

Consultation Matters

The new Information and Consultation Regulations are expected to have a big impact in April, however this month we look at two cases concerning the existing consultation obligations that may have just as big an impact on UK businesses of all sizes.

The current employment legislation requires that collective consultation is carried out in respect of certain business transfers and in relation to mass redundancies. The term "mass" meaning here that there has to be at least 20 redundancies before the consultation obligations are triggered.

What may not be appreciated is that for the purposes of collective consultation the term "redundancy" has a wide meaning. It is not confined to the circumstances where an employee will qualify for a redundancy payment because the business is closing down or staff levels are being cut back. In this context it covers any dismissal that is for a reason that does not relate to the individual. This is much wider and will cover most reorganisations where changes in terms and conditions can only be

enforced through dismissal and re-engagement.

In the case of **Hardy v Tourism South East** the employer had two main offices 100 miles apart. It decided that it needed to restructure. One of the offices would close and a smaller sub office opened. It was hoped that most of the staff would be redeployed either to the other main office or the new smaller one. There were 26 employees located in the office that was to close but it was considered by management that of these there would only be 12 redundancies.

It was expected the others would successfully apply for and obtain the other posts in the organisation. However the employees did not react as management expected and after the first round of consultation the number of likely redundancies

stood at 19 and later increased to 20.

Mrs Hardy was one of the employees made redundant. She made an application to the Tribunal that the employer had failed to carry out collective consultation. The claim was rejected on the grounds that the employer had not proposed to make 20 employees redundant. It had proposed to redeploy 14 employees and make 12 employees redundant. Therefore the trigger point for collective consultation had not been reached. Mrs Hardy appealed.

The Employment Appeal Tribunal agreed that the issue of whether the consultation obligations applied had to be decided by having regard to the employer's proposals. The key question was whether the employer was 'proposing to dismiss'.

The evidence here was that the employer was counting on the employees being redeployed. Was that a dismissal? In the judgement of the Employment Appeal Tribunal it was. It held that the employer proposes to dismiss, if it intends to withdraw the existing contract of employment, or it intends to make such substantial departures from it as to amount to it being withdrawn. Here the employer proposed keeping the employees in his employment but in different contracts of employment, it followed that it proposed to dismiss them from the existing contract.

The decision is a warning in relation to any re-organisation. If there are substantial changes proposed then even if it is believed that the employees will accept them the risk is that the collective consultation obligations will be found to apply.

Judging whether the changes are substantial will depend on the circumstances of each case. Consideration will need to be given to the terms of the contract, the terms of the proposed redeployment and the circumstances in which it is offered. If in this case the employment contract had contained a well drafted mobility clause it is unlikely that the employer would have been found to have been proposing dismissal.

A cautious approach may now be better as the penalties for failing to collectively consult can be severe. The "dismissed" employees may be awarded a sum of up to 90 days pay each.

Timing of Notice

The collective consultation legislation in relation to redundancies was implemented to put into effect in the UK the EU Collective Redundancies Directive. This was itself the subject of an appeal hearing this month. In the German case of **Junk v Kuhnel** the European Court of Justice was asked to decide when an employer can give notice of redundancy. The Directive stipulates that there should be a minimum period of collective consultation before the employees are made redundant. In the UK the period can be 30 days or 90 days depending upon the number of redundancies. However it is unclear what stage of the process is being referred to in the Directive' by term made "redundant". It could be the giving of notice of redundancy or the end of the notice period.

Commercially this can be an important issue. If it is the latter the employer can issue notice of dismissal in the consultation period and will comply with the consultation obligations as long as it expires after the minimum consultation period has ended. If on the other hand notice cannot be given until the end of the consultation period the employer has to budget for wages to cover the period of notice in addition to the consultation period.

The European Court of Justice held that giving notice of dismissal signifies that a decision has been reached and that this should not be done during the consultation period. In so doing it rejected the

interpretation given to the Directive by the UK Government.

If the UK legislation is now interpreted in this same way it may allow employees to claim what in practice would be a lump sum payment in lieu of notice at the end of the statutory consultation period. Again a cautious approach would be advised until such time as the UK courts can provide clarity on this issue.

Compensation increases

From 1st February the following increases to compensation limits were made:

Weeks pay £270 - £280

Unfair dismissal £55,000 - £56,800

Basic award £8,100 - £8,400

For further information about Employment generally please contact:

Employment Department
+44 (0)870 365 8000

If you have any comments or would prefer to receive our Employment information electronically, please email:
christopher.davies@halliwells.com

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Business Development
+44 (0)870 365 8000

www.halliwells.com