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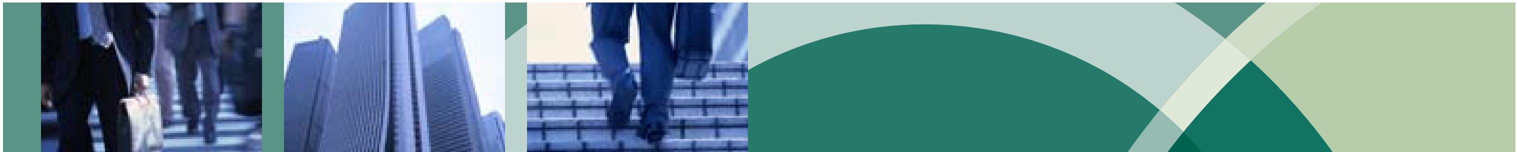
Law at work



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Features

Collective redundancies – Balancing legal compliance with workforce stability

Last month we covered issues to consider on individual redundancies. This month Kathryn Clapp reviews the process for collective redundancies and the legal and commercial considerations facing employers.

In the current economic downturn, mention of "mass" redundancies is hitting the news headlines daily. Organisations faced with job losses, downsizing, closure or merger, range from the City financial sector to large manufacturing plants and many service sector industries. Despite the diverse nature of their operations, the potential legal and commercial issues facing these employers, which arise out of the current economic crisis, are often the same. For employers there is an inherent conflict in trying to balance achieving legal compliance by adhering to complex collective redundancy procedures with maintaining workforce stability.

This article provides an overview of the process by which collective redundancies may be carried out and an insight into the potential financial cost to a business, not only where redundancy procedures prove defective, but also in the form of incentives and retention bonuses.

Legal background

The law governing collective redundancies in the UK is the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"). This stems from the EC Collective Redundancies Directive. Although the statutory disciplinary and dismissal procedures ("SDDP") apply to individual redundancies, they do not apply to collective dismissals though there is an overriding principle of fairness.

When does the duty to collectively consult arise?

Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer must collectively consult its workforce via trade union or elected representatives. Consultation must begin in good time and, for **100** or more employees, at least **90** days before the first of the dismissals takes effect. For **20–99** employees this requirement is reduced to **30** days.

Consultation must begin while proposals are at a formative stage and certainly before decisions on dismissal for redundancy is made. Even if a company is considering alternatives eg, the sale of a business as a going concern or closure, there is still a "proposal" which would trigger the obligation to consult. Where there is a long lead in time between a plan of action being decided upon and implementation, early consideration of methods to retain and motivate people (by way of retention bonuses for example) in the interim is vital to prevent employees leaving in anticipation of a potential period of economic uncertainty.

Although the headline figures of starting consultation 30 (or 90) days before the first dismissal stand out, these are minimum timelines, and the requirement to consult is "in good time". Case law has suggested that this is when employers form a view on (a) the likely date of collective redundancy, assuming that adequate negotiations take no more time than reasonably expected, and that negotiations take place with willingness and good faith on both sides towards reaching an agreement; and (b) how long it could reasonably be expected to take to negotiate an agreement covering the issues.

Maintain workforce stability: Structuring redundancies so they affect fewer than 20 employees?

It is important to consider at the outset whether it is possible to avoid making collective redundancies at all.

Use of mobility clauses

It may be possible to relocate affected staff by invoking an express mobility clause in their contract of employment that requires them to work elsewhere rather than dismiss them as redundant. There is no breach of contract and no dismissal. However, employers must not invoke an express term in an unreasonable manner such as to breach the implied term of trust and confidence. If there is no mobility clause then to require an employee to move to a new location, with a new job description, is likely to be a redundancy and re-engagement on new terms and conditions.

Defining the "establishment"

The duty to consult only applies where 20 or more dismissals are proposed at one "establishment". Although there is no statutory definition, there has been considerable domestic and EU case law on whether an employee's geographical location determines an establishment, or whether an organisational test applies. If employees work at different geographical locations, consider whether those sites form a single part of an undertaking or business or "establishment" to which the affected employees are assigned. This is likely to be the case if administrative functions such as accounts, payroll and management are centralised for all units. If, however, they operate independently of each other, then an employer may reduce the number of redundancies per establishment below the critical threshold of 20 employees.

Similarly, if a mobile sales team is under threat of redundancy, then consider whether the team is an establishment in its own right, or whether each employee might in fact be assigned to different local branch offices – and so are in fact separate establishments, again lowering the likelihood of requiring the collective procedures. Employment tribunals have tended to take a fairly common sense approach by considering the facts on an individual case basis.

Waves of 19 employees?

One option would be to stagger dismissals so no more than 19 take place within 90 days – but care is needed to ensure that there is no overlap. If two batches of redundancies are proposed which, when aggregated together means that there are 20 or more dismissals proposed over 90 days, then the employer is caught by TULCRA. However, another way of partially limiting exposure to collective consultation is if an employer is already consulting on 20 or more redundancies. If another batch of less than 20 are proposed within the same overall period of 90 days there is no obligation to collectively consult over them.

Recruit volunteers for redundancy – Does this work?

Although in some cases voluntary redundancy can avoid an organisation having to select for redundancy, those who volunteer are still legally "redundant" and their numbers would count for the purposes of reaching 20 to trigger collective redundancies. There are also cost implications as volunteers may only come forward if an enhanced redundancy package is on offer.

Whether an employer can avoid the collective redundancy process, or is to embark upon it, forward planning and careful preparation is essential.

Collective consultation: With whom is the employer required to consult?

The employer must consult with appropriate representatives of employees under threat of redundancy but also those affected by "measures" which could include new working hours, new systems of work or proposed variations to contracts of employment.

If the affected employees are within a category of employees in respect of whom recognition has been granted i.e. within the "bargaining unit" as defined by a collective agreement, then they will be represented by trade union representatives. For other affected employees the employer must choose to consult with either representatives not specifically elected for the purpose of redundancy consultation (eg, a pre-existing staff consultative body – but check that those employees were correctly elected) or representatives directly elected by affected employees for the purpose of redundancy consultation.

How do you decide on constituencies?

TULRCA sets out the rules for the election of employee representatives in fairly general terms. Determining the number of representatives and whether they represent the interests of all affected employees, and defined classes in particular, will depend on the particular circumstances. Factors may include the grades of employees affected, their geographical location and whether all the employees are going to be affected by the proposed redundancies in the same way. Will a whole group be made redundant, or employees selected from each grade? Is the timescale for the proposed redundancies the same for all employees? What will provide the greatest flexibility to all parties? Looking ahead, claims concerning alleged failures by employee representatives may only be brought by representatives to whom the failure related, so the size of constituency (and any failures associated with it) could directly link to the possible cost of a protective award for employees of that particular group.

How will you announce collective redundancies to the workforce?

The key to keeping the process on track is communication with the employees and their representatives. At the outset, as soon as an employer "proposes to dismiss as redundant 20 or more employees", consultation with the

relevant representatives should begin. This will need to be prefaced with communications with staff outlining the reasons for the redundancies. A meeting is preferable, but consider communications with mobile sales staff or those on secondment, maternity leave, sick leave or on holiday. Do you make the announcement to all employees or just affected employees? What about staff on other sites? The appropriate route to take will depend on the size and structure of the organisation, and even if only those directly involved are informed, wider assurances to unaffected staff will need to be made.

Nomination and elections of employee representatives

Although not a legal obligation, employers may set out to employees the role of an employee representative, their responsibilities, the number required and in which constituency, the time over which they should act and nomination and election procedure in outline.

Should more than one employee be nominated for a role, then an election should be held by way of a secret ballot. Either the employer can organise and run the elections or arrange for an independent body to do so such as the Electoral Reform Services. However, this could inhibit speed. If internet or postal ballots are used eg, for those on maternity leave or sick leave, documentation should have a unique identifying number or code (not allocated to particular employees) to ensure that voting is secret.

A breach of the election rules can give rise to a claim for a protective award by affected employees.

If no employee representatives are elected within a reasonable time frame, then the employer must provide information directly to affected employees but is not obliged to collectively consult with them.

What does collective consultation consist of?

Collective consultation includes consultation about ways of (a) avoiding the dismissals which includes consulting over the business reasons; (b) reducing the numbers of employees to be dismissed; and (c) mitigating the consequences of the dismissals, such as considering the level of redundancy payments, and other efforts which could be made, such as outplacement services or redeployment.

Consulting over an employer's business reason behind the proposal to dismiss (usually economic reasons) affects the scope and timing of the consultation. It must start sufficiently soon before the decision on the reason for the proposed redundancies is taken to enable consultation to be entered into "with a view to reaching agreement" (another statutory requirement). This essentially means a dialogue approaching negotiation between an employer and the representatives, although it does not necessarily mean that the two parties end with an agreement!

What information must be provided to representatives and other practicalities?

The information for consultation (see box below) must be sent or given to the representatives or, in the case of a trade union, to its head or main office. It is advisable that this is provided at the outset of the consultation process. Employee representatives must be provided with "accommodation and other appropriate facilities" to meet with affected employees. Employers can assist with telephone or computer requirements and prepare webcasts, intranet updates or "Question" and "Answer" briefings in order to facilitate the process of communicating with the employees via the representatives.

At the same time there is a requirement for the employer to notify the Secretary of State in writing on Form HR 1 of the proposed redundancies (which is available here) before giving notice to terminate an employee's contract of employment. This is also required at least 30 (or 90) days before the first of the dismissals takes effect. The penalty for non-compliance is liable on summary conviction to a fine not exceeding level 5 on the standard scale (currently £5000). A copy of this form should also be given to the relevant representatives.

Information an employer must provide to the employee representatives:

(a) the reasons for the proposals;

(b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant;

(c) the total number of employees of any such description employed by the employer at the establishment in question;

(d) the proposed method of selecting employees who may be dismissed;

(e) the proposed method of carrying out the dismissals, with due regard to any procedure, including the period over which the dismissals are to take effect;

(f) the proposed method of calculating the amount of any redundancy payments to be made over and above the SRP to employees who may be dismissed.

How long should collective consultation last?

Against the legal parameters of the 30 or 90 day period prior to the first dismissal, the process should continue long enough either for the parties to reach an agreement or exhaust the prospect of doing so. At some point during the process, for example after selection criteria have been agreed collectively, individual consultation should start and an employer give notice of dismissal. After the employer has ended the collective consultation (and individual consultation) he can give notice of termination during the 30 day or 90 day period, as long as the expiry of the notice occurs outside that period (if an employee leaves earlier this will be a "first dismissal" and be in breach of statutory consultation requirements).

However, for this to occur the employee representatives would need to agree that consultation has concluded. It is therefore important to have minutes recording the meetings between the representatives and employer throughout this process and written agreement from the representatives that they agree to notice being given to employees. This should help offset any later claims of a defect in the consultation process. Any agreement could well include an agreement by the employer to pay out a sum comparable with an element of the protective award to cover the remaining period of collective consultation (but see section on settling claims below).

For a detailed discussion on the redundancy payments to be made, see the article *Individual Redundancies* in September's Law at Work.

Enforcement and settling claims

Claims for failure to inform and consult employee representatives can only be brought by the appropriate representatives to whom the failure relates. This can potentially leave employees without an effective remedy – a position reinforced by recent cases. On the flip side, where an award is made to employees for a "protected period", its purpose is to compensate the employee for the loss of the benefit of consultation, and taking into account the seriousness of the breach, not for their individual financial loss. Tribunals may make protective awards of up to 90 days uncapped gross weekly pay against the employer company (and have recently done so). This can apply even if a company has subsequently gone into liquidation.

There is a limited "special circumstances" defence where it was not reasonably practicable for an employer to comply with consultation requirements but is difficult to prove in practice.

Settling a claim for a protective award is made via conciliation with ACAS. In a recent (TUPE consultation) settlement earlier this year a trade union procured a £5 million settlement, providing £3,000 for each of the more than 1,600 affected workers.

Settlement under a compromise agreement is excluded from TULRCA. Commercially, employers may opt to agree on a sum in lieu of a protective award if the situation is not contentious, or with the agreement of employee representatives, where consultation has concluded early.

Commercial considerations during the consultation process

Legal compliance v stability

Where employees are informed of a company's proposals for redundancies at an early stage, there is a delicate balancing act between the obligation to comply with the requirements of collective consultation (and the risk of

employment tribunal claims for non-compliance), with the need to maintain stability within the workforce and keep people on board, especially if the business is already struggling to operate profitably.

Against such a context employers should consider the size of any redundancy package, to keep affected staff from resigning, and take measures to incentivise key staff to remain, such as those in HR overseeing the redundancy process. One method is to offer retention bonuses, payable either on a particular future date, or after a particular collective and individual redundancy process has completed. Unlike enhanced redundancy payments, such bonuses would be fully taxable.

Timing of dismissals and how much will the process cost

Struggling businesses may seek early terminations to cut down their wage costs. This may include termination with payments in lieu of notice, or concluding consultation early (if possible) and negotiating enhanced redundancy packages to compensate for potential breaches of the collective consultation process.

Conclusions

In order to manage and carry out collective redundancies successfully requires careful, early planning by an employer. Consideration of whether collective redundancies are necessary is important at the outset. If so, employers should be organised: preparing employee representative information packs, considering termination packages, provisional identification of redundancies and drafting a timetable for the consultation process. Enough planning will assist in compliance with this complex legislation and, perhaps more importantly, enable a process to move quicker, keeping the required employees on board during the redundancy process.

By Kathryn Clapp

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Case law update

Age discrimination and retirement – The Heyday case

R (on the application of the Incorporated Trustees of the National Council on Ageing) ("Heyday") v Secretary of State for Trade and Industry (C-388/07) :35889329

Why care?

On 23 September 2008 the Advocate General gave his opinion in the so-called "Heyday" case. The case was heard in the European Court of Justice ("ECJ") on 2 July. The Advocate General's opinion is not binding on the final ECJ decision, which is due in December, but is an initial indicator.

The case involves an application for judicial review by Age Concern, the claimant, which has argued before the ECJ that certain of the provisions dealing with mandatory retirement ages in the Employment Equality (Age) Regulations 2006 (the "Regulations") do not properly implement the EC Equal Treatment Framework Directive (the "Directive"). In essence, the Heyday group are challenging whether retirement dismissals at 65 are lawful and can be objectively justified as a proportionate means of achieving a legitimate aim.

The case

The High Court referred a number of questions to the European Court of Justice which the Advocate General, a senior legal adviser to the ECJ, considered.

In brief the Advocate General's opinion, and proposal to the ECJ is that:

- The Directive governs the UK Age Regulations (so they could be judged to be unlawfully discriminatory).
- A difference in treatment on the grounds of age is not discrimination if it is determined to be a proportionate means of meeting a legitimate aim within the meaning of the Directive. Member States do not have to define the permitted kinds of differences in treatment in a defined list (so Member States have latitude and flexibility in determining what is justifiable, and the Advocate General indicated that a "hands off" approach from the ECJ is appropriate, so these issues will likely be dealt with in national courts).
- Dismissal by reason of retirement at 65 or over can in principle be justified and may not be unlawful discrimination. It needs to be objectively and reasonably justified under domestic law by a legitimate aim. To be upheld, it should also not be apparent that the means put in place to achieve that aim are inappropriate and unnecessary for the purpose. (So again, there is an indication that it would be for courts in the Member States to determine whether the public interest aims are appropriate. There is an indication that in the absence of anything demonstrably wrong, the legislation should be left intact).

The judgment of the Court is due around December 2008. It need not follow the opinion of the Advocate General. However, it is likely to. If it does, the case would then go back to the national courts of the UK.

What happens now?

Assuming Heyday wished to continue, which we think they will, they may then ask the High Court to look at the policy aims expressed by the UK Government and consider whether those aims are appropriately served by the legislation. We do not have clarity on the timeline for this, but it may take another year.

It is likely that the employment tribunal cases will continue to be stayed until there is a result from the High Court. So, employers may need to carry contingent provisions beyond 2009 while we wait for the final outcome, and the UK Government has already announced that it will review the default retirement age in 2011, so the current position may well change after that.

If there is a pro-Government High Court decision and it is not appealed, at that point we would expect there to be applications to the Employment Tribunals which are stayed cases, asking them to be dismissed.

For employers, the message remains to be "so far so good" but we are only part way through the process.

Team moves: When they can be attacked

UBS Wealth Management (UK) Ltd and another v Vestra Wealth LLP and others [2008] EWHC 1974 (QB)

Why care?

This was a successful application for a "springboard injunction" to contain the impact of a team departing in circumstances where it was alleged that there was an unlawful plan to poach the majority of UBS private banking staff. The case indicates that even if employees do not have a specific obligation to inform their employer of their planned departure from that employer, if they become aware of others who are planning to leave and / or of a co-ordinated plot to encourage staff to leave, they cannot stay silent.

The case

The High Court judge:

- held that UBS had put together a "formidable" case that there was an unlawful plan to poach staff and clients from UBS, formulated and actively managed by the defendant, assisted and encouraged by senior staff;
- dismissed the argument made by the defendants that there was no causative link between the breaches and the staff losses because of the general dissatisfaction at UBS – in doing this he referred to the scale of the departures and secret plotting designed to paralyse UBS;
- held that the UBS clients should not be serviced by former UBS staff in breach of their continuing restrictive covenants and also that the defendants should not solicit further defections of staff or clients of UBS with whom they had recent dealings. This was to last until the full trial.

Post-script:

After this hearing, the parties settled the matter on terms which are reported to include a promise on the part of the new employer (Vestra) not to approach any further UBS staff or clients until April 2009.

What to take away

While the strength of the evidence that UBS produced clearly influenced the judge's decision, the main factor that he continually returned to was the scale of the defections. The fact that one of the defendants, a senior employee, delivered 52 resignations on one day probably did not help his cause.

It is often assumed that springboard injunctions can only be used where there is an allegation that confidential information is being abused. This case demonstrates that that is not true - here even those defendants who were no longer restricted by covenants, were restrained from poaching staff and clients.

While the judge seemed to accept that, in some instances, there is no obligation for an employee to disclose to his current employer that he is negotiating with a new employer, employees who are aware of internal plans for a number of employees to leave may need to say something to their current employer, in line with their general duty of fidelity during employment. Careful planning is needed where employers wish to hire from rivals.

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Hot topics

Entitlement of agency workers to sick pay

From 27 October 2008, agency workers who are engaged on contracts of less than three months will be entitled to Statutory Sick Pay ("SSP"). Prior to this date they had been the only group of employees not entitled to SSP.

European Commission proposals for a revision of the Maternity Leave Directive (No.92/85)

The European Commission proposes to:

- increase the minimum amount of maternity leave from 14 to 18 weeks and a "recommendation" that the level of maternity pay be 'at least the level of sick pay'. If this is referring to Statutory Sick Pay, then this would require no change to UK legislation, as SSP is paid at a lower rate than SMP. However, if the proposal refers to contractual sick pay, then employers would have to ensure they paid women in their first 18 weeks of maternity leave at least as much as if they had been absent through illness during that period;
- offer greater flexibility to women in determining when to take compulsory maternity leave and increase it to six weeks. It is currently two weeks in the UK;
- improve the protection of women on, or returning from, maternity leave. The proposals are on a par with what is already currently provided to women in the UK.

The Commission hopes that agreement on the revised Directive can be reached in 2009 and Member States would then have two years to implement the changes. Further details of the proposals can be accessed here.

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