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# Call for Evidence on Collective Redundancy Consultation Rules

## Response from the Employment Lawyers Association

## 31st January 2012

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## INTRODUCTION

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by the Legislative and Policy Committee of the ELA under the chairmanship of John Evason and Paul Harrison of Baker & McKenzie LLP to consider and comment on the Call for Evidence on Collective Redundancy Consultation Rules. Its report is set out below. A full list of the members of the sub-committee is annexed to the report.

Our comments are divided according to the section and question numbers used in the Call for Evidence.

### Introductory Questions

1. **Question 1: How many consultations has your organisation undertaken in the last five years (since November 2006) on collective consultations where: (a) 100 or more redundancies were proposed within a 90 day period? or (b) between 20 and 99 redundancies were proposed within a 90 day period.**

   Not applicable. Members of the sub-committee have extensive experience of providing advice to employers, employees and employee representatives on collective consultations.

2. **Of the consultations that you reported in Question 1 please indicate the duration of each according to t he categories below where there were 100 or more redundancies proposed.**

   N/A.

3. **Question 3: Of the consultations that you reported in Question 1 please indicate the duration of each according to the categories below where there were between 20 and 99 redundancies.**

   N/A.

4. **Question 4: If any consultations took more than 90 days to complete, please say how many days these consultations lasted for.**

   N/A.

5. **Question 5: Over the last 5 years, how many employees have been made redundant from your organisation as part of a 100+ collective redundancy exercise?**

N/A.

**6. Question 6: Are you aware of your rights and obligations under sections 188 - 192 of the Trade Union and Labour Relations (Consolidation) Act 1992?**

N/A.

**7. Question 7: With whom do you consult about collective redundancies? What are the advantages and disadvantages of engaging with different types of representative.**

7.1 Members of the working party have experience of advising on collective consultations with all types of employee representative, including trade unions, pre-existing consultations bodies and specially elected representatives.

7.2 In our experience the consultation process tends to be easier and more effective with pre-existing representatives, whether a trade union or pre-existing consultation body. These bodies tend to be more familiar with their roles, have a broader understanding of the employer's business and have a pragmatic understanding of the purpose of consultation. As such they tend to be more effective at identifying relevant issues and representing employees' views. In addition, consulting with these representatives saves the time involved in electing new representatives and training them.

7.3 However, much does depend on the existing state of relations between the parties. Where relations with existing representatives are strained, consultations can be more difficult and the representatives are aware of how to approach negotiations in a way which makes it more difficult.

7.4 In addition, some members of the working party had experienced difficulties with trade union representatives being less engaged where the affected employees are not union members. Under current legislation, there is no option to consult with other representatives, if a trade union is recognised in respect of the elected employees, whether or not the employees are union members.

We note that where individual affected employees consider that they have been badly represented by their representatives (whether unions or elected representatives) e.g. where an employer has failed to consult properly and the employee representatives do nothing about this, individual employees have no recourse and cannot bring a claim for breach of s.188 themselves. However, we also note that from an employer's perspective, where there are legitimate representatives, it would bring additional uncertainty to the consultation process if employees could still bring individual claims. The employer could not rely on agreements with the representatives about how to deal with the consultation process.

7.5 Some employers prefer to consult directly with employees, where there are no existing representatives, albeit that this is not consistent with the legislation.

**Section 1: Process of consultation**

**8. What factors: (a) make agreement difficult? (b) make agreement more likely?**

8.1 In our experience, the factors which make agreement more likely include the following:

(a) Having experienced (or at least well trained) employee representatives with an understanding of their role;

(b) Having sufficiently senior management directly involved in the consultation process to show that it is taken seriously and for them to have enough information and decision making power to engage with the employee representatives;

(c) Good general relations between management and employee representatives;

(d) An ability and willingness on the part of management to make changes. Management may sometimes not wish to engage with employee representatives or may anticipate in advance the points which employee representatives may make, take them into account but then be reluctant to make any changes to their proposal. Having an open mind and flexibility to make some changes is helpful in demonstrating to employee representatives that employees' suggestions are being considered;

(e) Provision of sufficient information by management for employee representatives to understand at an early stage the business reasons for the proposals and the wider context;

(f) An ability to offer a more generous redundancy package than the statutory minimum;

(g) Good planning of the consultation. Selecting an appropriate number and geographical spread of representatives (where they are being elected). Allowing sufficient time for the consultation meetings and providing employee representatives with appropriate time and support in communicating with employees (e.g. use of e-mail/intranet sites etc).

(h) The reasons for the redundancy e.g. in the case of a site or business closure where there are no issues of selection, there may often be little to reach agreement on.

8.2 The factors which make agreement less likely are generally the reverse of those listed at paragraph 8.1.

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

9.1 UK case law on the obligation to consult often cites the meaning of consultation given by Glidewell LJ in *R v British Coal Corpn, ex p Price [1994] IRLR 72, Div Ct* which emphasised that an employer is not obliged to adopt any or all of the views of employee representatives, but stated that:

*"Fair consultation means:*

*(*a*) consultation when the proposals are still at a formative stage;*

*(*b*) adequate information upon which to respond;*

*(*c*) adequate time in which to respond;*

*(*d*) conscientious consideration … of the response to consultation."*

9.2 The ECJ has stated that the obligation under the Collective Redundancies Directive (the "Directive") appears to amount to an obligation to negotiate (*Junk v Kuhnel*) which may suggest a higher requirement. However, it is clear that there is an obligation to try to reach agreement but no obligation actually to do so.

9.3 In our experience it is sometimes possible to reach agreement with the employee representatives that the consultation process has been completed, even where the parties have not agreed substantively. Where that is not possible, it is often difficult for employers to be certain when consultation is completed. However, it may be possible to reach the conclusion that consultation has been completed where an employer has given employees all the

information required by the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"), has discussed all three of the minimum areas for consultation and has considered and responded to all counter-proposals in an attempt to reach agreement and answered all questions raised by representatives. Often, by this stage, the points being raised by employee representatives will be points which have already been considered and dealt with earlier in the process.

9.4 One further issue which can cause confusion for employers is the extent to which they can start individual consultation with affected employees before the collective consultation process completed. It is clear from the *Junk* decision, that notice cannot be issued before the collective consultation process is completed. However, employers are often keen to start up an individual dialogue between affected employees and their line managers at an early stage and individual consultation is generally required before giving notice. Individual consultation is not an irrevocable step towards implementing a redundancy in the same way that giving notice is and commencing individual consultation may therefore not be inconsistent with ongoing collective consultation, provided the employees with whom it takes place and the issues discussed do not suggest that, in practice, issues still being discussed collectively have in fact already been determined. Generally this will mean that collective consultation over whether to make redundancies and selection criteria will need to have been completed by the time individual consultation begins.

9.5 Finally we have experienced some potential difficulty in practice in determining when the consultation process should commence. Bearing in mind the ambiguities in the guidance of the CJEU in *Fujistsu* as clearly identified by the decision of the Court of Appeal in *Nolan v USA* [2010] EWCA 1223 ( see in particular paragraphs 57-62), we wonder whether the provisions could be clarified to clarify whether the strategic business decision (as opposed to the potential employment impact) is within the scope of the consultation duty.

**10. What happens during consultation?**

10.1 As members of the working party do not directly participate in consultations, we do not generally propose to comment further than we have done in the responses to other questions. However, we would observe that:

(a) The requirement to consult can sometimes, in practice, disadvantage employees because employers may hold back benefits which they are prepared to provide with a view to offering those benefits up as concessions during the consultation process. However, if employee representatives do not then request concessions, the benefits may never be offered. Where employee representatives are experienced, it is less likely that potential concessions will not be extracted and the employee representatives may also employ "negotiation tactics" of their own;

(b) Advances in IT have significantly increased the speed with which consultation can take place, in sectors where employees have easy access to computers, compared to the position when collective consultation obligations first took place. Intranet sites, wikis and e-mail can be used both to provide information to affected employees and to collect their views. However, there remain some sectors where employees do not have ready access to such facilities and are not used to such methods of communication, where more traditional methods of communication are still required.

(c) The recently added requirement to provide information to employee representatives regarding agency workers engaged by the employer requires the employer to provide information about agency workers engaged across its entire business(es). This can be an onerous obligation for a large employer. It will generally only be the use of

agency temps at the establishment where the redundancies take place which will be relevant to employee representatives.

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

11.1 In our experience, most consultation exercises do not lead to proposed redundancies not going ahead or to a substantial reduction in the need for redundancies. This may be because employers give careful thought to the need to minimise the number of redundancies before beginning the consultation process, given the cost and impact on the business of going through the process. In addition, non-union representatives may be inexperienced in the alternatives which can be suggested. It is sometimes the case that employees will put forward suggestions which reduce the number of redundancies required e.g. job sharing proposals, pay cuts, reduced time working. However, in most consultations discussion moves quickly onto other issues such as selection for redundancy (selection criteria and selection pools), alternative employment, timing of redundancies and financial and other terms of the redundancy package. In these areas, consultation more frequently has an impact on the employer's proposals.

**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.**

12.1 In our experience many employers, trade unions and employee representatives experience difficulties applying the definition of establishment. Different approaches are often taken by different employers/representatives in similar situations. In practice though, challenges to the approach taken by employers are relatively infrequent, perhaps because of the lack of certainty around the definition and because representatives often do not take legal advice during the initial stages of a consultation process. In addition, employers will often adopt a definition of establishment which avoids triggering consultation obligations. In these circumstances, employees may not have visibility of the full picture of the redundancies, particularly where there is no union/permanent employee representative body, and it can be difficult for them to challenge the employer's approach to the meaning of establishment.

12.2 Situations which frequently give rise to uncertainty under the current case law are:

(a) Multi-site businesses where there is little management at the individual sites e.g. retail outlets;

(b) Multi-site businesses which effectively operate as a single business unit;

(c) Homeworkers/field based workers;

(d) Single site businesses which contain different divisions of the same company, which operate with a degree of autonomy;

(e) Bodies such as universities and health trusts that operate independent departments and units, often separately funded from specific external grants, but which are located within larger units/ departments/ divisions.

**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?**

13.1 Currently, there will be a dismissal for the purposes of the legislation if an employee is "*employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract*" (s298 TULRCA and s95 Employment Rights Act 1996). This is subject to s252 TULRCA which excludes from the scope of the collective consultation provisions anyone employed on a fixed term contract of 3 months or less or a contract for a specific task which is not expected to last for more than 3 months, where the employee has not been employed for more than 3 months[1].

13.2 The difficulty to which this can give rise is that at the point at which the obligation to consult arises, there may already be fixed term contracts which are due to expire during the consultation period. If the employer does not propose to extend them under the same contract and the reason for non-renewal is not related to the individual concerned, then this would be a person whom the employer proposed to dismiss as redundant. If the contract is not renewed and the dismissal goes ahead, the employer will be in breach of s188 and s193 TULRCA because one of the proposed dismissals will take place before the completion of consultation/the minimum consultation period.

13.3 However, in these circumstances it may make no commercial sense for the employer to extend the contract and the reasons for not doing so may be entirely unrelated to the main redundancy proposals. If the employee has genuinely been taken on for a specific task which has ended there may be no work for the employee to do. It may be that some cases could be dealt with on the basis that the reason for non-renewal is a reason relating to the individual or by reference to the special circumstances defence. However, the scope of both concepts are uncertain and there may be cases where neither apply (e.g. a small number of employees taken on to prepare for a particular event). The employer is faced with the choice of extending the contract (if the employee will agree) of an employee who is not required or risking failure to comply (which could theoretically lead to an award in respect of all redundant employees and criminal liability). Whilst the risk of any penalty being imposed in practice seems low and employee representatives may be prepared to take a pragmatic approach, the apparent lack of a lawful way to allow the employee to leave early is unsatisfactory.

13.4 One solution would be to exclude the expiry of a limited term contract from the scope of the collective consultation provisions. Article 1(2)(a) of the Directive provides:

"*(1) This Directive shall not apply to - (a) collective redundancies effected under contracts of employment concluded for limited periods of time except where such redundancies take place prior to the date of expiry or completion of such contracts.*"

13.5 There may be a concern that a complete exclusion could lead to employers taking on employees under a succession of fixed term contracts to provide flexibility to avoid the application of the collective consultation obligations or that it could lead to collective consultation not applying in circumstances where it would be desirable e.g. because fixed term contracts are prevalent in a particular sector (e.g. see the facts of *Lancaster University v University and College Union*). In fact, the scope to use fixed term contracts to evade collective consultation would be limited by providing that it was only on expiry of the contract that the dismissal would be excluded from collective consultation obligations and by the fact that the use of successive fixed term contracts (for four years or more) is limited by

[1] This provision appears to apply even if such contracts are terminated before their expiry, which appears to go beyond the exception permitted by article 1(2)(a) of the Directive.

the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. However, if this was a concern, a more limited exclusion could be considered.

13.6 A similar issue which frequently arises for employers is where an employer has already begun individual redundancy consultation in relation to a group of fewer than 20 employees at the point at which a further proposal to make additional redundancies in the same 90 day period arises which takes the total number to more than 20. It appears that this would then trigger an obligation to consult in relation to all employees, including the first group in respect of whom individual consultation has already begun. However, this can be disruptive in relation to employees with whom individual consultation is already well advanced. If employees have already been given notice then a similar issue arises to that outlined above in that there is already a proposed redundancy taking effect during the consultation period. We note that s188(4) excludes from collective consultation those in respect of whom consultation has already begun. However, this appears to be referring to employees in respect of whom *collective* consultation has already begun. Certainly, the exclusion from the obligation to notify the Secretary of State in s193(3) only applies where the Secretary of State has already been notified. Again, it may be that the special circumstances defence can be relied upon where notice has already been given, but the scope of that defence is uncertain and it has generally been interpreted narrowly. It may be arguable, by analogy with the reasoning in *Junk*, that the employer no longer proposes to dismiss an employee who has already been given notice, having already taken the decision to give notice. However, a clarification of the position would be helpful.

13.7 A practical problem which arises out of the broad definition of redundancy in TULRCA is that many employers do not realise that the definition is wider than the definition of redundancy under the ERA and can include expiry of fixed term contracts and dismissals for "some other substantial reason" e.g. dismissal and re-engagement for the purposes of changing contractual terms and conditions. We note though that the definition of redundancy in TULRCA is taken from the Collective Redundancies Directive but guidance for employers on how to deal with these issues might be helpful.

**14. What factors do you consider could determine what constitutes an establishment?**

14.1 As noted at question 12 above, the current meaning of "establishment" is unclear and it would be helpful for employers and employees and their representatives to be given clear guidance on this. However, we note that the Government is reluctant to provide a statutory definition for fear that it would either remove flexibility from employers or risk infraction proceedings for failing to implement the Directive. However, we have doubts as to whether a list of factors could usefully be drawn up which would both provide useful guidance and avoid the risk of infraction proceedings.

14.2 As the Call for Evidence acknowledges any guidance on what constitutes an establishment will need to be consistent with ECJ case law. The two leading cases at ECJ level are *Rockfon A/S v Specialarbejderforbunet i Danmark* and *Athinaiki Chartopoiia*. Both cases state that the meaning of "establishment" is a term of Community law and cannot be defined by reference to the Member States.

14.3 In *Rockfon* the ECJ held that "establishment" means (depending on the circumstances) the unit to which workers are assigned to carry out their duties and stated that this did not have to have management which can independently effect collective consultancies.

14.4 In *Athinaiki* the ECJ expanded on this and held that:

"*an 'establishment', in the context of an undertaking, may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one of more given*

*tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks*"

14.5 It went on to hold that it was not necessary for an establishment to have legal autonomy, economic, financial, administrative or technical autonomy. Nor was it necessary for there to be a geographical separation between different "establishments".

14.6 These decisions point to a number of factors which could be taken into account in identifying an "establishment". However, there are a number of difficulties in making from this a list of factors which would be helpful to employers in identifying an establishment:

(a) Both cases make clear that the relevant factors depend on the circumstances of each case. They do not seek to lay down factors which will always be relevant and nor do they purport to be exhaustive.

(b) Both *Athinaiki* and *Rockfon* stated that a purposive approach should be taken to the meaning of "establishment" in order to maximise the situations where there will be an obligation to consult. In both cases the national consultation requirements under consideration were such that the smaller the establishment, the more likely there would be to be an obligation to consult. This led them to adopt a wide definition of establishment, under which a relatively small unit could amount to a separate establishment. However under the UK legislation the reverse is true, the larger the establishment identified, the more likely it is that there will be 20 people within that establishment who the employer proposes to dismiss[2]. Therefore the direction to take a purposive approach conflicts with the actual identification of the meaning of establishment, when applied in a UK context. Given that, on the one hand, the ECJ states that there is a term of Community law which cannot be defined according to Member States, but on the other hand there is scope to vary the meaning depending on the circumstances, it is not clear how the ECJ would approach the definition of establishment in a UK context.

(c) The factors quoted at 14.3 could be said to be the key factors in recognising an establishment, although the ECJ has not gone so far as to say that all of them are required in all circumstances. Certainly though, they will generally always be relevant to consider. However, to list those factors is not particularly helpful without knowing how to apply them. They may be present both in an organisation as a whole and in a local business unit and at different levels in between. The suggestion in *Athinaiki* is that the smallest unit which has those features will be an establishment. However, if this is specified, the factors start to become a definition and, as set out at (b) in a UK context, this runs contrary to the purpose behind the legislation.

(d) Although the cases identify a number of features which are not necessary for an establishment, that does not mean they would never be relevant. For example, in establishing whether a single site contains two establishments (a possibility contemplated by *Athinaiki*) it may be relevant that the two units have economic, financial, administrative and technical autonomy.

(e) Geography is also likely to be a relevant factor. The ECJ cases appear to contemplate that establishments will generally be at a single location, but that there may be more than one establishment at each location. However, they do not rule out the possibility

[2] We note that in *MSF v Refuge Assurance Plc* the EAT was of the view that UK law was not compliant with the Directive in this regard and that an obligation to consult should be triggered where 20 or more redundancies are contemplated across *all* establishments. It then went on to follow the approach in *Rockfon* adopting a broad interpretation of "establishment".

of establishments spanning more than one location in given circumstances. This may be more likely if a purposive approach is taken in the light of the UK legislation.

Overall therefore, whilst it would be helpful to have a definition, we consider that it would be difficult to draw up a list of factors falling short of a definition which would both provide useful guidance and avoid the risk of infraction proceedings. Inevitably any list of factors would include factors which were not relevant in all cases and applying the factors would be difficult without some "definition" as to what the parties are trying to identify, which would then risk infraction proceedings.

If the Government wishes to maintain a 90 day consultation period, it would be possible to have a clearly defined trigger for this (such as that set out in the HR1, referred to below), irrespective of the meaning of establishment under EU law. The disadvantage would be the potential for complexity if the triggers for the 30 day and 90 day consultation obligations were not aligned.

14.7 We note that the guidance notes on the current version of the form HR1 state that:

*"If you operate from more than one site, each one is treated separately for notification and consultation purposes. An **establishment** is the site where an employee is assigned to work. You must complete a form for each site where 20 or more redundancies are proposed."*

This suggests that each separate site will always be a separate establishment and that each site will be an establishment. It is helpful to provide guidance as to the approach which BIS will take. However, in the absence of a statutory definition to the same effect, this may not be legally correct. As such, it may cause confusion for employers who take a different approach to the meaning of establishment for consultation purposes. The fact that criminal liability attaches to a failure to comply with s193 TULRCA causes concern for some employers, particularly in the public sector, even if the risk of a prosecution is low. Given the difficulty in providing a clear definition of establishment, one option to address this would be to impose a civil rather than a criminal penalty enforceable by the appropriate Government department.

**Section 2: Duration of Consultation and Notification**

**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?**

15.1 We can see little advantage for an employer in having a minimum consultation period of 90 days as opposed to a minimum of 30 days, combined with the existing obligation to consult "in good time". Employers would always have the option to consult for longer, if they thought it necessary or beneficial. One possible issue might be that challenges to whether consultation had begun "in good time" might be more frequent, if the 90 day period was reduced, but employers who were concerned about a challenge could always consult for longer and so this slight risk for employers would be outweighed by the advantages.

15.2 There are a number of advantages for employers in having a shorter consultation period because it is often possible to complete consultation in a shorter period than 90 days. This is particularly the case where, for example, there is a site or business closure with no realistic alternative way to achieve the business objective and no need to consult about selection of employees because all employees at the site are at risk. In circumstances where consultation can be completed in less than 90 days, the advantages for employers in having a shorter minimum consultation period include:

(a) Being able to implement redundancies or restructurings sooner will save ongoing employment costs and bring forward any efficiency savings from the new structure. Where the changes are critical to the survival of the business, this may make it more likely that the business can be saved;

(b) A shorter consultation period and more rapid implementation of changes will reduce disruption to the business. A collective consultation process can distract both the employees who are potentially affected and management from focusing on the day to day running of the business.

(c) Having a longer minimum period can set expectations on the part of employee representatives (and management) as to how long the process "should" last and may lead to the process taking longer than would be required to satisfy the requirements of consultation. This can prolong the period of uncertainty for employees and increase the likelihood that high performing employees, who would ultimately be retained in employment, will find alternative employment before the consultation process is complete.

(d) Employers who need to make changes quickly may sometimes manipulate their proposals to ensure that they do not propose to dismiss 100 or more employees during a 90 day period (e.g. by reducing the number of proposed dismissals or phasing them over a longer period of time). If the 90 day minimum was removed, there would be no need to do this.

15.3 The advantages for employees in having a minimum 90 day consultation period include:

(a) Where consultation takes less than 90 days, they are likely to have a longer period of employment and so earn salary for a longer period than they would do if the 90 day minimum was not required;

(b) Where consultation takes less than 90 days, they are also likely to have more notice of their eventual dismissal and so longer to look for alternative employment, whilst still in employment.

(c) Although the requirement to consult "in good time" ensures that there would still be a legal obligation to consult to the same standard as at present, the minimum period of consultation may tend to set expectations as to how long consultation should last and so lead to longer consultation in practice. A shorter minimum period may lead to increased pressure from employers to end consultation before it is actually complete, reducing the time employee representatives have to consider the proposals and affect the consultation process.

15.4 The disadvantages for employees include:

(a) Employees who find alternative work may want to take voluntary redundancy during the consultation period. However, employers are reluctant to agree to this as a voluntary redundancy will generally amount to a dismissal and so it could mean that the first proposed dismissal has taken place during the consultation period and before the end of the period for notifying the Secretary of State and put the employer in breach of s188 and s193 TULRCA and at risk of a protective award in respect of all employees who are ultimately dismissed, including those dismissed after consultation is complete. Employee representatives may also be reluctant to agree to employees taking voluntary redundancy during the consultation period as it reduces their power base.

(b) As noted above, the minimum consultation period may in practice have the effect of extending consultation. A longer consultation period can lead to prolonged uncertainty as to whether an employee has a role.

(c) The period between announcement of a redundancy exercise and its implementation can be a period of reduced morale both for redundant employees and for those who will ultimately remain and moving more swiftly to the new structure would reduce this.

15.5 As regards the effect of notice periods, we consider that a shorter minimum consultation period would still lead to earlier implementation of the new structure in many cases. This is because employers may choose to pay employees in lieu of some or all of their notice periods in order to implement the changes more quickly. If employees would otherwise have worked out more of their notice period, there may be no net saving in wages to the employers or net loss of wages for employees if they are paid in lieu, but there may be business advantages in an early implementation (see above). In addition, it is not uncommon for employers, as part of their redundancy package, to agree to pay employees in lieu of their notice (irrespective of how much notice they actually have of their termination date). These employers would have a cash saving if they were able to implement the redundancies earlier and employees would consequently be financially worse off. Finally, some employees may have a short notice period which would expire before the end of the 90 day period.

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

16.1 See answer to 15.

**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?**

17.1 This would provide additional flexibility to allow an end to the consultation period and we consider that it would be likely to be used in some cases. One practical issue which would arise is how the employee representatives could agree e.g. would unanimous agreement of the representatives be required, would a majority be required, could reps agree separately on behalf of the constituency they represent or on behalf of different groups of employees? Another practical effect would be to make the role of employee representatives more difficult (particularly for those elected specially for the purpose who have less experience) as they might often come under conflicting pressures between employees who wanted to curtail the process (e.g. because they had a new job) and those who did not. It may be that in practice, representatives would only agree to a shorter period if the employer "bought out" the remainder of the consultation period. This would not therefore have the same potential for cost saving for employers as reducing the minimum period.

17.2 As mentioned above, there can also be disadvantages in the current system for individual employees who want to leave early e.g. to take voluntary redundancy and start a new role. One option to address this would be to allow either employee representatives or the employees themselves to agree to leave before the end of the 90 day period (but after the end of the 30 day minimum period), without the employer being in breach of section 188 or section 193. In this regard, as set out at 15.4(a) above, employee representatives may be reluctant to agree to individual employees leaving early as it would reduce their power base. As a result, individuals might be given the maximum flexibility if they can individually agree to leave early. This could be combined with a degree of protection for employees, by amending s288 TULRCA so as to allow employees to enter into compromise agreements in relation to their rights under s188. Another option which could be considered for addressing

this issue is changing the definition of dismissal for these purposes to exclude voluntary redundancies, although this might then be used to avoid triggering collective consultation at all where many volunteers could be found. In addition, it could increase difficulties for employees whose state benefits or benefits under insurance schemes depend on their having been dismissed.

17.3 As a general observation, we consider it would provide helpful flexibility if compromise agreements could be used to allow individual employees to waive their right to any protective award. In practice, employers do seek to compromise such rights but often either hold back the compensation payment to employees until the limitation period for bringing a claim has expired (which disadvantages the employees) or provide for repayment of an amount if the employees bring a claim. This leads to more complex agreements and an ongoing degree of uncertainty for both sides.

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

18.1 See answers to 15 and 17.

**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?**

19.1 See answer to 15. Both the advantages and disadvantages of a shorter minimum period increase as the minimum period decreases.

**Section 3: High Impact Redundancies**

**20. How critical is the length of the statutory minimum time period in instances of high-impact redundancies? Why?**

20.1 The advantages and disadvantages of a minimum consultation period for employers and employees would be as at question 15 in the case of high impact redundancies. As noted there, the requirement to consult in good time would ensure that there would remain a legal obligation to consult to the same standard as at present. Therefore the underlying purpose for consultation in the Directive (giving employees the opportunity to influence the redundancy process and in particular to avoid or reduce the number of redundancies or mitigate their effects) would still be achieved. There are other practical effects (not related to the underlying purpose of consultation) of having a longer minimum time period as outlined in the response to question 15 (e.g. business advantages of restructuring more quickly on the employer's part, longer to look for alternative employment on an employee's part). We are not in a position to comment on how the balance of these interests between employers and employees would change between a high impact redundancy and other redundancies or what balance should be struck as this is a question of policy.

20.2 Any attempt to have periods which varied depending on whether redundancies were "high impact" or not would run into difficulties in defining when redundancies were "high impact". This could lead to uncertainty and increased litigation. It could also discourage employers from recruiting in high impact areas where they operated from more than one site and some sites were not in high impact areas.

20.3 Clearly we are not in a position to comment on the extent to which Government agencies might need more than 30 days' notice of high impact redundancies. We note that under the article 4 of the Directive, Member States may grant the competent public authority the power

to extend the period of notification (where the original notification period is less than 60 days) so as to delay the implementation of redundancies. This power could be granted for use in the case of high impact redundancies. However, this would create uncertainty for employers and could give rise to difficulties as employees may be given notice during the notification period and notice could not be unilaterally withdrawn by the employer if the notification period was subsequently extended. A statutory power to withdraw the notices could be given, but there could still be disadvantages for employees and employers who had planned around the notices taking effect.

**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?**

21.1 We are not in a position to comment on what the threshold should be as this is essentially a policy question.

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

22.1 A graduated threshold with different time periods for different numbers of redundancies would increase the complexity of the law. It would make the initial assessment of the number of proposed redundancies more critical as the numbers would more frequently be close to a threshold and this in turn may make legal challenges to the period of consultation more frequent.

**Section 4: Fit with other legislation**

**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 consultation fit together.**

23.1 The rules on collective consultation and the TUPE Regulations frequently give rise to difficulties where redundancies are proposed in relation to a TUPE transfer. The problems are particularly acute where the redundancies effectively become an inevitability as a result of the transfer e.g. where the transferee is not acquiring the premises of the transferor and has no nearby premises of its own as it will move the business to or (in the case of an outsourcing) provide the services from a different location. This situation frequently arises in an outsourcing and/or offshoring context. In these circumstances, a strict application of the TUPE Regulations and collective consultation rules would suggest:

(a) The redundancies should be implemented by the transferee as they relate to the way the business is going to be run by the transferee going forwards. If they are implemented by the transferor they may be automatically unfair under TUPE as the transferor will not have an economic, technical or organisational reason for the dismissals (*Hynd v Armstrong*).

(b) Before the transfer:

(i) Under TUPE: the transferee will be obliged to notify the transferor of the proposed redundancies as a measure which it envisages taking (reg 13(4)) and the transferor will be obliged to notify the employee representatives of this measure (reg 13(2)(d)). However, there will be no obligation on the transferor to consult pre-transfer as it is not a measure that he "envisages that he will take" (reg 13(6)). Nor will there be an obligation on the transferee to

consult employees of the transferor before the transfer as he is not the employer of the affected employees.

(ii) Under the redundancy consultation provisions, the transferor has no obligation to consult as it is not proposing to make the redundancies. The transferee has no obligation to consult (and cannot discharge the consultation obligation which will ultimately arise) as it is not the employer of the employees who it will propose to dismiss.

(c) After the transfer:

*(i)* Under TUPE: current case law suggests there will be no obligation on the transferee to consult about the proposed redundancies (*UCATT v Amicus and others)*

(ii) Under the redundancy consultation provisions, the transferee will have an obligation to consult (assuming the proposal is to dismiss at least 20 employees) for 30/90 days depending on the number of redundancies. However, if it does not have local premises it may have nowhere for the employees to work during this period and so no work for them to do. If their redundancies are an inevitability as a result of the transfer then, certainly if consultation needs to cover the business reason for the redundancies (which will be considered by the ECJ in *United States of America v Nolan*) the transferee will already be in breach of its obligations under section 188 TULRCA, subject to the availability of the special circumstances defence.

(d) This has a number of disadvantages for the employees and the employer:

(i) The employees are notified of the redundancies before transfer but cannot enter consultation for some time. This leads to a prolonged period of uncertainty for employees. It may also damage the business by leading to a high turnover of staff, including those who might not ultimately be redundant, where some roles will be retained.

(ii) By the time employees are consulted, their opportunity to influence the outcome is more limited. There will be no possibility of reversing the transfer or changing its terms and their fate may well be "set in stone". From the transferee's perspective, this may mean that it is already in breach of its legal obligations and liable for a significant protective award.

(iii) From a purely practical point of view, if the transferee does not have premises close to the transferor any consultation exercise can be very difficult to organise once the affected employees are no longer employed by the transferor.

(iv) In an off-shoring situation the employees may transfer to the transferee who may have no presence in the jurisdiction and as such the employees may find it difficult to enforce any claim for a redundancy payment or for failure to inform and consult.

It may also be open to question whether the absence of any obligation under TUPE to consult with employee representatives of the transferring employees about the transferee's measures is consistent with the Acquired Rights Directive.

23.2 A process which often happens in practice, is that the transferor and transferee conduct a joint consultation with employee representatives prior to the transfer, with the redundancies being implemented immediately following the transfer (or redundant employees objecting to transfer and accepting a payment equal to a redundancy from the transferor and possibly signing a compromise agreement). This has a number of practical advantages for the employee and the employer:

(a) The employees are consulted at an early stage and at a time when they can still influence the outcome of the deal between the transferor and the transferee. They may also have access to ongoing employment vacancies with both the transferor and the transferee.

(b) The transferee is able to implement the redundancies more quickly and avoids the practical difficulties of having to continue to employ the employees after the transfer.

This may not be a practical solution in all cases e.g. where there needs to be pooling with the transferee's workforce and so joint redundancy consultation with representatives of the transferor's and transferee's workforce. However, in many cases it does provide a practical solution which benefits both employees and employers. It would also appear to comply with the policy behind the consultation requirements in the Acquired Rights Directive and the Collective Redundancies Directive. Given that under the Acquired Rights Directive the transferee will effectively "stand in the shoes" of the transferor (including as regards consultation) we consider that this approach could be explicitly permitted by UK legislation consistently with the Directives if this was thought to be beneficial.

23.3 The position could be further clarified and further flexibility provided by expressly permitting the transferor to dismiss, in reliance on the transferee's ETO reason for dismissal. It may again be necessary to involve the transferee in the consultation process in these circumstances, to ensure genuine consultation.

**24. What special circumstances relating to collective redundancies arise from insolvencies?**

24.1 The issues arising in relation to insolvency situations tend to relate to the timing of the consultation process and the conflict with an insolvency practitioner's statutory duties. It is a rare case where there is time to complete the process.

24.2 An administrator is under a statutory duty to keep the business as a going concern if it can. In most cases, that duty is likely to involve preserving jobs where possible. However, it may be the case that in order to preserve the business as a going concern the administrator needs to reduce the workforce quickly in order to make the business or the assets attractive to a buyer, or needs to cut out a loss making part of the business quickly. Indeed, it can be the case that if they are not able to make such changes quickly enough then value or sale opportunities will be lost, which could lead to more lost jobs. This problem would be exacerbated in the case of a pre-pack administration where the administrator is appointed just before the sale. The administrator may therefore be put in a situation where there is a conflict between their statutory duties and the requirement to comply with the collective redundancy obligations.

24.3 In the case of liquidation, whilst the liquidator might not recklessly allow claims to accrue, their duty is to the creditors (which may include employees) to realise the assets of the business for the best value. In order to do that, therefore, they may need to dismiss employees quickly.

24.4 In insolvency cases, it can often be the case that redundancies are inevitable, there are no other opportunities given the state of the business, and the employees will only be paid statutory redundancy (which may be funded by the National Insurance Fund). The

consultation process may, therefore, largely be futile because there may be very little to say. These difficulties are exacerbated in the case of the 90 day consultation period.

24.5 The "special circumstances" defence has occasionally been held to apply in insolvency situations. However, it has also been held not to apply. There is, therefore, great uncertainty about the application of this defence in insolvency situations. However, without specifying that insolvency situations will automatically constitute "special circumstances" it is difficult to see how the availability of this defence is likely to help the situation. One option might be to say that it will be a "special circumstance" where an insolvency practitioner is not able to comply with the collective redundancy obligations because of their competing statutory obligations. This would ensure that where there was time, the consultation would take place, but where it was not feasible, insolvency practitioners would have greater certainty that they would not be triggering a protective award.

24.6 Members of the working party had mixed experience over the extent to which insolvency practitioners seek to comply with their consultation obligations, even where circumstances would permit them to do so. Some were strongly of the view that it would be beneficial to provide a real incentive for them to do e.g. by imposing personal liability for a failure to consult or by making protective awards an expense of an administration as there is currently no financial sanction for them if they fail to do so. Increased compliance on the part of insolvency practitioners would also lead to savings for the National Insurance Fund, which otherwise might be responsible for up to 8 weeks of a protective award. Other members of the working party felt that this was unnecessary and inappropriate.

# Members of ELA Working Party

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