Chapter 20

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1. In your opinion, do you believe that it is satisfactory that an employer must consult with the workers' representatives about the commercial reasons for the collective redundancies? Did the EAT make an error in coming to this view in *UK Coal Mining Ltd. v NUM (Northumberland Area)*?

Author's answer: It is debatable whether the decision of the EAT in *UK Coal Mining* is correct. As a matter of principle, the philosophy behind the EU Directive that legally regulates collective redundancies is to provide a measure of pre-redundancy procedural rights to groups of workers, rather than to enable them to interfere with the substance of an employer's decision to engage in mass redundancies. If the EAT is correct, it would appear to give the tribunals and courts the power and also the obligation to second-guess the employer, taking into account the broader context of commercial and market considerations. Assuming that to be the case, it would entail a comprehensive level of judicial scrutiny of the employer's conduct, which would be unusual, as it is usually only in the context of the application of the proportionality standard of review that such a degree of intrusion is found in employment law, e.g. in workplace discrimination cases. On the other hand, there is the argument that meaningful consultation between an employer and employee is only viable if the workers' representatives have the ability to offer up alternatives to redundancy and that this will be impossible if the employer's (commercial or otherwise) motivations, reasons and justifications for the redundancies are not ventilated, debated and challenged. Seen from this perspective, the argument runs that the judiciary are fully entitled to scrutinise the substance of the employer's decision-making process in this regard, in which case, it is claimed that the line of jurisprudence in *UK Coal Mining* should be supported.

2. Is it ever possible to divorce the consultation about the collective redundancies from consultation about the commercial rationales for collective redundancies?

Author's answer: In *UK Coal Mining Ltd. v NUM (Northumberland Area)*, the EAT decided that it was an inevitable part of the redundancy consultation process for the employer to have to consult about the commercial justifications for its decision to engage in collective redundancies. The argument here is that consultation involves an exchange of opinions about how the redundancies proposed can be avoided and that it is impossible to do so without the parties engaging with the commercial reasons for a plant, factory or office closure, or the redundancies themselves. The point being made here is that it is artificial to divorce the dismissals from the reason for the dismissals and that in contemplating how the number of redundancies can be minimised, it is essential to dissect the justifications for the dismissals. Of course, this conflicts with decisions in the earlier case law of the EAT in *Middlesbrough Borough Council v Transport and General Workers' Union*[1] and *Securicor Omega Express Ltd. v GMB*.[2] In these cases, it was held that consultation should be about how the employer should carry out the proposed redundancies which management have deemed to be necessary, with the avoidance of any exchange of views about the business rationales for them.

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[1] [2002] IRLR 332.
[2] [2004] IRLR 9.

1. Do you agree with the legal position that the protective award is intended to punish the employer who fails to comply with the statutory information and consultation requirements rather than to compensate the employees for the employer's failure to consult? Is there any difference?

Author's answer: There are a number of ways of approaching a system of conferring financial sums where there has been a breach of a legal obligation. The two strands relevant in this context are the compensatory and punitive approaches. A compensatory approach asks how much (in monetary terms) the innocent party has lost as a natural or ordinary consequence or result of the breach. Under such a regime, only the losses sustained by the innocent party may be compensated. However, a punitive system goes further. Not only does it entitle the innocent party to recover his/her loss, but it is also designed to punish the wrongdoer party in breach. In this way, the innocent party will usually receive a sum that is in excess of his/her loss. In addition, the rules on the calculation of the protective award are slightly unusual insofar as the tribunals and courts have been instructed by the appellate courts to proceed with the calculation on the presumption that the full punitive award ought to be made and then work backwards by giving the wrongdoer credit to the extent that elements of the information exchange and consultation obligations actually took place in practice.