

EMPLOYMENT LAW UPDATE FOR CHARITIES SEMINAR JUNE 2008

CONSULTATION - WHAT DOES IT MEAN IN PRACTICE?

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WHY CONSULT?

First it is perhaps important to be clear exactly what we are talking about and the scope of this paper. There is a distinction, although sometimes a very fine one, between information, communication, consultation and collective bargaining. These terms may sometimes be used interchangeably but they all do mean something slightly different.

- **Information** is a one way street. An employer will provide information to employees, or to their representatives. There are occasions when there is a statutory obligation to provide specific information.
- **Communication** is more of a two way exchange involving the provision and exchange of information, including views of both the employer and employee. Communication allows those participating to gain a greater understanding of the others views, concerns and expectations.
- **Consultation**, which is what we are concerned about in this paper, builds on this exchange process. It levels the status of those involved (the employer and the employee, or their representatives) through a mutual examination of any issues. Consultation involves the employer in the active process of seeking out employee's views and taking proper account of those views both before any decision is made and in that decision. However, consultation does not involve any need for a meeting of the mind. The power and the duty to make a decision, remain with the employer.
- **Collective bargaining** takes consultation that step closer to a shared responsibility for decision making. It involves a formal process where the employer and a recognised trade union commit to seeking agreement through negotiation on defined issues (such as pay and terms and conditions).

There is a great deal of guidance on the perceived benefits of consultation between employer and employees. At its heart is the basic issue of trust between employer and employee. Employees work best in an environment where they feel valued (where their views are considered and their concerns addressed) and secure (where they know what is expected of them and what the future holds in terms of potential risks or threats to their

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employment). An employer needs to be able to respond to the market in which they work. That flexibility is restricted where staff cannot or will not adapt or positively resist change. Often this will be based on a misunderstanding of what is required. Such misunderstanding (fueled by rumour and suspicion and circulated by the office grapevine) can easily arise from misinterpreted information. The key to avoiding such misunderstandings is to understand the role of communication; identifying what information needs to be provided, the means by which it is provided and the way in which it is provided all of which enable the employee to best understand what is required and why.

It is important to recognise that consultation is a tool to be issued. Good consultation can assist with:

- **organisational performance** - spending time discussing what is required will help employee understand what is required from them and help to reduce any subsequent misunderstanding;
- **management performance** - recognising the concerns of employees (although this does not necessarily mean agreeing with those concerns) allows an employer to reach a decision which is likely to be more acceptable to employees. This enable the employer to respond more quickly where there is a need to do so as the employer does not have to start from scratch in introducing new procedures or seeking to vary contracts.
- **employee performance** - employees will perform better where they know what is expected
- **employee commitment** - where employees know where they fit into the organisation and how they can influence decisions which affect them and their future.

However, there is also a need to recognise that, the benefits aside, an employer will, in certain circumstances be obliged to consult with employees, or with employee representatives. A failure to consult in these circumstances can lead to severe penalties, usually financial.

As at June 2008, the financial awards likely in relation to matter of consultation are as follows:

Protective Award:

- | | |
|-------------------------|--|
| Collective Redundancies | - 90 days (actual) pay per employee |
| TUPE | - 13 weeks pay (capped at £330pw i.e. £4,290) per employee |

Unfair Dismissal	
Basic Award	- max £9,900
Compensation	- £63,000 capped but note where dismissal is for a protected act then no cap e.g. dismissal for a Health & Safety reason
Breach of Contract	- £25,000 capped
Discrimination	- unlimited

If the benefits of consultation are not a sufficient justification for engaging with employees, the financial consequences can be significant.

WHEN AND WITH WHO?

Collective Redundancies

A collective redundancy involves twenty or more employees at one establishment in a period of 90 days.

An employer proposing to make collective redundancies is required to consult in advance with representatives of the affected employees. Consultation must be completed, before any notices of dismissal are issued to employees. A complaint of failure to consult may be made to an employment tribunal, and must normally be brought within three months of the last of the dismissals. Where a complaint is upheld, the tribunal may make a protective award to employees of up to 90 days' pay.

In addition, the employer is required to notify the Department for Business, Enterprise and Regulatory Reform of any collective redundancies. Notification must be made before any redundancy notices are sent to affected employees.

The statutory redundancy consultation and notification provisions are set out in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). The provisions apply to all employees except:

- anyone who is not an employee - for example, an independent contractor or freelance agent;
- members of the police service and armed forces;
- share fishing men (who are paid solely by a share in the profits or gross earnings of a fishing vessel);

- Crown servants and Parliamentary staff;
- fixed term employees of three months or less unless the job actually lasts for more than three months.

For the purpose of collective redundancy, "redundancy" means a dismissal for a reason unrelated to the individual employee concerned. This differs from the definition of redundancy used for the purposes of unfair dismissal and whether an employee may be entitled to a statutory redundancy payment. A collective redundancy may occur as part of a re-organisation where there is no reduction in the overall number of employees because the employer is taking on new recruits, which is more likely to be considered as Some Other Substantial Reason for the purposes of determining a fair dismissal.

The collective redundancy rules are also likely to apply in contract variation situations, where the employer intends to offer alternative employment on different terms and conditions to some or all of the employees. The number actually dismissed may be less than twenty but the variation will have the effect in law as a dismissal with offer of re-employment. Even though many may be re-employed they will have been dismissed which will, where more than 20 employees have been effected, trigger the collective redundancy rules.

The rules will also apply where there may be "voluntary" redundancies, for example where an employee has no real choice whether to stay or to leave. If an employer is contemplating 20 or more redundancies and is not sure whether there will be sufficient volunteers, or whether some of the redundancies can be avoided, then the obligation to consult employees and to notify the Department for Business, Enterprise and Regulatory Reform will apply.

Whilst there is no obligation to consult outside of the statutory consultation rules employers do need to take account general issues of fairness and good practice if they are to avoid successful claims for unfair dismissal (on which see more below).

Who must be consulted?

It is the employer's responsibility to ensure that consultation is offered to appropriate representatives. Employee may be affected by the proposed dismissals, or by measures taken in connection with them, even though they themselves are not to be dismissed. Whether or not an employee is "affected" would be determined as a matter of fact by an tribunal.

Where those affected are represented by an independent trade union recognised for collective bargaining purposes, the employer must inform and consult an authorised official of that union. It is important to recognise that a trade union may be recognised for one group of employees in a company, but not for another so that there may be an obligation to consult with more than one union.

Where there is no union representation the employer must inform and consult some other appropriate representatives. These may be existing representatives for example appointed under the ICE Regs (see below) or some existing consultation body which has a general remit or one which allows for consultation on redundancies. Otherwise the employer may seek to or new ones specially elected for the purpose. TULRCA sets out the procedure for appointing such representatives.

In non-union cases, where affected employees fail to elect representatives, having had a genuine opportunity to do so, the employers concerned may fulfill their obligations by providing relevant information to those employees directly.

Consultation Periods

The statutory requirement is for the employer to begin the process of consultation "in good time" and to complete the process before any redundancy notices are issued.

In addition, consultation must begin at least:

- thirty days before the first of the dismissals takes effect (that is, when the employment contract is terminated) in a case where between 20 and 99 redundancy dismissals are proposed at one establishment within a period of ninety days or less;
- ninety days before the first of the dismissals takes effect (that is, when the employment contract is terminated) in a case where 100 or more redundancy dismissals are proposed at one establishment within a period of ninety days or less.

An employer who has already begun consultations about one group of proposed redundancy dismissals and later finds it necessary to make a further group redundant does not have to add the numbers of employees together to calculate the minimum period for either group.

Where employee representatives are to be specially elected, the employer will need to ensure that the election is completed and the representatives are in place (having had an opportunity for appropriate training if necessary) in time to allow the consultation process to be completed before any redundancy notices are issued.

What information must be disclosed?

The employee representatives will need enough information about the employer's proposals to be able to take a useful and constructive role in the process of consultation. An employer must therefore disclose the following information in writing:

- the reasons for the proposals;
- the numbers and descriptions of employees it is proposed to dismiss as redundant;

- the total number of employees of any such description employed by the employer at the establishment in question;
- the proposed method of selecting the employees who may be dismissed;
- the proposed method of carrying out the dismissals, taking account of any agreed procedure, including the period over which the dismissals are to take effect;
- the proposed method of calculating any redundancy payments, other than those required by statute, that the employer proposes to make.

The consultation is to include ways of avoiding the redundancy situation or dismissals, of reducing the number of dismissals involved and mitigating the effects of the dismissals. Consultation should be genuine and must be undertaken with a view to reaching agreement with the employees' representatives. Employers and employee representatives should work together to try to find common solutions.

Special circumstances

There may be special circumstances where it is not reasonably practicable for an employer to meet fully the requirements for minimum consultation periods or disclosure of information. In such circumstances, employers must do all that is reasonably practicable toward meeting the requirements.

Effect on other statutory consultation obligations

The Information and Consultation of Employees Regulations 2004 ("ICE Regs") give employees rights to be informed and consulted on an on-going basis about issues in the business they work. This includes decisions on collective redundancies and such rights are in addition to the consultation rights under TULRCA. An employer proposing to make collective redundancies must comply with the statutory consultation rules. For example, if a trade union is recognised in respect of employees affected by proposed collective redundancies, the employer must consult representatives of that union, even if there is a separate group of employees' representatives set up as a result of the IE Regs.

Where the standard information and consultation provisions in the ICE Regs apply, the employer is not required under the ICE Regs to inform and consult where the employer elects to consultation under TULRCA.

When should consultation begin?

Consultation must begin when the employer is 'proposing' the redundancies. This is before any final decision is made such that the consultation will have a genuine opportunity to influence any final decision. Where the employer is proposing to dismiss between 20 and 99 employees, consultation must begin at least 30 days before the

redundancy notices take effect. Where the employer is proposing 100 or more redundancies, the consultation must begin at least 90 days before the redundancy notices take effect. As a first step the employer will need to identify who they are consulting with and take steps as may be necessary to facilitate the election of employee representatives.

When does consultation end?

There is no time limit within which the consultation must be completed. Whilst consultation must start at least 30 or 90 days before the redundancy notices take effect, it is not necessary that consultation should last for all of that time. Where consultation has not been completed by the end of the 30 or 90 day period, employers should allow consultation to continue.

It is important to bear in mind that consultation does not required any agreement to have been reached before the consultation can be considered to be complete. Consultation must be genuine and "with a view to reaching agreement". This means that the employer should be willing to engage actively with the employee representatives when discussing alternative options. Consultation would normally be expected to cover ways of reducing the redundancies, or of mitigating their effects. For example, consultation may cover alternative work patterns, job share proposals etc. The consultative process should continue until the issues have been aired and parties have had a reasonable amount of time to comment on information provided and the proposals or counter-proposals which have been made. It is important for the employer and employee representatives to show that they have acted reasonably throughout their dealings and it is a good practice for parties to keep signed copies of any meeting minutes. In addition, the speed of the consultative process is likely to depend, among other things, with the amount of resource devoted to it. For example, employee representatives should be able to work more quickly, where they have access to good facilities to undertake their work and communicate smoothly with other employees.

Unfair dismissal and other detrimental treatment

Representatives are protected from dismissal or any detrimental treatment for acting as an employee representative in relation to the statutory consultation rules. The 12 months continuous employment requirement in order to be eligible to present an unfair dismissal complaint to the employment tribunal does not apply and any dismissal is automatically unfair.

Failure to Consult under TULRCA

In addition an employee may make a complaint to an employment tribunal that an employer has failed to meet the requirements under TULRCA.

The Tribunal finds a complaint justified it will make a declaration to that effect and may make a "protective award". The protective award is penal (i.e. for the failure to consult); it is not an issue of compensation and as such it is payable in addition to any other sum due to the affected employee, e.g. in addition to any notice pay, redundancy pay or unfair dismissal award. However it is protective so that if the employee is not made redundancy, such that the employee continues to be paid in the normal way then no sum would in fact be paid.

The award has an effect as though it were a statutory notice and pay period. This means that employees who go on strike, or are absent from work without good reason, or are granted unpaid leave at their own request, or have time off from work under certain provisions of the Employment Rights Act 1996, will not be entitled to payment. But employees who are absent under contractual holiday arrangements, or because they are ill, because of pregnancy or childbirth, or because of adoption, parental or paternity leave will be entitled to payment. They will also be entitled to payment during any period where the employer has no work available for them.

Employees who are fairly dismissed for a reason other than redundancy, or who give up their job during the protected period without good reason will lose their right to payment for the rest of the protected period.

Information and Consultation of Employees Regulations 2004 (SI2004/3426) (the "Ice Regs")

We discussed the ICE Regs in some more detail at our Employment Update Seminar in June 2005, setting out the formal triggers, the procedure for establishing a negotiated agreement and the standard provisions that will apply in default. . A copy of my talk is available on our website.

The Ice Regs only apply to employees, not the wider category of worker, and from April 2008 now apply to all organisations with more than 50 employees.

The Standard Provisions provide that an employer must provide information on:

1. the recent and probable development of the business' activities and economic situation;
2. the situation, structure and probable development of employment within the business and any measures envisaged, in particular where there is a threat to employment; and
3. decisions likely to lead to substantial changes in work organisation or in contractual relations.

The employer must consult on all but the first issue. In addition consultation on the third issue must be 'with a view to reaching agreement'

Available guidance from the DTI suggests that information under the first requirement may include:

- the launch of new products or services or a significant change or discontinuance.
- reorganisations within the undertaking
- any change to the undertakings aims or objectives
- changes in senior management or at trustee level

Where such changes may affect employment or lead to any contractual changes.

The second requirement will include:

- new employment opportunities or risk of redundancy; and
- employee training and development as an alternative or to mitigate redundancy.

The third requirement will include changes to contracts of employment.

Outside of the Standard Provisions it is for the parties to agree on what areas are subject to information and consultation. There are two approaches. You can be inclusive and identify all of the significant areas on which you believe consultation should take place. The danger is that when something arises which has not been considered you can spend a great deal of time discussing whether it ought to be consulted upon.

The alternative approach is to be exclusive and identify those matters where you agree that there will be no information and/or no consultation. For example an employer should look to exclude any consultation on specific issues of grievance and discipline or areas such as pay and conditions which may be covered under a collective agreement. Other areas to consider excluding from a negotiated agreement will be consultation on collective redundancies and transfers which are already subject to statutory consultation processes as outlined above. There is no requirement to exclude these and you may wish to follow both an information and consultation route as well and the specific statutory requirements. Indeed doing so may enable you to enable staff to have a better understanding of the issues involved and you will have a greater awareness of the likely reaction of staff.

Disputes under the ICE Regs

Any dispute or other issues arising in relation to either the Standard Provisions or a Negotiated Agreement are dealt with by the Central Arbitration Committee (the "CAC"). It has a number of powers open to it ranging from ordering a party to comply with any obligations through to imposing a financial penalty of up to £75,000 where the employer fails either to inform and consult as required by a negotiated agreement or where they have failed to arrange a ballot for appointment of the information and consultation representatives. This money is not paid to employees or to the representatives but to the Secretary of State.

A recent example is the Macmillan case where the publisher was fined £55,000 for its failure to comply with the requirements for the appointment of employee representatives.

In contrast challenging a Pre-Existing Agreement (a "PEA") is a matter for the Courts, if the PEA itself so provides or it can be shown that the PEA created an enforceable contract. In this way a failure to consult could give rise to a contractual claim, which is coupled with a claim for unfair dismissal could be brought in the Tribunal under its dual jurisdiction (although subject to a cap of £25,000 this is likely to be ample for this type of breach).

In considering the powers of the CAC remember that whilst they may have the ability to fine and direct they do not have the ability to declare invalid any action that may have been taken without the appropriate consultation.

Transfer of Undertakings

Where there is a relevant transfer of an undertaking, or where there is a service provision change as defined in the transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006/246 ("TUPE") then the transferor and transferee employers must inform and may have a duty to consult with employees or their representatives.

We discussed TUPE in more detail at our Employment Update Seminar in June 2006 and a copy of my talk is available on our website.

Two principal requirements exist in TUPE, being:-

- the disclosure of "employee liability information" to the transferee;
- information to and consultation with representatives of the affected employees.

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The second of these is more relevant here. There are two obligations; being to inform and, separately, to consult with representatives of employees who may be affected by the transfer. It is important to note that those affected will include:

1. individuals who are to be transferred;
2. colleagues in the transferor who will not transfer but whose jobs may be affected; and
3. new colleagues in the transferee whose jobs may be affected by the transfer.

The obligation to inform requires the following information to be provided;

- the fact that a transfer is to take place;
- approximately when it is to take place;
- the reason for the transfer;
- the legal, economic and social implications of the transfer for affected employees;
- measure that the employer envisages that it will take in relation to affected employees;
- the transferee must identify whether he intends to take any measures in relation to those transferred employees and details of the changes that are envisaged;
- there is also an obligation on the transferor to disclose whether he believes the transferee will be taking any measures and, if so, what he thinks they may be.

"Taking measures" is not defined but it can encompass any significant alteration to existing working conditions or practices. The obligation to inform and consult arises as soon as reasonably practical which will be long enough before the transfer to enable consultation to take place.

The obligation is to consult with appropriate representatives. This may be a recognised trade union or where one does not exist or cover all of the affected employees, employee appointed representatives who have suitable authority to be consulted in relation to a transfer. This may include representatives appointed under the ICE Regs (see above) but again (as I refer under the statutory consultation obligations which exist under TULRCA) it is important to understand the limits on the authority of any existing representatives and where that does not extend to consultation in relation to a transfer to ensure the election of representatives. The obligation is on the employer to assist in facilitating the election. If ultimately no representatives are appointed, the employer is not then obliged to inform or consult directly with the affected employees but there is nothing to prevent

the employer doing so. However, the employer cannot decide to inform and consult directly without having first satisfied its obligation with regard to the election of appropriate representatives.

Employee representatives do have certain rights and protections in order to enable them to carry out their functions properly. This includes the employer allowing access to the affected employees and to such accommodation and facilities, such as use of the telephone, as may be appropriate. Employee representatives do have protection against dismissal and detriment connected to their status or activities as a representative.

Consultation under TUPE

The duty to provide information applies to every transfer but the duty to consult only arises where the relevant employer envisages that there will be measures taken in relation to any affected employee. There is a greater duty placed on the employer to show that there has been a genuine attempt to inform, consult and reach agreement in relation to any measures that are proposed. However, there is no duty to consult about the mere possibility of measures and the duty will only arise once it is clear that measures will be taken.

The transferor is only obliged to consult with the appropriate representatives of its own employees and not with the representatives of the employees who will transfer as it is the transferee who will envisage taking any measures in relation to them after the transfer. The transferor's duty in relation to transferring employees is to provide them with information concerning the measures about which the transferee will take.

A complaint can be made to an employment tribunal if there is a failure to consult. Compensation cannot exceed 13 weeks pay (a weeks pay is capped at the statutory rate which is currently (June 2008) £330). A tribunal has the power to apportion any compensation between the transferee and the transferor on the basis of where the tribunal considers that the failure to consult lay.

Pensions

We discussed this issue in some more detail at our Employment Update Seminar in July 2007 when Simon Evans one of our Pensions experts outlined the requirements of the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006. Those regulations require employers to consult on certain 'listed changes' to pension terms. A copy of Simon's talk is available on our website.

In general, employers with more than 50 employees will have to consult on proposals to:

- change the normal pension age,
- close the scheme
- change to the contribution or accrual rates

Consultation requires:

- minimum 60 days,
- written notice to all affected employees providing sufficient information for them to understand the change and the impact on their interests,
- an opportunity for employees to raise queries/concerns, etc; and
- the employer must consider those queries/concerns before making a decision as to whether to implement the proposed change(s).

Failure to consult does not nullify any listed changes that are made but may result in a complaint to the Pensions Regulator who has powers to impose fines.

In addition an employer is obliged to consult:

- with a recognised trade union if the employer proposes to contract out of the state pensions (Occupational Pension Schemes (Contracting-Out) Regulations SI 1996/1172; and
- before selecting a registered stakeholder pension scheme (Pensions Schemes Act 1993).

Health & Safety

An employer is required to consult "fully and effectively" on all matters relating to health and safety at work. Health and safety at work is a very wide concept and will cover physical, mental and social well-being with well being more than simply the absence of illness or infirmity. For example Working Time was held to be a health & safety matter which meant that the Working Time Directive (93/104/EC) was brought into force under the qualified majority voting rules in the face of opposition from the UK.

The primary legislation remains the Health & Safety at Work Act 1974 ("HSWA"), although other acts deal with specific situations. HSWA imposes a number of obligations on employers and others and creates the Health and Safety Commission and the Health and Safety Executive, which are now due to merge. At workplace level the

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HSWA promotes the appointment of safety representatives and safety committees. There are confusing rules which apply to the appointment of representatives and committees in relation to unionised and non-unionised workplaces which is outside the remit of this paper.

More recently the Management of Health & Safety at Work Regulations SI 1999/3242 impose the duty on employers to plan, organise, control, monitor and review preventative and protective measures and reinforces the need for employers to provide information to employees or their representatives on "all questions" relating to health and safety at work.

The employer is required to provide representatives with any information within the employer's knowledge necessary to enable the representative to fulfill their function. There are a number of exceptions to the information to be provided.

The duty to consult (HSWA s2(6)) is "with a view to the making and maintenance of arrangements" which will enable the employer and the employees "to co-operate effectively in promoting and developing measures to ensure the health and safety at work of employees".

Specific consultation is required "in good time" on the following matters (reg 4A inserted by SI1992/2051):

- the introduction of any measures which may affect employees;
- arrangements for appointing persons to keep health under surveillance;
- health & safety consequences of introducing new technologies into the workplace;

Dismissal (or selection for redundancy) for Health & Safety activities (Employment Rights Act s100 and s105) is automatically unfair:

- where a health & Safety representative is dismissed for doing his job;
- participating or seeking to participate in consultations;
- raising health & safety concerns;
- leaving work in the face of serious and imminent danger;
- taking protective steps to avert serious and imminent danger.

It is important to note that the 12 months continuous employment requirement in order to be eligible to present an unfair dismissal complaint to the employment tribunal does not apply and there is no cap on the level of compensation a tribunal can award.

Unfair Dismissal Procedures

The statutory dismissal procedure requires (at stage 2) that the employer should meet with the employee. Nothing more is required to satisfy the statutory dismissal procedure but the purpose of the meeting is to allow the employee to have the opportunity to put whatever arguments they wish in defence of the specific concerns raised. Accordingly the dialogue between the employer and the employee is not strictly speaking one of consultation although you are in a sense seeking the employee's views on any decision to subject them to a disciplinary sanction including dismissal. The purpose and content of the meeting and the disciplinary procedure itself will be reviewed by a Tribunal in addressing the issue of fairness. The question of whether you have acted fairly will include consideration of the investigation and the disciplinary meeting itself.

Again this is a topic which I have covered in more detail elsewhere. A copy of my talk on Managing A Fair Dismissal, from our Employment Update Seminar in June 2005, is available on our website

Some key issues are:

Investigation - before taking any disciplinary action you must have conducted as full and fair an investigation as possible. One of the biggest dangers to an employer is to make an assumption without checking it out. In terms of any disciplinary procedure, if you want to make an assumption, assume that the tribunal will find the dismissal unfair. When it comes to the investigation - do your homework. Tribunals will often pay more attention to the investigation process than the actual disciplinary meeting.

Sickness Absence - in cases of sickness absence a meeting with the employee is an essential part of your investigation. You need to know what the reason for the absence is, whether there is any underlying medical condition and what the prognosis is for a return to work. Often this will require you to consider medical evidence but unless you happen to be a doctor disciplining your own staff, you will not be expected to have any medical knowledge or understanding. You are entitled to rely upon any medical evidence that is given to you whether that is by the employee, their GP, or a specialist that either they have been referred to, or one that you have asked them to see. Where there may be a conflict of medical evidence, you do not have to work out which is correct. If the employee refuses to co-operate, then you will have to act upon the facts that are within your knowledge.

Redundancy - there is an obligation to consider alternatives to redundancy. What is or is not an alternative (and the specific issue of what may be a suitable alternative offer of employment) will depend entirely upon the individual circumstance of the employee affected. You can only truly identify what may be an alternative through discussing, or consulting, with the employee.

Retirement - the Employment Equality (Age) Regulations 2006 introduced the right for employees to be entitled to request to continue working beyond the normal (for the work) retirement age. The procedure requires an employer to inform the employee of their right to request at least 6 months but not more than 12 months before the date of intended retirement. There is a continuing duty to inform and if a request is made to continue working then the employer must meet with the employee to consider that request. An appeal procedure also applies.

Flexible Working

I covered issues relating to flexible working in more detail at our Employment Update Seminar in July 2007, including the right to request flexible working. A copy of my talk is available on our website. The right applies to employees who care of children under the age of six or disabled children under the age of eighteen and to employees who care for, or expect to care for, adults.

Carers have the right to apply for a more flexible working pattern, which may include more flexible hours or times of work, or flexibility in terms of the employee's place of work. The regulations require employers to consider requests and to meet with employees for this purpose in accordance with a prescribed procedure.

Companies Act 1985

Companies with more than 250 employees are required to include a statement in their Directors Report which describes the steps taken to introduce, maintain or develop arrangements for, information, consultation, financial participation and economic awareness.

Also under s309 of the Companies Act 1985 directors had a duty to have regard to the interest of employees. This is now to be found in s175 of the Companies Act 2006 where the duty is to promote the success of the company and in doing so have regard (amongst other matters) to the interests of employees. The duty is owed by a director to the Company so that there are no means for the employees to object unless the employees are members and can enforce through member actions.

Other areas where there may be a duty to consult with employees

European Works Councils

The Transnational Information and Consultation of Employees Regulations SI 1999/3323 (the TICE Regs") may require that a multinational employer who employ more than 1000 employees and who operate in two or more European States establish a European Works Council (an "EWC") or some alternative but suitable structure for informing and consulting employees on matters of transnational concern.

The structure of the TICE Regs is reflected in the ICE Regs (more below) with which many employers will be more familiar. If the TICE Regs are triggered the employer must first establish a special negotiating body ("SNB") for the purposes of negotiating on the structure etc of the EWC. In the absence of a negotiated settlement there are standard default arrangements which will apply.

Representatives are protected from dismissal or any detrimental treatment for acting in a relevant capacity in relation to the SNB or EWC. The 12 months continuous employment requirement in order to be eligible to present an unfair dismissal complaint to the employment tribunal does not apply and any dismissal is automatically unfair.

European Company

A little used incorporated structure exists at European level and is called the Societas European ("SE")(European Company Statute (Council Regulation EC/2157/01) and the European Public Limited-Liability Company Regulations SI 2004/2326). The SE is registered in any one member state but that registration is then effective throughout the European Economic Area.

In order to be registered the SE must put in place suitable arrangements for employee involvement, but this is left very much to agreement between the employer and the employees. For example employee involvement may be provided through:

- formal participation in the board (or supervisory board)
- a works council; or
- agreed procedures for information and consultation through employee representatives.

Employee involvement may take three forms (which are specifically defined in art 2 of the SE Directive 01/86/EC) being:

- **information** - information on transnational matters at a time, in a manner and

with a content which allows the employees representatives to undertake an in-depth assessment of the possible impact and where appropriate prepare for consultation;

- **consultation** - the establishment of dialogue and exchange of views between management and employees representatives at a time, in a manner and with a content which allows the employee representatives on the basis of information provided to express an opinion on measures envisaged by management, which opinion may be taken into account in the decision-making process within the SE;
- **participation** - by way of employee representatives on the board (or supervisory board) of the SE whether those representatives are elected, appointed or co-opted.

The procedure for establishing employee participation is very similar to the TICE Regs (and hence the IE Regs). The management seeking to form the SE must set up a special negotiation body comprising employee representatives according to a prescribed formula and then attempt to reach a negotiated agreement. There are no limits on the scope of a negotiated agreement. In default standard rules for employee engagement in the SE will apply which, in particular, limit consultation on transnational matters as provided in the Directive.

Once again representatives are protected from dismissal or any detrimental treatment for acting in a relevant capacity in relation to the SE. The 12 months continuous employment requirement in order to be eligible to present an unfair dismissal complaint to the employment tribunal does not apply and any dismissal is automatically unfair.

European Co-operative Society

Similar to the SE the European Co-operative Society may be formed at European level, called the Societas Co-operative Europaea ("SCE") European Co-operative Society Statute (Council Regulation EC/1435/03) and the European Co-operative Society Regulations SI 2006/2078). Employee involvement is governed by the SCE Directive 03/72/EC and the European Co-operative Society (Involvement of Employees) Regulations SI 2006/2059.

The procedure for establishing employee involvement follows that for the SE above, except that there is a small SCE exception. A SCE with less than 50 employees is subject to a lighter regulatory regime where it is required to follow the domestic rules, if any, which exist in its state of registration. In the UK this would refer to the Industrial and Provident Society Acts which do not contain such provisions for employee involvement. Separately the ICE regulations would be relevant but these do not apply to organisations with less than 50 employees.

Cross Border Mergers

Whilst a cross boarder merger may result in an SE, it may also result in a single company which maintains its registration at national level, i.e. a private company limited by shares (or by guarantee) registered in England or Wales but which has operations in another member state. As such the Transnational Information and Consultation of Employees Regulations (TICE Regs as outlined above) may apply leading to the establishment of an European Works Council.

However the Cross Boarder Mergers Directive 05/56/EC will apply to the process of the merger itself and therefore at an earlier stage than at which the TICE Regs may be applied. The Directive is implemented by the Companies (Cross Border Mergers) Regulations SI 2007/2974 with effect from 15 December 2007.

The merger procedures require that the management of the merging companies must give particulars of the likely repercussions of the cross border merger on employment. A copy of this information (together with other information forming a report) will be given to shareholders, trade unions, employee representatives and in the absence of representatives to the employees directly. Comments on the report must be appended.

There is no provision under the Directive for consultation outside of any applicable domestic legislation. In the UK this would refer to the following as outlined above:

- Trade Union and Labour Relations Act (on collective redundancies);
- Transfer of Undertakings (Protection of Employment) Regulations 2006;
- Information and Consultation of Employees Regulations;
- Transnational Information and Consultation of Employees Regulations.

However the Directive does provide for employee involvement on terms to be negotiated subject to minimum standard rules which draw on existing participation arrangements, if any, applicable to any of the merging companies. The rules are complicated and only, for the purposes of this paper, relate to consultation, if any, based on an entitlement which arises under any of the rules set out above.

WHAT IS CONSULTATION?

Much of this has already been covered above. Consultation involves information and communication. It is a genuine attempt to seek agreement which can only be achieved where the employee has access to relevant information which the employee (generally

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acting through a representative) can understand. The timing and content of any consultation will depend entirely upon the circumstances of the matter being consulted on. Whilst there are specific circumstances where the employer must consult, there is the wider consideration of fairness.

Methods of consultation will vary from one employer to another and will be determined both by the reason for consultation, for example if it is under TUPE then statute identified who is to be consulted and about what and by the nature of the employer in terms of:

- size and structure;
- union recognition;
- management style.

Examples of non-statutory consultation bodies include:

Joint Consultative Committees ("JCC") are sometimes also called works councils (but should not be confused with European Works Councils under the TICE Regs). A JCC may satisfy the requirements of a Pre-Existing Agreement under the ICE Regs but this is unlikely in most cases as a result of the way in which the JCC came into being, e.g. before ICE and therefore before the requirements of a PEA were set out; lack of proper representation from senior management (who often see themselves as representing the employer) and hence establish itself as a representative body for *all* employees.

The JCC will usually comprise a number of representatives from management and other categories of workers. The composition will often be determined by the influence of particular staff groupings rather than simply proportionate representation. It is recommended that the JCC establishes its own constitution with agreement on matters such as:

- size and constitution
- appointment of representatives
- terms of reference, in particular areas not for consideration
- meeting arrangements

Joint Working Parties ("JWP") will have a similar structure but are generally established to consider a specific issue and will then disband. The JWP has the advantage of promoting joint problem solving and can bring together a representative cross section of

interested groups. However this inevitably gives the JWP a narrow focus and lack of continuity, particularly where the problem may be recurrent.

The UK Coal Mining Case

Since 1993, it had been widely accepted that the consultation obligations were focused primarily on addressing the consequences of the employer's proposals. There was no requirement to consult about the reasons behind any proposals when proposing collective redundancies, just how that proposal was to be implemented. Formulation of the proposal was a matter for management. The UK Coal Mining Case (*UK Coal Mining Ltd v National Union of Mineworkers (Northumberland Area)*) has changed this approach.

The decision was a relatively straight forward one since the EAT held that previous case law was now out of date and did not properly reflect changes which had been made to the statutory consultation rules, and in particular amendments to TULRCA on collective consultation which required the employer to consult on ways to avoid the redundancies.

There have been some suggestions that the UK Coal Mining Case means that employers will have to consult for much longer than the 90 day period set out in TULRCA. This is not right. The case does not alter when consultation must start or when it will end (see more on this under Collective Redundancies above) it simply means that employers will need to be prepared to consult on the detail of their proposal. In practical terms most employers will already, as a matter of good practice, have prepared a business case supporting their proposal and it will be rare that a well considered business case will be successfully challenged. There may be alternatives but the obligation is to consult, not to agree. It is also important to bear in mind that UK Coal was not entirely honest with the reason it had identified for the redundancy and since this was clearly shown to be a sham then the redundancies would have been found to be unfair on usual principals.

The key point of difference is that, under TULRCA, the duty to consult arises where redundancies are "proposed" whereas, under the Directive, the duty arises where redundancies are "contemplated". "Contemplating" clearly falls at an earlier stage in the thought process than "proposing" and public bodies must accordingly commence consultation earlier.

The 1993 case of *R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Vardy and others*, confirmed that the statutory consultation rules (as they then existed) did not require a consultation about the reasons for the redundancy. This decision was followed in the case of *Middlesbrough Borough Council v TGWU* (2002) and in *Securicor Omega Express Ltd v GMB* (2004).

The UK Coal Mining case was about the proposed closure of a mine. The company maintained that safety was the reason for the closure and the consequent redundancies.

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The Tribunal found that the real reason for the closure was economic and that the company had "deliberately falsified" the reasons given for the closure.

The unions brought a claim, alleging that the employer had failed to discharge its consultation obligations in accordance with TULRCA. The employer argued that there was no obligation on it to consult about the reasons for the closure at all. Because there was no such obligation, there could be no breach of TULRCA even if the reasons which it had given and discussed (voluntarily) were false.

The Tribunal accepted that there was no specific obligation to consult over the reasons for the closure but rejected the employer's argument that this got it off the hook. It held that: "In the real world employers cannot announce closures ... without at least giving some indication of the reason for the closure decision itself. In any event, if the employer chooses to give the information, it is important that the information should be true and should be given in good faith." Most employers will agree that this is the reality of consultation. The Tribunal awarded maximum protective awards of 90 days' gross pay per employee.

Instead, the EAT considered the word "proposed" and decided that the use of that word in section 188 did not prevent the consultation obligation extending to consultation over closures leading to redundancies (i.e. over the reasons for proposed redundancies). It was the EAT's view that: "In a closure context where it is recognised that dismissals will inevitably, or almost inevitably, result from the closure, dismissals are proposed at the point when the closure is proposed." The duty to consult will still only arise where closure is "fixed as a clear, albeit provisional, intention. But the obligation to consult over avoiding the proposed redundancies inevitably involves engaging with the reasons for the dismissals, and that in turn requires consultation over the reasons for the closure".

However, the EAT held that, where closure (i.e. the reason for the proposed dismissals) and dismissals are inextricably interlinked, a duty to consult over the reasons arises. This was not seeking to extend the term 'propose' to include any duty to consult where a redundancy was 'contemplated' which is the language found in the European Consultation Directive.

It is of note that the EAT referred and contrasted the information and consultation obligations under the ICE Regs which are wider in scope and that this was drawn on in support of the argument against UK Coal.

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Sources:

ACAS - Employee Communications and Consultation

DBERR - Redundancy Consultation and Notification: Guidance

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