- In most cases, employers should ensure that redundancy criteria are objective in nature. However, in some cases the Tribunal may be prepared to accept some subjective criteria (alongside objective criteria) where the role is creative in nature and not easily assessed against objective factors.
- In addition, *Mr P Lancaster v TBWA Manchester* highlights the importance of following a fair redundancy procedure including genuine and meaningful consultation with an employee about alternatives to redundancy and considering any suitable alternative employment.

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Was Swedish ad an ‘invitation to purchase’?

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Who: Ving Sverige AB

Where: Court of Justice of the EU

When: 12 May 2011

Law as stated at: 7 July 2011

Unfair Commercial Practices Directive

What happened

The Court of Justice of the European Union (‘ECJ’) ruled on the meaning of ‘invitation to purchase’ under the Unfair Commercial Practices Directive (‘Directive’), which is wider than previously assumed in the UK, and clarified what mandatory material information the Directive requires a trader to provide to a consumer when making an invitation to purchase.

Reference to ECJ

The Swedish consumer ombudsman took action against Ving Sverige AB (‘Ving’) following an advertisement by Ving in a Swedish newspaper offering trips to New York. The advertisement contained the following wording in bold ‘New York from SEK 7 820’, and below that in smaller letters ‘Flight from Arlanda with British Airways and 2 nights in the Bedford Hotel — Price per person in double room including airport taxes. Extra nights from SEK 1 320. Applies to

selected trips from September to December. Limited number of places'. There was a telephone number at the bottom of the advertisement.

The Swedish consumer ombudsman argued that the advertisement was an invitation to purchase and the information included was misleading by omission as there was insufficient or no information on the main characteristic of the trip, including the price. The Swedish national commercial court referred questions to the ECJ on the interpretation of 'invitation to purchase' under Article 2(i) of the Directive and the extent of the material information that needs to be included in an invitation to purchase under Article 7(4) of the Directive.

Definition of invitation to purchase

Invitation to purchase

Article 2(i) of the Directive defines 'invitation to purchase' as 'a commercial communication which indicates the characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase'. The ECJ held that the words 'thereby enables the consumer to make a purchase' did not mean that it was necessary for a commercial communication to include an actual opportunity to purchase, or for the communication to appear in proximity to and at the same time as such opportunity. The court said that such a restrictive interpretation of the concept of 'invitation to purchase' would be inconsistent with the objective of the Directive of achieving a high level of consumer protection. The court therefore held that an invitation to purchase exists as soon as the information on the product advertised and its price is sufficient for the consumer to be able to make a transactional decision.

In response to the questions posed by the Swedish court, the ECJ also clarified that a communication could meet the requirement of indicating the price of a product, and thereby being an invitation to purchase, even if only an entry-level price is indicated (ie the lowest price for which the advertised product or category of products can be bought, when in fact it is available in other versions or with other content with different prices). Similarly, a verbal or visual reference to a product may enable a customer to form an opinion on the nature and characteristics of the product for the purpose of taking a transactional decision and may therefore meet the requirement of indicating a product's characteristics in an invitation to purchase. In both cases, national courts will need to ascertain on a case-by-case basis, on the basis of the nature and characteristics of the product and the commercial medium of communication used, whether a communication containing such information enabled the consumer to take a transactional decision.

Definition of material information

Requirement to provide material information

Article 7(4) of the Directive sets out the information that is to be regarded as material to include in an invitation to purchase. This includes the main characteristics of the product (to an extent appropriate to the medium and the product), the address and identity of the trader, the price of the product or how it is to be calculated if it cannot reasonably be calculated in advance, payment arrangements and any cancellation rights.

The ECJ highlighted that the extent of the information on the main characteristics of a product that has to be communicated by a trader in an invitation to purchase must be assessed on the basis of the context of the invitation, the nature and characteristics of the product and the medium of communication used. The court therefore considered that Article 7(4)(a) may be satisfied if there was reference in the communication only to certain main characteristics of a product so long as there was a reference in addition to a website, which in turn contained the essential information on the product's main characteristics, price and other requirements of Article 7. It is up to the national court to assess on a case-by-case basis whether such reference enables the consumer to take an informed transactional decision.

The ECJ also held that a reference in the communication only to an entry-level price would not in itself amount to a misleading omission under the Directive. An entry-level price may be justified in situations where the price cannot reasonably be calculated in advance given the nature of the product. Where only an entry-level price is stated in an invitation to purchase and the detailed rules for calculating the final price or any additional charges are not indicated, the national court will need to determine whether the information is sufficient for the purpose of enabling the consumer to take an informed transactional decision. The national court will need to look at the limitations of the medium of communication used and other measures that the trader has taken to make the information available to consumers (eg on a website).

Why this matters

Alteration in perception in UK law

Through this decision, the ECJ has set a threshold for an 'invitation to purchase', which is lower than that previously assumed to be the case in the UK. The Directive was implemented in the UK by the Consumer Protection from Unfair Trading Regulations 2008 ('Regulations') and the government suggested during the implementation process that a commercial communication was only an invitation to purchase if it also allowed the consumer to make a purchase, although it gave no examples of this.

Examples of invitation to purchase given in the OFT's guidance on the Regulations either provide an order form together with the advertisement, or a mechanism to purchase (eg through a response to an SMS promotion), or a proximity to make a purchase (eg a price on a product in a shop or a menu in a restaurant). However, the ECJ's ruling in this case means that invitations to purchase are not limited to these circumstances.

Relevance of websites

Traders therefore need to be aware that the mandatory material information that the Regulations require to be included in commercial communications may need to be included in any advertisement that refers to a product or service, even in a limited way, as such advertisements may be considered to be an invitation to purchase. Traders may, however, take some comfort from the ECJ's comment that advertisements can refer to a website where the relevant information is set out.

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