SQUIRE SANDERS

WATCH OUT IF … YOU ARE USING AN EXISTING BODY OF EMPLOYEE REPRESENTATIVES FOR REDUNDANCY CONSULTATION PURPOSES

You may find it does not have the necessary authority to consult, thus rendering the entire collective consultation process invalid.

Any employer proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less must consult the "appropriate representatives" of any of the affected employees about the proposed dismissals. If there is no recognised union in place the employer can consult either: (a) employee representatives elected specifically for the purposes of the redundancy consultation exercise; or (b) employee representatives appointed or elected for a purpose other than the consultation exercise, but who have authority from the affected employees to receive information and to be consulted about the proposed dismissals on their behalf.

In practice it may be tempting for an employer to use an existing body of employee representatives (such as a works council or a general staff consultative committee) for these purposes, especially if it is keen to press on with the proposed redundancies and wishes to avoid arranging for the election of employee representatives, which will inevitably delay matters. However, beware the EAT's recent decision in ***Kelly & anor v The Hesley Group Ltd***. This case makes it clear that if the existing body of employee representatives does not have the necessary authority to engage in the collective consultation process then this constitutes a breach of the employer's obligations, putting it at risk of a protective award.

The Hesley Group Ltd provides long term residential care and education services for people with learning difficulties and complex needs. In 2010 it decided to change the terms and conditions of 300 staff at one of its schools. The aim was to save money by reducing hours, salary and overtime rates. Hesley managed to get some 90% of its staff to sign up to the new terms and conditions, but 32 of them refused to agree. As this was more than 20, it advised those staff that it was going to kick off a statutory collective consultation process in relation to its proposal to push through the change by dismissing them and offering re-engagement on the new terms and conditions.

As there was no union, Hesley decided to consult with the employee members of its group Joint Consultative Committee (JCC). There were two problems with this. First, not all of the staff representatives had been appointed or elected by the employees themselves. In practice Hesley had co-opted people on to the committee "to ensure that everyone has their voice heard". At the Tribunal hearing the Committee was described as a mishmash of appointees/co-optees and elected representatives. Secondly, the JCC's constitution said that it did not have a negotiating function – it had been set up merely as an advisory body to communicate the views of staff to management and vice versa.

Two of the JCC employee representatives subsequently brought claims in the Tribunal arguing that Hesley had failed to comply with its collective consultation obligations, in particular because the people on the JCC did not constitute "appropriate representatives" for collective consultation purposes. The Employment Tribunal rejected their claims, concluding that there was nothing in the evidence to suggest that the JCC did not have the authority of the affected employees to be consulted about the proposed dismissals. It also did not think it was significant that the JCC did not have a formal negotiating function, as it said that the purpose of collective consultation is not to negotiate but "to consult with a view to reaching agreement". And the difference there is what?

The employee representatives appealed to the EAT and it has now largely upheld their appeal. The EAT was critical of the Tribunal's broad-brush approach on the critical question of whether the JCC was an appropriate representative with the necessary authority to engage in the collective consultation process on behalf of the affected employees. It pointed out that the Trade Union and Labour Relations (Consolidation) Act 1992 states that representatives must have been elected or appointed "by the affected employees" and must have "authority" from those employees to receive information and to be consulted about the proposed dismissals on their behalf. The question of authority is therefore critical and should be determined by reference to "the purposes for and the method by which they were appointed or elected" and not how things had later panned out in practice. In this case, because a number of the representatives had been co-opted by Hesley and not appointed or elected by the employees the question of whether they had the authority to participate in the collective consultation process on behalf of those employees was not resolved.

Furthermore, the fact that the JCC's constitution said it was not a negotiating body was, contrary to the Tribunal's view, a problem for Hesley, "for to elect someone to a body which is not designed to negotiate is hardly to clothe that person with authority on the electorate's behalf to do so". It also said that the words "with a view to reaching agreement" effectively did mean negotiation and to hold otherwise was an error. It has therefore referred the case back to the original Tribunal to address its mind to these issues, though there now seems little prospect of Hesley succeeding on liability.

This case should act as a warning to employers tempted to use an existing body of employee representatives for collective consultation purposes without giving any real thought as to whether it has the necessary authority to engage in the process. If the representatives are not the right people and/or they have not been properly appointed, then this means the whole process will be flawed which could in theory result in a sizeable protective award. Ultimately the burden of proof is on the employer to show that the representatives are appropriate and thus far Hesley has not done that. All is not lost for Hesley, however, or any other employer which does its best to consult properly but omits to check this detail – the size of the protective award is a matter for the Tribunal's discretion. Here the JCC representatives did do their thing in consultation terms and there was no suggestion that Hesley's failure was in any way deliberate. None of the objectors were prejudiced by the technical lack of authority (though that is not strictly relevant) but most importantly, it does not appear that the employee representatives on the JCC took the lack of authority point at the time. If ever there was a case crying out for a dismissively low level of protective award, this is probably it. Perhaps with that in mind, the EAT said quite pointedly at the end of its decision that there could be "much to be said for a negotiated or mediated settlement" and that the parties should "give this consideration".

Acas has recently published guidance on "How to manage collective redundancies" which provides useful and clear guidance for employers embarking on large-scale redundancies. This includes a short section on electing employee representatives and their roles and responsibilities.

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