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Collective Redundancy Consultation for Employees facing Insolvency

Response from the Employment Lawyers Association

12 June 2015

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INTRODUCTION

1. The Employment Lawyers Association (ELA) is an unaffiliated and non-political group of specialists in the field of employment. Our membership includes those who represent and advise both employers and employees. It is not our role to comment on the political merits of proposed legislation, rather we make observations from a legal standpoint.

2. ELA's Legislative and Policy Committee is made up of both Solicitors and Barristers who meet regularly for a number of purposes; including to consider and respond to proposed new legislation.

3. A working group was set up by the Legislative and Policy Committee under the chairmanship of Robert Davies of CMS Cameron McKenna LLP to consider and comment on the Insolvency Service's Call for Evidence in respect of Collective Redundancy Consultation for Employers facing Insolvency ("the Call for Evidence"). A full list of the members of the working group is set out in the Appendix. Our response is set out below.

4. We have sought to provide observations from the working group's experience in advising companies and insolvency practitioners (IPs) in responding to the Call for Evidence. There are, however, certain questions which are more naturally answered by IPs and directors by virtue of their subject matter and we have not sought to speculate in relation to such questions. It is also important to emphasise that it was not possible to involve a member of ELA as part of the working party who has extensive or pre-dominant experience of advising individual employees and/or trade unions in the context of collective redundancies. Whilst we have sought to incorporate some thoughts from this perspective we emphasise this point which should be taken into account when reviewing this response. (We also expect that the Insolvency Service will receive responses from trade unions and their advisers to the Call for Evidence.)

BACKGROUND

An insolvency process (or the threat of one) does, of course present particular challenges for employers and IPs who seek to comply with employment law and have due regard to the rights of creditors and potentially save some or all of the business. Insolvency scenarios perhaps throw into very sharp relief why a "one size fits all" approach is not helpful. In some cases, it may be possible for the employer and/or the IP to comply with both their employment law and wider obligations, however, certain practical difficulties and potential anomalies do arise under the current regime.

The minimum consultation periods under TULRCA are 30 and 45 days, depending on the number of affected employees. However, this is at odds with the "window" of 14 days in which an administrator has to decide whether or not to adopt the contracts of employment of the employees under the *Paramount* ([1994] 2 All ER 513) principles. Any employee who remains in employment after that date has his or her contract of employment adopted.

The consequences of adoption are that qualifying liabilities under those contracts incurred after adoption acquire "super priority" status. Qualifying liabilities are limited to wages and salary, but include holiday pay, sick pay, pay in lieu of holiday and payments into an occupational pension scheme. They do not include a protective award (*Krasner v McMath [2005] EWCA Civ 1072*).

Clearly every insolvency will be different and in some cases, the employees will be retained for a period longer than the 14 day window in order to, for example, achieve a sale of some or all of the business or to effect an orderly wind down etc. However, where the on-going operation of the business is not feasible, IPs are left with the prospect of incurring super priority debts which are likely adversely to impact the monies available for floating charge holders and unsecured creditors if they continue to employ the employees for the full consultation period, or using the 14 day window to avoid this, but then potentially incurring a liability for a failure to inform and consult.

QUESTIONS AND REPLIES

1) What are the considerations undertaken when deciding whether or not to start consultation? How is it decided in practice where an employer is facing, or has moved into, insolvency?

The obligation to inform and consult may present an employer facing the prospect of insolvency with significant practical difficulties. If a standing employee body already exists which covers the entire workforce, then it may be possible to seek to inform and consult that body on a confidential basis. However, even in this case, the risk of a leak is likely to be a concern for the directors. Where no standing body exists, or where that body does not represent the entire workforce the employer would need to organise elections. As well as being time consuming (typically, an election process might take between 2 and 4 weeks if a multi-site national operation), engaging with the workforce on this basis means that it is highly likely that a leak would occur. If trading partners etc become aware that a business is consulting about the redundancy of, potentially, its entire workforce, then this is likely significantly to increase the risks to the business and may result in insolvency becoming a self-fulfilling prophecy. It is a policy consideration and decision for government to determine where the balance should lie in these circumstances.

2) How does meaningful consultation with a "view to reaching agreement" work in practice? How does notification work in practice?

The legislation specifies consultation about ways of avoiding dismissals, reducing the number of dismissals and mitigating the consequences of dismissals. In an insolvency situation, in many cases the first (and, often, the second) of these aims is unlikely to be achieved and the parties are more likely to concentrate on reducing numbers of dismissals and mitigating the effects. In cases where there are only modest (if any) sums available, mitigation may take the form of practical

assistance e.g. help with CV writing, generous time off to seek alternative employment, a visit by the local job centre etc.

3) What do you understand the benefits of consultation and notification where an employer is facing, or has become, insolvent? What further benefits do you think we could encourage?

Provision of information at the appropriate time is important to help employees to assess what they need, individually as well as collectively, to do. There is a risk that expectations on the part of the workforce may be raised beyond what is realistic in practice in the event of an employer facing insolvency, in that the actual scope to avoid, or even to reduce the number of, dismissals may be severely constrained.

4) In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?

In a non-unionised environment our experience is that this is very limited.

5) What factors, where present, best facilitate effective consultation where an employer is imminently facing or has become, insolvent?

Consultation may more readily occur if there are pre-existing employee representatives. Even then, the lack of time within which to make decisions about the employees may, in some cases, hinder effective consultation.

6) What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when am employer is imminently facing or has moved into insolvency?

See general comments above in the Background and the previous answers.

7) What factors, where present, negatively impact on the quality and effectiveness of consultation where an employer is facing insolvency, or has become insolvent?

In essence, time and resources.

8) Are advisors informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?

In our experience, yes. The focus then becomes one of how realistic some consultation may be in the circumstances.

9) Are directors facing insolvency starting consultation and notifying the Secretary of State as soon as collective redundancies are proposed and at the latest when they first make contact with an IP? If not, how can this be encouraged?

This is beyond the scope of our response.

10) Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?

Unlike in some other EU countries, absent a request from the workforce, there is no requirement under English law for employers to have a standing employee representative body. Where no such body exists, or where one does exist but does not cover the entire workforce, there can be

significant practical difficulties in organising elections. This is exacerbated if employees are in disparate locations, are not desk based and/or do not have access to personalised work or home based electronic communications.

11) How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?

This is beyond the scope of our response.

12) How might the process for notifying the Secretary of State and sharing information with third parties be improved?

This is beyond the scope of our response.

13) Could the process requirements for consultation be further clarified and improved?

It would be helpful to have a clearer acknowledgement/understanding of the consequences in terms of likely awards/compliance in circumstances where, despite the efforts of the employer and/or IP, consultation is likely to prove futile.

14) Would further guidance be helpful, and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?

Please see response 13. We would suggest revisiting the primary legislation first (although acknowledging that European jurisprudence may significantly restrict any changes to the designation of "special circumstances"), but recognise that this is a policy issue for Government.

15) How can the Government best incentivise or disincentivise the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?

Please see our response to questions 14 and 18.

16) What would most encourage constructive engagement by employees when in this situation? How can employees be best supported?

This is beyond the scope of our response.

17) Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?

No.

18) The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become, insolvent? Is the situation different as it applies to directors and IPs respectively?

Please refer to our response to questions 13 and 14 above. We think that it might be helpful if the Insolvency Service might be able to summarise, whether in the form of guidance or otherwise, various of the practical/financial challenges faced by IPs, in the context of insolvencies, when there are no pre-existing employee representatives. Such information might be usefully shared with the Employment Tribunals and may be referred to when assessing protective awards.

Ultimately, if insufficient account is taken of the challenges faced in undertaking consultation with the aims specified in TULRCA, that may prove to be a dis-incentive for consultation to occur; in other words, if the likely outcome is a protective award at or towards the upper end of the 90 day spectrum irrespective of the actual circumstances, that may prove to be a dis-incentive to consult at all.

19) How well is the MoU working?

This is beyond the scope of our response.

APPENDIX

WORKING PARTY

Robert Davies, CMS Cameron McKenna LLP
Catrina Smith, Norton Rose Fulbright LLP