Employment Law Update – Developments in Redundancy and Collective Employment Law

1. Collective Redundancies

S.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 - implemented the provisions of the Collective Redundancies Directive 98/5/EC into UK law.

S.188(1) TULR(C)A states that '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'.

Consultation must begin 'in good time' and in any event where 100 or more redundancies are proposed at one establishment within a 90-day period, must begin at least 45 days before the first of the dismissals takes effect - otherwise at least 30 days before the first dismissal takes effect - S.188(1A).

A quick reminder of previous developments:

The consultation period for proposals to make more than 100 people redundant was reduced in 2013 from 90 days to 45 days, where the proposal to make 100+ people redundant occurred on or after 6th April 2013.

"20 or more..."

University and College Union v University of Stirling [2015] UKSC 26;

The Supreme Court held that fixed-term employees who were not re-engaged by a university when their contracts expired were dismissed for reasons 'not related to the individual concerned' and were therefore redundant for the purposes of the legislation on collective redundancy consultation. Accordingly, their dismissals did count towards the 20-employee threshold that triggers the duty of collective consultation.

The TULR(C)A was amended, with effect from 6 April 2013, however to expressly exclude employees whose contracts expire at the end of a fixed term from the number of dismissals that may trigger the obligation to collectively consult, except where they are dismissed as redundant before the expiry of the fixed term – S.282.

'Establishment'

Union of Shop, Distributive and Allied Workers (USDAW) v WW Realisation 1 Ltd (C-80/14) EU:C:2015:291 (ECJ)

CJEU confirmed that 'establishment', for the purposes of the collective redundancy consultation provisions in the EU Collective Redundancies Directive (No.98/59), means the entity to which the worker is assigned. Accordingly, under S.188 of the Trade Union and Labour Relations (Consolidation) Act 1992, where an undertaking comprises several entities meeting the criteria for 'establishment', collective consultation is required only at those establishments where it is proposed to dismiss 20 or more employees.
There is no requirement for dismissals at all establishments to be aggregated for the purpose of this threshold, and so the TULR(C)A is not incompatible with the Directive in this regard.

Confirmed in *Lyttle*

Exclusion from collective consultation

In *Balkaya v Kiesel Abbruch- und Recycling Technik GmbH* (Case C-229/14), the CJEU was asked to rule on the compatibility with the Collective Redundancies Directive of a provision of German law under which executive directors of companies did not count as employees for the purposes of the collective consultation rules.

The CJ considered that the concept of 'worker' under the Directive cannot be defined by reference to the legislation of the Member States but must be given an autonomous and independent meaning in the EU legal order, in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned.

The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he or she receives remuneration. The director involved in the main proceedings, B, satisfied this definition, with the result that his exclusion from the collective consultation rules was incompatible with the Directive.

TULR(C)A collective consultation requirements apply in respect of employees as defined in S.295(1). Executive board members of companies in Great Britain are often also employees anyway but there is no specific exemption in respect of such individuals – their dismissals therefore do count, for the purpose of S.188(1) TULR(C)A, towards the threshold used to determine whether the duty to consult collectively has been triggered. They can also claim protective awards if employer fails to consult when required.

Potential of the *Balkaya* case?

How will courts and tribunals react to the CJ's view that the term 'worker' has an *autonomous meaning* in EU law?

Collective consultation provisions in TULR(C)A only apply to employees but it could be argued that 'a person who performs services for and under the direction of another person, in return for which he or she receives remuneration' refers not only to employees, but to the wider category of 'worker' which is used in other employment legislation.

The term 'worker' includes employees, but also encompasses those working under any other contract 'whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual'.

Potential implications if a claimant were to argue successfully that the S.188(1) threshold for the duty to consult must be triggered by the dismissals, by reason of redundancy, of "workers", rather than of "employees"?

2. Trade Union Act

Ballot thresholds

Currently S.226 TULR(C)A requires that all eligible union members must be balloted and a simple majority (i.e. over 50%) of votes must be in favour. TUA Ss.2 and 3 insert the following ballot thresholds into S.226 TULR(C)A:

- Section 2 TUA inserts new S.226(2)(a)(iia) into the TULR(C)A and requires that at least 50% of eligible members must turn out for a ballot ('the 50% turnout threshold'); and

- Section 3 TUA requires that 'where the *majority* of those who were entitled to vote in the ballot are at the relevant time normally engaged in the provision of important public services, unless at that time the union reasonably believes this not to be the case' – new S.226(2B) TULR(C)A ('the 40% support threshold').

'important public services'

New S.226(2E) TULR(C)A

- health services
- education of under-17s
- fire services
- transport services
- decommissioning of nuclear installations and management of radioactive waste and spent fuel; and
- border security.

Section226(2E) - partial definition of 'important public services' - detail is in the Regulations made under new S.226(2D) - Industrial Action (Important Public Services) Regulations 2016

Health services. Regulation 2 of the draft Regulations provides that 'publicly-funded emergency, urgent or critical health care services' constitute 'important public services'. It goes on to explain that emergency, urgent or critical healthcare services include:

- services provided in an emergency by an ambulance or associated transport service
- accident and emergency services in a hospital
- services which are provided in high-dependency units and intensive care in a hospital; and
- other care services (including diagnosis and treatment) provided by a hospital for illnesses, conditions or injuries which require immediate attention in order to prevent serious injury, serious illness or loss of life.

Annex A to the consultation response gives the following examples of occupations covered by the 40% threshold: doctors, nurses and other workers in the ambulance services, maternity services, accident and emergency services, intensive care and high dependency unit services – including where these services are publicly funded and provided in private hospitals.

Education. Regulation 3 covers the education of children between five and 16, specifically 'teaching and other services provided by teachers and persons appointed to fulfil the role of a head teacher at a school other than a fee-paying school' – Reg 3(1). A fee-paying school is one in which the majority of its pupils have fees for their attendance at the school paid for them by individuals – Reg 3(2). The use of the term 'school' in Reg 3 means that teachers in state-funded colleges do not fall within this category, even if they teach 16-year-olds.

Annex A states that the category covered by Reg 3(1) is intended to cover teachers, headteachers and academy principals in state-funded schools.

Fire services. Regulation 4 - 'fire-fighting services', are 'important public services' - includes dealing with calls for help and organising a response. Annex A states that this covers firefighters, firefighter managers and control-centre staff and managers who coordinate the response.

Transport services. Regulation 5 - the following transport services are 'important public services':

- any bus service which is a London local service as defined in S.179(1) Greater London Authority Act 1999
- passenger railway services (including metro, underground and tramway services)
- civil air traffic control services
- airport security services; and
- port security services conducted by a port in accordance with the requirements of the International Ship and Port Facility Security Code.

Regulation 5(2) and (3) - what constitute 'passenger railway services'.

- maintenance of trains or of the network
- signalling or controlling the operation of the network; and
- ticket sales and other services which enable trains to operate, but not:
- heritage, museum or tourist railway services operating on their own network; or
- railway services which relate only to routes that start or terminate outside Great Britain (eg Eurostar).

Annex A - examples of those covered by this category include London bus drivers and emergency and control room staff; train drivers, conductors, guards, safety staff, and signalling and electrical control staff; licensed civil air traffic controllers; airport workers who are directly involved in the operation and application of airport security; and port security services conducted by a port in accordance with the requirements of the International Ship and Port Facility Security Code.

Border security. Regulation 6 states that 'services related to border control functions in respect of the entry and exit of people and goods into and from the United Kingdom' are 'important public services'.

Annex A states that this includes designated staff at the border who implement entry and exit checks, and staff undertaking intelligence and targeting functions.

Balloting process

TUA also introduces a requirements relating to the balloting process. These cover the ballot paper itself, notification of the results, and the time limit placed on a successful ballot.

- **Voting papers**

S.229 TULR(C)A specifies what must be included on every ballot paper.

Section 5 TUA adds three new requirements to S.229:

•the ballot paper must include 'a summary of the matter or matters in issue in the trade dispute to which the proposed industrial action relates' – new S.229(2B)

•where the paper contains a question about taking part in industrial action short of a strike, the type or types of action must be specified – new S.229(2C), and

•the ballot paper must indicate the period or periods within which the action, or each type of action, is expected to take place – new S.229(2D).

- **Ballot results**

Section 231 TULR(C)A - as soon as reasonably practicable after the holding of a ballot, all members who were entitled to vote must be informed of the number of votes cats, the number who answered 'yes' and 'no' to the question or, as the case may be, each question; and the number of spoiled papers.

S.6 TUA amends S.231 TULR(C)A so that members will now also have to be given the following information:

•the number of individuals who were entitled to vote in the ballot

•the number of invalid voting papers that were returned (other than by being spoiled)

•whether or not the number of votes cast in the ballot was at least 50% of the number of individuals who were entitled to vote

•and, where the majority of those who were entitled to vote are normally engaged in 'important public services', whether or not the number of individuals who answered 'yes' to the question (or each question) was at least 40% of those entitled to vote.

Time limits and notice

S.234 TULRCA - ballot ceases to be effective if industrial action not called within four weeks, (or a period of up to eight weeks if agreed between the union and the employer). As long as the industrial action had been called within that period, the ballot continued to be regarded as providing support for the industrial action.

S.9 TUA amends S.234(1) TULR(C)A and provides that ballot will cease to provide support for industrial action if action is not called within six months (or within up to none months if agreed with employer)

The amendment also means that union now has longer in which to decide whether or not to take industrial action, as it no longer has to start the action within four weeks of the ballot.

S.234A(4)(b) now requires that a union to give an employer a minimum of 14 days' notice of industrial action following a successful ballot (an increase from the old requirement of seven days' notice). A shorter period of notice can be agreed with the employer but it mist be at least seven days.

Entitlement to vote

S.227(1) TULR(C)A provides that entitlement to vote depends on who at the time of the ballot it was *reasonable* for the union to believe would be induced to take part or, as the case may be, to continue to take part in the industrial action. Therefore, if a union has taken reasonable steps to ascertain this, it is unlikely that an employer would later be able to challenge the ballot's compliance with the new thresholds on the basis that some members were not balloted. This would also apply when assessing whether or not the majority of members were 'normally engaged in the provision of important public services', if the union mistakenly believes that members were not so engaged, provided that the belief was reasonable – S.226(2B) TULR(C)A.

Picketing

S.220 TULR(C)A provides that 'it is lawful for a person in contemplation or furtherance of a trade dispute to attend (a) at or near his own place of work, or (b) if he is an official of a trade union, at or near the place of work of a member of the union whom he is accompanying and whom he represents, for the purpose only of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working'.

Section 10 TUA inserts a new S.220A into the TULR(C)A which requires that, in order for picketing to be lawful the union must appoint an official or member who is familiar with the Code of Practice on Picketing, issued under S.203, to be the 'picket supervisor'.

Political fund

S.11 TUA will replace S.84 TULR(C)A with a new provision requiring that members must decide to opt in, by way of a written notice to the union, in order for the union to be able to collect monies from those members for the political fund. New S.85 provides for a transition period of not less than 12 months, the exact period to be set down in Regulations.

Ss.7 and 12 TUA introduce provisions requiring unions to include details of any industrial action taken during the year, and any political expenditure, in their annual return to the CO – new Ss.32ZA and 32ZB TULR(C)A,

Facility time

S.13 TUA inserts new S.172A into the TULR(C)A, containing a power enabling a Minister of the Crown to make Regulations requiring public sector employers to publish information relating to time off taken by trade union representatives for trade union duties and activities.

For the purposes of S.172A, facility time is defined as time off taken by a relevant union official that is permitted by the official's employer under:

- the provisions governing time off for union duties and activities in Ss.168, 168A, or 170(1)(b) TULR(C)A
- the right to accompany a union member to a disciplinary or grievance hearing, as provided for in S.10(6) of the Employment Relations Act 1999; or
- regulations made under S.2(4) of the Health and Safety at Work etc Act 1974 – S.172A(8).

The reporting requirements do not extend to time spent by non-union individuals who exercise the latter two rights.

S.14 TUA inserts new S.172B into the TULR(C)A which provides for 'reserve powers' that a Minister of the Crown can only exercise three years after Regulations under S.172A have come into force.

Certification officer

New Schedule A3 to the TULR(C)A - increases the investigatory powers of the CO.

The CO will be able to compel trade unions to produce documents which the CO considers to be pertinent to an investigation into whether the union has complied with one of a list of statutory obligations.

The CO will also be able to appoint an investigator to examine whether a union has complied with a relevant obligation, and make a legally binding order requiring the union's compliance with the investigator.

Schedule 2 to the TUA will amend various provisions in the TULR(C)A so that the CO can, of his/her own volition, investigate a union's compliance with a relevant obligation.

Where a union is found to be in breach of its statutory obligations, the CO will have the power to issue a financial penalty.

Implications for collective Rights, Human Rights and the Right to Strike

3. Brexit...