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Collective Redundancies: New DTI Guidance Regarding Consultation Requirements

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The UK Department of Trade and Industry (DTI) published recently new guidance on employee information and consultation obligations in the event of collective redundancies.

While the guidance relates to the implementation of UK legislation, it should be noted, first, that the laws relating to collective redundancy employee consultation obligations stem from a European Directive (98/59/EC) and, secondly, that many of the recommendations contained in the DTI guidance arise from the recent European Court of Justice decision in *Junk v Kuhnel* (C-188/03), a case concerning the laws implementing the Directive in Germany. Many of the issues identified in the DTI guidance, therefore, will also be relevant for employers operating in other EU Member States.

What is meant by "collective redundancy"?

A collective redundancy situation arises in the UK where an employer proposes to dismiss as redundant 20 or more employees at one "establishment" within a 90-day period.[1] This mirrors the wording of Article 1 of the Directive.

Redundancy for these purposes is construed widely and includes all dismissals for reasons unrelated to the individual employee concerned. In addition to the more obvious cases, such as the closure of a plant or product line, it could therefore include an offer of alternative employment to employees on significantly different terms of employment and the relocation of a business.

What information and consultation obligations are triggered?

An employer proposing to make collective redundancies must inform and consult with appropriate representatives of affected employees. Appropriate representatives are either i) trade union representatives, where a trade union is recognised, or ii) employee representatives elected in accordance with statutory procedures. Employers with Information and Consultation ("I&C") procedures established in accordance with rules imposed by the recently implemented European Directive 2002/14/EC may avoid the obligation to elect employee representative where the company already has put into place an I&C body that is authorized by the workforce to act as representatives in collective redundancy situations.

In addition, UK employers must notify the DTI of the anticipated redundancies. Similar obligations arise in other European countries.

UK employers are under no specific legal obligation to consult appropriate representatives, or notify the DTI, in cases falling below the 20 employee threshold. However, the employers may risk unfair dismissal claims if they fail to warn and consult those employees who are to be dismissed individually.

Before consultation can begin, the employer must provide appropriate representatives with various information in writing, including the reasons for the proposed redundancies, the numbers and descriptions of employees it is proposing to dismiss as redundant, the proposed method of selecting redundant employees, the proposed method of carrying out the dismissals, and the method of calculating severance payments.

Is there a minimum period for consultation?

Consultation must begin i) at least 30 days before the first of the dismissals takes effect in a case where between 20 and 99 redundancy dismissals are proposed; and ii) at least 90 days before the first of the dismissals takes effect where 100 or more redundancy dismissals are proposed.

The European Court of Justice held in *Junk* that `redundancy', as defined in the Directive, occurs when an employer gives **notice** to dismiss, not when the dismissal actually takes effect. It follows that an employer cannot terminate contracts of employment (in terms of giving notice) until after the conclusion of the consultation period required by Article 2 of the Directive. Thus, in the view of the European Court of Justice, even if the employer was entitled to terminate contracts during the procedure or even at its outset, the obligation to negotiate imposed by the reference in Article 2 to consulting `with a view to reaching an agreement' still would be compromised.

The DTI's position in relation to *Junk* is that consultation processes must be completed before any redundancy notices are issued. This is viewed by many lawyers in the UK as an overly cautious approach. Nevertheless, it now seems likely that this statement from the DTI will be relied upon by Employment Tribunal claimants where notice of termination has been given during the 30 or 90 day consultation period.

What about publicly traded companies?

The guidance document confirms that the Stock Exchange rules on confidentiality in relation to price-sensitive information about a listed company do not release employers from the duty to consult with employees in advance of collective redundancies connected with restructurings (e.g., an outsourcing of a division or a takeover). The DTI suggests

that provision should be made for employee representatives to be subject to confidentiality constraints of a specified duration, allowing them to be sufficiently informed to hold meaningful consultation with the employer during the relevant period.

Comment

Many companies operating in Europe consider the procedural requirements relating to employee terminations to be counter-culture, expensive to implement and ultimately unhelpful. That view is often shared by employees caught up in a redundancy situation, who are keen to resolve the uncertainty, take their severance payment and move on. Unfortunately, the interpretation being placed upon the *Junk* decision by the DTI means that notice of termination cannot under any circumstances be given until the end of the 30 or 90 day consultation period. This will generally make the termination process still more costly, and time consuming, for UK (and many other European and U.S.) employers. Please do not hesitate to contact us with any questions.

Note

1. Section 188, Trade Union and Labour Relations (Constitution) Act 1992.

The information in this alert is not intended to be legal advice. However, if you require legal assistance or would like additional information about UK or global employment matters, please contact Chris Walter in our London office at +44.79.7195.2241 or christorpherwalter@paulhastings.com or Erika Collins in the New York office at 212.318.6789 or via email at erikacollins@paulhastings.com.