Department of Business, Innovation and Skills
Call for evidence: collective redundancy consultation rules
Response from Thompsons Solicitors

January 2012

About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

Introduction

European law does not set time limits for consultations, only that consultation must be completed before notices are issued. See **Junk v Kühnel [2005] IRLR 310 ECJ** on the duty to consult. While we believe that the 90 and 30 day thresholds for consultation must be preserved in order to prevent employers breaching their duties to consult, it must be said that these thresholds are somewhat artificial.

Ultimately, consultation is only genuinely completed when both sides agree that it is and have signed off on the agreement.

That said, the existing thresholds ensure genuine and meaningful consultation and prevent employers from taking the need for flexibility when making business decisions to the point of selfishness. There is no evidence, and neither the government or the business lobby has provided any, that businesses are constrained by the thresholds.

The purpose of consultation is set out in **Regina -v- British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and Others [1994] IRLR 72** in which Glidewell LJ said:

"It is axiomatic that the process of consultation is not one in which the consulter is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex parte Bryant…when he said: 'Fair consultation means:

(a) consultation when the proposals are still at a formative stage;
(b) adequate information on which to respond;
(c) adequate time in which to respond;
(d) conscientious consideration by an authority of the response to consultation.'

Glidewell continued:

"Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consulter thereafter considering those views properly and genuinely."

Genuine consultation can of course take more or less than 30/90 days. In our view, the most effective outcome of this call for evidence, for all sides, would be a better definition of consultation and its conclusion.

We would suggest, based on Glidewell LJ's comments above, that would be that thehallmarks of genuine consultation are:

- Providing enough information so the person being consulted with can understand, assess and devise a sensible response, and in a timeframe that facilitates genuine exchange and reflection.

It is disappointing that the questions in this consultation paper are aimed at employers when the concern of any government committed to a fair society should be with employees, who are in a weaker position and more vulnerable to exploitation.

Thompsons will answer only those questions where we are able to take a view as claimant lawyers.

Response to the questions

Question 8

What factors:

a) make agreement difficult?

b) make agreement more likely?

Industrial relations work well in the majority of unionised workplaces and consultation is a natural and effective way of working. We suggest that a greater willingness by business to work with unions would make agreement more likely.

Question 9

If agreement cannot be reached, when can an employer be confident that the consultation is finished and that redundancy notices can be issued?

The question seems to imply a tick box, information giving approach which is not in the spirit of genuine consultation. Section 188 of the Trade Union & Labour Relations (Consolidated) Act 1992 states that consultation must be with a view to reaching agreement with the appropriate representatives. All options must be exhausted and if this is not achieved then it is a failure to agree.

If there is no agreement and notices are issued anyway, then the employer is potentially in a dispute situation.

Question 10

What happens during consultation?

Under Section 188 consultation must include ways of:

a) avoiding dismissals

b) reducing the number of employees to be dismissed; and

c) mitigating the consequences of the dismissals

And shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives. The law recognises that it is necessary that the reasons for dismissals are consulted on in order that the body being consulted with can challenge the basis of dismissing

employees for redundancy at an early stage if the reasons are not considered to be those the employer states they are.

This demonstrates that there is an interplay between redundancy consultations and insolvencies which this paper fails, in our opinion, to properly recognise. Please see our response to Q24 below.

In **Middlesbrough Council –v- TGWU [2002] IRLR** fair consultation is described as "Consultation when the proposals are still at a formative stage; adequate information on which to respond; adequate time in which to respond and conscientious consideration by an authority of the response to consultation."

Question 11

What impact does consultation have on the employer's business decision? (e.g. in terms of number of proposed redundancies actually effected?)

As said above, it is disappointing that questions such as this assume an impact on an employers' business decision but fail to demonstrate that the government has any concern about the impact on employees.

Question 12

Have you experienced specific difficulties when trying to determine what constitutes an establishment for the purposes of collective redundancy consultation? If yes, please describe them.

The issue of what determines an establishment is complex. Guidance by the European Court of Justice in **Athinaiki Chartopoii AE –v- Panagoitidis [2007] IRLR** states that an establishment has a distinct entity, having a certain degree of performance 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 accomplishment of those tasks.

It would be useful for employers and employees to have more guidance on this issue in the form of real cases.

The concern is that employers are using the establishment provisions to artificially divide employees into an 'establishment' with a view to reduce or eliminate their duty to consult. The ECJ recognised this in the **Rockfon AS –v- Specialarbjderforbunt I Denmark [1996] IRLR.**

Here there have been attempts by employers in the bank and finance sectors, notably Thomas Cook and RBS, to seek to limit the need to consult about thousands of redundancies by artificially defining the workforce to geographical and work-related sectors.

Question 13

BIS is aware that there are some issues around the interaction of fixed term contracts with collective redundancy consultation law. What problems do fixed term contracts create? What do you consider would be a potential solution?

It is not clear from the question what problems with fixed term contracts BIS is aware of. If the suggestion is that employers are failing to consult when they intend not to renew a fixed term contract, then the solution is that employers need to be made more aware of their duties to do so. Education and guidance is a simpler solution than any legislative change.

Lancaster University v UCU (EAT 2010) provides a useful illustration of the issues fixed term contracts create. http://www.thompsons.law.co.uk/ltext/lelr-weekly-192-consult-collectively.htm

Employers tend to be lulled into a sense of security by fixed term contracts. They let them expire and don't renew them. There is an assumption that the worker knew from the start when it would

expire so its not really a dismissal. The employer therefore thinks they don't need to consult.

The decision in Lancaster University makes clear that employers are obliged to collectively consult the recognised union where there are 20 or more fixed term employees whose contracts expire within a 90 day period. Typically the contracts of fixed term employees end on a variety of dates so it is important for unions to ask employers to provide the details of fixed term contracts due to expire within 90 days.

Greater awareness among both sides of the employer's obligations and of how the union can assist in this way will go a long way towards resolving the issues with fixed term contracts.

Question 14

What factors do you consider could determine what constitutes an 'establishment'?

See our response to Q12 above. There can be any number of factors and the guidance could be simplified to ensure that all sides are more aware of what they are. Put simply, "who pays the wages and the bills" and who are the "controlling minds" are key definitions.

Question 15

What are the advantages or disadvantages of the current 90 day minimum time period before redundancies can take effect, in your experience (a) for employers (b) for employees? In particular, what is the relevance of employees' statutory or contractual notice periods?

90 days facilitates employer and state intervention when there are large scale redundancies. Successful state intervention, such as that seen when MG Rover Group went into administration in 2005, where people were retrained and found other jobs, saves the government money in the long run.

Although the statute sets a consultation minimum of 90 days, it is unlikely that any employer would be faced with a protective award if agreement were reached earlier.

We would support the legislation being amended to allow for consultation to end at any time before the 90 days if agreement has been reached and all sides have signed off on it.

Question 16

What are the costs to business of the 90 day minimum time period over and above a 30 day period? What generates these costs?

There are inevitably both long term and short term costs to businesses of the requirement to consult. No doubt employers would save costs if they were able to make redundancies without any consultation with those affected. But the long term costs caused by the damage done if consultation and agreement are not reached will be far greater. If the outcome of genuine consultation is better employment relations then that is a positive outcome which will cost the employer far less in the long run.

Question 17

If there were a statutory provision for employers and employee representatives to shorten the 90 day minimum time period by voluntary agreement, would this be used?

The two sides in a consultation can already shorten the minimum time by voluntary agreement. We would support the legislation being amended to allow for consultation to end at any time before the 90 days if agreement has been reached and all sides have signed off on it. However, introducing a shorter minimum time period by statute would be an artificial and unnecessary measure.

Question 18

What would be the advantages or disadvantages of being able to shorten the period in this way?

A disadvantage in areas of high unemployment is that as much time as possible is needed to find ways that an employer making redundancies can support the workforce into new jobs such as by careers advice and retraining. Rover Group, as mentioned above, is a case in point. If the period is shortened then there will be less scope for this.

Question 19

What would be the advantages or disadvantages (a) for the employer and (b) for the employee of reducing the minimum time periods when 100 or more redundancies are proposed to 60, 45 or 30 days?

The proposed time periods appear arbitrary. It is not clear on what evidence they are put forward. The employees affected when there are 100 or more redundancies are the most vulnerable and they need the maximum protection for the reasons set out in answer to questions 15 and 18 above. If all sides reach agreement before 90 days then they can end the consultation voluntarily. But setting reduced periods is artificial and helpful to no one.

Question 20

How critical is the length of the statutory minimum time periods in instances of high-impact redundancies? Why?

It is not clear what definition of “high impact redundancies” is being used. Is it high impact as a large number of redundancies or high impact on a local economy? All redundancies are “high impact” on the individual and their dependant family. Clearly though, as said in answer to 15 and 18 above, where there are large scale redundancies, and in areas of high unemployment, 90 days is critical as it enables both employer and state intervention to support the workers into new jobs.

Reaching agreement and supporting the workforce, their families and the community, whatever part of the country they are in, is far more important than how long it takes to achieve.

Any move to reduce the minimum time periods according to whether the proposed redundancies are “high impact” or not, or according to where in the country they are taking place, would create an administrative nightmare and introduce a lack of consistency and predictability for employers.

Question 21

What would be the advantages or disadvantages of increasing the threshold for the number of redundancies proposed for the 90 day notification period (i.e. increasing it to a number above 100 redundancies)? What should the threshold be?

Increasing the threshold of the numbers affected for the 90 day notification period makes no sense

for employees or employers. There is no empirical or economic argument to increase the threshold.

Question 22

What would be the advantages or disadvantages of a graduated threshold with different time periods applying for different numbers of redundancies?

A graduated threshold would be an administrative nightmare which goes against the government's aim of deregulation, slashing red tape and reducing burdens on business.

Question 23

The Government is also calling for evidence on the Transfer of Undertakings (Protection of Employment) Regulations. Please identify any issues that you have in terms of how the TUPE Regulations and the rules on collective redundancy consultation fit together.

The obligations to inform and consult are the same in TUPE and collective redundancy. The rules are easy to comply with. They are good practice and not onerous. We see relatively few cases where there has been a failure by employers to understand their obligations.

There are of course ways in which employers can and do use the regulations to their advantage. For example, if a transferee doesn't want a group of employees they can be made redundant before the transfer.

Question 24

What special considerations relating to collective redundancy consultations arise from insolvencies?

Insolvencies are rarely unexpected for those who own a company. Employers could and should be entering into meaningful consultation at an early stage - as soon as they know that insolvency may be coming – with a view to avoiding redundancies.

The current 30/90 day consultation periods must still apply in insolvency situations in order to prevent unscrupulous employers using insolvency as a veil to avoid their obligations to consult.

Where an employer becomes insolvent, whether contracts of employment continue depends on the type of insolvency. They continue where a company is in voluntary receivership and a receiver or administrator is appointed. The receiver or administrator's obligations to consult under the redundancy process is the same as if they were the employer although they will not usually become liable to pay compensation themselves.

Employers do have a "special circumstances" defence which relieves them of their duties to an extent, if there are exceptional circumstances, physical or financial, which mean that it would not be reasonably practicable to discharge their collective consultation duties. Insolvency may be an example. However, the Court of Appeal in **Clarks of Hove Ltd v Bakers Union (1979)** found that while there may be special circumstances in the event of sudden disaster which makes it necessary for an employer to close down a business, they must take all reasonably practicable steps towards compliance.

An employer cannot therefore escape their duties by simply doing nothing. The provisions exist to strike a balance between the employee's rights and flexibility for the employer in certain exceptional circumstances.

Further information:

Thompsons Solicitors

Congress House

Great Russell Street

London

WC1B 3LW

jenniewalsh@thompsons.law.co.uk