COVID-19

SECTION 188(7) OF THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

A Guidance Note from the 2TG Employment Team **Spring 2020**

On the 20 March 2020, the Chancellor announced the Coronavirus Job Retention Scheme ("CJRS"), the first time in British history that the state would pay private sector employees' wages. The CJRS will provide grants of 80% of an employee's salary up to a total of £2,500 a month. This announcement will provide crucial protection to employees throughout the country. Employers are urged to stand by their workforce throughout the coming, testing months.

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However, employment lawyers are already seeing redundancies on a large scale. The CJRS cap of £2,500 per month will not provide an answer for all employers.

Where an employer is considering large scale redundancies, it is important that they are mindful of the requirements of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"). Section 188 applies where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. Section 188 obliges an employer to consult the appropriate representatives of employees who may be affected and to provide information. Failure to comply with section 188 may lead to a complaint being presented to an Employment Tribunal under section 189 TULRCA and the employer being liable to pay a protective award.

This note is concerned with the relatively little used section 188(7) TULRCA which provides a defence to failure to comply with the requirements of section 188(1A), (2) and (4) TULRCA where there are "special circumstances which render it not reasonably practicable for the employer to comply".

Section 188(7) TULRCA reads:

"If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a 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."

Covid-19 and Special Circumstances

An employer must prove that there were special circumstances that rendered it not reasonably practicable to comply with the requirements of section 188 TULRCA.

The circumstances relied upon must be "something out of the ordinary, something uncommon" (*Bakers' Union v Clarks of Hove Ltd* [1978] IRLR 366 CA). The Tribunal will assess the applicability of section 188(7) by "looking at the actual events which occurred and deciding whether or not those events rendered it not reasonably practicable to consult" (*E Ivor Hughes Educational Foundation v Morris and others* UKEAT/0023/15). What constitutes special circumstances will depend on the specific facts of each case and what might be special circumstances in one case might not be in another.

There is no doubt that the onset of Covid-19 is an extraordinary event. There is a temptation, however, to assume that Covid-19 would also amount to special circumstances for the purposes of section 188(7). Given a Tribunal's focus in approaching a section 188(7) defence, on scrutinising the actual events and their effect on the section 188 requirements, it is necessary for employers to demonstrate what about Covid-19 meant that complying with obligations under section 188 was not reasonably practicable.

The need to analyse reliance on special circumstances with care is demonstrated by case law on redundancies occasioned by insolvency. In *Bakers' Union v Clarks of Hove Ltd*, the employer had been in financial difficulty for some time and once it became apparent that the last hope of financial aid had failed, they dismissed their entire workforce and ceased trading on the same day. Geoffrey Lane LJ drew a distinction between a sudden disaster striking a company causing closure which could constitute special circumstances, and a gradual run down of a company which would likely not.

Considering Covid-19, a Tribunal might draw a distinction between a Company which gradually sees its business fall off owing to people staying home which ultimately ends in insolvency, and, on the other hand, a business who overnight loses its main supplier due to supervening government action occasioning imminent financial peril. Further, the availability of government support and in particular the CJRS, and why they do not sufficiently assist an individual employer, will likely need to be considered.

Even where a Tribunal is satisfied of the existence of special circumstances, an employer is still required to "take all such steps towards compliance... as are reasonably practicable in those circumstances".

In *Shanahan Engineering v Unite the Union* EAT 0411/09, an employer who had satisfied the Tribunal of the existence of special circumstances still had to pay a protective award. HHJ Richardson in the EAT considered that though special circumstances had rendered it inevitable that the workforce would need to be reduced, it remained open to the employer to decide how many employees should be made redundant, when that should happen, and what could be done to mitigate the consequences of dismissal. All of these matters were matters for consultation. Further, it was reasonably practicable in the circumstances for some consultation to be attempted.

Conclusion

Covid-19 has occasioned much talk of force majeure, frustration and in the context of section 188 TULRCA, special circumstances. Whilst the Chancellor's unprecedented promise of support to employers and employees might stave off wholesale redundancies, it is still likely that employers facing months of uncertainty will consider redundancies. Though employers are strongly encouraged to stand by their employees during the forthcoming period, some may not be able to do so.

Where an employer does contemplate making redundancies on a large scale, they will need to have regard to their obligations under section 188 TULRCA. It should not be assumed that Covid-19 will automatically trigger a special circumstances defence under section 188(7). Rather, it is necessary to carefully scrutinise the individual circumstances of a business and the problems they face.

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Ben represents employees and employers across a range of employment litigation including unfair dismissal, discrimination and whistleblowing claims. He is currently instructed by an employee in a claim for unfair dismissal against a backdrop of a highly peripatetic working life and instructed by the MOD in a long running sexual harassment and discrimination claim.

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