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Collective Redundancies: Consultation on changes to the rules

Response from the Employment Lawyers Association

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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 Consultation on changes to the rules on collective redundancies. Its report is set out below. A full list of the members of the sub-committee is annexed to the report.

Our comments are set out against the consultation questions.

Questions

1. Do you agree with the Government's overall approach to the rules on collective redundancy consultation?

We agree that the overall approach is sensible, save that we consider that a statutory solution to the fixed term contract issue would be preferable.

In addition, we note that there are no proposals relating to the issue of insolvency and collective consultation. It states that "the Government is keen to explore options for improving understanding of obligations in these circumstances and on raising levels of compliance" and points out that this would benefit employers, employees and the Exchequer.

As stated previously, some members of our working party were of the view that it would be beneficial to provide some form of incentive for insolvency practitioners to comply with their consultation obligations. Other members felt that this was unnecessary and inappropriate.

2. **Which of the two proposed options should replace the 90-day minimum period? Please explain why you think your choice would better deliver the Government's aims than the alternative.**

2.1 Ultimately the minimum consultation period is a question of policy on which we cannot comment.

2.2 However, if the 90 day period is replaced with a 30 day period then this would remove the need to consider whether 100 or more redundancies were proposed at a particular establishment during a 90 day period. This would simplify the law, furthering the government's aim of having a straightforward legislative process. It would make the initial assessment of the precise numbers affected less critical and avoid employers seeking to structure redundancies in such a way as to avoid triggering a longer consultation period. It

would also reduce the number of situations in which the precise meaning of establishment was critical. Therefore, we see advantages in having a single minimum consultation period.

2.3 More generally, there are advantages and disadvantages in having a shorter minimum consultation period - although the practical significance of these advantages and disadvantages are reduced when the difference between the consultation periods is only 15 days (rather than 60 days, as at present). As we set out in our response to the Call for Evidence:

2.4 In circumstances where consultation can be completed in less than [45] 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.

2.5 The advantages for employees in having a longer minimum consultation period include:

(a) Where consultation takes less than [45] 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 45 day minimum was not required;

(b) Where consultation takes less than [45] 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.

2.6 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.

3. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of "establishment"? Please provide comments to support your answer.

3.1 We agree that, given the current uncertainty in EU law as to the meaning of establishment and how this would be applied in a UK context, it would be difficult to set out an authoritative definition of establishment in legislation. There would be a risk of infraction proceedings and in any event any definition would be interpreted in the light of ECJ decisions. Therefore, even a statutory definition might not provide clarity in the long term.

As we said in our response to the Call for Evidence:

3.2 "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.

3.3 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.

3.4 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"

3.5 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".

3.6 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[1]. 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.*

4. Will defining "establishment" in a Code of Practice give sufficient clarity?

4.1 Defining "establishment" in a Code of Practice will not provide the degree of clarity which would be desirable as it has no binding effect. However, for the reasons set out above, such clarity may ultimately need to come from the ECJ. A Code of Practice which was clearly drafted would be more helpful than simply retaining the current statutory provisions with no guidance and might help to establish a common approach, pending further guidance from the ECJ and higher courts.

4.2 If "establishment" is defined in a Code of Practice consideration will need to be given to the guidance on the HR1 form. As we pointed out in our response to the Call for Evidence the current guidance on form suggests that each separate site will always be a separate establishment and that each site will be an establishment, which may not be legally correct or consistent with what is included in the Code of Practice. However, the wording on form HR1 has the benefit of being clear and given that this is an issue which gives rise to criminal liability it is helpful to have a clear indication of the interpretation which BIS will take.

5. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation? Please provide comments to support your answer.

5.1 We consider that the fixed-term contract issue would be better dealt with by legislation, given that the Government has options for legislating under the Directive.

5.2 A literal application of the current legislation would appear to have the effect that most non-renewal of fixed term contracts would fall within the scope of the consultation obligation. The EAT decision in *University of Stirling v University and College Union* seeks to achieve a practical outcome in relation to the application of collective consultation obligations to fixed term contracts. However, the analysis of the EAT in that case is not clear. The EAT seemed

[1] 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".

to consider that the very fact that an employee contemplated at the outset that their employment would be for a limited period means that the non-renewal of their contract relates to them as an individual, and so takes them outside the scope of the definition of redundancy under TULR(C)A 1992. However, that reasoning would seem to apply to all fixed term contracts and yet the EAT contemplated that expiry of some contracts (if the reason for non renewal relates to a business decision which could lead to significant job losses) would fall within the collective consultation obligations. A future division of the EAT could depart from the decision and there is likely to a period of uncertainty as to the correct application of the law, which would not be removed simply by guidance in a non-statutory Code of Practice, whereas a legislative solution could bring clarity and simplify the law.

As we outlined in our response to the Call for Evidence:

5.3 *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*[2].

5.4 *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.*

5.5 *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.*

5.6 *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."

[2] 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.

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

6. Have we got the balance right between what is for statute and what is contained in government guidance and a Code of Practice?

See answers to 3, 4 and 5.

7. What changes are needed to existing government guidance?

The existing guidance is very short and would need to be substantially expanded to provide useful practical support and cover all the issues proposed in the consultation paper. In addition to the areas outlined, it would be helpful for the Code of Practice to address how to deal with employees who wish to leave before the consultation process is complete. Any Code would

8. How can we ensure the Code of Practice helps deliver the necessary culture change?

It might be helpful to provide real case studies with named employers which highlight the benefits to employers of engaging openly in the consultation process and providing full information.

9. Are there other non-legislative approaches that could assist - e.g. training? If yes, please explain what other approaches you consider appropriate.

In our experience consultation is more productive when both employee representatives and employer representatives know what is expected of them and how the process should work. Where representatives (and in particular employee representatives) are inexperienced, training is very helpful in improving the quality of consultation. The availability of online training from ACAS may be a relatively cheap and efficient way to achieve this.

It could also be beneficial for employees at risk of redundancy to have access to interview and CV training during the collective consultation process. This might be achieved through links with BIS and charities that provide outplacement and through working closely with the Job Centre Plus. In the event that the affected employee's employment is terminated on the grounds of redundancy and they have received outplacement during the redundancy process then they may be able to obtain re-employment quicker than if they had to wait until their dismissal for such training.

10. Have we correctly identified the impacts of the proposed policies? If you have evidence relating to the possible impacts we would be happy to receive it.

N/A.

11. If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?

N/A.

12. If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business dealings during this time?

N/A.

Members of ELA Working Party

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