Collective redundancies – ECJ decision on reference period

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The European Court of Justice (ECJ) has confirmed in *UQ v Marclean Technologies SLU* that in deciding if the threshold for collective redundancy consultation is triggered, the reference period must be calculated taking into account any period of 30 or 90 consecutive days during which an individual dismissal took place. This means that employers must look both back and forward from an individual dismissal to determine whether there are 20 or more proposed dismissals. This creates a problem for employers who, based on UK law, decide if collective consultation is needed on a **forward** looking basis.

Legal background

The UK's collective redundancy laws and obligations are derived from the European Collective Redundancies Directive (the Directive). Under it 'collective redundancies' occur where a threshold number of dismissals 'for one or more reasons not related to the individual workers concerned' occur within a period of either 30 days or 90 days.

The Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) implements the Directive in the UK. The UK took a forward-looking approach. Under TULRCA, where an employer is *proposing* to dismiss as redundant 20 or more employees at one establishment within any period of 90 days or less, they must comply with statutory obligations to inform and consult with affected employees and notify the Secretary of State in the Department for Business, Energy and Industrial Strategy.

Background facts

UQ worked for Marclean in Spain and was dismissed on 31 May 2018, after a period of temporary incapacity. In June 2018, she brought a claim, arguing that her dismissal formed one of a number of "covert" collective redundancies and the correct redundancy procedure had not been followed. She argued that, between the date of her dismissal and 15 August 2018, a further 36 people had left Marclean and therefore this should have triggered a collective redundancy procedure.

The Spanish court referred questions to the ECJ essentially asking how, under the Directive, you measure that period of 30/90 days? For example:

- is it 30/90 days running forwards from the claimant's date of dismissal?
- is it 30/90 days running backwards from the claimant's date of dismissal?
- does it depend on whether the dismissals were abusive (i.e. designed to get around the Directive)?
- could time run forwards and backwards from the claimant's date of dismissal?

What did the ECJ say?

The ECJ decided that if the threshold number of dismissals is reached at any point across the 30- or 90- day period, the Directive applies in respect of those dismissals, and dismissals that occur before or after the given dismissal count towards the threshold – effectively treating it as a rolling period.

It is our understanding that the Court decision also means that the applicability of these protections is not determined by the subjective intention of the employer (as to how many redundancies it is *proposing* to make) – they will look at what actually took place.

What does this mean for employers

This important ECJ decision means that employers should be careful and look both back and forward from an individual dismissal to determine whether there are 20 or more proposed dismissals. This will be particularly important where employers are effecting redundancies in batches. For example, an employer may initially propose 15 redundancies and then later, if business has not improved, propose a further ten. If the past and proposed redundancies take effect in the same 90-day period the duty to collectively consult over all the proposed redundancies (some of which may already be underway/have happened) could be triggered. This will cause a number of practical difficulties which do not appear to have been considered or addressed by the ECJ.

Careful planning will be required. Employers will need to take into account both past and anticipated staffing reductions across their business, in order to assess whether the duty to collectively consult has been triggered.

The ECJ decision also raises questions over whether TULCRA is compliant with the Directive. Among other things, TULCRA may be inconsistent with the Directive because it states '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'.

As we are currently in the transitional period in relation to Brexit we are still bound by the decisions of the ECJ. What its impact will be after the transition period ends depends on whether there is a trade agreement between the UK and the EU, what it says about ECJ decisions and the approach the UK Government takes to ECJ case law in the absence of any such agreement.

Please note the judgment has not yet been published in English and therefore we will update you when we have the full translation.

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