Paul Hastings

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Stay Current

A Client Alert from Paul Hastings

Impacted by the Credit Crunch? Effecting Workforce Reductions in the UK

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AT A GLANCE

This ***Stay Current*** provides an overview of the UK redundancy process applicable when making 20 or more employees redundant, and highlights significant recent legal changes.

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1. Impact of the Credit Crunch

Several leading financial institutions have announced significant job losses over recent months. The UK Centre for Economics & Business Research forecasts that City of London employers will shed approximately 6,500 more jobs in 2008.

Special rules apply in Europe to significant reductions in workforce (known in the UK as "redundancy" programmes). The process is complicated by the European Collective Redundancies Directive (98/59) (the "Directive"), breach of which is punishable by significant financial penalties.

2. Collective consultation - UK

The UK implemented the Directive through the Trade Unions and Labour Relations (Consolidation) Act 1992 ("TULRCA"). TULRCA requires UK employers to consult collectively with representatives of employees affected by a redundancy programme as to certain topics for a minimum period of time before effecting dismissals.

2.1 When is the Redundancy Programme Consulting Obligation Triggered?

The obligation is triggered when the employer is *"proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less"*. This provision has been the subject of much litigation over the years.

2.2 Redundant

In order to determine whether the 20 employee threshold has been reached, employers must first determine who it intends to "*dismiss as redundant*". The definition of redundancy under TULRCA captures any dismissal "*not connected with the individual concerned*".

In the recent case of *Optare Group Limited v Transport and General Workers Union*, UK EAT/0143/07, the UK Employment Appeal Tribunal ("EAT") held that voluntary redundancies should be included in the pool of employees to be dismissed.

Optare accepted three voluntary redundancies, then effected a further 17 mandatory redundancies, within a 90 day period. Optare believed it was only proposing to dismiss 17 employees by reason of redundancy, so TULRCA did not apply. However, the EAT held that the volunteers should be included, since they had effectively volunteered to be dismissed. Were it not for the background redundancy, those employees would have retained their jobs. Accordingly, Optare had failed to comply with TULRCA, and a protective award was made to each affected employee.

Comment

Redundancy is construed very broadly for the purposes of TULRCA. All dismissals that are not by reason of the individual's conduct or capability should be included for the purpose of calculating the employee threshold number under TULRCA. In addition, "dismissal" occurs where:

- employees volunteer for redundancy; and
- employment ends because a fixed term contract expires.

2.3 Who to consult?

TULRCA requires the employer to consult with '*appropriate representatives*' of affected employees. Such representatives are:

- if a trade union is recognised in respect of affected employees, representatives of that trade union; or
- in other cases, an existing body of representatives that has specific authority from the workforce to consult on redundancies; or employee representatives elected for the purpose of the redundancy consultation process.

2.4 Information and timing

Before consultation begins, the employer must provide employee representatives with written information, including details of the numbers of employees affected, the approach to employee selection, likely payments, and so on.

TULRCA requires that consultation should begin "in good time" and at least:

- 30 days before the first dismissal takes effect (where the employer is proposing to dismiss between 20 and 99 employees within 90 days); and
- 90 days before the first dismissal takes effect (where the employer is proposing to dismiss 100 or more employees).

In the case of *Junk v Kühnel, C-188/03 (ECJ)*; [2005] IRLR 310, the European Court of Justice confirmed that, if employers have satisfied their collective consultation obligations, notices of dismissal may be issued prior to the expiry of the 30 or 90-day period, but the dismissals cannot occur before the end of those fixed periods, which are measured from the beginning of the collective consultation.

2.5 What to consult about?

Consultation must address ways of:

- avoiding the dismissals;
- reducing the number of dismissals; and
- mitigating the consequences of the dismissals.

Traditionally, no requirement was imposed on employers to consult with employee representatives about the commercial reasons for the proposed redundancies.

However, in *UK Coal Mining Limited v National Union of Mineworkers*, EAT/0397/06/RN, the EAT held that the duty to consult extends to consultation about the business reasons for making redundancies.

The trade union, representing over 100 redundant employees, disagreed with UK Coal Mining about the alleged reasons for the closure of the mine and challenged the Company's decision to effect the redundancies. UK Coal Mining argued that there was no existing case law requiring it to have consulted with the employers about the closure.

The EAT held that consultation should have taken place about the decision to close the mine. The EAT considered that to exclude such discussion would make a mockery of the statutory requirement to consult about 'ways of avoiding the dismissals'.

Comment

While this decision appears to undermine management prerogative when it comes to making key business decisions, it is unlikely to alter significantly the way in which many employers approach collective consultation. The statutory obligation is to consult with a view to reaching agreement; it is not necessary to reach agreement. Most employers would already consider it good practice to include in the early stages of the consultation process an explanation for the proposed redundancies, and to invite comment from representatives.

3. Notification

TULRCA imposes an obligation on employers to notify the Department for Business, Enterprise and Regulatory Reform of collective redundancies before beginning the minimum consultation periods under TULRCA. Failure to comply with this obligation is a criminal offence and punishable by a fine of up to £5,000.

4. Potential exposure

In the UK, the Tribunal will award protective awards of up to 90 days' pay per employee for failure to comply with TULRCA. In addition, employees may bring individual claims for unfair dismissal and each recover up to £60,600 in compensation.

5. Practical tips for employers

- Careful pre-redundancy planning should take place. Employers should calculate the numbers of employees affected, and determine (where appropriate) how to elect employee representatives and get the process started.

- Minutes of meetings should be kept, and agendas agreed in writing, to create evidence of TULRCA compliance.

- Employers should be prepared to explain the business rationale underpinning proposed redundancies, and be open to alternative suggestions, allowing time for discussion.

- Employers with established redundancy procedures should review them to ensure they comply with TULRCA.

- Employers must remember that TULRCA obligations do not negate the requirement to consult with affected employees on an individual basis.

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