

Collective Redundancies

Your Rights



Overview

Where your employer is proposing to make 20 or more employees redundant within a period of 90 days, it will have obligations to consult affected employees as a group. This is known as 'collective consultation'. If you know or suspect that such a situation exists then you may be entitled to be a part of such consultation and your employer could be subject to significant penalties if it fails to comply.

When do the collective consultation rights apply?

Under the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) there are far reaching obligations on employers to notify recognised trade unions or, if there are none, employee representatives and the Department for Business Innovation and Skills (BIS) of forthcoming redundancies.

If 20 - 99 or more redundancies are being proposed at one establishment within a period of 90 days, the employer must consult with the affected employees in good time and at least 30 days before the first dismissal takes effect. For these purposes a dismissal takes effect when notice to terminate the contract is given, so consultation should take place before that happens.

The obligation on the employer where it is proposing to dismiss 100 or more employees as redundant at one establishment within a 90 day period means that consultation must begin at least 90 days before the first of the dismissals takes effect/notice is given.

A redundancy for the purposes of these obligations is 'a dismissal for a reason not related to the individual concerned'. This will include typical redundancy situations such as site closures and wider downsizing, but also applies to situations where the employer proposes dismissing a group of employees in order to re-employ them on new terms and conditions. In addition, dismissals which occur through the expiry of a fixed term contract without it being renewed are counted towards the 20 dismissal total.

If the employer starts out by proposing, say, 120 redundancies and later decides to reduce the number to say, 90, the consultation period remains the same throughout as it was at the start. In this example, your employer would be obliged to consult for the full 90-day period on the basis that the original proposal was to make 100 or more redundancies. In the same way, if your employer originally proposed to make 20 people redundant and this figure was reduced to 15 during the course of consultation, the obligation to consult for 30 days would remain. In this situation, the employer would be able to reduce the length of the consultation period only with the agreement of the representative body.

Who must an employer consult?

The obligation is to consult representatives of all affected employees. An employee may be affected even if he or she is not put at risk of redundancy, because the proposals will result in changes to the workforce,

allocation and volume of work, job titles and so forth.

If the affected employees have a recognised trade union then the union will automatically be the body with whom the employer must consult, even in respect of employees who are not union members.

If there is no union recognised for the affected descriptions of employees, the employer must consult with an existing group of employee representatives (such as a works council or staff forum) if that group has authority from the affected employees in relation to information and consultation about the proposed dismissals. If no such group is already in existence, the employer must arrange for employee representatives to be elected by the affected employees, in accordance with the requirements of TULRCA (section 188A(1)). The obligation on your employer is to inform and consult with the employee representatives.

What information must be provided?

For the purposes of the consultation, the employer must disclose in writing to the appropriate representatives:

- The reason for its proposals
- The number and description of employees it proposes to dismiss
- The total number of employees of such description employed by the employer at that establishment
- The proposed method of selecting the employees to be dismissed (where appropriate)
- The proposed method of carrying out the dismissals with due regard to any agreed procedure and time period
- The proposed method of calculating the amounts of any redundancy payments other than statutory redundancy payments.

There may be room to argue about the date consultation began and when it should end if proper information was not provided at the start.

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What must the consultation include?

Your employer must consult about ways of:

- Avoiding the dismissals
- Reducing the number of employees to be dismissed, and
- Mitigating the consequences of the dismissal.

The extent to which an employer was required to consult an employee representative body over the reasons for the proposals has been the subject of a lot of debate. The Employment Appeal Tribunal decision in *UK Coal Mining Limited v National Union of Mineworkers* [2008] ICR 163 is very helpful for employees/employee reps raising this issue as it held that there is a duty on employers to consult on the business reasons for making redundancies. However, in November 2010 the Court of Appeal referred a case to the European Court of Justice on this issue (*USA v Nolan*) so the law on this issue cannot be taken as fixed.

Depending upon what area of an organisation or business you work in, there may be grounds for challenging the reasons for and numbers of redundancies proposed, as well as simply consulting about how they will be implemented. If you are being made redundant in a situation where an entire business at a particular site is closing, there may be less scope for arguments like this. However, if you are in a part of a business where cuts are proposed but some employees will remain, you may be able to come up with creative alternative ways to cutting jobs. Trade unions often negotiate agreements that all staff in the affected divisions will go part-time, take salary cuts or forgo bonuses until business improves, thereby avoiding the need to make redundancies or reducing the number of redundancies.

Your employee representatives should also be involved in consulting and negotiating upon what selection criteria will be applied in the redundancy exercise and what the system for redeployment should be. Selection criteria should be as fair and objective as possible.

For more information on issues relating to selection criteria in a redundancy situation please see our factsheet: 'Redundancy – your rights'.

Ways of avoiding dismissals will usually include looking at the following options:

- Natural wastage
- Voluntary redundancy scheme
- Restricting recruitment – headcount freeze
- Reducing temporary staff/contractors/agency staff
- Early Retirement
- Filling any existing vacancies by redeploying potentially redundant staff
- Training/re-training potentially redundant staff for the work that is available.

Compulsory redundancies may be avoided by considering whether an enhanced voluntary redundancy/early retirement package could be offered.

Your employer should also discuss ways of minimising the hardship of dismissals. This could include giving staff reasonable time off to search for alternative employment and assistance with job-seeking such as outplacement services. The calculation of any enhanced redundancy payments, the tax treatment of termination payments, whether employees will be required to work their notice and the timing of giving notice/terminating employment will all be areas for consultation which relate to mitigating the consequences of the dismissals.

What if my employer fails to inform and consult?

Failure to make arrangements for an election of employee representatives or to consult with the employee representative body may lead to the employer being held liable to pay each redundant employee a protective award of up to 90 days' gross pay. Where employee representatives have been elected or a trade union is recognised, only they can bring the claim. If there is neither a recognised union nor employee representatives in place, each individual employee must bring his or her own claim, according to the Employment Appeal Tribunal decision in *Independent Insurance v Aspinall* in April 2011.

A claim must be presented to an Employment Tribunal within the period of three months less one day of the date on which the last of the dismissals takes effect.

An employer has a defence to such a claim where it can show that special circumstances arose which made consultation not reasonably practicable. This can only very rarely be shown by an employer.

If the claim succeeds the Tribunal makes a 'protective award' which entitles each affected employee who is dismissed by reason of redundancy to pay for a period of up to 90 days. The Tribunal starts with the 90 day period and looks to see if any factors justify a reduction in the period. Factors include the number of lost days' of consultation and the seriousness of the employers breach. For example, if the breach of the requirements of the legislation was purely technical, the award may be little or nothing. If, however, there are serious issues of dispute and ongoing debate as well as a substantial number of days lost from the consultation period then the award is likely to be larger. There is no upper limit on the amount of a week's pay for calculating a protective award and this is to be calculated gross, rather than net.

The purpose of the protective award is to punish employers who do not comply with their collective consultation obligations and is not based on usual principles of compensation in the Employment Tribunal. It does not relate to any financial loss actually suffered by the employees concerned, nor should any other compensation payment be set-off against it.

The threat of a claim/claims for a protective award are a key means by which employees and their representatives can ensure compliance with the collective consultation obligations. Imagine a situation where a hundred employees are made redundant and/or affected by the redundancies and each of them brings a claim for 90 days' gross uncapped pay. If they win, that could be a very expensive bill for the employer to meet.

An employer may be exposed to a fine or conviction if they fail to send written notification of redundancies to BIS no less than 90 days before the first dismissal takes effect where it proposes to make 100 or more employees redundant at one establishment within a period of 90 days or less. If an employer has become insolvent then up to 8 weeks of a protective award can be recovered from the National Insurance Fund.

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Timing of notice in a collective redundancy situation

Your employer can for contractual purposes issue notice of dismissal at any time. Providing full notice is served or payment in lieu of pay and benefits for the duration of the notice period is provided then no contractual claim would arise.

However, if notice of dismissal is issued prior to or during the consultation period then this may well give rise to a claim for the employees for failure to consult. In the case of *TGWU v Ledbury Preserves* the Employment Appeal Tribunal held that 'There must be sufficient meaningful consultation before notices of dismissal are sent out. The consultation must not be a sham exercise; there must be time for the representatives to consider properly the proposals that are being put to them'.

The European Court of Justice decision in *Junk v Kuhnel* (C188/03) [2005] 1 C. M. L. R. 42 makes clear that consultation should normally take place before the employer proposes giving notice of dismissal, as opposed to during the notice period, in order for it to be meaningful and comply with the legislation.

Transfer of Undertakings

Under the Transfer of Undertakings (Protection of Employment Regulations 2006 (TUPE) Regulations, where a business or part thereof is being sold by one legal entity to another (or provision of a service is shifting from one provider to another) there are a number of additional information and consultation rights for employees who are employed by that entity. These often run in conjunction with a collective redundancy situation because a merger of two businesses often leads to a large number of redundancies.

The TUPE Regulations require the buyer and seller to inform and (in some circumstances) consult with recognised trade unions or elected employee representatives in relation to any of their own employees who may be affected by the transfer or any measures taken in connection with it. The obligation is to inform and consult in relation to any 'affected' employees, which is wider than just those employees who will be transferred from the seller to the buyer and includes any employees who will be affected as a result of the transfer of employees or the measures being taken.

The detailed requirements of the TUPE Regulations are beyond the scope of this factsheet but you should bear it in mind and seek further information if you think this applies to you.

Bringing a Claim

In addition to a claim for a protective award, individual employees may have other claims relating to their redundancies such as contractual, unfair dismissal, discrimination and/or whistleblowing claims. These claims will usually need to be brought to the Employment Tribunal within three months less one day of the effective date of termination of that individual employee's employment. Please note that time limits can be complicated so you should seek prompt legal advice if you think you may have a claim. Please also note that the ACAS Code of Practice, which replaces the statutory Dispute Resolution Regulations, does not apply to redundancy situations.

You should seek legal advice if you think you may have a claim.


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Contact Us

Please feel free to discuss your own position and concerns. Contact your nearest Russell Jones & Walker office or call:

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