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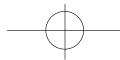

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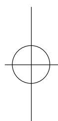
THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 85 January 2004

Divided, not conquered

Fairhurst Ward Abbots Ltd v (1) Botes Building Ltd; (2) Mr K Vaughan and others EAT 1007/00, IRLB 721 September 2003

In this recent case the Employment Appeal Tribunal has considered the issue of whether there is a transfer when a contract comes up for tender in a second generation transfer and is divided into separate parts.



The case concerned workers who had previously been employed by the London Borough of Southwark and who had transferred under TUPE to Botes Building Limited in 1996. In 1998 Southwark sought tenders for the provision of services undertaken by Botes and in doing so divided the contract into Area 1 and Area 2. Fairhurst was successful in its bid for Area 2 and decided that none of the eight workers were assigned to Area 2 and therefore their contracts did not transfer. Botes considered that the eight employees did transfer. Both companies refused to employ them, and neither would take responsibility for the dismissal.

The ET considered that there was an undertaking which transferred in two parts. Six of the workers were dismissed by Fairhurst and two were dismissed by Botes.

Fairhurst appealed on the ground that there was no economic entity capable of retaining its identity upon transfer because the contract for Area 2 was not the same economic entity as existed previously and because no assets had transferred.

SPLIT CONTRACT RETAINS IDENTITY

The EAT rejected Fairhurst's argument. In reaching its decision that Area 2 was an economic entity capable of transfer the EAT relied on both the Acquired Rights Directive and the Regulation 3 of TUPE which refer to both an undertaking or part thereof.

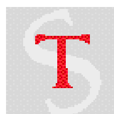
The EAT rejected Fairhurst's contention that there had to be a discrete and identifiable economic entity before the transfer. The EAT noted that although the specific question had not been addressed by either the European or domestic courts it was neither logical nor practical that there had to be a separate economic entity before a transfer. In particular, the EAT considered that the fact that the regulations specifically mentioned a "part of an undertaking" envisaged the situation where a body will only want to contract out of one of its functions otherwise there would be no need for a specific provision.

Furthermore, the EAT took a purposive approach to the Directive and the Regulations and considered that if this situation was not covered then employers could simply divide entities into smaller parts as a ruse for circumventing the TUPE regulations.

NO WORKFORCE DOES NOT MEAN NO TRANSFER

The Employment Tribunal had found that even though Fairhurst had refused to take on the eight workers from Botes in the honest belief that it was entitled to refuse to do so, there was still a transfer. The EAT upheld the tribunal's decision. The EAT considered that the fact that Fairhurst had refused to take on the workforce on legal advice (as opposed to deliberately trying to avoid TUPE) did not necessarily mean that there was no transfer.

This decision confirms that employers in second generation transfers cannot avoid their responsibilities under TUPE by simply carving up contracts. Nor can an employer rely on legal advice as a legitimate reason for not taking on a workforce under a contract. Employers beware: the Courts are on to you.



THOMPSONS SOLICITORS

PART-TIME WORKERS

Retaining discrimination

Matthews & Others v (1) Kent and Medway Towns Fire Authority (2) Royal Berkshire Fire and Rescue Service and (3) the Secretary of State for the Home Department. IDS Brief 743 October 2003, [2003] IRLR 732

In its first decision under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the "PTWR"), the Employment Appeal Tribunal has upheld an Employment Tribunal decision that retained firefighters are not able to claim parity of treatment and contractual terms with their whole time colleagues. In a disappointing judgment the loopholes in the law are exposed.

Retained firefighters have fixed weekly maintenance and drill commitments. They tend to have other jobs nd respond to a "call-out" system for operational duties normally by bleeper. Wholetime firefighters work under a shift system. Both are covered by the same national terms and conditions and both are indistinguishable, even to firefighters, when they are working.

After the PTWR came into force on 1 July 2000, some 12,000 retained firefighters (RF), backed by the FBU, lodged claims with Tribunals claiming that they were treated less favourably than their whole time colleagues in relation to access to the Firemens' Pension Scheme, sick pay and additional responsibilities pay.

Under the PTWR, an applicant must show that they are a "part-time" worker; their comparator is a "comparable full-time worker"; and any less favourable treatment is on the ground that the applicant was a part-time worker.

For a "part-time" worker to be able to cite a "comparable full-time" worker the "full-time" worker has to be employed under the "same type of contract"; and both workers have to be engag-ed in "the same or broadly similar work having regard where relevant to qualifications, skills and experience".

The "same type of contract" refers to categories such as employee, worker or apprentice. There is then a further distinguishing type of contract: "any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract."

The EAT, upholding the Tribunal decision and dismissing the claims, found that:

- Although RFs and their whole time colleagues were both "employees", it was reasonable for fire brigades to treat them differently on the ground that they had a different type of contract;
- The work of RFs and their whole time colleagues was not "the same or broadly similar";
- The reason for the difference in treatment was because of the RFs part-time status; and
- The Secretary of State was not able to justify objectively the difference in treatment (although this did not matter because the whole timers were not "comparable full-time" workers).

The EAT rejected the RFs argument that as they and their whole time colleagues were both "employees", it was not possible for either to fall within "any other type of contract…" for the purpose of regulation 2(3)(f). The EAT also allowed the brigades to use factors such as the different amounts of time spent attending fires, variable work patterns, differing amounts of fire safety work and different recruitment and selection procedures to justify the differential treatment of retained and whole time firefighters on the ground that they had a different type of contract.

The EAT then rejected the RFs argument that the "core" of the two jobs was the same: fighting fires. Instead, it found that whole timers had a "fuller wider role and [a] higher level of skills and qualifications".

This is a very disappointing decision. It suggests a narrow, legalistic approach to the PTWR enabling miniscule distinctions between jobs to be accumulated and used as a reason to treat part-timers less favourably than their whole time colleagues. The RFs have permission to appeal to the Court of Appeal and the case will be heard at the end of March 2004.

HUMAN RIGHTS

Sex, lies and videotape

XXX v YYY and another, EAT 9.4.03 (0729/01 & 0413/02) IDS Brief, 743 October 2003, [2003] IRLR 561

In XXX v YYY, the EAT had to consider what happens when an Applicant's right to a fair trial collides with a bystander's right to respect for private and family life.

X worked as a nanny for Y and Z's son, J. She resigned and claimed that she had been discriminated against on grounds of her sex and constructively dismissed. She alleged that Y, J's father, had made unwelcome sexual advances towards her. X tried to have admitted into evidence at the Tribunal a video recording that she had made covertly one morning in the kitchen of Y and Z's house, in the presence of J. She claimed that the video showed Y making sexual advances towards her.

The Tribunal decided that X's infringement of Y and Z's rights to respect for private and family life were justified because the family home was also X's place of work. Y and Z appealed. The EAT first remitted the case back for the Tribunal to decide whether J's Convention rights affected the issue.

The Tribunal viewed the video in private and decided that admitting the video could be "in accordance" with the law (justifying an interference with J's rights) because J's rights of confidence were not breached as he was only an "incidental" character. It then decided that the tape should not be admitted because it did not advance X's case and was not therefore essential to the preservation of her right to a fair trial. Everybody appealed.

The EAT disagreed with the Tribunal's approach. It said that the Tribunal had been wrong to conclude that the interference with J's rights was "in accordance with the law". The Tribunal had been wrong to use the analogy of a passer-by featured on CCTV footage. The EAT also said that the Tribunal could not properly say whether the tape advanced X's case without considering it alongside all of the other evidence in the case.

The EAT found that the pragmatic way to protect everybody's rights was for the tape to be admitted in evidence and considered, but in private by the Tribunal - as allowed by the Tribunal's rules of procedure. So that no members of the public or the press would be permitted at that part of the hearing, only the parties and their representatives.

CALCULATING PENSION LOSS

The long awaited Employment Tribunal **Compensation for Loss of Pension Rights** booklet, 3rd edition, has now been published.

It replaces the 2nd edition, published in 1991, which was criticised by the EAT in *Clancy v Cannock Chase Techical College [2001] IRLR 331* as being over-simplistic. Used by Employment Tribunals and practitioners to calculate pension loss, it is an invaluable guide to the tricky mathematics involved in the subject. It is depressing to acknowledge that if an unfairly dismissed employee was in a final salary pension scheme, the chances of finding employment with a similar scheme are slim indeed. The loss of access to a final salary scheme can be enormous and represents a valuable loss that must be included in a claim for compensation.

It must be accurately assessed, as a calculation based on the employer's contribution to the scheme is much less than the actual loss to the employee.

Available from The Stationery Office (www.to.co.uk/bookshop or 0870 240 3701) priced £10.75

EQUALITY

Achieving equality at work

The last 30 years have seen significant developments in the legal regulation of discrimination at work. Yet discrimination and inequality of opportunity are endemic. The rolling implementation of the Race Directive and Framework Directive on Equal Treatment in Employment and Occupation over the next few years, offer an opportunity to simplify and strengthen current UK provisions.

But what are the main aims of the Directives and will the new Regulations proposed by the government adequately transpose the provisions into domestic law? Is the government right to focus on the creation of a Single Equality Commission or would it be better to first develop a coherent and comprehensive Single Equality Act? These questions and more are addressed in detail by an expert panel of contributors in a timely report published by the Institute of Employment Rights.

In well structured, cogently argued and easily readable chapters, each head of discrimination is examined in detail. The chapters begin with a critical review of current legislation before examining the provisions of the Directives and ending with policy suggestions for the future.

Race and Work: Karon Monaghan argues that current race discrimination laws are limited by not requiring positive measures to overcome existing disadvantages and because the protection is restricted by the "justification" clause, which "accommodates the interests of the dominant community at the expense of the minority".

She goes on to consider the details of the European Race Directive 2000 and notes that the improved protection offered is marred by the complexity of the structure. It is transposed by way of Regulations rather than primary legislation, which "have rendered an already complex area of law impossible for anyone but the most expert discrimination practitioners to negotiate".

Towards sexual orientation diversity at work: Sarah Hanett considers the implications of one of the new areas of discrimination law – sexual orientation. While the author welcomes the Regulations as the first legislative step in proscribing discrimination on the basis of sexual orientation, she also highlights a number of weaknesses

First, the Regulations fail to outlaw discrimination on the basis of marital status, denying equal access to workplace benefits like pensions. Second, protection is not extended to the provision of goods and services. Third, the Regulations specifically allow religious organisations to discriminate against lesbians, gay and bisexual employees.

Diversity of Religion and beliefs: Mark Bell welcomes the introduction of the Employment Equality (Religion or Belief) Regulations and examines in some detail the extent to which they comply with the requirements of the Directive.

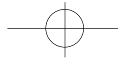
He notes that the new definition of indirect discrimination helpfully shifts the debate away from statistical analysis in favour of scrutinising the possible justification for the practice. However, the justification clause in the UK Regulations is "more flexible" than in the Directive and "rather unhelpful".

The government has also failed to include a specific clause making it unlawful to direct another to discriminate (eg an employer who instructs an agency not to send a Sikh for interview). On a more positive note, he notes that the scope of the Regulations is wide, protecting contract and agency workers and extending coverage to the post-employment relationship.

Eradicating disability discrimination: With six years of case law to review, Mary Stacey examines the UK's disability discrimination legislation before assessing whether faults will be corrected by the Disability Discrimination Act (Amendment) Regulations 2003. She then considers what further action is required if disability discrimination is to be eradicated from UK workplaces.

The author expresses disappointment that the government has not used the opportunity provided by the Directive to introduce more wholesale reform but

This month's guest author is Carolyn Jones, director of the Institute of Employment Rights



she concludes by welcoming the Regulations as a significant step forward. She believes they will go a long way towards helping the Disability Discrimination Act lose its "poor relation" status. However, more is required, most pressingly in the appellate courts' approach to the justification defence which is used to defend the status quo, rather than achieve the avowed purpose of the legislation to create rights for disabled people.

What's the difference? – the question of age: Lucy Anderson looks at how the government proposes to implement the age discrimination aspects of the Employment Directive. She notes that whilst unions have no difficulty with anti-ageist rights in principle, "unions have been worried that employers will use the opportunity of new legislation to "level down" rights to pensions or benefits linked to age or seniority"

Other weaknesses identified include reducing the calculation for unfair dismissal awards for the 41 to 65 age group from one and a half weeks to one week's pay. The lack of a statutory commission charged with investigating and enforcing the rights is identified as the biggest weakness.

The author concludes by saying that while the proposed Regulations provide a welcome first step, they will be weak in comparison with equivalent provisions in other countries and that to be effective, age discrimination must be incorporated into a Single Equality Act.

Sex equality at Work: Professor Aileen McColgan begins by highlighting that women still suffer from glass ceilings, sticky floors and lower pay. Attempts to ameliorate the worst aspects of inequality have often had the result of simply institutionalising women's status as second-class citizens in the workplace.

She argues that the Government should focus on radically tackling the long-hours culture in the UK by adopting a more aggressive implementation approach to the Working Time Regulations. Workers in the UK have the longest working hours in Europe.

The author then critically analyses the UK framework of equality legislation before assessing the extent to which the amended Equal Treatment Directive will address the flaws identified.

Enforcement and remedies: In a final section, the Editor focuses on the important issue of enforcement before pulling together the strands of previous chapters. The current enforcement approach is a highly individualistic one, which ignores the many collective mechanisms envisaged by the creators of the 1970s legislation. The result is that by far the most commonly used enforcement mechanism involves individual legal action in the employment tribunal – for which no legal aid is available. In legal terms, the main enforcement weakness is the fact that the burden of proof lies on the applicant.

Reviewing the likely impact of the new Directives, the Editor highlights the positive point - that the burden of proof in most cases will shift from the victim to the accused. This is welcomed but it leaves untouched many other problems:

- the newly protected grounds of sexual orientation, age and religion and belief have not been assigned to an existing Commission let alone allocated a specific Commission of their own.
- the government does not intend to provide for the award of compensation in unintentional indirect race discrimination cases;
- the individualistic enforcement mechanisms remain. These must be supplemented by a duty on employers to take active steps to scrutinise their employment practices and eliminate any discrimination;
- levers such as the award of public contracts to employers who make genuine efforts to improve workplace practices should be used; and
- the equality commissions (or Single Equality Commission) must be given strengthened powers of formal investigation.

ACHIEVING EQUALITY AT WORK

Edited by Aileen McColgan,

Available from Institute of Employment Rights,
177 Abbeville Road, London SW4 9RL
Priced £12 (trade unions and subscribers),
£30 (others). 020 7498 6919. www.ier.org.uk

AGE DISCRIMINATION

When I'm sixtyfour

In three years time it will be unlawful for an employer to dismiss an employee just because they have reached retirement age. Indeed except in exceptional circumstances it will be unlawful to have a standard retirement age for the workforce at all. It will be unlawful to take account of a worker's age in calculating a redundancy payment or unfair dismissal basic award, and it may also be unlawful to pay more to a worker by reason of their length of service, or to cap service at, say, 20 years in the calculation of a contractual benefit. Laws outlawing discrimination on the grounds of age will be in force by October 2006. Given the significant implications of the change, many employers are changing their work practices now so as to be in a position to absorb the changes more easily when they finally become compulsory.

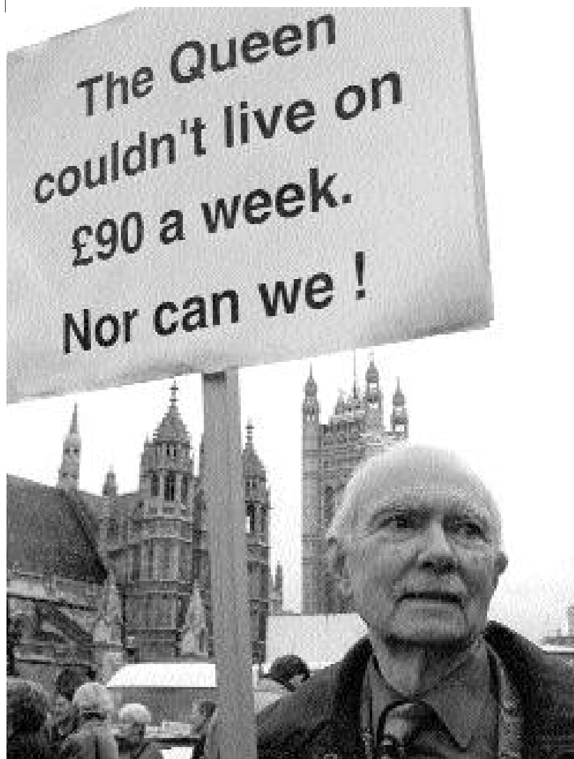
Age discrimination is the last and final strand of the European Framework Directive to be implemented. We already have laws against race, gender and disability discrimination. As a result of the Framework Directive, we will see Regulations outlawing discrimination on the grounds of religion and sexual orientation coming into force in December 2003. Then as from October 2006, we will have laws outlawing discrimination on the grounds of age. The government initially consulted on the broad principles of age discrimination in Towards Equality and Diversity in 2001. In **Age Matters**, (as if Age did not matter?) published in July 2003, we see the further more detailed consultation from government, specifically on proposals for implementing age discrimination laws in the UK.

The European Directive, which the government is committed to implement, sets out the requirement for a law outlawing discrimination on the grounds of age by reference to the well-trodden paths of direct and indirect discrimination. However, unlike the other discrimination strands, direct discrimination on the grounds of age can be objectively justified by a legitimate aim. Much of **Age Matters** is concerned with what might constitute a valid justification defence, in particular in relation to the most problematic of issues: compulsory retirement ages. Whatever else is unclear about the impact of the Directive, what is clear is that the days of compulsory retirement ages are numbered. **Age Matters** therefore sets out five "specific aims" which the government suggests might amount to valid defences to any case of direct discrimination on the grounds of age. They are health and safety, facilitation of employment planning ("where a business has a number of people approaching retirement age at the same time"), training requirements for a post, encouraging and rewarding loyalty, and the need for a reasonable period before retirement. How it is proposed the defences will work is that in relation to any potential act of age discrimination, an employer could establish a defence if they can show that they can justifiably bring their decision within one of these potentially fair categories of defence.

Quite how these "specific aims" outlined in the consultation paper fit with the justification defence set out in the Directive is not clear. The Directive suggests that any blanket justification for age discrimination will be unlawful, and the defence will only apply if in any particular case the employer makes a decision on the facts relating to the particular employee and the particular requirement of the business.

Still less clear is how the proposed "default" retirement age of 70 will fit with the requirements of the Directive. Acknowledging the difficulties that an employer may face in not being able to implement any uniform provision on retirement ages, the Consultation Paper suggests that there should be a default retirement age of 70 beyond which age employers could compulsorily retire without having to justify their decision.

A common misconception regarding the proposed changes is that it will mean that workers will have to slog on at work until they are 70 or over before they can



retire. That is not the case. Any employee will have the right to retire when they wish, and the new law will simply allow those who do wish to continue at work to carry on working without having compulsory retirement imposed on them. What is central to the debate is the issue of pensions. If a 65 compulsory retirement age goes, does that mean that pensionable age will also be increased, so neatly providing a solution to the current pension crisis? The government assures us that this will not happen, though the implications of the changes to the law on pension entitlement are not spelt out in the consultation document.

What is clearer is that if compulsory retirement ages are to go, then so will the age limits on employees being able to pursue claims for unfair dismissal and redundancy payments. What could be more discriminatory than an employer dismissing unfairly at age 66 solely because they know that the employer has no remedy through the Tribunals by reason of their age? Acknowledging that the age cut off points for unfair dismissal at normal retirement age failing which 65 will be unlawful, **Age Matters** suggests that instead the law should provide that where, exceptionally, an employer has managed to establish a justifiable retirement age then that may be the cut off point for an unfair dismissal claim. Failing that a cut off can be set at the age 70 default limit.

SIXTEEN GETS SWEETER

Age discrimination will protect the young as well as the old. Our current system of taking age into account in calculating basic awards and redundancy payments will also be unlawful. Currently these calculations increase according to whether the employer is aged under 21, between 21 and 40 or over 41, with the younger employee receiving only half a week's wages for each year of service, the 21 to 40 year old receiving one week's pay and the over 41 receiving one and a half week's pay. This, as **Age Matters** acknowledges, amounts to unlawful discrimination against the younger worker. Unfortunately however the government seeks to address the problem by "averaging out" the calculation at 1 week's pay. Although UK employees currently receive significantly less by way of redundancy payment than our European counterparts, the consultation paper threatens to reduce the entitlement still further for those over 41.

On the basis that the 20 year cap on service counting towards a basic award would be indirectly discriminatory against older workers with more than 20 years service, **Age Matters** proposes that the cap be removed. Also helpful, the absence of entitlement to a redundancy payment for the under 18s would also be removed, on the basis that this is clearly (and unjustifiably) directly discriminatory against those employees who are under 18.

Age Matters covers many other issues related to age discrimination. Where the Directive requires implementation of issues similar to those in the other strands such as sexual orientation or religion, then the consultation paper suggests that the provisions are duplicated. So, for example, we see broadly the same definition of harassment and victimisation on the grounds of age as with sexual orientation and religion, and the same procedural points such as time limits for pursuing Tribunal claims.

Responses to the consultation paper had to be submitted by 20 October 2003. The government state that they will be developing draft regulations in the light of those responses with a view to consulting on them in the first half of 2004. The intention is that they will be laid before Parliament by the end of 2004 to allow 2 years for employers to familiarise themselves with the Regulations.

On reading **Age Matters** one is only too aware of the huge changes that employers will have to make to work practices to ensure compliance with the new laws. What must not be lost sight of is that the introduction of laws preventing unjustified discrimination on the grounds of age will remove one of the final injustices in our current industrial relations structure. By outlawing less favourable treatment for that most arbitrary of reasons - a person's date of birth - we will see our workplaces move closer to the ideal of each worker being judged according to their contribution and ability rather than the preconceived ideas of the employer.

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REDUNDANCIES

Failure to consult

GMB and others v Amicus and others [2003] IRLB 721

The EAT has recently considered the meaning of the exception to the "special circumstances" defence to breaches of the obligations to inform and consult about collective redundancies.

BW Ltd was part of a group which had been acquired by a subsidiary of BC Inc. The ultimate holding company of the group was HII. In June 1999 HII and BC Inc applied for bankruptcy protection. On 18 November 1999 the directors of BW Ltd were informed by HII that it was no longer prepared to provide it with financial support. On 22 November 1999 BW Ltd was placed in administration. Following consultations between BW Ltd's administrators, the recognised trade unions and employee representatives, 55 employees were dismissed on the ground of redundancy on 29 November 1999. On 9 December 1999 BC Inc (which provided BW Ltd with 80% of its work) informed the administrators that it could offer only a limited amount of work for a 9 week period. In light of this, on 16 December 1999 the administrators dismissed a further 68 employees for redundancy. GMB and Amicus presented complaints to an employment tribunal that BW Ltd had failed to comply with the consultation requirements of s188 of the Trade Union and Labour Relations (Consolidation) Act 1992.

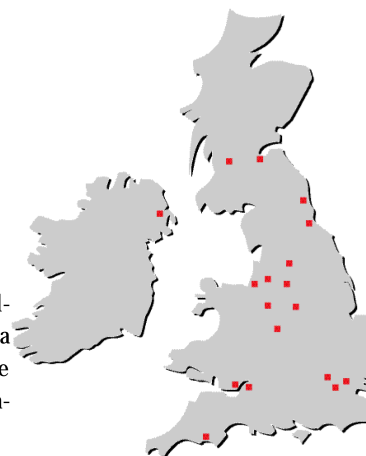
The Tribunal held that there were special circumstances which made it not reasonably practicable for BW Ltd to comply with its s188 obligations. GMB and Amicus appealed to the EAT complaining that the Tribunal had made errors of law in relation to its interpretation of s188(7). S188(7) provides that:

"Where the decision leading to the proposed dismissals is that of a person controlling the employer (directly or indirectly), a failure on the part of that person to provide information to the employer shall not constitute special circumstances."

The EAT looked to the Collective Redundancies Directive to interpret the s188 provisions, noting the requirement to consult 'in good time' and provide employees with 'all relevant information' including certain specific information. Under the Directive it is no defence to a claim that a parent company had failed to provide 'necessary information' which includes information necessary to begin the consultation process. The EAT held that information under s188(7) meant information necessary to start the consultation process, as well as the giving of information required by s188(4).

The EAT then turned to consider the phrase "leading to the proposed dismissals". It held that a decision would lead to proposed dismissals if it gave rise to the occurrence of the dismissals and the person making the decision contemplated that it would have that consequence.

The EAT held that the Tribunal had erred in law in finding that an employer who failed to comply with its obligations to inform and consult about collective redundancies had made out a "special circumstances" defence. The EAT remitted the matter back to the Tribunal to make further findings of fact, but gave the following guidance. Any period between the making of a decision that leads to redundancies by a controlling undertaking (if the person making it contemplates that some redundancies will follow from it) and the date on which the employer is informed of the decision should be disregarded when a Tribunal is considering whether or not there are special circumstances making it reasonably practicable for the employer not to have complied with its obligations.



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