2022/6

# Narrow scope of the 'special circumstances' defence for not consulting on collective redundancies confirmed (UK)

**CONTRIBUTORS** David Hopper and Kerry Salisbury*

## Summary

In a case arising from the sudden collapse of a construction company, the Employment Appeal Tribunal has confirmed the limited scope of the 'special circumstances' defence for not consulting on collective redundancies.

## Legal background

The UK implemented Council Directive 98/59/EC relating to collective redundancies in Sections 188 to 198 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). Section 188 of the TULRCA requires an employer to consult with its employees' appropriate representatives if it is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. Consultation must start 'in good time' and at least 30 days before the first of the dismissals takes effect, or at least 45 days before such dismissal if the employer is proposing to dismiss 100 or more employees.

Affected employees are usually entitled to compensation of up to 90 days' uncapped pay if their employer breaches this requirement. However, an employer will not be liable if 'special circumstances' existed which made it not reasonably practicable for the employer to comply – so long as the employer took all steps towards compliance as were reasonably practicable.

## Facts

Carillion plc was a public company with a turnover of £5.2 billion in 2016. The Carillion group was a multinational business services and construction services group of companies. It provided facilities management services to government ministries, various public sector authorities and corporate clients. It also worked on infrastructure projects, such as rail, and on major construction projects for public and private sector clients.

By July 2017, Carillion had begun to face serious financial difficulties. Its financial position continued to decline, and it went into liquidation six months later on Monday 15 January 2018. Its collapse followed a weekend of failed negotiations between its board of directors and its stakeholders, including the government. Although it had not previously received financial support from the government and knew that continuing financing of its operations by its banks would be conditional on such support, the board's position was that this outcome to negotiations was nonetheless 'unexpected'. The board claimed that it had presented a compelling long-term business plan, which had been well received, and that it had been confident that short-term lending facilities would have been made available by the relevant stakeholders. In the days after its collapse, Carillion's liquidators dismissed a significant number of its 18,000 employees without first consulting their appropriate representatives. Over 1,000 of these employees brought claims for payment of 'protective awards' under Section 189 of the TULRCA.

Carillion's liquidators argued that the collapse of rescue talks over the weekend of 13 and 14 January 2018 meant that 'special circumstances' had existed. They claimed that the events of that weekend were 'sudden intervening events'.

Relying on a decision of the Court of Appeal from 1978 (*Clarks of Hove Ltd – v – Bakers' Union* [1978] 1 WLR 1207), the Employment Tribunal (ET) rejected this argument. It found that there had been no 'out of the ordinary', 'uncommon' or 'sudden disaster' event. Instead, Carillion's insolvency had followed a 'downward path' representing a 'history of decline' in its financial position over many months from (at least) July 2017.

Carillion's liquidators appealed against the ET's decision to the Employment Appeal Tribunal (EAT).



* David Hopper is a partner at Lewis Silkin LLP. Kerry Salisbury is an associate at Lewis Silkin LLP.

doi: 10.5553/EELC/187791072022007001007

## Judgment

Carillion's liquidators argued that the ET had wrongly focused solely on the cause of Carillion's insolvency and not its wider circumstances. It should have looked at the context and consequences of the insolvency as well, when considering whether there were 'special circumstances'.

They also argued that the ET should not have followed the *Clarks* case, because that decision predated the introduction in the 1980s of a 'rescue culture' for businesses in financial distress and the possibility of employees' employment continuing with another employer through the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) if business assets are sold.

The EAT rejected each of these arguments. It agreed with the decision in *Clarks* that insolvency 'may or may not' constitute 'special circumstances'. This is because whether a particular insolvency is 'special' will always depend on its particular facts, as insolvency is not an uncommon event. The ET had expressly considered all events dating back to July 2017 when reaching its conclusion. The EAT found that, despite the ET's focus on the events of the weekend of 13 and 14 January 2018, it had been entitled to conclude that Carillion's particular circumstances were not 'special' or a 'sudden disaster'.

The EAT also rejected the argument about the emergence of a 'rescue culture'. It noted that *Clarks* was general guidance and had never been limited to insolvency situations. It also noted that Carillion's liquidation as opposed to, for example, it being placed into administration, meant that the dismissals were analogous to those made in the 1970s in any event.



## Commentary

This decision highlights the dilemma for employers in financial difficulties. On the one hand, a prudent approach might be to commence collective redundancy consultation well in advance of potential dismissals in order to minimise the risk of significant financial penalties if the employer later needs to act quickly. On the other hand, the exercise of engaging in consultation may well signal the business's difficulties to the market, and thereby exacerbate them.

It is possible that the board thought that Carillion was 'too big to fail' and so the government would inevitably have to support it. But no member of the board gave evidence to the tribunal, so it is not clear exactly why they were so sure of help from the government. It is at least understandable why Carillion did not commence consultation at an earlier date if its board of directors was confident of securing financial support, irrespective of how mistaken this belief might have been. But a genuine belief that there will be a rescue package, does not constitute 'special circumstances' when it turns out to have been mistaken.

The decision demonstrates the potentially significant financial cost for an employer (in this case, 90 days' pay each for over 1000 employees) if it chooses not to consult when the possibility of dismissals can reasonably be foreseen, and then has to act quickly due to a financial collapse.

This decision also provides useful guidance in light of the Covid-19 pandemic. In March 2020, and prior to the introduction of the government's furlough scheme, many businesses chose to make significant numbers of dismissals without consulting employee representatives first. This was on the basis that the onset of the pandemic amounted to a sudden intervening event, meaning they had to cut their costs as quickly as possible. This case demonstrates the difficulty that employers will face in defending claims for failure to consult if it would have been practicable, even if costly, for them to consult properly during that difficult time.

## Comments from other jurisdictions

*Finland (Janne Nurminen, Roschier, Attorneys Ltd)*: The Finnish Codetermination Act (2021/1333) sets out procedural rules the employer is required to observe when contemplating reductions of workforce. The Codetermination Act provides that an employer regularly employing at least 20 employees has an obligation to consult with the employees concerned (or their representatives) about the reasons, effects and possible alternatives for the contemplated reductions before the employer makes any decision that leads to reductions.

The Codetermination Act does not specify the exact time when the consultations must take place. According to that Act the employer must commence consultations when *considering* measures which may lead to an employee being dismissed, laid-off or shifted to part-time work or a change of the essential terms of employment of an employee. As a rule, the consultation obligation cannot be deemed to have been fulfilled until six weeks or 14 days (depending on the number of employees impacted) have elapsed since the start of the consultations. No decisions on the planned rearrangements may be made until the consultation obligation has been fulfilled (i.e. the consultations are over).

The Codetermination Act contains a similar exception to an employer's duty to consult as in the UK. According to that Act the employer may resolve the matter without prior consultations if particularly serious reasons which affect the company's production or service activities or the company's finances and which could not have been known in advance form an obstacle to the consultations. However, the employer must initiate the consultations without delay when grounds for deviating from the consultation obligation no longer exist. The


doi: 10.5553/EELC/187791072022007001007

employer must also provide reasons for such an exceptional procedure.
As in the UK, in Finland the employer may have to pay compensation to an employee if the employer breaches the duty to consult. The maximum amount of compensation is EUR 35,000 per employee. The applicable compensation amount is determined on a case-by-case assessment where, for example, the nature of the non-compliance and the employer's efforts to correct its procedure is considered. A serious breach resulting in a high compensation amount could for example be a case where the employer does not consult on the matter at all with the employees concerned.
In Finland, there is no established case law concerning these aforementioned particularly serious reasons due to which the employer could, for example, dismiss an employee without prior consultations. The preparatory works on the Codetermination Act do not clarify the matter. This implies that the threshold for these particularly serious reasons has been set rather high. Thus, the employer may make decisions under the Codetermination Act without prior consultations only in very exceptional circumstances. For example, if authorities ordered a restaurant to close without a preliminary warning due to the Covid-19 pandemic such grounds for deviation could exist. In light of the provisions of the Finnish Codetermination Act it seems that the circumstances described in the UK case would not constitute a particularly serious reason due to which the employer could neglect its duty to consult in Finland.

*Germany (Frank Schmaus, Luther Rechtsanwaltsgesellschaft mbH)*: If a German labour court had decided on the case at hand it would have held all notices of termination to be invalid. This would result in both the continuation of the wrongfully terminated employment relationships and, in principle, in the continuation of remuneration.
However, if the employer prevents the (wrongfully terminated) employee from resuming his or her work, for example during litigation, the employee must allow to be credited against him or her what they save as a result of not performing the services or acquire or wilfully fail to acquire through use of their employment elsewhere (Section 615 of the German Civil Code (*Bürgerliches Gesetzbuch*, 'BGB').
Similar to the laws of the United Kingdom, German law also provides for the need to carry out consultations with the competent employee representation body (if installed) in the context of mass redundancies within the scope of the German Employment Protection Act (*Kündigungsschutzgesetz*, 'KSchG'); the latter being the implementation Act of Council Directive 98/59/EC. Nevertheless, German law differs in at least two respects from UK law.
Firstly, the consultations need to be started before submitting the collective redundancy notification to the employment agency. However there is no minimum deadline as long as the employer can attach the employee representation body's statement to the collective redundancy notification. If not in existence, the employer can replace the statement by a *prima facie* evidence stating that the consultations have been duly carried out for a minimum period of two weeks (Section 17(2), (3) sentences 1-3 KSchG).
Secondly, the need for consultations with the competent employee representation body is without exception. German law does not provide for a 'special circumstance rule' as is the case in the UK or any other exception. The lack of consultation results in the invalidity of notifications given (Federal Labour Court (*Bundesarbeitsgericht*, 'BAG'), 21 March 2013 – 2 AZR 60/12). This applies to solvent, distressed and insolvent employers.

**Subject**: Collective Redundancies
**Parties**: Carillion Services Ltd (in compulsory liquidation) and others – v – Benson and others
**Court**: Employment Appeal Tribunal
**Date**: 8 July 2021
**Case number**: EA-2021-000269-BA
**Internet publication**: https://assets.publishing.service.gov.uk/media/615c6c24d3bf7f56003e96a2/Carillion_Services_Ltd__in_complusory_liquidation__and_Others_v_Mr_C_Benson_and_Others_EA-2021-000269-BA__previously_UKEAT_0026_21_BA_.pdf



doi: 10.5553/EELC/187791072022007001007