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Collective consultation

Collective consultation may seem quite a daunting prospect to some employers, particularly professional service firms who do not have recognised trade unions and are used to communicating with their workforce on an individual level. Nevertheless, in the current economic climate, with workforces already nervous about job prospects, it appears that a number of employers have recognised the benefits of collective consultation (whatever their industry field) and are collectively consulting when they are not legally obliged to do so. In this paper, we examine an employer's collective consultation obligations (primarily in respect of redundancy) and set out some handy hints and tips to help you along the way.

The Current Context

The duty to collectively consult can arise in various circumstances, for example, on the transfer of a business or where employees in organisations with at least 50 employees have requested that their employer set up an information and consultation staff forum. In the current climate, however, collective consultation most often crops up in the context of redundancies.

In a survey conducted by Speechly Bircham and King's College London of over 300 senior HR professionals, 80% of organisations surveyed had used compulsory redundancy to reduce their workforce. The survey also revealed that 42% of those who made staff redundant in the past year engaged in some form of collective consultation, usually because of a union agreement or because the numbers involved meant it was a statutory requirement but quite often because it was considered to be the right thing to do. 34% of organisations envisaged making more cut-backs in 2009 and 35% of organisations cited managing redundancies as a major HR challenge for 2009. As such, the concept of collective consultation is something that some organisations are going to be unable to avoid.

In our briefing papers in March and April 2009, we examined ways of avoiding redundancies as well as the selection criteria to be adopted should redundancies be unavoidable. Both these areas will form part of the subject matter about which employers proposing multiple redundancies will need to collectively consult their workforce. But what else does collective consultation entail, how do you go about it and most importantly perhaps when do you have to consider it?

When does the duty to collectively consult arise?

The duty applies where an employer is proposing to dismiss as redundant 20 or more employees at any one establishment within a period of 90 days or less. The relevant legislation is section 188 of Trade Unions and Labour Relations (Consolidation) Act 1992 (**TULRA 1992**), which implements the European Collective Redundancies Directive (Directive 98/59) (the **Directive**).

What does “proposing” to dismiss actually mean?

The term “proposing” means more than mere contemplation ie employers must have a plan that has crystallised so that they are aware that at the very least 20 or more employees are likely to be affected. That said, “proposing” means less than a decision. Employers will have missed the opportunity to collectively consult if a firm decision has already been made. This makes sense - how can an employer carry out meaningful consultation with a closed mind?

There has been lots of case law about the term “proposing” and it is broadly accepted that this does not adequately reflect the Directive which requires consultation where collective redundancies are “contemplated”. Unless you are a public sector employer, employees cannot rely on the Directive but Employment Tribunals must interpret the provisions of TULRCA 1992 consistently with the Directive and ECJ rulings so the safest approach is to start consultation as early as possible and in any event consultation must commence in “good time”.

Where the duty applies, the employer must notify the Secretary of State for Business Enterprise and Regulatory Reform (**BERR**) of the proposed redundancies using form HR1. Failure to do so is a criminal offence and an employer will be liable for a £5,000 fine.

What is an “establishment”?

This is straightforward if all of the redundancies are proposed at a single site - they will be treated as being carried out at one “establishment”. If there are two or more group companies employing staff at a single location, each company would be considered separately when determining whether the duty to collectively consult would apply – it is a separate obligation on each employer.

The difficulty arises where redundancies are proposed across a number of geographical locations as employers will need to consider whether separate geographical locations can be treated as being single establishments. The crucial test is whether the businesses at the separate geographical sites operate independently or not. The following will all be taken as being indicative of the separate sites operating as one establishment:

- Support functions such as payroll, HR and/or finance are organised centrally rather than being localised;
- each site carries out similar business activities;
- the various sites share the same customers;
- employees work across sites, or are often relocated or assigned from one site to another.

If in doubt, it is best to err on the side of caution. Whilst the collective consultation process is potentially more cumbersome, the level of awards that an Employment Tribunal can make if you do not collectively consult are high, as to which see below.

What types of dismissals trigger the duty to collectively consult?

When considering the number of redundancies proposed over a 90 day period, you need to go beyond compulsory redundancies and consider whether during this period you have had any voluntary redundancies (38% of organisations used voluntary redundancy last year according to the survey), any fixed term contracts that have expired and whether you have had to dismiss and re-engage employees in order to change terms and conditions of employment. These types of dismissals all go towards triggering the duty to collectively consult, due to the fact that the definition of redundancy for the purposes of collective consultation is wider than the definition of redundancy in the traditional sense. The test is “a dismissal for a reason not related to the individual”. This will exclude, for example, dismissals for poor performance or misconduct but will include many others.

What about dismissals already subject to consultation?

In order to ascertain whether the duty to consult is triggered, the dismissal of employees in respect of whom consultation has already begun is excluded. For example, if an employer proposes 30 redundancies within a 90 day period (Batch 1), the duty to collectively consult is triggered. If during the same 90 day period, the employer later proposes 10 more redundancies (Batch 2), there is no duty to collectively consult on Batch 2 providing that it is genuinely a new and separate proposal. This approach is not, however, without risk. If the employer had actually proposed all 40 redundancies from the outset, but delayed implementing Batch 2 in order to avoid collectively consulting with the last 10 employees, the duty to consult in respect of all 40 employees would have been triggered.

What about staggered dismissals?

If, for example, an employer proposed 10 redundancies in February 2009, the duty to collectively consult will not be triggered (**Batch A**). If the employer then went on to propose 10 more redundancies in March 2009 (i.e. within a 90 day period) (**Batch B**) would the duty to collectively consult be triggered in respect of all 20 redundancies proposed. This could be a problem if the employer has already begun to implement the Batch A redundancies.

An Employment Tribunal did hold at first instance, in the case of *Transport and General Workers Union v Nationwide Haulage Limited*, that the law did not “demand the impossible” and that a “proposal” refers to what will happen in the future, not what has already taken place. Therefore, if batch A and batch B are genuinely separate proposals, then there should be no need to collective

consult. However, whilst this case may be persuasive in the future, it is still only a first instance decision and so employers should be wary about relying on it as it is not binding on other Tribunals. As such, employer should consider the following alternative approaches:

- **Approach 1:** Delay Batch B redundancies so that they fall out of the 90 day period and the duty to collectively consult is not triggered. Employers will need to balance the cost of employing Batch B for this additional period against the risk of having to pay a protective award for not collectively consulting on either Batch A or B.
- **Approach 2:** Collectively consult on both Batch A and B (but this will only be possible if notice of dismissal has not been served on the first batch). If notice of dismissal has been served on Batch A, then the employer does need to appreciate that there is still a risk of a protective award being payable in respect of failing to consult Batch A even if it has collectively consulted with Batch B.

Who must the employer consult?

An employer must consult “appropriate representatives” of the “affected employees”. “Affected employees” are those who may be “affected by the proposed dismissals or who may be affected by measures taken in connection with those dismissals”. Therefore the duty extends beyond those employees immediately at risk of redundancy.

“Appropriate representatives” can be recognised trade union representatives (providing that the affected employers fall within the “bargaining unit”). “Appropriate representatives” can also be an existing staff body providing that it has authority to be consulted on behalf of the “affected employees” in respect of redundancies eg it cannot be the canteen committee. If there are none, then the employer will need to hold elections for employee representatives.

What factors should an employer consider when electing employee representatives?

There is a wide variety of issues that employers will need to consider before launching the election process. In particular:

- Employers need to consider whether employee representatives are elected to represent affected employees as a whole or as a constituency (i.e. whether different classes of effective employees will have their own representatives).
- There is no set ratio of employee representatives per group of employees, however, an employer must ensure that there is “sufficient” representation to carry out meaningful consultation. A ratio of 1 representative to 10 employees is more than ample. A ratio of 1 representative to 70 would not probably be adequate as the representative would not be able to get around all 70 so as properly to represent their views.

- What is the term of office for the representatives going to be? Will they be elected for this particular redundancy exercise only or for a period of time beyond this?
- All candidates must be affected employees on the date of the election.
- Employers should not exclude affected employees from standing for election.
- All affected employees are entitled to vote.
- Voting should be in secret and accurately counted.
- Consultation cannot start until after representatives have been elected.
- If no individuals come forward from one particular constituency to act as an employee representative, then it is perfectly acceptable to approach individuals and ask them to consider standing if you feel they have the necessary skills to undertake the role.

What are the appropriate consistencies?

Employers should consider whether employees are affected in different ways. For example is the proposal to make all employees in one geographical area redundant, while other geographical areas will be subject to a selection process and a proportion of employees being retained? Consider whether you can divide affected employees into constituencies in the following way:

- Geographical areas;
- Department/business unit;
- Roles;
- Level and grades; and
- Proposed selection pools.

What you are looking to achieve as far as possible is each representative being elected from a group that in so far as possible has the same interests and issues.

It is necessary for employers to train employee representatives in their role?

There is no legal obligation to train employee representatives but clearly in order to engage in meaningful collective consultation it is to an employer's benefit to ensure that representatives are fully aware of the remit of their role. Employers should also ensure that representatives have sufficient time during the working day to meet with members of the management team conducting the redundancy exercise as well as their work colleagues to ensure that they are kept updated as to the process. It would also be sensible for the employer to allocate a suitable place for any meetings which may be necessary and to provide any equipment the employee representative may need to carry out the role. The role of an employee representative does not qualify the individual for any additional payment.

What are the time limits for starting consultation?

There is an overriding obligation on employers to begin consultation “in good time” before the redundancies take effect. Within that there are minimum periods depending on the numbers involved. Where an employer is proposing to dismiss between 20 and 99 employees in a 90 day period, consultation must begin at least 30 days before the first dismissal takes effect.

Where an employer is proposing to dismiss 100 or more employees within a 90 day period, consultation must begin at least 90 days before the first dismissal takes effect.

How long should collective consultation last?

It is a common misconception that collective consultation must last for at least 30 or 90 days. However, these minimum periods actually relate to the start date of consultation and the date on which the first dismissal takes effect. There has been some debate about whether notice of termination can be served during the 30 or 90 day period providing the expiry of notice occurs outside this period. There is still ambiguity on this point following the ruling of the European Court of Justice (**ECJ**) in the case of *Junk v Kuhnel*. Whilst some have interpreted *Junk* as being authority to allow notice of dismissal during the minimum 30 or 90 day period, provided that notification of redundancies has been given to the competent public authority prior to this minimum period commencing and provided that dismissal does not take effect until after the minimum period has elapsed, the conservative (and safest) approach for employers to take is to allow at least 30 or 90 days between the start of consultation and the date notice of dismissal is served on employees. The conservative approach would also be to allow at least 30 or 90 days to elapse between the date on which employers notify the Secretary of State for BERR and the date notice of dismissal is served on employees. This does not mean however that consultation has to be ongoing throughout that period – it may be that all parties to the consultation process agree after a shorter period that there is nothing left to discuss. The employer can then go on to talk to individuals who are to be put at risk of redundancy but, adopting the conservative approach, no notices should be issued until the expiry of the 30 or 90 day period.

What information must be provided to appropriate representatives?

The following information must be provided as a minimum:

- Reasons for the proposed dismissals;
- Numbers and descriptions of employees whom it is proposed to dismiss as redundant;
- Total number of employees of any such description employed by the employer at the establishment in question;
- Proposed selection method;
- Proposed procedure;
- Proposed method for calculating redundancy payments; and

- Copy of form HR1.

This information must be given to appropriate representatives in writing. If there are no appropriate representatives and the affected employees have failed to elect employee representatives, then in these circumstances the information can be given directly to employees.

The best approach is to provide all of the information set out above at the start of collective consultation. If it is not possible to do this, then an employer needs to give sufficient information in order to start off a meaningful collective consultation with the remainder of the information to be provided as soon as it is available (otherwise there is a risk that an employer may be found not to have collectively consulted for the requisite period of time).

The information needs to be genuine and given in good faith. For example, in *UK Coal Mining v National Union of Mine Workers*, the Employment Appeals Tribunal (**EAT**) agreed with a Tribunal's finding that an employer had deliberately given a trade union false information by stating that the closure of a colliery was due to health and safety concerns when in actual fact it was due to the economic viability of the colliery. This was a clear breach of the duty to collectively consult and resulted in the employer being required to pay the maximum protective award.

What is an employer required to consult with representatives about?

The EAT confirmed in *Middlesbrough Borough Council v TGWU and Unison* that consultation on the following three topics is mandatory:

- Avoiding the dismissals;
- Reducing numbers to be dismissed; and
- Mitigating the consequences.

Consultation on these matters should be undertaken with a view to reaching an agreement. This does not mean that agreement needs to be reached but the employer has to engage in open minded consultation with agreement in mind.

Typically, it is reasonably straightforward for employers to engage in consultation on bullet points 2 and 3. This would, for example, include consultation on the level of redundancy payments to be offered to redundant staff (eg statutory or enhanced redundancy payments?), re-deployment and whether outplacement will be offered to redundant staff.

It is the first bullet point that has proved most controversial. This requires employers to consult on whether the redundancy should in fact take place at all. In *UK Coal Mining v National Union of Mine Workers*, the EAT held that employers must consult on the business reasons for the proposed redundancies. For example, if an employer is proposing to close a particular site, which will result in the loss of jobs, then the employer must consult on ways of avoiding redundancies which should include consultation about whether or not the site should close and alternatives which would keep it open. Employers risk an expensive penalty if they do not do this as demonstrated in *GMB and AEE v Campbell's UK Ltd*. In this case, the employer decided to close

one of its factories before starting collective consultation. The employer tried to argue that it had carried out consultation on the possibility of transferring employees to other premises which satisfied the requirement to consult on ways of avoiding dismissals. It was held that this was not sufficient and that consultation on this topic fell within the scope of “reducing the numbers of employers to be dismissed”. Therefore, the employer was required to pay a protective award of over £400,000.

What are the risks for failing to comply with the duty to collective consult?

If an employer has failed to comply with the duty to collectively consult, a Tribunal may award a protective award of up to 90 days’ pay per dismissed employee. This is gross pay and the statutory cap on a week’s pay does not apply. The award is not based on loss of earnings, but on the seriousness of the employer’s default. As such, it is permissible for a Tribunal to use the maximum protective period (90 days in all cases) as a starting point when assessing the amount of a protective award.

A claim for a protective award must be brought by appropriate representatives or it can be brought by individual employees where there are no employee representatives.

An employer cannot use a compromise agreement to stop an employee bringing a claim for a protective award. However, once a Tribunal has made a protective award, a complaint by an employee that an employer has failed to pay the sum due under the protective award can be settled by a compromise agreement.

In the current climate, we have observed some financial institutions offering redundant employees compromise agreements which purport to apportion part of the compensation to the employer’s failure to include individuals in a collective consultation exercise for the requisite minimum period. Whilst this may be satisfactory to deter some employees from bringing a claim for breach of the duty to collectively consult, the compromise agreement does not adequately settle such a claim. It is also unlikely that a Tribunal will consider the fact that the employer has already compensated the employee for its failure to carry out collective consultation for the requisite period when determining the level of any protective award given that the basis of calculating a protective award is not to compensate the employee; it is to punish the employer. Therefore, an employer adopting this approach could find itself paying twice, once in the compromise agreement and then a second time as a result of a tribunal award.

The last day on which a claim for a protective award can be brought in an Employment Tribunal is the period of 3 months less one day of the date on which the last of the dismissals takes effect.

Positives and Negatives

The feedback from the survey is that employers who have engaged in collective consultation feel that it has had a positive outcome. In particular, collective consultation can:

- Reduce the fear of the unknown and increase the sense of stability and security of employment amongst the workforce;
- Stimulate better cooperation between managers and employees. It is vital that managers are engaged in the exercise in order for collective consultation to be successful;
- Result in better decision making and fair treatment of the workforce;
- Make individual consultation quicker and more focused (i.e. it is likely that the only areas which an employer will need to individually consult on are the scoring of the individual against the selection criteria and suitable alternative employment);
- Reduce the risk of a successful unfair dismissal claim; and
- Promote engagement and understanding amongst the workforce.

There can of course be some downsides to collective consultation such as:

- It can be time consuming;
- There can be a feeling that it is delaying the inevitable and is preventing everyone concerned from “moving on”; and
- It does mean that the business needs to be open-minded – an employer will be in breach of the duty to collectively consult if it has a closed mind to suggestions to avoid redundancies.

Practical tips

The following tips can assist an employer to carry out a successful collective consultation exercise:

- Plan, plan, plan;
- Ensure you have a timetable for consultation;
- Allocate responsibilities;
- Identify one person as the principal point of contact and make sure everyone knows him or her
- Include employees on long term sick and maternity leave in the consultation process;
- Ensure that meetings are held with appropriate representatives and the minutes are published on the firm’s intranet to keep everyone updated;
- A list of common questions and answers should also be posted on the intranet for ease of reference and updated once further questions are fed back from appropriate representatives during the collective consultation exercise; and
- Prepare appropriate communications.

When else may an employer be required to collectively consult with its workforce?

This note has focused on collective consultation on large scale redundancies. However, the duty to collectively consult can also arise in the following circumstances:

- Regulation 13 – Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE); and
- Information and Consultation of Employees Regulations 2004 (ICE Regulations).

TUPE applies where there is a transfer of a business (or part thereof) or a service change provision from one party to another. The employees employed in that business will transfer with it with their rights and obligations in tact. There is an obligation to provide either a recognised trade union or employee representatives with information about the proposed transfer and to collectively consult about measures arising from it. This exists regardless of the number of employees concerned and the obligation extends to representatives of all those affected by the transfer which is often a wider group than simply those actually transferring. This can overlap with collective consultation on redundancies where the transfer is going to lead to a large number of redundancies. Failure to inform and consult under TUPE will again expose the employer to a protective award similar to that payable for breach of the obligation to collectively consult on large scale redundancies.

Employers also need to bear in mind the ICE Regulations. These allow employers in organisations with at least 50 employees to request that their employer set up an information and consultation staff forum to consult with its workforce. Where such a forum already exists it is likely that its constitution will mean that there will be an obligation to consult at a much earlier stage than the point at which the statutory duty to collectively consult on redundancies is triggered. Whilst representatives elected as a result of the ICE Regulations would normally qualify as an appropriate standing body of representatives for the purposes of collective redundancy consultation, some employers may still wish to consult with representatives directly elected by employers affected by the specific redundancies.

The scope of TUPE and the ICE Regulations is beyond the scope of this briefing note, but you should bear these in mind and seek legal advice if you think either of these may be relevant.

Further survey results

Hopefully, this briefing note has helped answer any concerns that you may have regarding the collective consultation process. If not, please give us a call. Our survey revealed that collective consultation is primarily a HR responsibility and that:

- 45% reported that the process was well received by the workforce; and
- 25% said it was not.
- 51% said their workforce participated positively in the exercise; and
- 26% said they did not.

- 71% said management participated positively in the exercise; and
- 11% said they did not.
- 32% reported that the exercise prolonged the agony for concerns; and
- 42% disagreed this was the case.

These results would suggest that overall the process is well received and is effective.

Concluding remarks

Remember collective consultation can help! Do not worry if difficult members of staff put themselves forward as appropriate representatives. It is best to flush out their concerns earlier rather than later. Remember, consulting and communicating with your workforce can help:

- reduce/eliminate workplace conflict (which is the subject matter of our seminar on 26 May 2009); and
- enhance employee engagement (which is the subject matter of our seminar on 25 June 2009)

Contact

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Events programme

Speechly Bircham and Kings College London are running a series of learning events from February to July 2009, based on the key trends and issues that emerged from our joint survey 'Riding the recession'.

To find out more about the events programme and to download the survey report "Riding the recession? The State of HR in the economic downturn", please visit http://www.speechlys.com/Employment_training_programme

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