Second Update on Collective Redundancy

Representation

1. This article follows on from the first of our articles, which considered the proposal for redundancies and the start of collective consultation.

Good Time

2. It will be evident from this article that a key consequence of the present situation is that the process of the appointment of, and consultation with, representatives will be slower. It should not be forgotten that the dates of 30 or 45 days before the first dismissal takes effect are minimum periods for consultation, the obligation being to begin the consultation in **good time** and in event before those trigger points, S.188(1A).

3. Consultation cannot begin until the representatives are in place, although we note the caveat of S.188(7A) below. Thus a key message of this article is that it is necessary, in the present situation, to allow more time for the entire process of consultation. Further, in the context of a furloughed workforce the special circumstances defence is unlikely to provide a defence if an employer has not allowed sufficient time for the election and for consultation to be undertaken meaningfully.

4. The key point then is to engage with the process of election early and consider how practically it can be fairly achieved and the representatives effectively enabled to discharge their duties whilst the workforce is furloughed or at least socially distanced.

Representatives

5. A key step in the process of collective consultation is the identification of the appropriate representatives for consultation. By way of refresher,the legislation adopts a sequential model for identifying those representatives. The first stage is the identification of the affected employees.

Affected Employees

6. Whilst we have previously focused on the issue of the proposal which has triggered the need for consultation, namely the proposal to dismiss employees as redundant, the test for representation poses a slightly different question. It is necessary to identify those who are affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals. This may be a wider constituency than those whom it is proposed to make redundant. The term "measures" mirrors the language in the TUPE regs and would appear to embrace a broad definition of the consequences of the proposed redundancies for employees, beyond contractual changes, per Todd v Strain [2011] IRLR 11, EAT. By way of an example, if an employer proposes to close a manufacturing plant, which involves more than 20 employees being made redundant, so as to trigger the consultation obligation, the affected employees may include employees of the employers at a different plant where the number of furloughed employees may be reduced as a consequence or shift patterns changed. The wording does not require those affected employees to be employed in the same establishment as that to which the proposal relates.

7. Although the breadth of the scope of the employees for whose representatives need to be consulted is broad the remedies for failure to consult do not reflect the scope of that obligation. Under S.189(3) a protective award for breach of the obligation is directed only at those who have been dismissed as redundant or it is proposed to dismiss as redundant. On a practical level this dislocation between the obligation and the remedy may explain why, in our experience, the wider scope of the obligation does not often feature in claims. There may however be scope for an interpretation of the Act to give effect to the intentions of the Directive and afford a remedy for the wider constituency of affected employees.

Who are the Representatives

8. Once the affected community of employees as been identified it is necessary to ask successive questions. The first question is whether an independent trade union is recognised for any of the affected workers, recognised that is for collective bargaining purposes as defined by s.178(3) TULR(C)A. If it is so recognised then representatives of the union must be consulted. This may not include all of the affected employees, for example management levels outside the recognition agreement and it is typically necessary to move to the second question in any event; that is whether there are existing elected employee representatives with authority to be consulted in respect of the affected employees, although elected primarily for another purpose such as a works council. The caveat is that it is necessary for them to have the authority for consultation on the proposed redundancies, that will require a consideration of the terms of reference for the elected body at the point of the election of the representatives. See by way example Kelly v Hesley Group Ltd 2013 IRLR 514, EAT where a body was found not to have the requisite authority. Thus it needs to be clear that when the affected employees elected representatives to that body they did so on the basis that their mandate extended to them having the authority to be consulted on proposed redundancies with the ability to negotiate with a view to reaching agreement. Absent that authority the body cannot be retrospectively clothed with such authority.

9. Even if there is such a representative body in existence with the required authority the third question is whether the employer chooses to consult with that body, as consulting with the body (even if it has authority) it is an elective choice for the employer. The employer may choose to seek the election of representatives specifically for the purposes of the consultation. If there is any uncertainty about the authority of existing representatives this is the safer course. If there are affected employees for whom there is no recognised union nor any properly mandated previously elected representatives an election has to be held.

Elections

10. The election of representatives is likely to present a number of practical problems in the present circumstances. It is one thing to have to seek elections from a workforce that is working from home using IT facilities, quite another to seek the election from a furloughed workforce that may not have access to IT facilities. The statutory requirements make no such distinctions, although the mechanics of the election may be an issue for a special circumstances defence, which we address below.

11. S.188A(1) sets out specific requirements for the election process. It is important to note that in two respects they do allow a margin of discretion which could accommodate the present circumstances. Firstly the overarching obligation under S.188A(1)(a) is to make such arrangements for the election as are reasonably practicable to ensure that the election is fair. Further S.188A(1)(i) provides that so far as reasonably practicable the voting must be in secret and the election conducted so as to ensure that the votes are accurately counted.

12. The present situation may then lead to an argument that there are constraints which dictate limitations on what is reasonably practicable in conducting a fair election. However, the existence of the furlough scheme means that time pressure is not likely to be regarded as such a factor. The existence of the furlough scheme can be taken to mean that typically an employer has the time to undertake the necessary steps for a fair election, for example inviting the nomination and the election of representatives by post with the consequent delays. Equally, the availability of time may mean that it is possible to use the services of independent conductors of workplace ballots to conduct the ballot for the representatives, such as the Electoral Reform Society.

13. The first stage in the process is for the employer to determine the number of representatives to be elected, S.188A(1)(b). The touchstone being that the number must be sufficient to represent the interests of all of the affected employees having regard to the numbers and classes of those employees. The concept of "classes" reflects the fact that the interests of all workers may be not be aligned and distinct classes of workers may then require their own representatives. As there is no need to hold an election if the number of volunteers for election is less than or equal to the number of vacancies, per Phillips v Xtera Communications Ltd 2012 ICR 171, EAT, the temptation is to allow for more representatives. Further in Philips the number of representatives was increased to allow another volunteer to be added in, again practically a step often taken where there are only a small number of volunteers more than the original proposed number. But in the present situation, caution should be exercised as to the numbers as regard has to be had as to how the consultation will be carried out. With a technically enabled workforce video conferencing is an obvious solution but absent that a telephone conference call, with multiple attendees, is likely to be the only socially distanced solution. This has the prospect of the chaos we have all experienced in large telephone conferences. It remains however the likely solution, see the well known example of USDAW and others v WW Realisation 1 Limited (Case 320156/2010 (ET) where the Administrators use of such a conference call was found to have mitigated the failings under S.188 so as to reduce the protective award made.

Consulting

14. The availability of technology to the workforce representatives is arguably not going to dictate the manner of the provision of the required information for the purposes of consultation, under S. 188(4), which does not on its face include email delivery. Whilst all the information does not have to be given before the consultation begins (see Securicor Omega Express Ltd v GMB *[2004] IRLR 9*, EAT) it will have to be given during the process of consultation and the section contemplates delivering the information to the representatives or posting it to them. In the case of a union sending it by post to the address of its head office. The use of email may occasion only a

technical breach but again the more practical problem is a workforce where the representatives do not have ready access to such mediums of communication. Again allowing time for the postal delivery of documentation requires time.

Access to Colleagues

15. Quite aside from the practical challenges of the consultation in the present situation there is the need for representatives to be able to have access to those they represent. There is positive obligation under 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.

16. How can access work with a furloughed workforce ? Will it initially be postal, with the costs and facilities for the representatives to be able to write to their colleagues being met by the employer. That might be the initial contact with the affected employees with the organisation of telephone conference facilities, at the representatives direction, for subsequent contact. Clearly thought will have to be given to ensuring that this can be achieved in a confidential way and ensuring the GDPR rights of the employees are protected. Thus it requires the employer to send the communications to the affected employees. In the case of a recognised trade union the constituency will be beyond its membership and it will need to have access to all of the affected workers beyond their members, which in practical terms will require the union to be able to send communications to all of the affected employees. Again there are likely to be GDPR concerns about giving over all of the contact information but there may be resistance from the unions to using the employer as the conduit of information. A similar problem arises in the context of trade union recognition votes and the solution of an independent person conducting the communication process may provide the compromise.

Special Circumstances and the reasonably practicable obligations

17. It is apparent that there are practical problems occasioned by the present situation which even allowing sufficient time may not successfully resolve. As noted above, the overriding obligation under the election process is to make such arrangements as are reasonably practicable to ensure the election is fair.

18. There is then the specific caveat of S.7(A):

> (*a*) the employer has invited any of the affected employees to elect employee representatives; and
>
> (*b*) the invitation was issued long enough before the time when the consultation is required by subsection (1A)(*a*) or (*b*) to begin to allow them to elect representatives by that time
>
> the employer shall be treated as complying with the requirements of this section in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.

19. Thus, if the delays in the election process mean that the consultation did not begin before the minimum period of 30 or 45 days before the first of the proposed dismissals the employer still complies with the s.188 obligation as to time if it

complies with its obligations over consultation and it does so as soon as reasonably practicable after the election. But practically this only applies if the employees have occasioned the delay in the conclusion of the election as the employer must have started the process long enough before the beginning of the consultation to have allowed the election to take place. That is likely to be judged on the basis of the present situation and the need for the employer to have allowed sufficient time as outlined above, so this will not provide a defence in the case of a late rushed election process.

20. There is then the wider "special circumstances" defence to breaches of S.188 under S.188(7) that

> (7) If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection (1A), (2) or (4), the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances.

21. The clause does not expressly cover the election process, although each of the expressed failings covered may be seen as a consequence of a failure in the election process and thus the failure of the election process is within the ambit of the section.

22. The section is broadly drawn but most of the case law has considered situations around the insolvency of the employer prompting redundancies. The authorities focus on the need for the special circumstances to present a crisis and the resultant decisions to close down workplaces having constituted a sudden and unexpected disaster. This was the language used in Keeping Kids Company v Smith and the Secretary of State [2018] IRLR 484 to describe the type of situation which may amount to special circumstances, echoing the earlier decision in The Bakers' Union v Clarks of Hove Ltd [1978] IRLR 366 CA.

23. We have previously observed that absent furlough, the suddenness of the present crisis and the consequent immediate closure of a business might then amount to special circumstances which rendered it not reasonably practicable for the consultation obligations to be fully complied with. But the presence of furlough makes it more difficult for an employer to argue this if the failures under S.188 are the consequence of its' failure to allow sufficient time to conduct the process from election to consultation.

24. Of course even if the virus and lockdown amounted to special circumstances, it remains necessary for the employer to show that it took all steps towards compliance with that requirement as were reasonably practicable in the circumstances.

Conclusion

25. The present circumstances mean that even beyond the normal dictates of effective consultation, the practicalities of the process of election of and consultation with the representatives in the present situation require that the process is started early allowing more time than would conventionally be allowed. The existence of the furlough scheme is likely to mean that the failure to allow sufficient time is not of itself going to afford a special circumstances defence.

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