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Consultation

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Collective Redundancy Consultation: Past, present and Future

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S.188 Dismissal

- **20 or more employees at one establishment within a period of 90 days or less**
- Triggered by dismissal to harmonise t and cs
- Not by expiry of fixed term contracts: "reason relating to them as individuals" and not for redundancy *University of Stirling v University and College Union* and now confirmed by 2013 Regulations

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Information

- (a) The reasons for the proposed redundancies.
- In UK Coal below the employer lost in front of the tribunal on the basis that it had provided false reasons to the work force.
- (b) The numbers and descriptions of employees whom it is proposed to dismiss as redundant - as indicated by the wording of the statute, this does not mean that a list of names should be presented to the representatives, only an indication of the potential numbers of employees from within each category. A list of names would suggest that matters had largely been pre-determined.

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Information

- (c) The total number of employees of any such description employed by the employer - this simply means that when giving the numbers of employees from within each group who may be made redundant, the total number of employees currently employed within that particular group should be specified, e.g. within administration, sales, professional services and management, for example. If there are obvious sub-groupings within the major groups, e.g. finance, legal and HR within an administration section for example, an employer should also specify the total numbers of employees within those sub-groups, and the numbers who may be affected.
- (d) The proposed method of selecting employees for redundancy - an employer is required to set out the criteria which it proposes to adopt for the purpose of selecting those employees who will be made redundant. It is not sufficient to say, for example, "this will be determined during the consultation exercise".

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Information

- (e) The proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect - this should include amongst other things, details of when the employer proposes to implement the dismissals, whether notice will be given and the timing of individual consultation and issuing notices of termination, including whether such notices will be issued on the same date or over a period, e.g. one week. There may be an agreed redundancy procedure which is relevant.
- (f) The proposed method of calculating any non-statutory redundancy payment - this will include explaining to employee representatives the calculation of any enhanced payments to be made over and above statutory redundancy payments.
- The above information should be given in writing to the employee representatives ideally before the first consultation meeting.

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Purpose

- **Must** include consultation about ways of:
 - (a) avoiding the dismissals;
 - (b) reducing the numbers of employees to be dismissed; and
 - (c) mitigating the consequences of the dismissals, (e.g. severance compensation).

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Purpose

- *UK Coal v. NUM [2008] IRLR 4*
 - Employer said mine was closing for 'economic and safety reasons'
 - Must consult on business reasons as part of ways of avoiding
 - And not give false reasons

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Timing?

- Statutory minimum periods:
 - 100 or more dismissals in 90 day period – 45 days before first dismissal takes effect
 - Between 20 and 99 - 30 days
- 'in good time' means work backwards and look at how much time is left until the proposed redundancy date

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Timing?

- Vardy, the Court of Appeal had held that “contemplated” in the CRD and “proposed” in section 188 were significantly different
- Junk v Kuhnel [2005] ECR I -855 analysed the position under the “contemplating” formula. The ECJ held (at para 37) that “the obligation to consult and to notify arises prior to any decision by the employer to terminate contracts of employment.”
- Akavan Erityisalojen Keskusliitto AEK ry and ors v Fujitsu Siemens Computers Oy [2009] IRLR 944 suggests distinction between contemplate and propose may not be stark. “It must therefore be held that, in circumstances such as those of the case in the main proceedings, the consultation procedure must be started by the employer once a strategic or commercial decision compelling him to contemplate or to plan for **collective redundancies** has been taken”. “contemplate” probability
- See also UNISON v. Leicestershire

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Protective Award

- S.190(1) allows for later claims by eg non-union members
- Susie Radin v GMB [2004] ICR 893
- Punitive
- Start with maximum
- Special circumstances?

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Nolan

- The Advocate General gave his opinion in Nolan that the obligation to consult on collective redundancies arises under Directive 98/59 when a strategic or commercial decision is taken which compels the employer to contemplate or to plan collective redundancies.
- It is for the national court to determine the date of the strategic decision, the date when consultation began, and to decide whether consultation began in good time. The observations made in the ECJ decision of Fujitsu were restated and, although the EAT's decision in UK Coal Mining was not expressly referred to, it was implicitly disapproved of in a footnote. (United States of America v Nolan (C-583/10)).
- ECJ said no jurisdiction as Directive excludes employees of public administrative bodies
- Referral back to CoA

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2013

- **New Acas guide on collective redundancy consultation**
- Acas has also published [How to manage collective redundancies](#), a non-statutory guide aimed at employers. The guide includes:
 - A ten-point checklist of key issues to consider when faced with a collective redundancy situation.
 - An outline of the legal requirements and responsibilities of an employer in a collective redundancy situation.

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2013

- meaning of "establishment" For example (1) is it a 'distinct entity'- this does not require geographic separation from other units, does not require independence and not require independent management; (2) does it have a degree of permanence and stability; (3) does it have the ability to carry out the tasks it has been assigned; (4) does it have a workforce/organisational structure to allow it to carry out its function;

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2013

- Advice on how to deal with cases in which TUPE 2006 also applies, or in which the employer is potentially insolvent. The suggestion is both employers should work together.
- A sample redundancy selection criteria matrix (attendance, disciplinary record, skills, standard of work) and redundancy procedure for agreement between employers and employee representatives.

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