Changes to terms and conditions; Individual and Collective Redundancy Consultation

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Changes to terms and conditions

1. With employees starting to return to work (be that on a part-time basis or otherwise) and employers continuing to assess the viability of their businesses as going concerns, how might employers make changes to an employees' contractual terms lawfully in order to avoid redundancies, for instance agreeing a reduction in wages?
2. If a contract of employment does not authorise the employer to change the employee's terms, the employer really has 4 options:
   - Obtaining express agreement from the employee;
   - Relying on implied agreement to the purported change;
   - Unilaterally imposing the change and relying on implied agreement;
   - Terminating the employment and offering to re-engage on new terms.

3. In relation to obtaining express or implied agreement, the 2 key legal principles of consent and consideration must be borne in mind, because without either of those being present any change that is purported to be made by an employer to an employee's contractual terms is highly likely to be held to be unlawful.

4. Consent can be obtained by either an employee's express or implied agreement to a proposed change of his or her contractual terms.

5. It can also derive from any pre-existing contractual provisions which allow the employer to unilaterally make variations to an employee's contract. So, for example, if employers are considering reducing employees' pay on return from furlough, they can potentially do this if there is a flexibility clause in the employment contract permitting the change, but these clauses are rare and unless a union is involved Courts and Tribunals do not like employers seeking to rely on these pre-existing variation clauses to make significant changes to employees' contracts, and so they are interpreted very narrowly.

6. The best evidence of express consent and that which gives both employer and employee the most certainty that any contractual variation has been effective, is to obtain something in writing to that effect from the employee.

7. In addition, express consent can be obtained through a collective agreement (for instance where a recognised union is involved) where an employee's contract expressly states that his or her terms and conditions can be changed by agreement at collective level.

8. Express consent can also be given orally by an employee, but that is something which is obviously less certain than written consent and more open to challenge at a later stage if there was only one other person present, usually the employer, when the oral consent was given.

What are the consequences if agreement to reduce pay cannot be reached?

9. If an employer attempts to obtain express agreement to a reduction in pay but is unable to do so then 2 options are:

    - Impose the change and rely on the employees' implied agreement to the change;
    - Terminate the existing contract and offer continued employment on new terms

10. But, terminating the contracts and offering continued employment on new terms it is important to bear in mind:

    - Depending upon how many people it is proposed to termite their contracts and then re-engage on different terms, the proposed dismissals will count as redundancies under the Trade Union and Labour Relations (Consolidation) Act 1992 ('the 1992 Act');
    - Wrongful dismissal if the employer fails to serve the required contractual notice;

- Unfair dismissal, albeit employers are likely to want to rely on the potentially fair reason for dismissal of some other substantial reason.

Is the issue of 'implied consent' equally straightforward?

11. Unfortunately not. Cases involving implied consent are usually very fact specific and fact dependent as to what is required to evidence implied consent. Clearly parties to a contract will be far less certain that a purported contractual variation is in operation as a matter of law, than if express consent is obtained. And it follows that this is the reason why the majority of cases that come before the Courts and Tribunals where there is a dispute as to contractual variation involve implied consent.

12. What it seems can be distilled by way of general guidance from the case law is that when an employer purports to impose a change to an employee's contract, if the following 3 criteria are satisfied implied consent may be inferred by a Court or Tribunal and the purported variation may be lawful if:

    (1) The employee continues to work for a significant period of time;
    (2) He or she does so without protest (either individually or collectively);
    (3) Whilst continuing to work the employee is aware of the purported change being imposed by the employer.

13. Whilst there are only a small number of authorities in which the Courts or the EAT have had to consider whether employees have become disentitled to enforce the terms of a contract of employment because they have failed to object to a purported variation, the seminal case dealing with implied consent is the Court of Appeal case of **Abrahall v Nottingham City Council**[1], in which Lord Justice Underhill helpfully reviewed the relevant authorities[2].

14. What is clear from reviewing those authorities is that when assessing whether or not to infer implied consent to a purported contractual variation by the employer, Courts and Tribunals will look at the nature of the term which is purported to be changed and the practical application of that purported change.

15. And so if the variation relates to a matter which has immediate practical application (i.e. the rate of pay or altering job duties) and the employee continues to work without objection after effect has been given to the variation (i.e. his or monthly pay has been reduced or

[1] [2018] ICR 1425.
[2] Paragraph 70 and onwards of the Judgment.

he carries out the altered duty) then obviously he or she may well be taken to have impliedly agreed. But where the variation has no immediate practical effect (i.e. in the cases of mobility clauses, restrictive covenants, or annual bonuses) the position is not the same[3].

16. In addition, it has been held that the fundamental question to ask in cases where employees continue to work in circumstances where the employer has purported to effect the change, is: '*whether the employee's conduct, by continuing to work, is only referable to his having accepted the new terms imposed by the employer*'[4]. If it is, then the purported change is likely to be effective, but if it is not and there is evidence that his continuing to work is referable to other reasons then it may not be effective.

17. So finally, what the Court of Appeal variously said in **Abrahall** in relation to cases where the issue of whether or not implied consent should be inferred by Courts dealing with purported contractual variations, was that:

"…..If the conduct of the employee in continuing to work is reasonably capable of a different explanation it cannot be treated as constituting acceptance of the new terms…It is not right to infer that an employee has agreed to a significant diminution in his or her rights unless their conduct, viewed objectively, clearly evinces an intention to do so. To put it another way, the employees should have the benefit of the doubt."[5];

"*Secondly, protest or objection at the collective level may be sufficient to negative any inference that by continuing to work individual employees are accepting a reduction in their contractual entitlement to pay, even if they themselves say nothing…*".[6];

"Thirdly….It is easy to see how it may not, depending on the circumstances of the particular case, be right to infer acceptance of a contractual pay-cut as from the day that it is first implemented: the employee may be simply taking some time to think…[but] *a time may come when that ceases to be a reasonable explanation.*

18. And finally, consideration for the purported change must be given. Whilst at the present time it may well be that offering to furlough employees rather than dismissing them for redundancy is enough, ordinarily Courts and Tribunals would expect something more by way of consideration i.e. a one off payment of a sum of money.

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[3] **Jones v Associated Tunnelling Co Ltd** [1981] IRLR.
[4] **Solectron Scotland Ltd v Roper** [2003] UKEAT 0305/03/3107; [2004] IRLR 4.
[5] Paragraph 87 of the Judgment.
[6] Paragraph 88 of the Judgment.

In the context of the pandemic, can a reduction in pay be implemented for a temporary period?

19. Yes, subject to agreement with the employees taking into account what I have just said in relation to consent. That reduction could be for a finite period of time, or until the happening of a specific event. I think that a time-limited reduction in wages is likely to be far more readily accepted by the Courts and Tribunals than a permanent one.

Individual consultation prior to any redundancies

Can employers make employees on furlough redundant?

20. Yes. The Scheme confirms that an employee can be made redundant whilst on furlough or afterwards, and that an employee's redundancy rights will not be affected by being on furlough.

Can employee and trade union representatives who may need to be consulted on redundancy during furlough perform their duties without breaking their furlough?

21. Yes, although there are obvious practical difficulties that could arise in undertaking redundancy consultation while the vast majority of the affected employees are on furlough.

22. Employers will need to consider virtual meetings and, where the employees concerned do not have the facility to participate in a video call, the possibility of conducting consultation meetings by telephone or in writing. These issues may be particularly acute where the obligation to collectively consult applies, as pursuant to section 188(5A) of the Trade Union & Labour Relations (Consolidation) Act 1992 there is a statutory requirement to allow appropriate representatives access to the affected employees and to afford those representatives such accommodation and other facilities as may be appropriate.

Turning now to potential individual or small scale redundancies (1 – 19 people), is the legal position different when employers are considering consulting and dismissing 20 or more individuals at the same time?

23. Yes, so I think it's worth a brief reminder that when employers are considering dismissing less than 20 employees by reason of redundancy, as many SMEs will be at the moment and doubtless for months to come, the starting point is, of course, section 139 of the Employment Rights Act 1996 which provides that:

> (1) *For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to*
>
> *(a) the fact that his employer has ceased or intends to cease-*
>
> *(i) To carry on the business for the purposes of which the employee was employed by him, or*

(ii) To carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business –

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

24. In the EAT case of **Safeway Stores Plc v Burrell**[7] it was stated that the correct approach for determining whether a dismissal was by reason of redundancy pursuant to section 139(1)(b) involves a 3 stage process:

(1) Was the employee dismissed?

(2) If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

(3) If so, was the dismissal of the employee caused wholly or mainly by that state of affairs?

25. If those criteria are satisfied then section 98(2)(c) of the ERA is engaged as it is a potentially fair reason for dismissal and the Tribunal will move to look at section 98(4) of the ERA which states:

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case…

26. And then in order to answer the question whether the dismissal lay within the range of conduct which a reasonable employer could have adopted (which includes the way in which consultation was handled by an employer during the redundancy process), the EAT

[7] [1997] ICR 523; [1997] IRLR 200; [1997] 1 WLUK 332. This case was subsequently approved by the House of Lords in **(1) Noel Murray (2) Adrian Doherty v Foyle Meats Ltd** [2000] 1 AC 51; [1999] 3 WLR 356; [1999] 3 All ER 769; [1999] ICR 827; [1999] IRLR 562.

in the case of Williams & Others v Compair Maxam Ltd[8] set down a set of 5 principles by which reasonable employers could be expected to act in accordance with (which are applicable to individual as well as collective redundancies):

1. *The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
2. *The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.*
3. *Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*
4. *The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.*
5. *The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.*[9]

27. Now whilst not all of these criteria will be applicable in every case (indeed they were set down in an industrial era when union involvement was even more prevalent in workplaces than it is now), they are a very good starting point for employers.

28. And specifically in relation to considering the 5th principle, employers should consider if they are unable to offer employees alternative employment, whether they could furlough them in order to retain them. This because it is something that Tribunals, hearing any future unfair dismissal cases, are bound to ask employers who dismissed employees by reason of redundancy.

[8] [1982] IRLR 83.
[9] Paragraph 19 of the Judgment.

Consultation and Collective Redundancies[10]

Where can the statutory framework be found for dealing with consultation in relation to collective redundancies?

29. The statutory duty on employers to inform and consult their workforces about proposed redundancies is set out in section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('the 1992 Act').

30. The 1992 Act was introduced in order to implement the mandatory provisions of the EU Collective Redundancies Directive[11].

31. It is important to point out that the Coronavirus Job Retention Scheme makes clear that collective consultation obligations are not altered by the Scheme.

32. Section 188(1) of the 1992 Act provides:

> "W*here 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*].

So are small scale redundancies excluded from the legislation?

33. Yes. An employer's duty to consult in accordance with the 1992 Act only arises where it is proposing to dismiss 20 or more employees at one establishment within a period of 90 days.

By use of the term 'employees', does that mean 'workers' don't need to be consulted in collective redundancies then?

34. That's correct[12]. There is an unresolved anomaly here between what the 1992 Acts says and what the equivalent obligations under the EU Collective Redundancies Directive provide[13].

[10] IDS Employment Law Handbooks, volume 9, chapter 12.
[11] No.75/129 (which has now been replaced by the EU Collective Redundancies Directive (No.98/59).
[12] As defined in section 295(1) of the 1992 Act.
[13] No.98/59; **Balkaya v Kiesel Abbruch- und Recycling Technik GmbH [2015] ICR 1110, ECJ**.

What about fixed-term employees?

35. Fixed term employees are excluded from an employer's duty to consult on collective redundancies under section 188 unless the employer is proposing to dismiss the employee as redundant before the expiry of the term, the completion of the particular task or the occurrence or non-occurrence of the specific event[14].

What does '*who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals'* mean?

36. That is recognition of the fact that there might also be employees whose jobs are not directly under threat (i.e. who it is not proposed to dismiss) but who may nevertheless be either directly or indirectly affected by the proposed redundancies.

If the obligation to consult falls on the 'employer' for the purpose of the 1992 Act, who is that?

37. Whilst that may sound obvious, but section 295(1) of the 1992 Act defines the employer as the 'person by whom the employee is (or, where the employment has ceased, was) employed'.

38. That is significant because even if the decision to make redundancies is taken by another company controlling the employer (i.e. where the employer is part of a group of companies), the obligation to consult will always lie with the subsidiary company which employs the employees and never with the parent company who might have taken the decision about collective redundancies[15].

What does 'proposing to dismiss' actually mean?

39. In answering that question it should be noted that there is a disparity between the wording of the 1992 Act and the EU Collective Redundancies Directive. Whilst the 1992 Act imposes a duty to consult at the point that an employer proposes collective redundancies, the Directive requires consultation where an employer is contemplating collective redundancies.

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[14] Section 282 of the 1992 Act.

[15] **Akavan Erityisalojen Keskusliito (AEK) ry and ors v Fujitsu Siemens Computers Oy** [2010] ICR 444, ECJ. Albeit in this case the decision was on the EU Directive and covered 'workers' rather than 'employees'.

40. This issue arose for consideration by the ECJ in the case of **Junk v Kuhnel**[16] where it stated that:

> "The case in which the employer 'is contemplating' collective redundancies and has drawn up a 'project' to that end corresponds to a situation in which no decision has yet been taken. By contrast, the notification to a worker that his or her contract of employment has been terminated is the expression of a decision to sever the employment relationship, and the actual cessation of that relationship on the expiry of the period of notice is no more than the effect of that decision"[17].

41. Domestically, in the case of **UK Coal Mining Ltd v National Union of Mineworkers & anor**[18], the then President of the EAT, Elias P, considered all of the relevant authorities (including **Junk**) and held:

> "…in a closure context where it is recognised that dismissals will inevitably, or almost inevitably, result from the closure, dismissals are proposed at the point when the closure is proposed. The difference between proposed and contemplated will still impact on the point at which the duty to consult arises – it will not be when the closure is mooted as a possibility but only when it is fixed as a clear, albeit provisional, intention."[19]

42. The ECJ revisited this issue in the case of **Akavan Erityisalojen Keskusliitto (AEK) ry and ors v Fujitsu Siemens Computers Oy**[20] in which it held that:

> "….the consultation procedure must be started by the employer once a strategic or commercial decision compelling him to contemplate or to plan for collective redundancies has been taken"[21].

Is there a difference in the definition of 'redundancy' between of individual claims for redundancy payments or unfair dismissal claims pursuant to section 139 ERA 1996 and 'redundancy' for the purpose of collective consultation purposes under the 1992 Act?

43. Yes. Pursuant to section 195(1) of the 1992 Act, the definition of 'redundancy' for collective consultation purposes differs significantly from the ERA definition.

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[16] [2005] IRLR 310.
[17] Paragraph 36 of the Judgment.
[18] [2008] ICR 163.
[19] Paragraph 86 of the Judgment.
[20] [2010] ICR 444.
[21] Paragraph 48 of the Judgment.

44. Section 195(1) provides that '…references to dismissal as redundant are references to dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related'.

45. The implications of that difference in definition between individual and collective redundancy is potentially important as, for example, if an employer wants to introduce a change in terms and conditions but cannot secure the agreement of employees to the change, the usual course is to terminate their existing contracts of employment and issue new ones incorporating the required variation. These facts would be unlikely to fall within the ERA definition of 'redundancy', and so would not give rise to statutory redundancy payments (although they may give rise to unfair dismissal claims).

46. But under the section 195 definition of 'redundancy', such dismissals – not being related to the individuals concerned – would trigger the section 188 statutory consultation procedure requiring the employer to negotiate with the appropriate representatives of the employees with a view to reaching an agreement before imposing the new contracts.

47. So in the EAT case of **GMB v Man Truck and Bus UK Ltd**[22] the employer gave employees notice of dismissal and then offered to re-engage them on new terms. The EAT held that the duty to consult applied despite the fact that the employer never intended the employees to lose their jobs and that the employees continued to work uninterrupted throughout.

Are there minimum statutory consultation periods for collective redundancies?

48. Yes. Section 188(1A) provides that:

> 'The consultation shall begin in good time and in any event –
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> *(a)* Where the employer is proposing to dismiss 100 or more employees…, at least [45 days], and
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> (b) Otherwise, at least 30 days, before the first of the dismissals takes effect'.

49. It is important to bear in mind that these minimum periods are aimed at ensuring that the parties have adequate time to consult by stipulating a date by which consultation must have started. They do not provide for how long the consultation should take. To put it a another way, the 30 and 45 requirements do not require the parties to consult for 30 or 45 days. It is therefore possible for collective consultation to take place over a shorter period

[22] [2000] ICR 1101, EAT.

of time. However, the employer's proposals must still be at a formative stage when consultation begins and the union must be given sufficient time to make a meaningful contribution.

50. And so in the **Amicus** case that I'll come to again in a moment, the EAT held that the employer, which started consultation well before the applicable 30 day minimum requirement, complied with section 188(1A), even though consultation with the trade union effectively lasted only 2 weeks.

51. However, a note of caution, where the employer you might be advising has reached agreement with the appropriate representatives before the end of the minimum consultation period, it should not be tempted to then bring forward the date of any agreed dismissals. If it dismisses before the statutory consultation period is up, it will be in breach of section 188 and a protective award of up to 90 days could be claimed.

52. It is also important to remember that section 193 of the 1992 Act requires employers to give the Secretary of State advance notice of its proposals to dismiss before giving notice to dismiss (which must be done on an HR1 Form), as if they don't give such notice it is a criminal offence with an unlimited potential fine[23].

What does 'in good time' mean?

53. That phrase derives from the EU Collective Redundancies Directive[24] and which itself doesn't lay down any specific time limits.

54. In the case of **Amicus v Nissan Motor Manufacturing (UK) Ltd**[25], the employer informed the elected employee representatives on the staff council on 1st October 2003 of its plan to relocate its purchasing services department from Sunderland to Bedfordshire on 1st June 2004 (so about 8 months in advance). The employer required the 62 employees to indicate by the end of January 2004 whether they were prepared to move to Bedfordshire. However, consultation with union representatives did not begin until 19th January 2004.

55. In dismissing the employee's appeal, the EAT accepted that: "…"good time" means no more and no less than time sufficient for fair consultation to take place working back from the final date which is the first date for dismissal…one cannot adopt a too mechanistic or arithmetical approach to working out what is or is not good time. It will depend on many

[23] Section 194.
[24] Article 2(1).
[25] EAT 0184/05.

factors and is essentially a question for a Tribunal. A number of the matters involved will obviously be firstly the numbers of staff and indeed unions to be involved in the process, secondly what is a reasonable time for the union to be able to respond to the proposals and to make counter-suggestion regarding redundancies whilst the proposals are still at a formative stage…"[26].

> "They asked themselves the important question which was not withstanding the fact that the union officials did not become involved until either the end of December or beginning of January was there still good and sufficient time for **fair and meaningful consultation** to take place before the effective date of dismissal…"[27]

What does 'at one establishment' mean?

56. The leading European cases on the definition of 'at one establishment' is **Rockfon A/S v Specialarbejderforbundet I Danmark**[28] and **Athinaiki Chartopoiia AE v Panagiotidis and ors**[29], in which the ECJ held that:

- The term 'establishment' is to be defined broadly;
- In the context of an undertaking, an establishment may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks, and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks;
- The entity in question need not have any legal, economic, financial, administrative or technological autonomy in order to be regarded as an establishment;
- It is not essential for the unit in question to be endowed with a management that can independently effect collective redundancies in order for it to be regarded as an establishment.

57. Furthermore, the EAT in **Seahorse Maritime Ltd v Nautilus International**[30] held that:

> "The establishment may not be a physical unit. It could be an organisational unit in a service industry set up to provide a certain type of labour or to provide labour at a particular location. The operator may not own or operate the unit, such as one

[26] Paragraph 11 of the Judgment.
[27] Paragraph 15 of the Judgment.
[28] [1996] ICR 673.
[29] [2007] IRLR 284.
[30] [2017] ICR 1463.

providing catering services to a particular organisation or at a particular building. The relevant establishment will be the unit within the employer's organisation to which the employees are assigned not that of the client for whom their employer provided services"[31].

58. In **USDAW and anor v Ethel Austin Ltd and ors**[32] (known as the Woolworths case) the ET treated each individual store as a discrete 'establishment'. Many of the stores had less than 20 employees and so this resulted in over 4,000 employees not receiving protective awards, rather only those who were in stores with over 20 people received them. When the case reached the ECJ which remitted the matter to the Court of Appeal, it essentially gave a judgment in which permitted the finding that each store should be considered a separate establishment[33].

What should the consultation include?

59. Section 188(2) provides that the consultation must include consultation about:

(a) Avoiding the dismissals;

(b) Reducing the numbers of employees to be dismissed, and

(c) Mitigating the consequences of the dismissals, and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

60. It is important to bear in mind that these 3 factors (a) – (c) must be treated independently and so employers must consult on each of them, else they will potentially be in breach of section 188 if they do not consult on one of them[34].

61. Whilst the last requirement does not mean that the parties have to reach an agreement as ultimately the final decision on redundancies is a matter for the employer alone, the obligation on the employer to consult is absolute and to do so meaningfully. If an employer is found to be simply going through the motions of consultation, they are likely to be found to be in breach of section 188[35].

[31] Paragraph 45 of the Judgment.
[32] [2013] ICR 1300.
[33] **USDAW and anor v Ethel Austin Ltd and ors** [2015] ICR 675.
[34] **Middlesbrough Borough Council v TGWU and anor** [2002] IRLR 332, EAT.
[35] **Susie Radin Ltd v GMB and ors** [2004] ICR 893.

How does an employer determine the numbers of redundancies which are required to be included for the purpose of engaging section 188?

62. Section 188(3) provides that:

> "In determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun.

63. But, 2 examples:

(1) If an employer is already consulting on 60 proposed redundancies and then a further 40 redundancies are proposed a week later, pursuant to the strict application of section 188(3) an employer would not need to add the two groups together to mean that there was a minimum 45 day consultation period rather than a 30 days minimum period for each;

(2) However, if both of the aforementioned groups of redundancies were proposed within a 90 period, the question then becomes whether an employer was just staggering the redundancies so as to avoid its longer collective consultation requirements. The Court or Tribunal will look behind this apparent staggering to ascertain whether in fact the employer had in fact proposed to dismiss the 100 employees at the same time.

What is the position when the employer's restructure results in an intention for a proportion of the workforce to go into alternative roles rather than be dismissed?

64. That situation arose in the case of **Hardy v Tourism South East**[36] in which the claimant, Ms Hardy was one of 26 workers employed by the respondent, Tourism South East, at its Tunbridge Wells office. On 30th January 2004, the organisation announced that it was closing that office as part of a restructuring with the loss of all 26 jobs. The employer hoped that most of the staff would be redeployed and that there would only be 12 redundancies. However, the employees would have to apply for any available vacancies. Upon Mrs Hardy's complaint that her employer had failed to inform and consult in accordance with section 188, the employer accepted that but maintained that they were not required to do so because, since they were not proposing to dismiss as redundant 20 or more employees at the same establishment. The ET agree with that submission and dismissed Mrs Hardy's claim.

[36] [2005] IRLR 242.

65. However, the EAT allowed Mrs Hardy's appeal holding that:

> "*An employer "proposes to dismiss" an employee for the purposes of s.188(1) if what is proposed amounts to a termination of the employee's contract of employment. The essential question is whether an objective consideration of what the employer says or writes, the employer is proposing to withdraw the existing contract of employment from the employee, or the departures which the employer is proposing from the existing contract are so substantial as to amount to the withdrawal of the whole contract. The mere fact that an employer proposes to redeploy an employee is not decisive. If the employer only proposes to keep the employee in his employment on what is in reality a different contract of employment, he will be proposing to terminate the existing one. Whether the employer was proposing to terminate the contract of employment therefore depends upon the terms of the contract of employment and upon the terms of the redeployment and the circumstances in which it was offered*"[37].

When can the dismissal notices be sent out to employees?

66. According to the EAT in **TGWU v Ledbury Preserves (1928) Ltd**[38], 'there must be sufficient meaningful consultation before notices of dismissal are sent out. The consultation must not be a sham exercise; there must be time for the union representatives who are consulted to consider properly the proposals that are being put to them'.

Is there any defence available to an employer who fails to consult in accordance with section 188 of the 1992 Act?

67. Yes. Section 188(7) of the 1992 Act provides for a 'special circumstances' defence:

> "*If in any case where there are special circumstances which render it not reasonably practicable for the employer to comply with the requirement of subsection [(1A), (2) or (4)], the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances.*
>
> *[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 rendering it not reasonably practicable for the employer to comply with such a requirement.]*

[37] Paragraphs 17 and 18 of the Judgment.
[38] [1985] IRLR 412.

68. However, rather unhelpfully, there is no definition of 'special circumstances' contained within the Act.

69. In the Court of Appeal case of **Clarks of Hove Ltd v Bakers' Union**[39] it was held that:

> *"…to be special the event must be something out of the ordinary, something uncommon; and that is the meaning of the word 'special' in the context of this Act*".[40];
>
> *"Where as here, the employer has admittedly failed to give the requisite 90 days' notice the burden is clearly imposed upon him, by the statute, to show that there were special circumstances which made it not reasonably practicable for him to comply with the provisions of the Act, and also that he took steps towards compliance with the requirements, such steps as were reasonably practicable in the circumstances. There are, it is clear, these three stages: (1) were there special circumstances? If so, (2) did they render compliance…not reasonably practicable? And, if so, (3) did the employer take all such steps towards compliance….as were reasonably practicable in the circumstances?*

How might COVID-19 be dealt with by the Courts / Tribunals when employers inevitably put it forward as a special circumstance?

70. As well as needing to show that the circumstances are special (which on the **Bakers' Union** definition it is likely to be), employers still need to show that compliance was not reasonably practicable. So the effect of the pandemic may mean that there are practical difficulties with appointing representatives in the normal way and undertaking full consultation, and also in terms of remaining solvent while the process is undertaken. However, I think it's more than arguable that the employers can conduct meaningful collective consultation remotely if the facilities are in place to do so.

71. It is understood that the Scheme has the backing of the TUC and so it might be that the risks of claims for protective awards is low. An employer could proceed without undertaking collective consultation and take the risk that it is later found to be in breach, but I think that would be unwise.

72. A middle road could be for an employer to undertake a consultation for a shorter period on the basis that the change proposed is only a change to the employees' contracts of employment, and then only proceed to a formal collective redundancy consultation if full

[39] [1978] ICR 1076.
[40] Paragraph 16 of the Judgment, per Lane LJ.

employee consent is not obtained. It is arguable that this is all that is required under section 188, on the basis that the employer does not propose to make any dismissals until the point that it becomes clear that there is no employee consent.

So would insolvency amount to a 'special circumstance' then?

73. The Court of Appeal dealt with that very question in the **Bakers' Union** case and held that:

> *"…insolvency is, on its own, neither here nor there. It may be a special circumstance, it may not be a special circumstance. It will depend entirely on the cause of the insolvency whether the circumstances can be described as special or not. If, for example, sudden disaster strikes a company, making it necessary to close the concern, then plainly that would be a matter which was capable of being a special circumstance…If the insolvency…was merely due to a gradual run-down of the company, as it was in this case, then those are facts…can come to the conclusion that het circumstances were not special…"*[41]

Can special circumstances that occur after the obligation to consult excuse an earlier failure to comply?

74. No. In **Keeping Kids Co (in compulsory liquidation) v Smith and ors**[42], the Claimants had been employed by Keeping Kids Company ('KKC'), a charity based in London and Bristol. During the course of late 2014 and for the first half of 2015, KKC had been in a financially precarious position and, on 12th June 2015, an application was made to the government for a one off grant of £3 million, made on the basis that KKC would then secure matching funds from private donors. The grant application included a plan for the restructuring of KKC, under which over half of the employees would be made redundant by mid-September 2015 in any event. Failing receipt of funds from the government, the alternative was that KKC would become insolvent. On 29th July 2015, the government agreed the grant application and released funds to KKC. The next day, however, there was publicity regarding a police investigation into safeguarding issues, which meant KKC could not secure matching funds from private donors and had to pay back the money to the government. Within a matter of days thereafter, KKC closed down and all employees were dismissed by reason of redundancy.

[41] Ibid.
[42] [2018] IRLR 484.

75. The ET determining the claim for protective awards concluded that there was a 'proposal to dismiss' by 12th June at the latest[43]. On appeal, KKC argued that what happened on 30th July amounted to 'special circumstances'. The EAT took the view that it: *"…was plainly an unexpected and sudden disaster for KKC, which entirely derailed its plans and meant that operation had to close down pretty much immediately*"[44]. However, whatever the situation after 30th July, this could not excuse its failure to comply with its obligation to consult from 12th June until then and so a protective award was appropriate.

If 'special circumstances' are proved, do these absolve an employer from complying with the consultation requirements in respect of which compliance was reasonably practicable or which were not affected by the special circumstances?

76. No, as per the case of **Shanahan Engineering Ltd v Unite the Union**[45], where the EAT held that although special circumstances relieved the employer of the obligation to undertake the full 30 day consultation over collective redundancies, it should still have made some attempt at consultation. The EAT stated that: "*The instructions given…made it inevitable that the workforce on the contract would have to be reduced; but it remained for Shanahan to decide whether employees should be dismissed for redundancy, how many employees should be dismissed, when they should be dismissed, and what if anything ought to be done to mitigate the consequences of dismissal…*"[46].

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[43] Paragraph 21 of the Judgment.
[44] Paragraph 70 of the Judgment.
[45] UKEAT/0411/09/DM.
[46] Paragraph 31 of the Judgment.

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