

Redundancy and Collective Consultation

ELA Introduction to Employment Law



Today's presenters



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The aim of today's session

- To provide an overview of an individual redundancy process
- To provide an overview of the key elements of a collective consultation process in a redundancy situation
 - When is the duty triggered?
 - Whom to inform and consult?
 - The process to be followed
 - Penalties for non-compliance
- To provide practical tips on issues to consider before and during a redundancy exercise

Is there a redundancy situation?

- The statutory definition covers three specific situations:
 - The closure of a business
 - The closure of a particular place of work
 - A diminishing need for employees to carry out work of a particular kind
- A dismissal will not be for redundancy unless it falls within one of these three situations

Is there a redundancy situation?

- **Where an employer has ceased, or intends to cease, carrying on the business for the purposes of which the employee was employed** (s.139(1)(a)(i) ERA 1996), e.g. closure of manufacturing business resulting in dismissal of all employees
- **Where an employer has ceased, or intends to cease, carrying on the business in the place where the employee was employed** (s.139(1)(a)(ii) ERA 1996)
 - Where is an employee employed to work?
 - Consider impact of mobility clauses
- **Where the requirements of the business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where they are employed, have ceased or diminished** (s.139(1)(b) ERA 1996), e.g. employer requires fewer employees to do the same amount of work, there is less work available, etc.

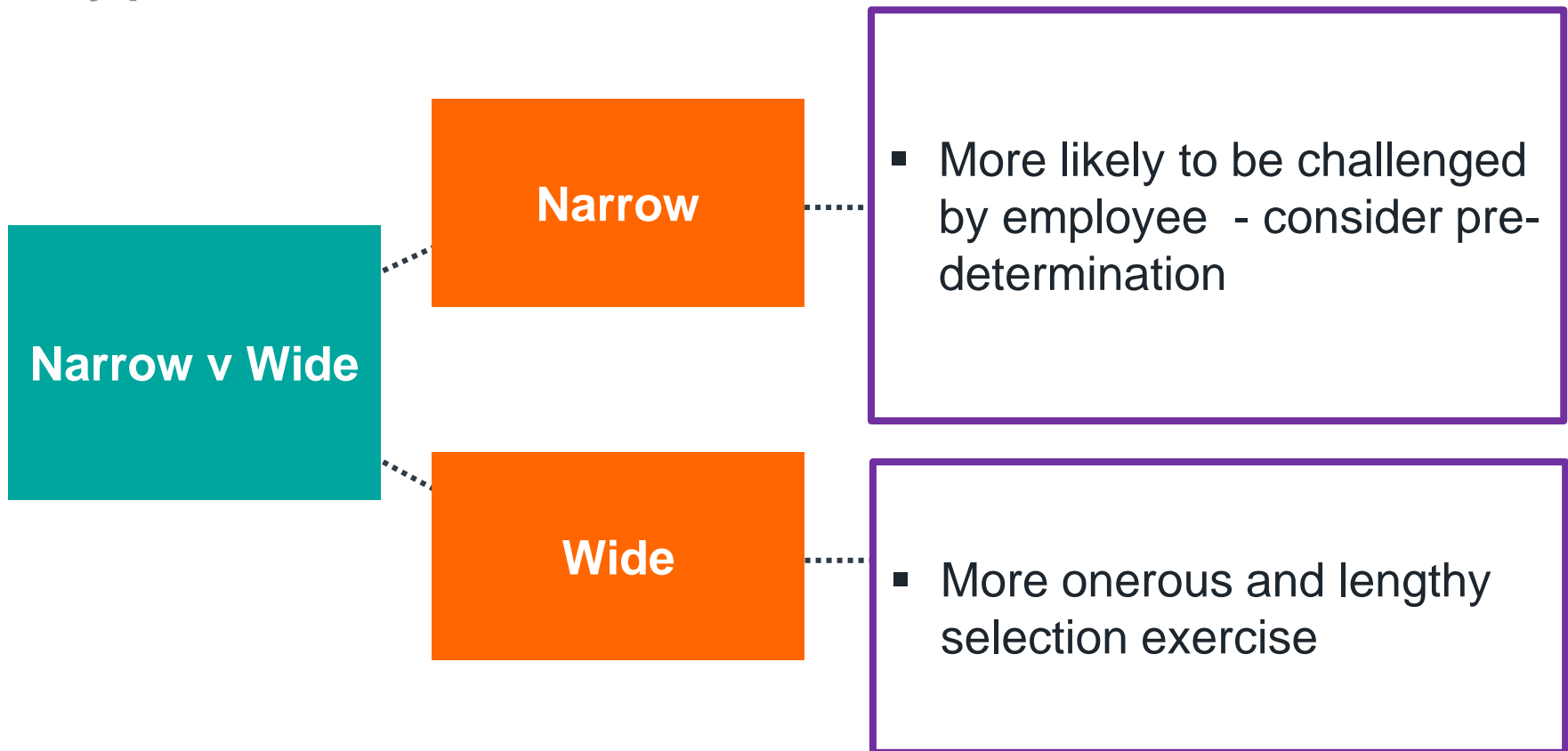
Other points to watch out for

- Restructuring/reorganisation
- Fixed-term contracts
- TUPE transfers
- Bumping

- Key consideration - how many employees are you proposing to dismiss?
- Individual consultation – fair procedure – applies irrespective of the number of redundancies
- The Acas Code of Practice on Disciplinary and Grievance Procedures does not apply to redundancy dismissals
- Collective consultation – requirements are set out in statute (s.188 TULR(C)A 1992)

- Selection
 - The pool for selection
 - Is a pool required or is the “at risk” role self-selecting?
 - What type of work is ceasing or diminishing?
 - To what extent are employees doing the same work?
 - To what extent are employees’ jobs interchangeable?
 - Has a specific selection pool been agreed with the union or employee representatives?
 - The pool must be within the “range of reasonable responses”

Key points to consider:



Always consider what is reasonable in all of the circumstances

Redundancy selection criteria

- Criteria should reflect the current and future needs of the business
- Employees should be assessed against the criteria over a fair period
- Have a fair (i.e. objective and transparent) way of assessing them which you are able to clearly document
- Criteria and scoring mechanism should produce clear distinctions between employees
- Managers should score consistently
- Keep an audit trail/notes of discussions

- Commonly used selection criteria
 - Skills and knowledge
 - Attendance
 - Disciplinary records
 - LIFO?

Points to watch out for

- Automatically unfair reasons
- Discriminatory criteria
- Pregnant women/maternity leave/family leave
- Employees absent on health grounds
- Part-time workers/fixed-term employees
- Any established/agreed redundancy selection criteria – if depart from these, explain why and seek to agree

Employer discretion over selection criteria

- The aim of individual consultation is to:
 - Explain to the employee why they have been provisionally selected for redundancy
 - Give the employee the opportunity to express their views and raise any questions
 - Discuss and/or identify any alternatives to redundancy, including any alternative employment available
- What about “bumping”?
- Consultation does not mean the employer has to agree with what the employee says - but it must genuinely consider what the employee has to say
- Individual consultation should not cover collective matters that have already been discussed and concluded as part of collective consultation
- What if a grievance is raised by an individual?

- Usually advisable to have at least two consultation meetings
- The right to be accompanied
- Right of appeal?
- Individual consultation must take place prior to the employee being given notice
- Do not forget about individuals who are absent from work, e.g. on maternity leave or long-term sick leave

- Employers are under a positive duty to look for alternative employment to avoid the need for redundancy. Key points to consider:
 - Consider all vacant positions. Provide details of vacancies in group companies, where practicable
 - Make sure search for alternative employment is sufficiently thorough
 - Provide sufficient information about vacancies so employee can take informed view about suitability - do not make assumptions about suitability
 - Employer is not obliged to create alternative employment
 - Ensure any searches are documented
 - Consider most appropriate method of selection (i.e. scoring, interviews, assessments)
 - Continue searches until termination date (not just date on which notice of termination served)

Points to watch out for:

- Employees on maternity leave have an automatic right to be offered any suitable vacancies (the “Regulation 10” right)
- If an affected employee is disabled, consider reasonable adjustments when selecting employees for alternative vacancies
- New legislation will extend redundancy protection for pregnant women and new parents

Statutory trial periods:

- Four-week statutory trial period if Ts&Cs of new role differ
- Employer and employee to assess the suitability of new role
- May be extended only for the purposes of retraining
- Successful → continuity preserved and no statutory redundancy pay entitlement
- Unsuccessful → dismissed at the date the original contract ended (for statutory redundancy pay purposes)

Statutory redundancy pay

- Minimum two years' service
- Calculation based on pay, service and age
- Cap on weekly pay - current weekly maximum £643
- Refusal of suitable alternative employment may affect entitlement

Enhanced redundancy pay

- Unfair dismissal
 - Employee must generally have at least two years' continuous employment
 - Automatically unfair reasons
 - Basic award set off against statutory redundancy pay
 - Maximum compensatory award – the lower of 52 weeks' pay or statutory cap (currently £105,707)

- Discrimination
 - No qualifying period of service
 - No statutory cap on amount of compensation that can be awarded

To ensure that a dismissal for redundancy is fair, an employer must establish that:

- Redundancy is the **real** reason for the dismissal;
- It acted **reasonably**, in all the circumstances of the case, in treating redundancy as the reason for dismissing the employee. In practice, this means "procedural fairness".

So how can we ensure "procedural fairness"?

- Provide employees with advance warning;
- A reasonable redundancy pool;
- Apply selection criteria fairly/objectively;
- Consult with employees;
- Consider alternative employment;
- Provide right of appeal;
- Consider internal policies.

What this entails will depend on the circumstances

When does the duty to consult collectively arise?

The obligation to consult collectively is triggered “***where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less...***” (S.188(1) TULR(C)A 1992)

“where an employer is proposing to dismiss as redundant ...”

- The employer is the legal entity that employs the employee
- Group companies are separate employers for these purposes
- Dismissal has the same meaning as in s.95 Employment Rights Act 1996 – note certain fixed-term contracts are excluded from the duty to consult collectively
- “Proposing” to dismiss vs “contemplated”
- Wide definition of redundancy for collective consultation purposes. For example, the duty may be triggered when seeking to change terms and conditions of employment by dismissal and re-engagement

“... 20 or more employees...”

- Voluntary redundancies are generally included.
- Employees on fixed-term contracts are not included if the fixed-term contract is coming to the end of its agreed duration.
- Redeployment will count towards the total number of proposed dismissals.
- **Question:** Would you include employees who may be entering into settlement agreements?
 - Yes, irrelevant for the purpose of calculating relevant thresholds for collective consultation.
 - Remember – you cannot waive claims for a failure to inform and consult on collective redundancies under a settlement agreement, but you can potentially settle a claim for a failure to pay a protective award.

Scenario 1

Function A proposes to make 15 redundancies on 1 September. Function B proposes to make 15 redundancies on 10 September.

- 20 or more proposed redundancies within a 90-day period
- Collective consultation obligations apply

Scenario 2

Function A proposes to make 15 redundancies on 1 September. Function B proposes to make 15 redundancies on 1 January.

- 15 proposed redundancies on 1 September and 15 proposed redundancies on 1 January
- The two batches of 15 proposed redundancies are more than 90 days apart
- No collective consultation is required and only individual consultation is needed
- This is the case even if the timing of the dismissals was deliberately staggered

Scenario 3

- Function A proposes to make 20 redundancies on 1 September and starts collective consultation. Shortly after the start of that collective consultation, Function B proposes to make 15 redundancies on 1 November.
 - If collective consultation has already started in respect of one batch of proposed redundancies, those dismissals do not have to be taken into account for any subsequent batch (s.188(3) TULR(C)A)
 - Function A's proposed redundancies can be discounted for the purposes of considering Function B
 - Function B's proposed dismissals are fewer than 20 in number
 - No collective consultation required for Function B (only individual consultation)
- **CAUTION** - a Tribunal will scrutinise what was in the employer's mind
- **CAUTION** – ECJ's decision in *UQ v Marclean Technologies* (C-300-19)

“...at one establishment ...”

- An “establishment” is the unit to which the employees are assigned to carry out their duties.
- Leading case: ***USDAW & anor v WW Realisation 1 Ltd (in liquidation), Ethel Austin Ltd & anor*** (C-80/14) (each Woolworths store was an establishment for collective consultation purposes)
- For multi-site employers, this will normally be the individual site/office/store where the employee works
- Potentially more complicated in relation to mobile workforces/“field” staff
- Very little UK case law on meaning of “establishment”

“...within a period of 90 days or less”

- Rolling period of 90 days – detailed planning/overview is key. Need to have visibility of number of proposed redundancies within any rolling 90-day period.
- If the relevant employer proposes to carry out the dismissals over a longer period of time, such that 20 dismissals are not proposed to occur within a 90-day period, then the duty to consult collectively will not arise.

Whom should you consult?

- ***“The employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.”***

- “Appropriate representatives” of the affected employees – so not necessarily just those employees who are at risk of redundancy.
 - Trade union representatives; or
 - Employee representatives (if no recognised union)
 - Either an existing representative body if one exists and it satisfies certain conditions, in particular that it has authority from the affected employees to receive information and be consulted about the proposed dismissals on their behalf; or
 - An employee representative group specifically elected by affected employees for the purposes of this consultation exercise.

Q: “If we have an existing employee liaison group, can we use that?”

A: Potentially, but a number of issues to consider first, including:

- For what purpose was it established? Does that group have authority to be consulted on the redundancies? How were the members appointed or elected? Is it representative of the affected employees?
- Safest approach is to elect reps specifically for these purposes – but need to build in time for elections, etc.



Electing employee representatives – practical tips

- Ensure you comply with detailed requirements set out in TULR(C)A
- Decide on number of representatives to be elected – will the representatives represent the affected employees as a whole (e.g. all employees in a particular division) or will different classes of affected employee have their own representatives (e.g. by reference to department/role/seniority)?
- Ensure there are sufficient reps to represent the interests of all affected employees but not too many so the process doesn't work effectively!
- Decide on and announce process for nominations, e.g. can candidates nominate themselves or must they be nominated by one or more colleagues? No ballot necessary if one candidate per particular constituency.

Electing employee representatives – practical tips (cont...)

- Consider how you will carry out the process if staff are working remotely
- Ensure appropriate safeguards are in place to protect confidentiality
- Consider training for employee reps on roles and responsibilities
- Who will provide the training? Internal HR or external lawyer or HR consultant?

The rights of appropriate representatives

- Must be allowed to have access to the affected employees and to have such accommodation and other facilities as may be appropriate.
- Appropriate representatives are also entitled to reasonable paid time off during working hours to perform their functions. Representatives must therefore be allowed sufficient time to discuss issues amongst themselves and communicate effectively with the employees they are representing.
- Representatives have certain statutory rights, e.g. the right not to be dismissed or to suffer a detriment for a reason connected with their status or activities as representatives.

When must consultation begin?

Must take place before any final decisions on the proposals are made

A dismissal 'takes effect' when the employment contract comes to an end, e.g. the date on which notice to terminate expires

Collective consultation periods:

- 20 – 99 employees → minimum 30 day collective consultation process
- 100+ employees → minimum 45 day collective consultation process

These are minimum time periods – consultation could take longer



- Must disclose, in writing, the following information to the appropriate representatives (“s188 information”):
 - Reasons for the proposals.
 - Numbers and descriptions of employees you propose to dismiss as redundant.
 - Total number of employees of that description employed at the establishment in question.
 - Proposed method of selection.
 - Proposed method of carrying out the dismissals.
 - Proposed method of calculating redundancy payments.
 - Number of agency workers, where they are working and the type of work they are doing.

- The obligation to consult with appropriate representatives relates to any employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.

- Consultation must include consultation about ways of:
 - Avoiding the dismissals.
 - Reducing the number of employees to be dismissed.
 - Mitigating the consequences of dismissals.

- Must be undertaken with an open mind and “with a view to reaching agreement on the proposals”.

- **No final decisions on the proposals can be made until collective consultation has been concluded.**

- Risk of a protective award.
 - No qualifying service required.
 - 90 days' actual gross pay per employee.
 - Punitive not compensatory.
 - “Special circumstances” defence – very narrowly construed.
- Increased risk of unfair dismissal claims for those who have two years' qualifying service
- Maximum compensatory award for unfair dismissal currently £105,707 or 52 weeks' pay (whichever is lower) plus a basic award.

- HR1 Form - Obligation to notify the Secretary of State.
 - Must be lodged before notices of dismissal are issued and at least 30/45 days before the first dismissal takes effect.
- Failure to notify = criminal offence.
- Remember that any documents/emails, etc. will be disclosable in tribunal proceedings or data subject access requests.
- Acas Guidance
- Consider discrimination risks also – ensure maternity leavers and those absent on sick leave are carefully considered as part of the arrangements

Typical redundancy consultation process

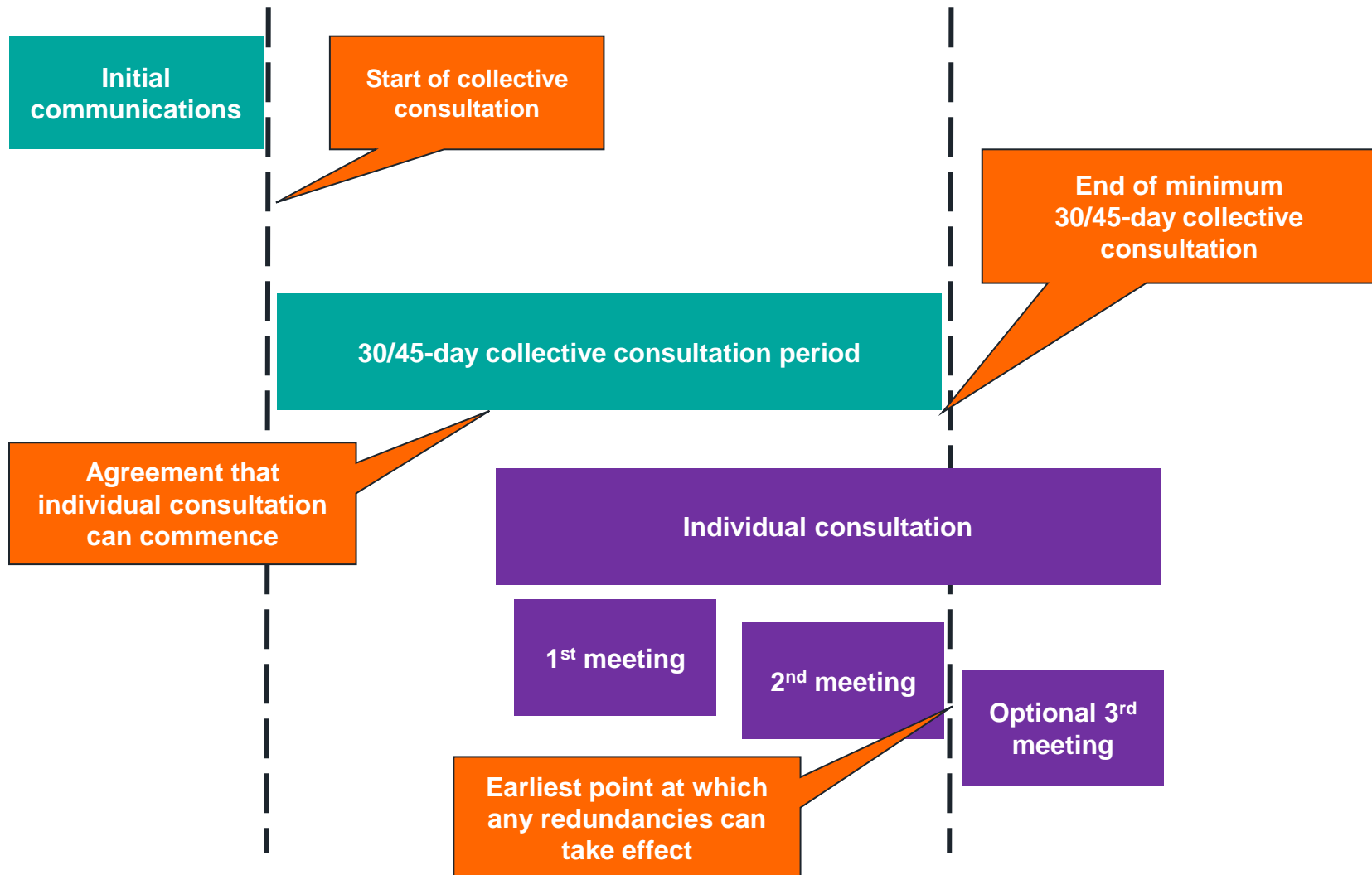
Step	Action	Due by Date
1	Initial steps – e.g. statement/announcement to all employees in affected areas regarding proposals and explaining rationale, consultation process and next steps	Day 1
2	Email to all employees confirming the details of the announcement (to include those not in the business – on holiday, sick leave, maternity or parental leave, etc.).	Day 1
3	If needed, announce elections for employee representatives. Circulate nomination forms and invite nominations.	Day 1
4	Close nominations for employee representatives. If not contested, announce appointments.	Day 3
5	If ballot necessary, send out notification of ballot, ballot papers and open voting.	Days 4/5

Typical redundancy consultation process

Step	Action	Due by Date
6	Ballot and announce results. Inform successful and unsuccessful candidates of outcome. Consider arranging training for employee reps.	Days 8 - 10
7	Start of formal collective consultation process - Issue s.188 letter together with HR1 Form to appropriate representatives. Send HR1 Form to the government. First collective consultation meeting with appropriate representatives. S.188 letter and proposals will form the agenda for this first meeting.	Day 15
8	Further collective consultation meetings. Q&As from previous meetings and new questions will form the main agenda for these meetings.	Days 23 – 30
9	End of formal collective consultation process – i.e. 30 days after Day 15. (Assumes 30-day consultation process).	Day 45
10	Individual consultation process	Day 46 onwards

- By agreement with the employee reps, you can commence individual consultation during the latter part of the collective consultation process
- Individual consultation can even be concluded and notice of redundancy served during the collective consultation process
- **Important: where notice is served during the collective consultation period, the termination date must fall at least one day after the expiry of the 30 (or 45) minimum collective consultation period**

Sample timeline for expedited consultation process





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