Easter Term

[2015] UKSC 26

On appeal from: [2014] CS1H 5

JUDGMENT

University and College Union (Appellant) vThe University of Stirling (Respondent) (Scotland)

before

Lady Hale, Deputy President

Lord Wilson

Lord Sumption

Lord Reed

Lord Hughes

JUDGMENT GIVEN ON

29 April 2015

Heard on 21 January 2015

Appellant	Respondent
Caspar Glyn QC	Brian Napier QC
Tom Brown	Hugh Olson
(Instructed by Maclay Murray & Spens LLP)	(Instructed by Anderson Strathern Solicitors)

LADY HALE: (with whom Lord Wilson, Lord Sumption, Lord Reed and Lord Hughes agree)

1.

An employer which proposes to "dismiss as redundant" 20 or more employees at one establishment within a period of 90 days or less has an obligation to consult the appropriate representatives, usually a recognised trade union, of any of the employees who may be affected: section 188(1), Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"). The question in this case is whether those employees include people employed on limited term contracts ("LTCs") whose contracts will come to an end without renewal during the relevant period. This in turn depends upon two questions, one straightforward and one not so straightforward. The first is whether the expiry and non-renewal of an LTC amount to a dismissal for this purpose: it does (see para 15 below). The second is whether

such a dismissal is “for a reason not related to the individual concerned”, which is the statutory definition of a dismissal “as redundant” in this context: section 195(1), 1992 Act. That is the issue.

These proceedings

2.
In the year 2009 to 2010, the University of Stirling had a projected deficit of some £4.4m. It proposed, therefore, to make up to 140 of its permanent staff redundant. It notified the Department of Business, Innovation and Skills to this effect. On 15 July 2009, it began collective consultation with the relevant trade unions, including the University and College Union. It also launched a voluntary severance scheme and accepted 134 applications from members of staff to take part. In October 2009, therefore, the University concluded that there was no need for compulsory redundancies and the collective consultation process was concluded.

3.
However, the University did not consider that it needed to include in the collective consultation process employees who were employed under LTCs which were to come to an end during the consultation period. The Union, on the other hand, considered that they should have been included and brought complaints that the University had failed to comply with its legal obligations. It was decided that the Employment Tribunal should consider whether such employees were dismissed “as redundant” by reference to four test cases.

4.
Dr Harris was employed as a post-doctoral research assistant. Her contract was due to expire on 16 August 2009 and the University resolved not to renew it. Dr Doyle was employed to co-ordinate and deliver three undergraduate modules in English Studies in the spring semester of 2009. Her contract was not renewed when the semester ended on 29 May 2009. Ms Fife was employed to provide maternity cover, initially until 2 May 2009, extended until 4 September 2009, and again until 9 October 2009. Between 10 October 2009 and 10 September 2010 she was employed on a casual basis. Ms Kelly was originally employed to provide sick leave cover for one month in July 2007, and then from 1 October 2007 to 31 March 2008. Her employment was then extended until 30 September 2008 and then to 30 September 2009, partly because she was a named researcher on a number of projects and partly to cover for a colleague who was working reduced hours after returning from maternity leave.

5.
It is, as the Employment Tribunal found, common practice for this University (and indeed other universities) to obtain external funding for specific research projects. Those funds will allow for the employment of research assistants to work on the particular research project under the supervision of a permanent member of the academic staff. It is common for the researcher’s contract of employment to be limited either in time or by the specific task to be carried out. When that happens the researcher will not be re-employed unless funding for the project has been extended or funding is obtained for a new project for which he or she is suitable. Some researchers therefore move from institution to institution, according to the research projects which become available. This is considered beneficial to their own career development as well as to the institutions involved.

6.
The Employment Tribunal held that Dr Harris, Dr Doyle and Ms Kelly had all been dismissed “as redundant” for the purpose of the consultation requirement; it was not satisfied that Ms Fife had been dismissed at all. The Employment Appeal Tribunal held that all four of the test case employees had

been dismissed, but that none of them had been dismissed as redundant: [2012] ICR 803. The Inner House agreed with the Employment Appeal Tribunal: [2014] CSIH 5, 2014 SLT 352. The Union appeals to this court.

The law

7.
The provisions with which we are concerned were first enacted in Part IV of the Employment Protection Act 1975 ("the 1975 Act"). This was designed to implement in UK law the requirements of European Union law contained in Council Directive 75/129/EEC on the approximation of the laws of the member states relating to collective redundancies. Part IV of the 1975 Act was consolidated as Part IV, Chapter II, of the 1992 Act. In its turn, Council Directive 75/129/EEC was consolidated in Council Directive 98/59/EC of the same name ("the Directive"). For the purpose of the Directive "'collective redundancies' means dismissals effected by an employer for one or more reasons not related to the individual workers concerned ..." (article 1.1(a)). This definition was also contained in the earlier Directive.

8.
However, the Directive does not apply to "collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts" (article 1.2(a)). Thus, the United Kingdom does not have to include workers employed under such LTCs in its provision for consultation about collective redundancies, and in fact, with effect from 6 April 2013, they have been excluded. But that was after these proceedings were begun. Before then, UK law gave such workers greater protection than is required by EU law (see the Opinion of Advocate General Wahl in Andrés Rabal Cañas v Nexea Gestión Documental SA, Fondo de Garantía Salarial (Case C-392/13), 5 February 2015, paras 72-75).

9.
The evolution of the relevant UK law, as contained in the Trade Union and Labour Relations (Consolidation) Act 1992, is relevant. The duty to consult is contained in section 188(1) (formerly section 99(1) of the 1975 Act). As originally enacted, this required an employer who proposed to "dismiss as redundant" a single employee to consult the recognised trade union. This obligation did not apply to employment under a contract for a fixed term of three months or less or for a specific task which was not expected to last for more than three months where the employee had not been continuously employed for more than three months (section 282(1)); but it did apply to anyone else employed under a contract limited to a term or a task whom the employer proposed to "dismiss as redundant".

10.
The definition of "being redundant", in section 195(1) of the 1992 Act (and formerly in section 126(6) of the 1975 Act), originally adopted the classic definition which dates back to the Redundancy Payments Act 1965, and survives to this day in the definition of redundancy for the purpose of the right to a redundancy payment, in section 139(1) of the Employment Rights Act 1996. That is, references to "being redundant" were references to -

"(a) the fact that the employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee is or was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee is or was so employed; or

(b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he is or was so employed, have ceased or diminished or are expected to cease or diminish."

In Association of University Teachers v University of Newcastle-upon-Tyne [1987] ICR 317, the Employment Appeal Tribunal held that this definition covered the lack of further funding for the post of a lecturer employed under an LTC and so the consultation duty should have been observed when the contract was not renewed. The same reasoning would probably apply to the contracts of employees such as Dr Harris, whose research project came to an end, and Dr Doyle, whose undergraduate course came to an end. There might be more room for argument where the need for the work remained the same but there was no longer a need to replace the employee who normally did it.

11.
No doubt the United Kingdom thought that this definition would be adequate to cover the same ground as the definition in the Directive. However, the Commission of the European Communities brought enforcement action against the UK on the ground that it was not wide enough. In particular, it did not cover "cases where workers have been dismissed as a result of new working arrangements within an undertaking unconnected with its volume of business": Commission of the European Communities v United Kingdom (Case C-383/92), [1994] ECR I-2479, para 32; [1994] ICR 664 at 724. The UK conceded that this was so even before the case got to court. The definition in section 195 (but not elsewhere in the law) was amended in August 1993, to take its present form:

"(1) In this Chapter 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.

(2) For the purposes of any proceedings under this Chapter, where an employee is or is proposed to be dismissed it shall be presumed, unless the contrary is proved, that he is or is proposed to be dismissed as redundant." (Emphasis supplied)

12.
On 26 October 1995, the consultation duty in section 188(1) was amended so that the duty now only arises where the employer proposes to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less (the option which is provided for in article 1.1(a)(ii) of the Directive). Finally, on 6 April 2013, section 282 was amended so as to exclude, inter alia, employment under an LTC unless the dismissal takes place before the expiry of the term or the completion of the task. Thus both elements of "gold-plating" provided in UK law have now come to an end.

13.
As we are dealing with a definition which is for the particular purpose of the duty to consult about proposed collective redundancies, the statutory purpose and content of that duty are of some relevance. Under section 188(2), the consultation has to include consultation about ways of avoiding the dismissals, reducing the numbers of employees to be dismissed, and mitigating the consequences of the dismissals. Under section 188(4), the employer has to disclose the reasons for his proposals, the numbers and description of employees whom it is proposed to dismiss as redundant, the total number of employees of any such description employed by the employer at the establishment in question, the proposed method of selecting the employees who may be dismissed, the proposed method of carrying out the dismissals, and the proposed method of calculating any redundancy payments to be made.

14.
For completeness, if an employer fails to comply with section 188(1), the trade union may present a complaint to an Employment Tribunal (section 189(1)). If the tribunal finds the complaint well founded it must make a declaration to that effect and also has power to make a protective award (section 189(2)). This is an award of remuneration for the protected period to those employees who have been dismissed as redundant, in respect of whose dismissal or proposed dismissal the employer failed to comply with section 188 (section 189(3)). The protected period is also within the discretion of the tribunal but cannot be for more than 90 days (section 189(4)). The employer also has a duty to give advance notice of proposed collective redundancies to the Secretary of State (section 193) and failure to do so is a criminal offence (section 194).

15.
Finally, by virtue of section 298 of the 1992 Act, "dismiss" and "dismissal" are to be construed in accordance with Part X of the Employment Rights Act 1996. Section 95(1)(b) of that Act provides that an employee is dismissed if "he is employed under a limited term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract". It is common ground, therefore, that these employees were dismissed. The only question is whether they were "dismissed as redundant" within the meaning of section 195(1) of the 1992 Act. This in turn depends upon whether the reasons for the dismissal were "not related to the individual concerned".

Discussion

16.
The Employment Tribunal held that "the required relationship between the individual and the reason for dismissal … must be a close and direct one with a reason personal to the individual, such as the employee's conduct or capability, rather than the employee's job or the employer's need to have work done being identified" (para 51). The Employment Appeal Tribunal, on the other hand, held that "A reason relates to the individual if it is something to do with him such as something he is or something he has done. It is to be distinguished from a reason relating to the employer, such as his (or in the case of insolvency, his creditors') need to effect business change in some respect" (para 73). In these cases, "at least one of the reasons for all four dismissals was that the employee had agreed to [an LTC], accepting that it would come to an end at a particular date or on the occurrence of a particular event". This was a reason relating to the individuals concerned (para 74). The Inner House agreed: the reason for the dismissal was the fact that the employee had entered into an LTC. That was a reason related to the employee (para 72).

17.
Mr Caspar Glyn QC, for the Union, understandably complains that that is not how the University had first put its case before the Employment Tribunal. It had explained that the contracts had come to an end because the funding for a post had ended, or a project had been completed, or another employee had returned from maternity leave or a fixed term contract had expired. It had argued that fixed term contracts were, as a class, excluded from the consultation requirement. But their witness, Professor Simpson, had stated that the fact that a person had entered into a fixed term contract would be a "consideration" in deciding not to renew their employment. Only before the Employment Appeal Tribunal did the University's position become that at least one of the University's reasons in each of the test cases was that the employee had agreed to accept that his or her contract would come to an end at a particular time or on the occurrence of a particular event. This was a question of fact and the Employment Appeal Tribunal's jurisdiction is confined to questions of law.

18.
However, the more serious complaint about the approach of both the Employment Appeal Tribunal and the Inner House is that it is difficult to imagine that any employer, when considering whether to offer another contract to an employee whose LTC has just come to an end, does not have in mind the very reason why that decision falls to be made, namely that the employee had agreed to an LTC in the first place. The reality is that this approach would exclude all LTCs from the scope of the duty. The Inner House was particularly clear about this, when saying that the reason for the dismissal was the fact that the employee had entered into an LTC. This cannot be right, for two reasons: first, if Parliament had intended to exclude all LTCs, as it was entitled to do, it would have said so; and second, by expressly excluding some, and now (almost) all, of them, Parliament must have accepted that, without the exclusion, at least some LTCs would fall within the scope of the duty. However, it is easier to say what is wrong with the approach of the Employment Appeal Tribunal and the Inner House than it is to discern the true meaning of the phrase.

19.
Mr Glyn argues that many, if not all, non-renewals of LTCs would have fallen within the original definition of a redundancy. When changing the definition in 1993, Parliament was intending to broaden the scope of the protection offered by the 1992 Act. It cannot have been intended that, in relation to LTCs, it should have been narrowed almost to extinction. However, as the Employment Appeal Tribunal pointed out, not all failures to renew an LTC automatically fell within the former definition of a redundancy: it would depend upon the circumstances. Moreover, Parliament was changing the definition in response to how the Commission and the Court of Justice considered that the Directive should apply to employees generally. They will not have had its application to LTCs in mind, as these do not fall within the scope of the Directive at all. The question for us is how those words “for a reason relating to the individual” apply to an LTC.

20.
It is, however, important to bear in mind that Parliament will certainly not have intended to narrow the scope of the consultation duty from the classic redundancy situations covered under the earlier law: the cessation or reduction in business. Furthermore, it intended to add to those situations the reorganisation of the business: classically, where employees are dismissed and offered new contracts so that their terms and conditions of employment can be changed. This lends powerful support to Mr Glyn’s contention that the terms and conditions of the employees’ contracts of employment cannot be a “reason related to the individual”, because if they were, such business rearrangements, although the very reason why the definition was changed, would not be covered.

21.
The context and content of the duty to consult all suggest that it is concerned with the needs of the business or undertaking as a whole. The employer has to explain why he wishes to make a substantial number of employees redundant, which descriptions of employee he proposes to make redundant, and how he proposes to choose among the employees within those descriptions. Employees on LTCs might be a description of employees for this purpose, and being on an LTC might be a criterion for selecting for dismissal, but it is a collective description rather than a reason relating to the individual concerned.

22.
Where an LTC comes to an end, the “dismissal” in question is the non-renewal of the LTC – or rather the failure to offer a new contract, the LTC having come to an end. The fact that it was an LTC, or even that the employee agreed to it, cannot by itself be a reason for the non-renewal. Many LTCs are

in fact renewed or new contracts offered. The question is whether the reasons for the failure to offer a new contract relate to the individual or to the needs of the business. Sometimes, no doubt, it will relate to the individual. The employer may still need to have the work done, but for one reason or another considers that this employee is not suitable to do it. That would not be a dismissal for redundancy. But the ending of a research project or the ending of a particular undergraduate course would not be a reason related to the individual employee but a reason related to the employer's business. The business no longer has a need for someone to do the research or someone to teach the course. The same would usually be true of the ending of maternity or sickness cover. The need for the job would not have ended but the need for the job to be done by someone other than the person who usually does it would have ended. That too is not a reason related to the individual employee but a reason related to the employer's business.

23.
In short, the Employment Appeal Tribunal stated an admirable test: "A reason relates to the individual if it is something to do with him such as something he is or something he has done. It is to be distinguished from a reason relating to the employer, such as his (or in the case of insolvency, his creditors') need to effect business change in some respect". The error was to place the coming to an end of an LTC into the first rather than the second category.

24.
I would allow this appeal and remit the case to the Employment Tribunal for consideration of the remaining issues.