishments employing at least 20 employees (Article 3), estimated at under 3% of all companies in the EU, though about 50% of all employees in the EU. Member States are allowed 3 years for transposition of the directive into national law.

Not content, the UK government extracted concessions both increasing the threshold of application and extending the period of transposition. Too modest to allow itself to be named, the UK government is identified in Article 10 as: "a Member State in which there is no general, permanent and statutory system of information and consultation of employees, nor a general, permanent and statutory system of employee representation at the workplace allowing employees to be represented for that purpose". This dubious distinction is likely to be claimed only by the UK and Ireland, though arguably even the UK includes a permanent statutory system of health and safety representatives. This raises the question of whether "general" refers to all workplaces, not to all issues.

If the UK succeeds in exploiting this provision, it will increase the threshold to undertakings with 150 employees or establishments with 100 employees for a period of a further two years, and for a further year this threshold will only decrease to 100 in undertakings and 50 in establishments. Many British workers will have to wait until 2008 for the rights guaranteed to other EU citizens three years earlier.

## Conclusion

Given the long delay in transposition which it extracted, it is entirely possible that a Labour government will not be in power in 2008 when the deadline expires. For that reason alone, the government should be encouraged to introduce the necessary implementing legislation earlier.

Whenever this happens, litigation is probable. The Intergovernmental Conference scheduled for 2004 is likely to incorporate into the EC Treaty the EU Charter of Fundamental Rights which includes among other fundamental rights Article 27: Workers' right to information and consultation within the undertaking. Looking to this Charter, the European Court of Justice is likely to be more sympathetic to the objectives of the EU directive than to the domestic policies of the UK Government.

# The price is right

## Elkouil v Coney Island Ltd [2002] IRLR 174

**THE EMPLOYMENT Appeal Tribunal, in an important decision, have clarified what compensation should be awarded in redundancy dismissal cases. Section 123 (1) of the Employment Rights Act 1996 states that when considering the amount of a compensatory award it "...shall be such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."**

Readers will be familiar with the 'Polkey reduction' in Tribunal awards (where an award is reduced if it is considered that had the employer taken the appropriate steps it would not have affected the outcome). In redundancy dismissal cases such as Mining Supplies (Longwall Ltd v Baker [1988] IRLR 417 and Abbotts v Wesson-Glynwed Steels Ltd. [1982] IRLR 51 EAT, the Tribunals generally awarded two weeks compensation on the basis that had the employers acted properly the employee would have had a further two weeks employment.

The EAT in Elkouil v Coney Island Ltd have revisited these decisions when considering the particular facts of the case.

Mr Elkouil was employed as a credit controller. New systems were introduced between May 1998 and July 1999 and Mr Elkouil was made redundant with immediate effect on 27 July 1999. A complaint was lodged at the Employment Tribunal claiming unfair dismissal on the grounds of lack of consultation. Following the earlier decisions, the Tribunal considered that consultation would have taken no more than two weeks and therefore made a compensatory award of two weeks pay.

Mr Elkouil appealed on two grounds:

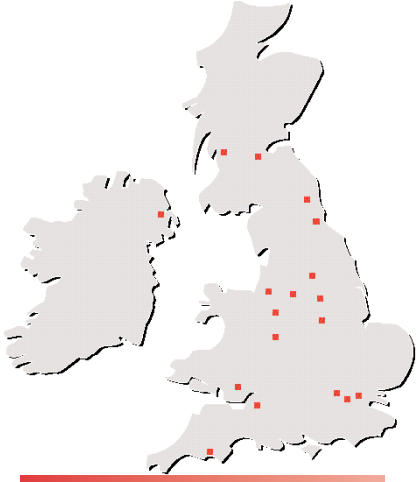
1 The tribunal had erred in failing to find that the dismissal was unfair because not only had there been a lack of consultation but also a lack of warning.
2 The amount of compensation awarded was inappropriate in the circumstances because the employers knew at least 10 weeks in advance that he was at risk of being made redundant.

The first ground of appeal failed. The EAT held that there was not a separate duty on the employer to warn an employee of impending redundancy. Consultation and warning are part of the same process which should commence with a warning that the employee is at risk.

Even though the first ground of appeal failed the EAT upheld the second. They considered that where a Tribunal finds that an employee was unfairly dismissed for redundancy on the grounds of lack of consultation, the appropriate method of calculating compensation was by reference to what would have been the likely outcome if they had done what they should have.

In upholding Mr Elkouil's appeal the EAT considered that the Tribunal should not have constrained itself to assessing compensation on the basis of how long the consultation process would have taken and making an assumption that the employee would have been employed for that period. Instead, where, as in Mr Elkouil's case, the employers knew some 10 weeks before he was dismissed that he was going to be made redundant the appropriate measure of compensation was 10 weeks.

This decision provides a wake up call to unscrupulous employers who spring redundancies on workers at the last minute. It is only fair that employees are properly compensated when employers fail to warn them that their job is at risk.





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