

labour and employment lawflash

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Consultation Period for Large UK Redundancies Cut from 90 Days to 45 Days

Change will reduce collective consultation burden on UK employers and means that redundancy dismissals can take effect more quickly.

On 18 December, the UK government announced an important change to the minimum consultation period required when an employer proposes to dismiss 100 or more employees as redundant. The minimum consultation period for large-scale redundancies will be halved from 90 days to 45 days, with a proposed implementation date of April 2013. Whilst this policy change does not go as far as some employers had hoped (many were calling for the period to be reduced to 30 days), it will likely be welcomed by employers that are increasingly turning to redundancy to cope with a difficult economic climate.

Background

Under UK law, where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, it must collectively consult with its employees through their representatives. There are currently two collective consultation periods depending on the number of employees that the employer proposes to dismiss as redundant. These two periods are as follows:

- For redundancies of 20 to 99 employees, consultation must begin at least 30 days before the first dismissal.
- For redundancies of 100 or more employees, consultation must begin at least 90 days before the first dismissal.

In June 2012, as part of its systematic review of UK employment law, the government published a consultation¹ on the collective redundancy rules that outlined proposed measures to “revitalise” the rules on collective redundancy consultation. The consultation closed in September 2012, and the government published its response on 18 December 2012.²

Proposed Changes to Law

The most significant change to redundancy law is that the minimum consultation period for large-scale redundancies (i.e., where an organisation proposes to dismiss as redundant 100 or more employees within a period of 90 days or less) will reduce by half from 90 days to 45 days. The government intends that the change will take effect from April 2013.

The government has also stated that it will introduce new nonstatutory guidance on collective consultation through the Advisory, Conciliation and Arbitration Service (ACAS). The guidance will aim to address the principles and

1. View the consultation at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31361/12-808-collective-redundancies-consultation.pdf.

2. View the government's response at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/36737/12-1352-collective-redundancies-government-response-to-consultation.pdf.

behaviours behind a good quality consultation. The guidance will also focus on dealing effectively with the most contentious issues, such as providing guidance on the meaning of an “establishment”. The duty to collectively consult is triggered where an employer proposes to dismiss as redundant 20 or more employees at one **establishment**. As such, the analysis of an employer’s establishment(s) is a key element in determining whether collective consultation obligations are triggered. The government hopes that the guidance will assist with the establishment analysis, although the changes do not go as far as introducing a statutory definition of establishment, which some commentators had called for.

In addition, the government plans to legislate to make it clear that the dismissal of employees engaged under fixed-term contracts that are expiring in accordance with their terms will not trigger an obligation to collectively consult. This change will address concerns from the higher education sector, in particular.

Sanctions for Noncompliance

The potential cost to an employer that fails to effectively consult with its employees in accordance with the statutory collective consultation obligations is significant. If the affected employees successfully bring a claim for failure to properly inform and consult, an Employment Tribunal (i) would make a declaration that there had been a failure to collectively consult and (ii) may also make a “protective award”. The protective award is up to 90 days’ pay per employee (this award is uncapped, unlike other types of employment compensation under UK law). The protective award is intended to punish the employer for not complying with collective consultation obligations; it is not meant to compensate the employees for their individual financial loss. When assessing the amount of the protective award, the Employment Tribunal begins at the maximum penalty (90 days’ pay), and the primary task of the employer is therefore to advance cogent arguments as to why that maximum penalty should be reduced.

Implications

The government’s announcement is an important change in the law and one that will undoubtedly be welcomed by UK employers, particularly at a time when large-scale redundancies have become increasingly necessary due to the ongoing economic crisis. The current 90-day period can cause problems with staff morale and can artificially prolong the consultation process, causing uncertainty for employees and increased costs for employers.

The announced change will mean that the difference between the two collective consultation periods will be only 15 days (as opposed to the current difference of 60 days). It is likely, therefore, that employers that are uncertain what period of collective consultation will be triggered (typically because there may be more than one “establishment”) will opt to consult for 45 days in order to reduce their exposure to a successful claim for failure to effectively consult.

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