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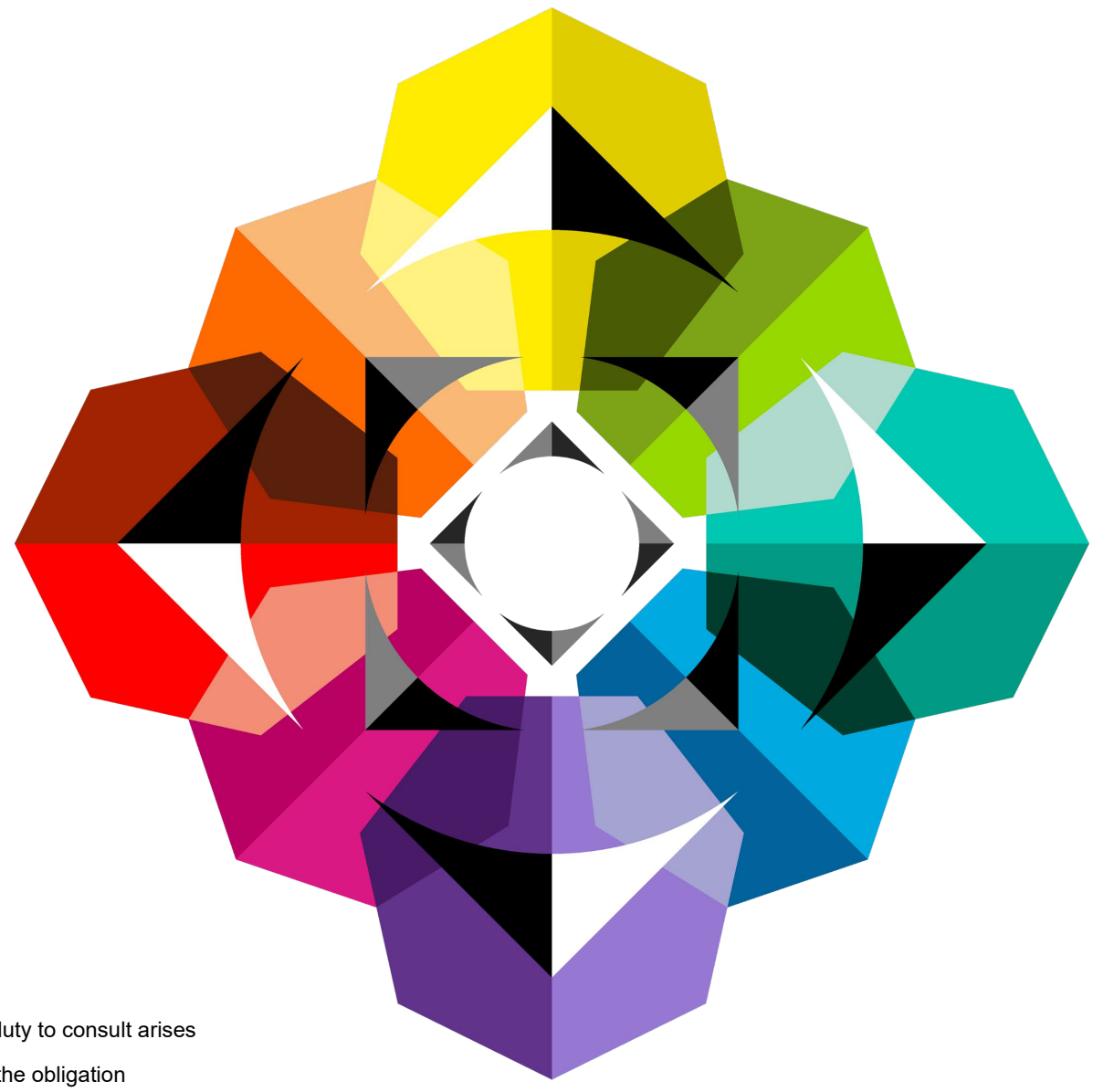
Collective redundancies



Inside

Most employers are aware of the procedures that have to be followed when making someone redundant (or their job, to be more precise). If you'd like a reminder, see our Inbrief on Redundancy. Additional, more complex requirements arise when an employer is proposing collective redundancies. If 20 or more people are likely to be made redundant within 90 days, there must be consultations with all affected staff before the dismissals can take place. This Inbrief highlights some of the main issues for employers.

Collective consultation is needed if an employer proposes to dismiss 20 or more employees "at one establishment" in a 90-day period. This involves consulting employee representatives about various matters, including ways of:

- avoiding the dismissals
- reducing the number of dismissals
- mitigating their consequences

Consultation must start "in good time" and, if 100 or more employees are likely to be dismissed, at least 45 days before the dismissals take effect. Otherwise the minimum period is 30 days. Protective awards of up to 90 days' pay per employee can be imposed on an employer that fails to inform and consult properly.

An employer will still need to inform and consult in the normal way with individuals whose jobs are at risk, even if collective consultation is also needed.

When does the duty to consult arise?

An employer must be proposing to dismiss at least 20 employees in a 90-day period at one establishment before collective consultation is required. An "establishment" is generally the unit or workplace to which employees are assigned - it must be relatively permanent and stable, but does not need to have independent management who can decide to dismiss staff, or be economically or administratively separate.

If an employer is proposing more than 20 redundancies across a number of workplaces, but less than 20 at any single location, it must consider whether the workplaces should be treated as a single "establishment" so as to trigger the duty to consult. This will depend on factors such as whether:

- the unit performs specific tasks; and
- it has facilities, such as a workforce and an organisational structure, to enable it to perform those tasks

A redundancy for the purposes of collective consultation includes a dismissal for any reason not related to the individual employee. So for example, a requirement to inform and consult could arise if an employer is proposing to dismiss and rehire in the context of changes to terms and conditions of employment.

Dismissals due to the expiry of fixed-term contracts which have a clear termination date and are coming to their planned end do not count towards the number of redundancies. However, such dismissals do count if the fixed-term contracts are being ended early.

The concept of "proposing to dismiss" has generally been understood to refer to the future dismissal of employees. A ruling of the European Court of Justice in 2020 suggested that employers should look backwards as well as forwards in calculating the number of dismissals – discussed in more detail in our article here. There are various reasons why this might not apply in the UK. However, a prudent approach would involve counting all dismissals within a rolling 90-day period - including all those recently made, those in respect of which consultation has already begun, and those proposed for the future.

Triggering the obligation

The duty to consult is triggered when an employer has "proposals" to dismiss. This means it must have formulated a plan that is likely to result in dismissals. It is extremely important

that consultation begins before any final decisions have been taken. For example, if a subsidiary company has a plan to dismiss employees, it will have a “proposal” even if the plan cannot be implemented until it has been approved by the directors of the parent company.

If an employer does not start consultation when its proposals are still fairly tentative, there is a risk that it will be unable to hold meaningful discussions with the employees. For example, if an employer wants to close a particular office to save costs, but only consults employees once it has taken the decision, it will be difficult meaningfully to discuss ways of avoiding the dismissals. In turn, this could mean a significant financial penalty for the employer (see below).

Appropriate representatives

Collective consultation must take place with “appropriate” representatives of the “affected employees”. These include employees who are at risk of dismissal, and any other employees who are affected - for example because their job duties may change as a result of a restructuring.

If a trade union is recognised in respect of the affected employees, the employer must consult with the union representatives. Otherwise, employers can choose whether to consult with:

- existing employee representatives who have the authority to be consulted about such things (e.g. a staff consultative forum); or
- representatives elected specifically for the purposes of the consultation.

If a union represents only some of the affected employees, representatives will be needed for the remaining staff.

Any election of representatives must comply with a number of requirements, such as voting taking place in secret. The employer has a duty to ensure that the election is fair. The length of time the employer needs to allow for the election will depend on a number of factors, including the numbers involved and where employees are based. At least a week and possibly longer is likely to be required.

Those who stand for or vote in the election and those elected as representatives are protected against detrimental treatment. This doesn’t mean that they cannot be selected for redundancy, but they must not be disadvantaged because they stood for or voted in the election or were elected as representatives.

Appropriate representatives should be provided with accommodation and facilities to allow them to fulfil their role. This might include a room to meet with other representatives and employees, and access to telephone and email systems if this is necessary to communicate effectively with other employees.

Content and length of consultation

Once representatives are in place, the employer must give them certain information. If there are no representatives, for example because no-one stands as a candidate in an election, the employer must give the information to all the affected employees. The information includes:

- reasons for the proposals
- numbers and descriptions of employees the employer is proposing to dismiss and total number of such employees at the workplace
- proposed selection method
- proposed method of carrying out the dismissals
- proposed method of calculating any enhanced redundancy payment
- some information regarding the use of agency workers

The information forms the basis of consultation with the representatives. Consultation must, as a minimum, cover ways of:

- avoiding the need for dismissals
- reducing the number of dismissals
- mitigating the consequences of the dismissals

The duty to consult on ways of avoiding the dismissals means consultation must start at a sufficiently early stage. If the employer only begins consultation when it has already decided on redundancies, it will probably be found to have breached its consultation obligations.

In a business closure situation, where 20 or more people are likely to lose their jobs, the employer should not take a firm decision to close the business or workplace until it has discussed this with appropriate representatives. Discussions should start when closure is a clear intention, albeit a provisional one; the duty is not triggered merely because closure has been raised as a possibility.

In any collective redundancy situation, the employer should explain the business case for the proposed redundancies and listen to the representatives’ views. The representatives may accept the business rationale, in which case consultation can quickly move on to other issues, such as alternative employment and any redundancy package on offer. If not, the employer should allow a reasonable period for discussion before taking a final decision.

Consultation must take place "with a view to reaching agreement". This involves a two-way dialogue with the representatives, who should have an opportunity to relay the views of the affected employees back to management. There is no obligation on the parties to reach agreement. If consultation has been entered into with an open mind, but the parties have been unable to agree, the employer is free to take a decision regardless of the representatives' views.

Consultation must start "in good time" to allow the relevant discussions to take place and a minimum period before the first of the dismissals takes effect. The minimum periods are:

- 30 days where between 20 and 99 employees are to be dismissed
- 45 days where 100 or more employees are to be dismissed

Consulting for the minimum period does not necessarily mean that an employer has consulted in good time, particularly if it had formulated the proposals some months in advance. It is prudent to start consultation as soon as possible once there are proposals.

Consultation must have finished before employees are given notice of termination. This means that where there are employees with three-month notice periods, and 100 or more employees are to be dismissed, the redundancy process could take four and a half months to complete. In theory, consultation could be completed more quickly if agreement is reached on all matters before the end of the minimum period. But in practice, it would be unlikely for representatives to agree to an early end to consultation unless the employer agrees to compensate employees for the period of consultation that is lost.

Exceptions

There is a limited exception to the duty to consult if there are "special circumstances" that make consultation not reasonably practicable. This exception has been very narrowly interpreted and applies very rarely. Most of the cases involve insolvency and, even then, not every insolvency situation will make consultation impracticable.

Even if special circumstances exist, an employer must still conduct whatever consultation is reasonably practicable. A failure by a decision-taking parent company to tell its subsidiary about redundancy plans is not a special circumstance.

The cost of getting it wrong

If an employer fails to comply with any of its obligations, a complaint to an employment tribunal can be made by the appropriate representatives, or in some cases by employees themselves. If the tribunal upholds the complaint, it can order the employer to pay a "protective award" of up to 90 days' pay per affected employee. In deciding what length of award is appropriate, the tribunal decides what is just and equitable in all the circumstances.

The purpose of a protective award is to punish an employer for failing to inform and consult rather than to compensate employees for any loss they sustain because of the failure. In practice this means that the employer cannot argue that consulting would have made no difference, so the employees have lost nothing and are not entitled to the award.

If there has been no consultation at all, the tribunal will start with the maximum 90-day protective award and reduce it only if there are mitigating circumstances. In other cases, the tribunal will focus on the seriousness of the employer's default, including whether it was deliberate. If an employer only starts consultation once it has decided to make redundancies, it is likely to face a substantial protective award because it will only have consulted about ways of mitigating the consequences of the dismissals. This will be the case even if the consultation that took place lasted for the full 30 or 45-day period.

Notifying the authorities

Employers have a separate duty to notify the Department for Business, Energy & Industrial Strategy (BEIS) if they are proposing collective redundancies. The duty is triggered if there are proposals to dismiss 20 or more employees within 90 days (the same as for the obligation to consult). Notification must be given before notices of termination are issued and at least 45 days before the first dismissal takes effect (or 30 days if fewer than 100 employees are to be dismissed).

The relevant information may be provided on form HR1 and broadly reflects the information that has to be provided to the representatives for collective consultation purposes (see above). The penalty for failing to provide the information to BEIS is an unlimited fine.

ACAS guidance

ACAS has published a non-statutory guide, Handling large-scale redundancies for employers. The guidance explains the legal framework and best practice requirements behind collective redundancy consultation and includes guidance on when consultation should start; who it should cover; who should be consulted; what should be discussed; how the consultation should be conducted; when consultation can be considered to be complete; and the meaning of "establishment".

For more information on this subject please contact:

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