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Collective Consultation in 2020

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The brief

- A practical guide to collective consultation obligations at a time of coronavirus
- Not a complete review of the law in this area
- Identifying the key challenges and providing practical solutions
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Key challenges

- Identifying the proposal in time
- Organising representation
- Obstacles to effective communication
- The pandemic as an explanation for non-compliance
- Concurrent collective redundancy and TUPE consultation



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Proposal for redundancy

Why is pinpointing the trigger important?

- Two temporal conditions:
 - *in good time*
 - *30/45 days before first of dismissals*
- The latter is counted backwards from the proposed dismissals
- The former is counted forwards from the proposal – therefore need to know when the proposal crystallises to ensure collective consultation starts *in good time*
- HR1s and criminal liability

The trigger: s.188

“Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less...”

”

Difficult definitions

- Identifying the trigger requires us to consider two troubled aspects of s.188:
 - “proposing”
 - “establishment”
- It’s technical!

Proposing

- "proposing" v "contemplating" debate
- UK Coal Mining Ltd v National Union of Mineworkers (Northumberland Area) and another [2008] IRLR 4: the critical issue is when a strategic or commercial decision is taken (by either the employer or an entity which controls the employer) which compels it to contemplate or plan the redundancies.

Proposing

- UK Coal probably still the law (via a circuitous route through:
 - Akavan Erityisalojen Keskusliitto Alek ry and others v Fujitsu Siemens Computers oy case C-44/08; [2009] IRLR 944 Akavan; and
 - United States v Nolan [2011] IRLR 40 (CA) and [2012] IRLR 1020 (CJEU))
- CA in Nolan recognised the position is uncertain, but will it now be for the domestic courts to resolve?

Proposals and Covid-19

- Do the uncertainties of the pandemic entitle an employer to put off collective consultation?
Probably not
 - UK Coal
 - Better too soon than too late
 - Consultation at a formative stage of the proposal still qualifies

Establishment

- Proposal for collective redundancies must be at *a single establishment* to trigger the duty
- Rockfon A/S v Specialarbejderforbundet i Danmark [1996] IRLR 168
 - the unit to which the workers made redundant are assigned to carry out their duties

Establishment

- Athinaiki Chartopoiia AE v Panagiotidis [2007]
IRLR 284
 - a distinct entity,
 - having a certain degree of permanence and stability,
 - which is assigned to perform one or more given tasks,
 - and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks.

Establishment

- The importance of geography
- Lyttle and others v Bluebird UK Bidco 2 Ltd , Rabal Cañas v Nexea Gestión Documental SA and USDAW v Ethel Austin [2015] IRLR 577
 - Establishment: *concerns the socio-economic effects that collective redundancies may have in a given local context and social environment*
- HR1: *an establishment is the site where an employee is assigned to work*

Establishment

- But structural/organisational factors also important
 - Mills and Allen v Bulwich Appeal No. EAT/154/99 July 2000 (EAT)
 - Seahorse v Nautilus [2019] IRLR 286
- Is it all just a matter of impression anyway?
 - Renfrewshire Council v Educational Institute of Scotland [2013] IRLR 76



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Representation and consultation

The affected workers

- Employees affected by the proposal
- Wider than those proposed to be made redundant
- Beyond the establishment at which redundancies are proposed
- “Measures” reflecting TUPE, a broad term

The affected workers (2)

- The absence of an effective remedy
- Never the subject of a proposal to dismiss
- Could the remedies be construed so as to give effect to CRD and afford a remedy

The Representatives

- Trade unions recognised for collective bargaining, for any of the affected employees must be consulted
- Existing consultative forum, elected with a mandate to be consulted and negotiated on proposed redundancies, or, at the employer's election
- Representatives elected specifically for the purpose

The Problems of Election

- IT facilities may not be universally available for the workforce
- Self nomination and election process by post
- Operating a secret ballot
- Possible use of independent scrutineers
- Taking all reasonably practicable steps to ensure the election is fair, S.188A(1)(a)
- All of this will require time

Elected Representatives a curse or a blessing

- Who may bring claim?
- And for what
- Only representatives may claim protective awards/TUPE compensation for a class of workers
- *Independent Insurance Co Ltd v Aspinall [2011] IRLR 716. (S.188)*
- *Ferguson and others v Astrea Asset Management Ltd. EAT 15th May 2020 (TUPE)*

The Problems of Consultation

- The temptation to allow numerous representatives will pose practical problems for effective consultation
- Telephone conferences need manageable numbers
- Information for consultation needs to be provided in writing
- Consultation with a view to reaching agreement

The Problem of Access

- S.188(5A) that the employer shall allow the appropriate representatives access to the affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate
- Possible GDPR issues around providing contact information
- Facilitating contact by post and telephone conference facilities

Special Circumstances

- S.7(A) a delay in the election process, but only if started in good time
- The Pandemic and lock down may be the type of sudden unexpected disaster contemplated by special circumstances.
- However the presence of the furlough scheme must have changed that dynamic
- The presence of the scheme is likely to mean that the failure to allow sufficient time to take steps to ensure that there is a fair election and meaningful consultation in the present circumstances is not of itself going to afford a special circumstances defence.



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Collective redundancy and TUPE
consultation

A typical scenario

- Business in financial distress
- Proposal for collective redundancies
- Sale of business or part of business in prospect
- Sale may be to unrelated third party, or to related party (e.g. management buy out following prepack administration)
- Sale involves a relevant transfer under TUPE

Commercial pressure

- Can pull in different directions
- Purchaser may want redundancies pre-transfer else indemnities/reduction in sale price
- Vendor may want to keep sale confidential to maintain market and consumer confidence or to avoid jeopardising sale itself

Effect of insolvency

- Is business subject to relevant insolvency proceedings?
- Terminal insolvency (e.g. liquidation)
 - Reg.8(7) TUPE
 - Reg. 4 and 7 do not apply
 - Does the duty to inform and consult under Reg.13 apply?
- Non-terminal insolvency (e.g. administration, including prepack):
 - Regs. 4 and 7 do apply - Key2Law (Surrey) LLP v De'Antiquis [2012] IRLR 212, CA
 - Relevant transfer

Double up

- Two duties:
 - s.188 TULRCA
 - Reg.13 TUPE
 - Similar but not the same
- Two liabilities:
 - 90 days (s.189(4) TULRCA)
 - 13 weeks (reg. 16(3) TUPE)
 - Both uncapped
 - Double recovery?

A quick comparison

	s.188	Reg.13
Trigger	Proposal for collective redundancies	Relevant transfer
Timing	In good time and not less than 30 or 45 days before first dismissal	long enough before the relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees
Which employees?	employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals	employees of the transferor or the transferee who may be affected by the transfer or may be affected by measures taken in connection with it

A quick comparison cont...

	s.188	Reg.13
Reps	TU OR pre-existing employee reps with authority OR elected employee reps	TU OR pre-existing employee reps with authority OR elected employee reps
Information	s.188(4) list	Reg.13(2) and (2A) list
Consultation	avoiding the dismissals, reducing the numbers of employees to be dismissed, and mitigating the consequences of the dismissals, and shall be undertaken by the employer with a view to reaching agreement	Only where employer envisages taking measures in relation to affected employee – shall consult with view to reaching agreement – shall consider and representations and reply to them
Defence	Special circumstances	Special circumstances

Streamlining

- Appropriate reps can be used for both information and consultation exercises
- Employee reps already elected for purpose of collective consultation probably satisfy Reg.13(3)(b)(i) TUPE
- Processes can be run concurrently

Making redundancies at purchaser's request

- Can vendor/transferor make pre-transfer redundancies for transferee and would they fall within Reg.7?
 - Dismissals probably because of transfer
 - Transferor cannot rely on transferee's ETO reason: Hynd v Armstrong and others [2007] IRLR 338
 - But what if transferor had own proposal for redundancies which prospect of sale accelerated?

Pre-transfer redundancy consultation

- Scenario: following transfer, transferee employer proposes redundancies
- If dealt with sequentially, danger of duplication of effort and greater impact on employees

Sections 198A and 198B TULRCA

- Enables t'ee to conduct pre-transfer collective consultation
- Consultation may count towards compliance with s.188 duty
- Voluntary process – so only likely where t'or and t'ee have good relationship and t'or prepared to allow t'ee access to employees pre-transfer
- Allowing pre-transfer consultation as a bargaining chip on price/indemnities

When does it apply?

- There is to be, or is likely to be, a relevant transfer.
- The trade union has a collective redundancy proposal.
- Transferring staff likely to be affected
s.198(1) TULRCA
- The trade union notifies the employer in writing of its election.
- The employer agrees to the election
s.198A(2) and (3) TULRCA

Effect

- T'ee deemed to be the affected employees' employer pre-transfer for the purpose of s.188
- But does this comply with the ARD?
- With whom should the t'ee consult?
 - Position clear where there is a recognized TU
 - But what if there is not? Appears to default to using t'or's existing employee reps or reps elected from transferring employees

Practical considerations

- T'ee liable for s.188 breach, even where due to t'or's failure to provide information – that failure does not amount to a special circumstance (s.189B(1)(d) TULRCA)
- T'ee cannot effect pre-transfer dismissals as it is not the employer for those purposes
- But nor can t'or rely on t'ee's ETO reason

Practical considerations

- T'ee's redundancy pools may encompass employees from both employers – need for coordination of information to ensure consistency
- Cancellation of the t'ee's election may leave t'or in lurch in relation to TUPE information and consultation if the proposal was to conduct the exercises jointly
- Problems of confidentiality



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