Appeal No. UKEAT/0305/12/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 4 December 2012
Judgment handed down on 12 March 2013

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

WORKING LINKS (EMPLOYMENT) LTD — APPELLANT

PUBLIC AND COMMERCIAL SERVICES UNION — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARTIN PALMER (of Counsel) Instructed by: Dickinson Dees LLP Camden House Prince's Wharf Teesdale Park Stockton on Tees TS17 6QY
For the Respondent	MR STUART BRITTENDEN (of Counsel) Instructed by: Thompsons Solicitors LLP Arundel House 1 Furnival Square Sheffield S1 4QL

SUMMARY

REDUNDANCY – Collective consultation and information

The evidence to support a conclusion that a trade union has been recognised by an employer for collective bargaining purposes within the meaning of section 178 of the **Trade Union and Labour Relations (Consolidation) Act 1992** must be clear. The Employment Judge erred in deciding that the Claimant was so recognised without identifying evidence which supported such a conclusion. Discussion is not negotiation. Also as illustrated by the use of the two different terms in section 178(2)(g), negotiation has a different meaning from consultation. **NUGSAT v Albury Brothers Ltd** [1978] IRLR 504 applied. Appeal allowed. Case remitted to a different Employment Judge to consider the issues relevant to whether the Claimant has standing to bring a claim under TULR(C)A section 189.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Working Links (Employment) Limited appeal from the decision of an Employment Judge ('EJ') on a Pre-Hearing Review ('PHR') by a judgment sent to the parties on 4 October 2011 that they recognised the Public and Commercial Services Union for the purpose of collective bargaining within the meaning of **Trade Union and Labour Relations (Consolidation) Act 1992** ('TULR(C)A') section 178. The issue arose in the context of a claim by the Union brought under TULR(C)A section 189 that Working Links had failed to consult them about proposed redundancies in accordance with section 188. The Claimant was represented at the PHR by their National Officer and the Respondent by a solicitor. The witness evidence adduced on behalf of the Claimant was contained in the written statements of two full time officials, Mr Parry who dealt with the Respondent in 2003 to 2008 and Mr Steel who was the Senior National Official for the sector covering the Respondent for 2005 and 2009. Neither was available to attend the hearing. Mr Cutler who has worked in the Respondent's Human Resources Department since July 2003 made a statement and attended the hearing. Whilst he was available for this he was not cross-examined. In order to have the standing under section 189(1B)(a) to bring a claim alleging a breach of section 188 a trade union not only must be recognised within the meaning of section 178 but also must be recognised in respect of the description of the employees who may be affected by proposed dismissals for redundancy or who may be affected by measures taken in connection with those dismissals. Thus recognition under section 178 is just one element to be established by a trade union seeking to show that it has the standing to bring a claim for breach of section 188. The parties will be referred to by the titles before the EJ as Claimant and Respondent. References to paragraph numbers are to those in the judgment of the EJ and to statutory provisions are to TULR(C)A unless otherwise indicated.

Outline facts

2. The Respondent provides "welfare to work" services to the Employment Service. It was set up in 1999 or 2000, initially as a partnership involving the Manpower Services Commission, the DWP and another body. Some employees of the Respondent were members of the Claimant although the judgment does not give their numbers, job posts or locations.

3. By 2003 an agreement titled 'Recognition Agreement between Working Links (Employment) Limited…and the Public and Commercial Services Union…' (the 'Recognition Agreement') was in place. The relevant document before the EJ which set out the 'Recognition Agreement' introduced it with a statement including:

> **"PCS is the union that represents many Employment Service personnel and in the interests of good industrial relations have negotiated with them to conclude a separate agreement covering all Working Links employees and secondees."**

Clause 3 of the Recognition Agreement headed 'SCOPE' provided:

> **"This agreement shall apply to all members of the Union directly employed by Working Links and providing services under the Employment Zone contracts with the Department for Education and Employment."**

Arrangements for consultation between the Claimant and the Respondent were set out with local and national meetings. The local meetings were "to consider items of mutual interest that affect employees". Consultation on proposed changes to terms and conditions of employment were referred to. However it was stated that "Working Links shall not be bound by these consultations". Information for consultations on terms of employment would be provided by the Respondent. The Respondent recognised that the Claimant may represent their members in relation to disciplinary and grievance issues. A dispute resolution procedure for collective issues stated:

> **"In the event that representations on any collective issue do not result in resolution at the appropriate level, the issue shall be considered by the Working Links Zone Director or his/her nominee and appropriate Full Time Official of the Union. If agreement is not reached, either party may request the issue be referred to ACAS for resolution by conciliation. Such request for conciliation shall not be unreasonably refused."**

Facilities for the Claimant's representatives were to be provided. The parties agreed:

> **"…to consider means of concluding a revised agreement providing for a closer working relationship to be established to the benefit of PCS members and the unemployed people seeking work through the Employment Zone."**

4. The EJ recorded that individual contracts of employment dating from 2003, 2009 and 2010 stated that there was "a collective agreement in force between PCS and the company". In paragraph 12 the EJ observed:

> **"It is not clear from such evidence as I have what the collective agreement was, but it must be supposed that the 2003 contract at least refers to the recognition agreement."**

5. The EJ held at paragraph 21 that the parties started to negotiate "towards the further agreement" mentioned at the end of the recognition agreement. They met in September 2005. In a draft note of a discussion between the parties on 30 September 2005 it is recorded that the Claimant wanted to update the existing partnership agreement:

> **"…that was established at a very different time and has never been fully realised."**

The EJ further held:

> **"…we have little evidence of what exactly was being negotiated about at this time. Mr Parry in his witness statement referred to negotiating 'a range of issues', but unhelpfully there was no detail of what those issues might be…**
>
> **25. Mr Steel's witness statement refers to having been engaged in discussing redundancies and restructuring, prior to the next agreement at this stage on pay. He confirmed that there were annual discussions about pay, but that he did not negotiate it…."**

6. In 2006 a new agreement titled 'The Strategic Agreement' was entered into. The EJ stated in paragraph 26:

> **"I was told that this had superseded the earlier agreement, although there is nothing in the documentary evidence."**

7. The Introduction to the Strategic Agreement stated that:

> **"It facilitates better joint communication and consultation at local and national level. It encourages greater employee involvement and progressive industrial relations.**
>
> **…**
>
> **Working Links recognises that PCS needs to have a strong membership base in order to contribute effectively. Working Links and PCS will work together to enhance representation and effective joint consultation."**

Consultative forums were to be established at local and national level. The text relating to both referred to their purpose as being to discuss issues. Those at strategic/national level were to consider "company wide issues" and those at local level to discuss contract specific issues, health and safety and how to implement national decisions. The role of local forums is to resolve problems and promote quality service. The EJ recorded in paragraph 26 that Mr Cutler, who was Head of Employee Relations and Reward, gave evidence that he had never known such a forum to be set up in his area, which is the North East.

In a section headed 'Dispute Resolution' the Strategic Agreement provided that:

> **"To improve the quality of communication between Working Links and PCS each will provide and keep up to date, a key contacts list covering relevant operational and functional roles. Appropriate 'pairings' will then be agreed. In the event that any matter cannot be reasonably resolved at the appropriate level then it will be escalated in accordance with the contact network. In the unlikely event of the matter remaining unresolved the final responsibility will lie with the Managing Director of Working Links and the Senior National Officer at PCS."**

8. The EJ held in paragraph 30 that:

> **"The language of the agreement is to some extent opaque, and it is especially vague about what the agreement was actually to discuss."**

She noted in paragraph 31 that a note of a meeting between the parties on 23 February 2006 which involved the two union officials whose statements were before the EJ recorded that the union were overall very happy with the draft Strategic Agreement. They:

> **"…advised that they were legally unable to recognise the voice [of non-] union members, and even if they could, they absolutely had no mechanism with which to do so."**

Paragraph 32 records the parties' position on the meaning of this statement:

> **"The parties both say that this document is important. The Respondent says that if the union was advising that they were legally unable to recognise the voice of non-union members, that indicates that they understood that they were not recognised for collective bargaining on behalf of the workforce, as if they were, that would include those who were not their members. The union relies on the reference to a forecast of time, to indicate that this was a process, in which they were negotiating about the range of facilities for union representation and union officers to have access to their members, as well as dispute resolution."**

However, despite the express positions of the parties, the EJ reached the conclusion that this was a reference "to the trade union by its rulebook being legally obliged only to consult its own members on the proposals".

9. Mr Cutler's unchallenged evidence in his witness statement was that the reference in the Respondent's standard contract of employment to a collective agreement was to the Strategic Agreement. There was in place an employee consultation group known as 'Viewpoint'. The Viewpoint document before the EJ expressly stated that Viewpoint was not "an arrangement for collective bargaining".

10. The EJ recorded in paragraph 35 that:

> **"In the period after the strategic agreement had been agreed there is evidence from Mr Steel that he was involved in consultation about some redundancies in Wales and Scotland. Though he is very light on specifics, it appears that he represented individuals who had been made redundant."**

In paragraph 36 the EJ recorded that Mr Cutler wrote to Mr Parry of the Claimant on 30 January 2008 informing him that 51 redundancies were proposed in the Northeast. Mr Parry was informed that none of these employees were members of the Claimant. He provided Mr Parry with a timetable for consultations. Although not referred to in the judgment, Mr Cutler wrote:

> **"I would be extremely grateful if you could assist us during this process and would welcome the opportunity to discuss."**

The EJ referred to the evidence of Mr Cutler that the Claimant was invited to redundancy consultations but did not attend. She observed at paragraph 36:

> **"It is possible of course that this episode is the one which he [Mr Cutler] referred, if none of their members were affected, PCS may not have attended."**

11. In 2010 the union "launched a push to obtain statutory recognition". The EJ held:

> **"Particularly on 9 February 2010, their intention was to seek recognition for their membership in Tower Hamlets…. The union wish to 'extend and strengthen' the Strategic Agreement to cover pay bargaining and other matters relating to our members' terms and conditions. In other words our strong belief is that a more traditional agreement between ourselves would be mutually beneficial."**

12. In paragraph 41 the EJ recorded:

> **"On 1 November 2010 the General Secretary of the union, Mark Serwotka, wrote to his members about Working Links, saying 'we have been working with newly elected reps to revitalise our presence in Working Links'. There were currently almost 300 members in the company with members in 39 of the company's 70 offices. Amongst other things, it said, 'we are also looking at winning recognition for collective bargaining in areas where our membership is strongest which means your local elected reps will be able to negotiate with management on pay."**

At paragraph 42 the EJ held:

> **"There is little information about what has happened since. There has not been any move by the union, it seems, to present the statutory recognition issue to the CAC…"**

13. The EJ noted that there were subsequent redundancies. In consultation documents the Respondent informed staff about election of employee representatives. They said:

> **"If you are a member of PCS you do not need to take part in any election as you will be represented by PCS at the consultation meetings."**

The Respondent asked which PCS employees would be appointed to represent the affected members of the Claimant.

14. In the section of the HR1 form notifying the DWP of proposed redundancies in which the employer is asked to provide "the names of recognised trade union, name of representative, description of employee they represent" to be consulted, the Respondent wrote "PCS (not recognised for collective bargaining), representative Jim Hanson, description of employees you represent: PCS members". In reply to the question: "if you did not recognise trade unions for any groups of employees, please give the names of their elected representatives below" the Respondent replied "election ongoing".

The statutory framework

15. **Trade Union and Labour Relations (Consolidation) Act 1992**:

> **"Section 178**
>
> **(1) In this Act "collective agreement" means any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more of the matters specified below; and "collective bargaining" means negotiations relating to or connected with one or more of those matters.**
>
> **(2) The matters referred to above are—**
>
> > **(a) terms and conditions of employment, or the physical conditions in which any workers are required to work;**
> >
> > **(b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;**
> >
> > **(c) allocation of work or the duties of employment between workers or groups of workers;**
> >
> > **(d) matters of discipline;**
> >
> > **(e) a worker's membership or non-membership of a trade union;**

(f) facilities for officials of trade unions; and

(g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.

(3) In this Act "recognition", in relation to a trade union, means the recognition of the union by an employer, or two or more associated employers, to any extent, for the purpose of collective bargaining; and "recognised" and other related expressions shall be construed accordingly."

Section 188:

"(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.

…

(1B) For the purposes of this section the appropriate representatives of any affected employees are—

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade unions, or;

(b) in any other case, whichever of the following employee representatives the employer chooses—

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information to be consulted about the proposed dismissals on their behalf;

(ii) employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1)."

Section 189:

"(1) Where an employer has failed to comply with a requirement of section 188 or section 188A a complaint may be presented to an employment tribunal on that ground—

…

(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;

(c) in the case of failure relating to representatives of a trade union, by the trade union;

…"

The Judgment of the EJ

16. Having set out TULR(C)A section 178, the EJ directed herself:

> **"…to look at whether there have (sic) been collective bargaining meaning negotiations on one or more of the topics set out in (a) to (g)."**

The EJ referred to the judgments of the Employment Appeal Tribunal ('EAT') and the Court of Appeal in the **National Union of Gold, Silver and Allied Trades v Albury Brothers Ltd** [1977] IRLR 173 and [1978] IRLR 504. The EJ directed herself that:

> **"51. …the Master of the Rolls held that an act of recognition is such an important matter, that it should not be held to be established unless the evidence is clear, either by an actual agreement for recognition, or in 'clear and distinct conduct showing an implied agreement to recognise the trade union for the purposes of collective bargaining'.**
>
> **52. There was then a discussion of what recognition meant. I (sic) was said that it entailed not merely willingness to discuss but also to negotiate with a view to striking a bargain upon one or more matters set out in section 29(1). That section set out the matters now contained in section 178(1)."**

In her consideration of the authorities, the EJ also referred to the judgment of the EAT in **TGWU v Andrew Dyer** [1977] IRLR 93 a case in which she said that "the question of how to recognise whether there was recognition if there was no written agreement was discussed". The EJ observed at paragraph 54:

> **"In that case it was held that recognition must be clear or unequivocal, usually, though not necessarily, involved in a course of conduct over a period of time."**

The EJ observed of **National Union of Tailor and Garment Workers v Charles Ingram and Co.** [1977] IRLR 47:

> **"This held that recognition implies agreement, which implies consent. Where as in the present case there is neither a written agreement that the union should be recognised, nor an express agreement which is not in writing, it is sufficient, if the established facts are clear and unequivocal and give rise to the clear inference that the employers have recognised the union. This will normally involve conduct over a period of time, ad the longer that state of affairs has existed, the easier it is to reach a conclusion that the employers have recognised the union."**

The EJ also referred to **USDAW v Sketchley Ltd [1981] IRLR 291** for the proposition that:

> **"…an employer who enters into an agreement with the union relating to the terms and conditions of employment of members of the union, runs a severe risk that the inference will be drawn that the employer recognises the union as having negotiating rights in that field."**

17. At paragraph 29 the EJ held:

> **"It therefore falls to me to analyse the extent to which the strategic, said to be non traditional agreement, did cover any of the subject matter required for bargaining to be collective."**

In paragraph 59 the EJ recognised that the Claimant's case was that they had an express agreement with the Respondent to negotiate about a number of matters within section 178(2). The EJ noted that the Claimant referred both to the Recognition and the Strategic Agreements but particularly to the Strategic Agreement. They also relied "on the evidence of the redundancy consultations". The EJ held at paragraph 60 that:

> **"…the documents provided little evidence of what specific issues had in fact been discussed under the umbrella of these agreements, but it seems that there has throughout, as it frequently appears, [been] an intention to discuss matters with each other…. It is not clear to what extent these issues have been discussed in practice, but certainly it appears to have been the intention of both parties that they should be discussed."**

18. Having considered the evidence relating to each alphabetical subsection of TULR(C)A section 178(2), the EJ held at paragraph 74:

> **"…it seems to me that on such facts as are available that the employer did engage in collective bargaining, meaning negotiations on at least two and possibly three of the matters set out in section 178(2) namely, facilities, disputes resolution and machinery for negotiations and consultations. Accordingly I conclude that this union was recognised for the purposes of collective bargaining."**

19. The reasoning by which the EJ reached this conclusion is set out in paragraphs 66 to 69 and either 62 or 65 which are set out in full:

> **"62. Item (b) is about a particular termination of employment, which would cover the situations involving redundancy. I note here that for recognition there has to be an agreement, and that an "agreement" implies that there is a bargain struck between the parties. There could impliedly be an agreement, on the part of the employer who desired to have an agreement with the unions so as to head off the risk of industrial action, particularly as some local activists were inclined to trouble – that loosely, would be the consideration of a bargain, beyond simple consultation. There is specific evidence as to the context of negotiations about redundancy.**
>
> **…**

65. The next (d) is matters of discipline. The earlier recognition agreement, and presumably by continuation the strategic agreement, contemplated a procedure for resolving disputes which went up to managing director and national officer level, and to that extent it seems that the union was recognised for the discussion of discipline, if 'disputes' covers disciplinary issues. The April 2010 email appears to record an agreement to discuss discipline generally, as distinct from representing individual members."

66. Then (e) is negotiation about a worker's membership or non membership and (f) about facilities for officials. The union points to the fact that they had a check-off agreement, which of itself just provides a service to the union, but more particularly point to the reference in the meeting to discussion about the management enquiring about what facilities the union wanted for time off. This supports a finding that there were negotiations about facilities.

67. Then finally (g) 'machinery for negotiation or consultation and other procedures, consultation' and the subject matter of that is to represent workers in such negotiation or consultation. In this case there seem to have been prolonged discussions and negotiations about machinery and arrangements for consultation. That seems to have particular meaning in the context of the earlier negotiation about redundancy, in that the Respondent had agreed to recognise that PCS representatives provide support to redundant workers in South Wales, and also in the 2010 negotiations. It seems that 'machinery' in that sub-clause is not limited to machinery for negotiation or indeed to represent workers in negotiations. It includes negotiations about representation in consultations.

68. I recognise that in view of the limited amount of facts, it is important to examine the extent to which these were about negotiations, rather than consultation, at every stage. The parties themselves referred to negotiation. There is also a series of meetings, characteristic of negotiation with a view to agreement (whether or not agreement was achieved).

69. What supports recognition is the long course of dealing between the union and the company throughout the workforce, which while specifically excluding negotiation about pay in terms and conditions, seems to have included other matters in negotiation at any rate. There is a long period of such dealings, which seem to have gone back some 10 or 11 years at least."

The submissions of the parties

20. Three grounds of appeal were advanced by Mr Palmer on behalf of the Respondent. The introduction to the Grounds of Appeal in the Notice of Appeal included the following:

"17. While the Tribunal correctly identifies the relevant authorities in *NUCSAT v Albury Brothers, TGWU v Andrew Dyer*; the Tribunal ignored the import of those authorities that in determining the primary facts from which conclusions were to be drawn, such fact should be based upon clear evidence of agreement and/or actual conduct requiring a degree of mutuality as to the purpose between the negotiations.

18. In reaching her judgment, the Employment Judge has made a series of errors of law in that she failed to apply the law found in Section 178 TULRCA properly. In essence the flaws in her judgment derive from confusing the status of recognition of an independent trade union for the purposes of collective bargaining with the trade union merely being informed of or consulted about decisions by the employer. This error has rendered her judgment defective."

21. Mr Palmer relied upon the judgment of the Court of Appeal in **National Union of Gold, Silver and Allied Trades v Albury Brothers** [1978] IRLR 504 to submit that an employer is not to be held to have recognised a trade union unless the evidence is clear. It is established by

TGWU v Andrew Dyer [1977] IRLR 93 that where a recognition agreement is to be inferred from the actions of an employer and a union the evidence must be clear and unequivocal. Mr Palmer accepted that the EJ referred to the relevant authorities but submitted that she failed to apply them to the facts.

22. In support of Ground 1 Mr Palmer submitted that the EJ failed to give proper weight to the evidence of Mr Cutler, the Head of Employee Relations, in particular his evidence of recent dealings of the Respondent with the Claimant and as to whether there had been negotiations with the Claimant. Mr Cutler gave evidence at the hearing before the EJ. The EJ did not explain why she did not accept his unchallenged evidence that the Respondent did not believe there was an agreement with the Claimant for recognition or conduct supporting such an inference. By contrast the EJ accepted the evidence in the witness statements of Mr Steel and Mr Parry for the Claimant although they did not attend the hearing to be cross-examined. In particular reference was made to Mr Steel's evidence of consultation about redundancies in Wales set out in paragraph 35 and the reliance placed on that evidence by the EJ in paragraphs 63 ad 67 in concluding that the Respondent had negotiated with the Claimant about "machinery for negotiation or consultation".

23. Mr Palmer pointed out that the EJ did not identify in paragraph 74 on which of three matters set out in TULR(C)A section 178(2) facilities, disputes resolution and machinery for negotiations and consultations she found that the Respondent had engaged in collective bargaining with the Claimant. "Possibly" engaging in collective bargaining, the qualification attached to an unidentified one of the three, was not enough to establish that there was collective bargaining within section 178(2).

24. Mr Palmer drew attention to paragraph 60 in which the EJ noted that the documents provided little evidence of what specific issues were discussed "under the umbrella of the Recognition and Strategic Agreements". Further, she held that it was not clear to what extent these issues were discussed in practice. In particular in these circumstances Mr Palmer contended that the EJ should have had regard to the unchallenged evidence of Mr Cutler in paragraph 14 of his statement that the 2003 Agreement was replaced by the 2006 Strategic Agreement; that it was normal practice for the Respondent to notify the Claimant of any transfers pursuant to the Transfer of Undertakings Regulations ('TUPE') and of collective redundancies (Statement para 43), and that the Respondent would also arrange for the election of employee representatives on the basis that the Claimant was not formally recognised to represent all the employees within a particular group. Mr Palmer submitted that these arrangements were not the end product of negotiations. Counsel also drew attention to the Claimant's position as expressed in a meeting on 23 February 2006 that they were "legally unable to recognise the voice of non-union members".

25. As for Ground 2, Mr Palmer contended that by associating the longevity of consultation with the issue of recognition, the EJ erred in law. He submitted that the EJ failed to explain what matters, if any, constituted negotiations for the purposes of, related to or were connected with any of the matters set out in TULR(C)A section 178(2). The EJ erred in law in the matters taken by her to constitute "collective bargaining" for the purposes of TULR(C)A section 178(2). The EJ misdirected herself by giving importance to one factor alone, the period of time over which there had been dealings between the Claimant and the Respondent.

26. It was submitted that none of the conclusions of the EJ are founded upon the level of certainty deemed necessary by the Court of Appeal in **Albury**. Further it was said that the EJ erred in having regard to the length of the period over which dealings between the Claimant and

the Respondent took place rather than the substance of those dealings and whether they were negotiations about the subject matter in section 178(2).

27. Mr Palmer considered the basis for the conclusion of the EJ that the Respondent engaged in collective bargaining, meaning negotiations on facilities for trade union officials, section 178(2)(f), disputes resolution, probably considered under section 178(2)(b) and machinery for negotiations and consultations, section 178(2)(g).

28. Mr Palmer submitted that the EJ considered "disputes resolution" under section 178(2)(b), "engagement or non-engagement or termination or suspension of reemployment…of one or more workers". In considering section 178(2)(b) in paragraph 62 the EJ referred to the Respondent's "desire to have an agreement with the unions so as to head off the risk of industrial action". The reference to "Disputes resolution" in paragraph 74 relates more closely to the terminology in paragraph 62 in which the EJ considered section 178(2)(b) than any of the other matters in that subsection. Mr Palmer submitted that the matters set out in paragraphs 62 and 63 did not support a finding that the Respondent had engaged in negotiations with the Claimant about the termination of employment of workers. The Respondent had consulted the Claimant about redundancies of their members. They had not negotiated.

29. The EJ set out the basis upon which the EJ concluded that the Respondent had negotiated with the Claimant about the provision of facilities for trade union officials within the meaning of section 178(2)(f) in paragraph 66. Mr Palmer submitted that the existence of a check-off agreement does not support a finding that the Respondent negotiated with the Claimant about facilities for union officials. Neither did a discussion at which management enquired about what facilities the Claimant wanted for time off provide such support.

30. The "prolonged discussions and negotiations about machinery and arrangements for consultation" which the EJ referred to in paragraph 67 as supporting a finding that the parties engaged in negotiations on machinery for negotiations or consultation within the meaning of section 178(2)(g), on the evidence was consultation about redundancy. It was not negotiation.

31. The EJ relied upon a "long course of dealing" between the parties as supporting recognition. A long period of such dealings going back some 10 or 11 years at the least was referred to although the EJ did not specify the dealings which she relied upon. Mr Palmer contended that the inference of collective bargaining could only be drawn from clear evidence of negotiations on one or more of the topics in section 178(2). Discussion or consultation did not support such a conclusion. Nor did the period of time over which discussions or consultations took place give rise to an inference of collective bargaining.

32. In Ground 3 of the Notice of Appeal, the Respondent relies on the matters referred to in Ground 2 to challenge the conclusion of the EJ that the Respondent had engaged in collective bargaining, meaning negotiations on at least two and possibly three of the matters set out in section 178(2), facilities, disputes resolution and machinery for negotiations and consultations as perverse. For the reasons developed in support of Grounds 1 and 2 of the appeal it was contended that the conclusion of the EJ was perverse.

33. In reply to the contention on behalf of the Claimant that the decision of the EJ is in any event to be upheld on the basis that the Respondent engaged in collective bargaining with the Claimant because they had entered into the Recognition Agreement which provided a mechanism for consultation on matters within section 178(2)(a) to (f), Mr Palmer submitted that the EJ found that the 2003 Recognition Agreement had been replaced in 2006 by the Strategic Agreement. This finding was supported by paragraph 14 of the witness statement of Mr Cutler

and by other evidence. The question of whether the Respondent recognised the Claimant for collective bargaining purposes within the meaning of section 178 could be decided on the 2006 agreement which had replaced the 2003 agreement. Mr Palmer submitted that the 2006 Strategic Agreement was not the end product of negotiation. In any event it did not satisfy section 178(2)(g). Mr Palmer drew attention to the statement by the Claimant recorded in the minutes of a meeting of 23 February 2006 and paragraph 18 of the statement of Mr Cutler that they acknowledged that the union was "legally unable to recognise the voice of non-members". Mr Cutler commented that this indicated to him:

> **"…that PCS acknowledged that the new strategic agreement would not provide them with full recognition rights over a particular group or class of employees within the Company."**

That issue, which was relevant to the claim under TULR(C)A section 188 remained to be determined.

34. By a Respondent's Answer, the Claimant relied on the grounds of the EJ for reaching her decision and "the matters set out in the Respondent's [Claimant's] submission to the Rule 3(10) hearing". That submission ran to 11 pages and 51 paragraphs. However the principal point taken is that "none of the grounds of appeal challenge the findings and conclusions as to Section 178(2)(g)". Mr Brittenden for the Claimant submitted that unless the appeal is successful on all three challenges, meaning the challenges to the three matters within TULR(C)A section 178(2) relied upon by the EJ in reaching her conclusion, that the Respondent engaged in collective bargaining on at least two and possibly three of the following: facilities, dispute resolution and machinery for negotiations and consultation, her decision is to be upheld but on slightly different grounds. In any event the EAT is invited by the Claimant to uphold the EJ's findings and conclusions on section 178(2)(g).

35. Mr Brittenden contended that the submissions on behalf of the Respondent failed to recognise the difference between TULR(C)A section 178(2)(a) to (f) and (g). Whereas in respect of the former, the EJ must be satisfied that the Claimant was recognised for negotiation purposes, the same is not required under section 178(2)(g). It is sufficient to establish recognition under section 178(2)(g) if collective machinery has been negotiated so as to facilitate consultation in respect of one of the matters falling within section 178(2)(a) to (f). To fall within section 178(2)(g) the machinery was not required to be for negotiation in respect of those matters.

36. Mr Brittenden contended that the 2003 Recognition Agreement was relevant. The section in the Recognition Agreement titled "Arrangements for Consultation" supported a conclusion that the Claimant was recognised for collective bargaining as it provided machinery for consultation on matters within section 178(2)(a) to (f). He drew attention to paragraphs 4b and 4c of the 2003 Recognition Agreement which provided for consultation on terms of employment and the provision of information for such consultation in support of this contention. Mr Brittenden also referred to paragraph 16 of the Witness Statement of Graham Steel in which he stated:

> **"16. At no time did any manager from the very top down suggest to me that Working Links did not recognise PCS in respect of anything other than national pay rates."**

Mr Brittenden referred to the standard form contract of employment which refers to a collective agreement with the Claimant. The findings of fact made by the EJ establish that the Claimant was invited by the Respondent to consultation on proposed redundancies. This finding was supported by the evidence of Mr Cutler.

37. Mr Brittenden recognised that the representation provisions in TULR(C)A section 188 had not been addressed and would have to be determined. Those included the question of whether the Claimant was recognised for collective bargaining purposes in respect of employees who may have been affected by the proposed redundancies.

Discussion and conclusion

38. The question of whether the Claimant was recognised by the Respondent arose as a preliminary issue in the determination of the union's claims under TULR(C)A section 189 that the employer was in breach of the redundancy consultation provisions of section 188. Thus the answer to the question "was the Claimant recognised by the Respondent for the purposes of collective bargaining?" does not provide a complete answer to whether the union has standing to bring a claim under section 188. Even if the Claimant were recognised by the Respondent within the meaning of TULR(C)A it would have to establish that it was recognised in respect of employees of a description who may be affected by proposed redundancies. The judgment of the EJ provides no indication that this question was considered. Having regard to the General Secretary's letter to colleagues of 1 November 2010 in which he observed "we now have members in 39 of the company's 70 offices" it cannot be assumed that even if the Claimant were recognised by the Respondent they would by virtue of recognition alone have the standing to bring a claim under section 188. That would depend on whether the employees who may have been affected by proposed redundancies were of a description in respect of which the Claimant was recognised. To trigger the obligation under section 188 there would be proposed redundancies of 20 or more employees at one establishment within a period of 90 days or less although the number of affected employees in respect of whom representatives or members of a trade union may be appropriate representatives within the meaning of section 188(1B)(a) or (b) may be less.

39. Even if recognised for certain collective bargaining purposes, the Claimant may not have been recognised for some descriptions of employees, for example managers or employees generally who were not members of the Claimant. The 2003 Recognition Agreement in terms and the note of the Claimant's meeting of 23 February 2006 at which the draft 2006 Strategic Agreement was discussed indicated that the Claimant did not regard itself as representing non-union members. However, even if the Claimant were not recognised for collective bargaining, if for the purpose of consultation under section 188 the Respondent chose to consult members of the Claimant who within the meaning of section 188(1B) were appropriate representatives of certain affected employees, those members could be said to have the standing to bring claims for breach of section 188 in respect of the affected employees whom they represented. There were findings by the EJ that the Respondent had consultations with the Claimant in February and March 2011 regarding proposed redundancies which affected their members. In paragraph 63 the EJ recorded that members of the Claimant were excluded from electing representatives for redundancy consultations because the Claimant was to be consulted in respect of their members. Accordingly it would have been preferable if the preliminary issues had been:

> Whether the employees who may have been affected by proposed redundancies falling within **Trade Union and Labour Relations (Consolidation) Act 1992** section 188(1):
>
> (1) Were of a description in respect of which the Claimant was recognised; and if not
>
> (2) Whether the Respondent had chosen to consult with members of the Claimant as appointed or elected by affected employees with authority to or expressly for the purpose of receiving information and being consulted under section 188.

40. If the EJ held that the Claimant was not recognised within the meaning of section 178 only question (2) would be relevant. Failure to choose employee representatives for

consultation purposes can give rise to a claim under section 189 by employees affected or dismissed by reason of collective redundancy.

41. There is agreement between the parties as to the approach to be taken by courts and tribunals to the question of whether a trade union is recognised by an employer for the purposes of collective bargaining within the meaning of TULR(C)A section 178(3). "Collective bargaining" is defined in section 178(1) as "negotiations relating to or connected with one or more of the matters" set out in section 178(2)(a) to (g). "Collective agreement" is separately defined in section 178(1) as "any agreement or arrangement made by or on behalf of one or more employees or employers' associations and relating to one or more of the matters specified" in section 178(2)(a) to (g).

42. Recognition of a trade union for collective bargaining purposes is an important matter. In **NUGSAT v Albury Brothers Ltd** [1978] IRLR 504 Lord Denning MR observed at paragraph 11:

> **"A recognition issue is a most important matter for industry; and therefore an employer is not to be held to have recognised a trade union unless the evidence is clear. Sometimes there is an actual agreement of recognition. Sometimes there is an implied agreement of recognition. But at all events there must be something sufficiently clear and distinct by conduct or otherwise so that one can say, 'They have mutually recognised one another, the trade union and the employers, for the purposes of collective bargaining."**

Lord Justice Eveleigh held at paragraph 19:

> **"…it seems to me that recognition entails accepting a trade union to some extent as the representative of the employees for the purpose of carrying on negotiations in relation to or connected with one or more of the matters set out in s29(1) of the 1974 Act [now TULR(C)A Section 178(2)]. Thus it entails not merely a willingness to discuss but also to negotiate in relation to one or more such matters. That is to say, to negotiate with a view to striking a bargain…"**

Lord McDonald in **Transport and General Workers Union v Andrew Dyer** [1977] IRLR 93 held:

> **"8. We agree with the appellants that recognition need not necessarily involve some formal act on the part of an employer, and that it can inferred from his actings and those of the union.**
>
> **…**
>
> **9. Where agreement is to be inferred from actings these must be clear and unequivocal, usually though not necessarily, involving a course of conduct over a period of time."**

Ground 1

43. The issues on which Mr Palmer submitted that the EJ ignored Mr Cutler's evidence were the following. That the 2006 Strategic Agreement replaced the 2003 Recognition Agreement. The EJ noted in paragraph 26 that she was told that the Strategic Agreement had superseded the 2003 Recognition Agreement. In paragraph 39 the EJ directed herself to analyse the extent to which the Strategic Agreement covered any of the subject matter required for bargaining to be collective. Accordingly she appears to have proceeded on the basis suggested by Mr Cutler's evidence, that the 2006 Strategic Agreement replaced the 2003 Recognition Agreement.

44. Mr Palmer complained that the EJ accepted Mr Steel's evidence that he was involved in consultation about some redundancies in Wales and Scotland without referring to Mr Cutler's evidence that the Claimant was notified rather than consulted about collective redundancies. Mr Cutler's evidence was consistent with the findings of the EJ that the Respondent would consult with the Claimant about redundancies of its members. It was for this reason that employee members of the Claimant did not participate on the election of employee representatives who were to participate in consultation with the Respondent on proposed redundancies. Members of the Claimant were to be represented by Claimant representatives. This approach is also consistent with the HR1s completed for the redundancies in South Wales in 2011 referred to in paragraph 63. The point made by Mr Cutler that the fact that the

Claimant was seeking formal recognition in 2010 by applying to the CAC carried the implication that it was not recognised was noted and considered by the EJ in paragraph 70.

45. In my judgment the EJ did not fail to give "proper weight" to the evidence of Mr Cutler in any of the respects relied upon by Mr Palmer. The weight to be attached to the evidence is a matter for the EJ. In any event in the respects mentioned, Mr Cutler's evidence supported rather than detracted from the findings of fact by the EJ.

Ground 2

46. The fact that an employer had discussions with a trade union about various matters over a long period of time does not convert discussion into negotiation. To constitute "collective bargaining" within the meaning of section 178(1) there must be negotiations. The reaching of a collective agreement does not necessarily result from collective bargaining. No negotiations may have been necessary. As explained by Eveleigh LJ and Sir David Cairns in **Albury** discussion is not to be equated with negotiation.

47. Facilities for union officials were considered in paragraph 66. The EJ held that there was a reference in a meeting to discussion about the Respondent enquiring what facilities the Claimant wanted for time off. An enquiry of this nature does not support the finding by the EJ that these were negotiations about facilities. Nor does the fact that the Respondent operated check-off support such a conclusion. There is no finding of fact that there were negotiations about check-off.

48. It is not clear whether "disputes resolution" held by the EJ to have been negotiated by the parties was a reference to section 178(2)(b) or (d). If the EJ were relying on consultation with the Claimant about the redundancies of its members, consultation is not negotiation.

Depending upon the numbers involved, the Respondent was under a statutory duty imposed by section 188 to consult appropriate employee representatives, who could include trade union officials, about proposed redundancies. Such consultation is not collective bargaining for the purpose of section 178(1). The longevity of dealing with the Claimant over redundancies does not support a conclusion that there was negotiation on matters within section 178(2)(b).

49. If the reference in paragraph 74 to "disputes resolution" is to negotiation over matters of discipline in section 178(2)(d) there is no basis for concluding that a disciplinary procedure whether in the Recognition Agreement or the Strategic Agreement resulted from negotiations. In paragraph 39 the EJ had directed herself to:

> **"…analyse the extent to which the strategic, said to be a traditional agreement, did cover any of the subject matter required for collective bargaining."**

On this self direction the EJ would have considered the 2006 not the 2003 Agreement. In paragraph 65 the EJ considers both Agreements in the context of section 178(2)(d). If she is correct in so doing and observing that the procedure for resolving disputes in the earlier Recognition Agreement applied "presumably by continuation" in the Strategic Agreement, that mechanism illustrates that the procedure was not the subject of negotiation in 2006. Further the EJ stated that "it seems that the union was recognised for the discussion of discipline, if 'disputes' covers disciplinary issues". Discussion is not negotiation within the meaning of section 178. The matters relied upon by the EJ do not support a conclusion that there was negotiation about "disputes resolution", whether this was considered under section 178(2)(b) or (d).

50. In reaching her conclusion that the Respondent negotiated with the Claimant about machinery for negotiation or consultation relating to any of the matters set out in section

178(2)(a) to (f) within the meaning of section 178(2)(g) the EJ relied upon "prolonged discussions and negotiations about machinery and arrangements for consultation". In this regard she referred to "earlier negotiation about redundancy" and the representation to be provided by the Claimant to its members.

51. The "negotiation" about arrangements for representation by the Claimant of its members relied upon by the EJ was in the context of consultation about and in redundancies. The Respondent may have been statutorily obliged to undertake consultation on collective redundancies. The fact that these consultations may have taken place on a number of occasions and over several years does not convert section 188 consultation into collective bargaining for the purpose of section 178(1). Recognition within section 178(3) is a necessary but not a sufficient condition for representatives or members of a trade union to be consulted under section 188. The fact that trade union representatives are consulted on redundancies does not mean that the trade union is recognised within the meaning of section 178(3) or recognised in respect of a description of employees affected by a particular collective redundancy. Trade union members may be appropriate representatives for the purposes of section 188 by reason of section 188(1B) (b). Further, an employer may consult trade union officials or member representatives on proposed redundancies even if not statutorily obliged to do so.

52. The EJ did not state whether and if so which provisions of the Strategic Agreement she considered to include machinery for negotiations or consultations on any of the matters in section 178(2). The EJ appears to have relied in reaching the conclusion that the Respondent had engaged in collective bargaining on matters within section 178(2)(g) not upon the Strategic Agreement but on the practice of the Respondent in redundancy consultations.

53. The EJ did not seek to support her conclusion that there was collective bargaining on machinery for negotiation of consultation on matters within section 178(2)(a) to (f) by reference to a particular provision of the Strategic Agreement. In any event the scope of the topics for national and local consultation in the Strategic Agreement may be difficult to categorise as falling with any specific provision in section 178(a) to (f). The topics for national level discussion are stated to be "company wide issues including business development, employment strategy and industrial relations". Contract specific issues, health and safety and how to implement national decisions were for local level discussions. Neither did the EJ identify any particular passage in the statements of Mr Steel or Mr Parry to support a conclusion that the Claimant was involved in negotiating machinery for negotiation or consultation on relevant matters. The fact that the two terms are to be treated as having different meanings is made clear by the use of both in section 178(2)(g). Mr Brittenden relied upon the difference between the two in his submissions on that provision. Although Mr Parry introduced his statement by writing that he was responsible for negotiations with the Respondent from 2003 until 2008, at paragraph 7 he wrote that Mr Cutler talked about negotiating a standing redundancy agreement shortly after January 2008 but that he "moved on to another pitch before this could take place". The statement made by Mr Steel refers to discussions with the Respondent. However the EJ did not identify any particular passage in the statement upon which she could or did rely to support a conclusion that there had been negotiations about machinery for negotiation or consultation of matters falling within section 178(2)(a) to (f). A "long course of dealing" between the parties without more does not support a conclusion that there was negotiation on matters falling within section 178(2)(g). In my judgment the findings of fact by the EJ do not support a conclusion that the Respondent negotiated machinery for negotiation or consultation on matters falling within section 178(2)(a) to (f) with the Claimant. The decision of the EJ cannot be upheld on the basis that section 178(2)(g) was satisfied.

54. In my judgment the EJ erred in holding that consultation on redundancies was voluntary negotiation about machinery for consultation.

55. In light of the conclusion reached on Ground 2 of the Notice of Appeal it is unnecessary to consider **Ground 3** which, in any event, fails to particularise the alleged perversity.

Conclusion and disposal

56. The EJ erred in law in concluding for the reasons she stated that the Respondent had recognised the Claimant for collective bargaining purposes within the meaning of section 178 in relation to any one of the two or "possibly" three matters within section 178(2) which she referred to as the subject of negotiations. Further, the decision cannot be upheld on the grounds advanced by the Claimant in support of a finding that the Respondent engaged in collective bargaining on matters within section 178(2)(g).

57. As has been established since **Albury,** an employer is not to be held to have recognised a trade union unless the evidence is clear. In my judgment the EJ did not identify such clear evidence in reaching the conclusion that the Respondent had recognised the Claimant for collective bargaining purposes within the meaning of section 178. However it cannot be said with confidence that there was no such evidence before the EJ to conclude that no EJ properly directing themselves would have reached that conclusion. Neither would that issue have been dispositive of the standing of the Claimant to bring a claim under section 189.

58. Accordingly the appeal is allowed and the case remitted to a different Employment Judge to determine the following preliminary issues:

Whether the employees who may have been affected by proposed redundancies falling within **Trade Union and Labour Relations (Consolidation) Act 1992** section 188(1)

(1) were of a description in respect of which the Claimant was recognised; and if not

(2) Whether the Respondent had chosen to consult with members of the Claimant appointed or elected by affected employees with authority to or expressly for the purpose of receiving information and being consulted under section 188.