AN IER RESPONSE

Collective Redundancies: Consultation on changes to the rules.

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The Institute of Employment Rights is an independent think tank involving academics and lawyers specialising in labour law. IER is supported by trade unions representing over six million workers.

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This IER Response, kindly drafted by the lawyer named, reflects the author's own work not the collective views of the Institute. The responsibility of the Institute is limited to approving its publications, briefings and responses as worthy of consideration.

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Summary

The 90 day consultation period works in the interests of employers in many cases and its purpose includes protecting employees. It also reduces the prospect of challenge regarding meeting the requirements of consultation. Any reduction in consultation periods will have a negative impact on the quality of consultation. The reduction will limit the ability of employers and unions to develop alternatives to redundancies including redeployment and short-term working. As a result, unnecessary redundancies will take place, employers will lose skilled staff, and unemployment levels are likely to rise.

We support the TUC and Unite in their contention that collective redundancy consultation obligations have been of significant benefit to both workers and employers. We also agree that the proposals will limit the opportunities for unions to seek agreement from employers on alternatives to redundancies and that this will increase job insecurity, damage workforce morale and reduce the incomes of those facing redundancy. Reducing consultation will shift the burden from the business to the government as employees have increased reliance on welfare benefits.

The IER disagree with the government that the UK law is gold plated and that the legislation is too restrictive. Arrangements regarding redundancy fall short of the practices of other EU member states. Reducing the consultation period will make UK workers more vulnerable to redundancies when multinationals decide to restructure.

The impact assessment document states that even though other countries may have shorter consultation periods their broader employment rights regimes are much stronger. In the UK there is heavy reliance on the trade unions to ensure that genuine consultation occurs. If the period of consultation is shortened employees in places of employment without trade union involvement will find it difficult to organise and effect meaningful consultation.

The IER is not convinced that development of a non-statutory Code of Practice or guidance will be sufficient by itself to improve the quality of consultation. This will only be achieved through the adoption of strengthened legislation.

Finally, the IER believes that the government should promote engagement between employers and unions through wider use of the Information and Consultation of Employee Regulations 2004.

Questions

1. Do you agree with the Government's overall approach to the rules on collective redundancy consultation?

1.1 General approach

We do not agree with the overall approach. The consultation document sets out the key objectives for reform:

a. To improve the quality of consultation

b. To ensure that employers can restructure effectively to respond to changing market conditions
c. To balance the interests of the employees made redundant with those that remain

a) Improving the quality of consultation

The IER support the TUC's contentions that the government's proposals will prove counter-productive and will weaken worker protection. We agree that by reducing the minimum 90 days period there is a risk that the proposals will send a clear message to employers that there is no need to engage in meaningful consultation. We agree with the contention that the proposed changes are likely to undermine good practices of seeking alternatives to redundancies and will actively deter good employers from engaging in more comprehensive consultation.

b) Ensuring that employers can restructure effectively to changing market conditions

The TUC has made a strong argument as to why there is no need to change existing consultation arrangements to respond to changing market conditions. They have brought evidence from competitive countries in the OECD which confirms this contention.

c) Balancing the interests of employees made redundant with those who remain

The TUC submission in the call for evidence brought case studies to show how unions and employers successfully used longer consultation periods to identify ways of avoiding redundancies through efficiency, savings, winning new contracts or negotiating short term working patterns.

Shorter consultation periods will mean that employees receive less pay to meet their household expenses and less time to look for new employment. We note the evidence brought by the TUC that it is often not possible for individuals to find work during their statutory or contractual notice period the contrary to the consultation document. Contrary to the government consultation document the TUC contend with supportive evidence that shorter consultation periods are also likely to have a detrimental impact on morale amongst the remaining staff.

We support the TUC proposal that the government should raise awareness of the fact that the duty to consult applies not only to those employees who the employer proposes to dismiss but also to those who might directly or indirectly be affected by the proposed dismissals. The future code of practice or guidance should encourage employers to consult on the impact of redundancies and restructuring on the remaining workforce.

The IER is disappointed that the government has decided not to take steps to deter or prevent employers from using s188 redundancy notices to impose cuts in pay and conditions.

1.2 When consultation commences

It is often difficult to determine when the consultation process should commence and the case law in this area remains ambiguous. The guidance provided to employers could provide clarification and direction on this point. The guidance could propose that consultation commence at the latest when the strategic business decision is made so as to include employees at an earlier stage. Agreement during consultation is more likely when the provision of sufficient information by management for employee representatives to understand at an early stage the business reasons for the proposals and the wider context.

1.4 Insolvency

The government has not made any suggestions as to how to address and improve compliance by insolvency practitioners with the collective redundancy consultation rules. As the consultation points out this would benefit employers, employees and the Exchequer. The consultation document also states that insolvency is rarely a surprise to the employer.

And yet, the consultation document merely states that *"the Government is keen to explore options for improving understanding of obligations in these circumstances and on raising levels of compliance"*. However, no proposals have been made to achieve these goals.

It would be beneficial to provide some form of incentive for insolvency practitioners to comply with their consultation obligations. For example, the consultation requirements could make insolvency practitioners personally liable for complying with the obligations

2. **Which of the two proposed options should replace the 90-day minimum period? Please explain why you think your choice would better deliver the Government's aims than the alternative.**

2.1 There are a number of advantages for longer consultation periods that will be compromised with the proposed changes.

(a) Where consultation takes less time, they are likely to have a longer period of employment and so earn salary for a longer period than they would do if the period was shorter.

(b) Where consultation takes less time, they are also likely to have more notice of their eventual dismissal and so longer to look for alternative employment, whilst still in employment.

(c) Although the requirement to consult "in good time" ensures that there would still be a legal obligation to consult to the same standard as at present, the minimum period of consultation may tend to set expectations as to how long consultation should last and so lead to

longer consultation in practice. A shorter minimum period may lead to increased pressure from employers to end consultation before it is actually complete, reducing the time employee representatives have to consider the proposals and affect the consultation process.

(d) Employers would potentially be at a disadvantage with a reduction of the number of days for consultation as there would be greater uncertainty as to whether adequate consultation had taken place in line with the European Directive. Please see comments above for additional advantages for employers with longer consultation periods.

The IER supports the TUC contention that 30 or 45 day consultation periods are not practical especially with large redundancy situations which are complex. They contend that it is feasible for employers to cover all the key stages, including consultation on the reasons for redundancies, and the ways of avoiding redundancies; selection processes and redeployment exercises, within 45 days.

3. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of "establishment"? Please provide comments to support your answer.

3.1 The two leading cases at ECJ level are *Rockfon A/S v Specialarbejderforbunet i Danmark and Athinaiki Chartopoiia.* Both cases state that the meaning of "establishment" is a term of Community law and cannot be defined by reference to the Member States.

In *Rockfon* the ECJ held that "establishment" means (depending on the circumstances) the unit to which workers are assigned to carry out their duties and stated that this did not have to have management which can independently effect collective consultations.

The ECJ states that there is a term of Community law, which cannot be defined according to Member States. However they state that there is scope to vary the meaning depending on the circumstances.

A recent ET decision of *USDAW, Unite and Wilson v WW Realisation 1 Limited* ("Woolworths") Judge Auerbach found that each individual Woolworths store was a separate establishment for the purpose of the sec 188 of TULRCA. This decision highlighted the serious problem with regards to the way collective consultation has been addressed in relation to establishment. It illustrates the problem of defining establishment too narrowly and not in line with the intent of the Directive.

The issue of whether domestic legislation differs from the European Directive was raised referring to the case of *MSF v Refuge Assurance* when the EAT was of the view that UK law was not compliant with the Directive in this regard and that an obligation to consult should be triggered where 20 or more

redundancies are contemplated across *all* establishments. It then went on to follow the approach in *Rockfon* adopting a broad interpretation of "establishment".

3.2 The establishment test means that businesses can subdivide into different units to avoid consultation duties. As such, the IER supports ways to avoid employers duty to consult on collective redundancies with a view to reaching an agreement on the ways of avoiding redundancies or mitigating the effects of necessary job losses.

We support the TUC proposal that the 20 employee threshold for consultation should be removed. This would help to ensure that the rights to consultation apply equally to all.

Alternatively, we support the proposal to replace the establishment test with an undertaking test which has been proposed by the TUC.

4. Will defining "establishment" in a Code of Practice give sufficient clarity?

A Code of Practice which was clearly drafted would be more helpful than simply retaining the current statutory provisions with no guidance and might help to establish a common approach. The Code should actively discourage employers from breaking up businesses into separate units to avoid EU consultation duties.

5. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation? Please provide comments to support your answer.

The IER objects to any attempts to exclude fixed term staff from consultations. In UK law failure to renew fixed term contract s in considered as a redundancy and fixed term employees are included in collective redundancy arrangements. The IER does not believe that this should change.

The future Code of Practice or guidance should not suggest that employers can exclude staff on fixed-term contracts from consultation arrangement. This approach would not be compatible with the requirements of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

The IER believes that the duty to consult on collective redundancies should be extended to cover agency workers and other casual workers. The terms in the Directive are not limited to employees, as in the case in the UK. The Directive applies where an employer contemplates making workers redundant.

6. Have we got the balance right between what is for statute and what is contained in government guidance and a Code of Practice?

We do not believe that the Government has got the right balance. We are not convinced that the introduction of guidance without any strengthening of the law will improve the quality of consultation on redundancies or improving compliance with EU law.

The IER would argue that the law should be amended in line with *Junk v Kuhnel* to clearly state that redundancy notices cannot be issued before consultation has been completed.

7. What changes are needed to existing government guidance?

The existing guidance is very short and would need to be substantially expanded to provide useful practical support. It should also:

a) Promote the benefits of effective and meaningful consultation and negotiations between employers and trade unions on collective redundancies
b) Encourage employers to negotiate and agree redundancy policies in advance of redundancy situations.
c) Emphasise that consultation must be undertaken with a view to reaching agreement
d) Be flexible and vary according to the circumstances
e) Explain the types of information which must be provided to union reps and workplace reps
f) Emphasise that consultation should start as early as possible
g) Emphasise that employers should seek wherever possible to avoid the need for redundancies
h) Emphasise the importance of consultation continuing until all avenues for avoiding redundancies have been fully exhausted
i) Encourage employers to negotiate clear and non-discriminatory selections criteria
j) Deter employers from using section 188 notices to vary and reduce terms and conditions
k) Set out clear advice on rules relating to suitable alternative work
l) Encourage employers to provide support to individuals at risk of redundancy, including access to training
m) Encourage employers to assess and monitor the effect which restructuring has on the health ans well being of staff
n) Encourage employers to provide facilities for union and workplace reps
o) Confirm that the special circumstances defence only applies in exceptional circumstances

8. How can we ensure the Code of Practice helps deliver the necessary culture change?

Clear guidance will not be enough to improve the quality of consultation or to improve compliance with consultation duties.

Strengthening sanctions which apply to employers that fail to consult on collective redundancies is more likely to deliver the culture change.

9. Are there other non-legislative approaches that could assist - e.g. training? If yes, please explain what other approaches you consider appropriate.

In our experience consultation is more productive when both employee representatives and employer representatives know what is expected of them and how the process should work. Where representatives are inexperienced, training is very helpful in improving the quality of consultation.

It could also be beneficial for employees at risk of redundancy to have access to interview and CV training during the collective consultation process. This might be achieved through links between BIS and charities that provide outplacement and through working closely with the Job Centre Plus. In the event that the affected employee's employment is terminated on the grounds of redundancy and they have received outplacement during the redundancy process then they may be able to obtain re-employment quicker than if they had to wait until their dismissal for such training.

10. Have we correctly identified the impacts of the proposed policies? If you have evidence relating to the possible impacts we would be happy to receive it.

The government has not provided substantive evidence to justify the decision to weaken collective consultations. The government has relied on anecdotal evidence and perceptions of businesses and employers lobbying organisations.

The government has stated that one of the principle objectives of the proposed reforms is to improve the quality of consultation. However, the proposed changes mean that there is a significant risk to the quality of consultation. The TUC has detailed further risks associated with the proposed changes to collective redundancy consultations.

11. If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?
N/A

12. If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business dealings during this time?
N/A.