

WRIGLEYS

- SOLICITORS -

EMPLOYMENT LAW FOR CHARITIES SEMINAR JUNE 2004

Recent developments

In the pipeline Part 1

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1. MUTUAL TRUST and CONFIDENCE

Background

It is an implied term of every contract of employment, whether written or oral, that both the employer and employee will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties. The duty is on both sides, but in most cases it is raised by employees alleging a breach by the employer. The scope of the term has widened gradually since its inception in the 1970s. The term can be invoked in a variety of circumstances, as follows:

1.1 Disciplinary matters

Mutual trust and confidence can be undermined by the way in which an employer operates disciplinary procedures. In *Alexander Russell plc -v- Holness* EAT677/93, Mr Holness was given a written warning for poor timekeeping. The next day he was late for work. His employer immediately summoned him to a disciplinary hearing at which he was given a final written warning. The employer called Mr Holness to a disciplinary hearing the same day and gave him a final written warning. Mr Holness claimed that Alexander Russell plc had breached the duty of trust and confidence. The EAT agreed that in a case which was not gross misconduct, calling him to a disciplinary hearing within 24 hours of the earlier warning was oppressive and not justified in the circumstances.

1.2 Reasonableness

Whilst the term can act as a restraint on unreasonable behaviour, there is still no implied term that an employer will treat an employee in a reasonable manner. Indeed the recent case of *Marshall Specialist Vehicles Ltd -v- Osborne* 2003 IRLR672 confirmed *Transco plc (formerly BEG plc) -v- O'Brien* which held that rather than having to act reasonably, and preferable to using language such as "acting in a fair and even handed manner", what needs to be identified is that conduct by the employer was so serious that it amounted to a repudiatory breach.

A finance director, Osborne resigned in June 2000 and claimed she had been forced to do so due to a nervous breakdown caused by the excessive burden of overwork imposed on her by the company. She had tried to work out her notice but in early August wrote a letter saying she was unable to do so, enclosing a sick note. It was agreed that she had a serious medical problem, but not agreed that the company had breach the implied term of mutual trust and confidence (nor that there had been a breach of the implied health and safety term in relation to a contract of employment leading to stress - see later). After the first letter, some attempt was made by Mr Marshall to address the situation by offering to meet and find a solution. The evidence suggested that she was inclined to refuse help and to take on the work of the Human Resources Director. The company was in trouble and both sides knew that. The company's failure to take steps before she resigned and adjourning a meeting arranged following her notice to find a solution because a previous meeting overran and because Ms Osbourne and Marshall were tired did not amount to a repudiatory breach of the implied term.

1.3 Manner of dismissal

Until recently, the doctrine of mutual trust and confidence was limited in that it did not occur in the context of dismissal, the rationale including that an employee is protected by statute - most recently the Employment Rights Act 1996 and the unfair dismissal protection it affords an employee.

Earlier this year, the Court of Appeal held that an employment tribunal can award damages for distress, humiliation, damage to reputation or family life or

psychiatric injury, effectively opening the way for claims arising from "the manner of dismissal" in unfair dismissal cases. This decision marks a change from the current view that has been applied for almost 30 years.

As regards compensation on dismissal, section 123 of the Act states that the compensatory award shall be "such amount as the tribunal considers just and equitable...to include any expenses reasonably incurred...and loss of any benefit".

In *Dunnachie -v-Kingston upon Hull City Council*, the Court of Appeal considered Mr Dunnachie's appeal against the EAT's decision to overturn the first tribunal's decision to award him £10,000 for injury to feelings.

Mr Dunnachie had claimed that his manager had humiliated him, behaved aggressively and threatened him over several months. He argued that his three week absence from work was due to stress. He resigned and claimed constructive dismissal. He claimed compensation for economic loss, damage to family life and loss of professional status. The Employment Appeal Tribunal held that section 123 is to compensate for economic loss, not non-economic loss, and that the statutory cap for compensation in tribunals in unfair dismissal claims was inconsistent with the ability to recover non-economic loss. The Court of Appeal restored his award and allowed recovery for injury to feelings.

The current cap of £55,000 for the compensatory award in unfair dismissal cases will still apply, but the decision reinforces what should already be good employment practice of ensuring that staff are clear about the circumstances in which the disciplinary procedure will be applied, what the procedure is, and that it is applied in a consistent and fair manner.

Furthermore, the Council have appealed to the House of Lords and it is of course possible that they will be successful.

1.4 Remembering absent employees

Two recent cases highlight the importance of communicating with and keeping informed an absent employee, whether their absence is due to sickness, maternity

leave, sabbatical or any other reason. Both cases involve the duty of mutual trust and confidence.

1.4.1 Visa International Services Association -v- Paul 2004 IRLR42

Ms Paul had been working for Visa for over 12 years. She went on maternity leave. Before doing so she expressed the desire to work in Visa's Dispute Resolution Unit. Whilst she was on maternity leave, a vacancy arose in the Unit. The position was advertised and filled by an external candidate, Ms Paul not having been informed. When Ms Paul found out about this, she thought that her chances of promotion had been damaged by Visa's failure to tell her about the vacancy. She resigned and claimed unfair dismissal, wrongful dismissal, pregnancy related detriment, pregnancy related dismissal and sex discrimination. This was on the basis that she had been unfairly disadvantaged during her maternity leave. Incidentally, Visa counterclaimed for monies paid in excess of statutory maternity pay, which Ms Paul viewed as an act of victimisation. She made an additional complaint of victimisation.

The Tribunal held, and the Employment Appeal Tribunal agreed, that Visa had breached the implied term of mutual trust and confidence in failing to keep Ms Paul informed of job opportunities. Ms Paul had therefore been constructively dismissed. In fact all her claims were upheld. The employer argued that they were not in breach of the implied term of mutual trust and confidence because Paul was not suitable even to be short listed for the post. The EAT said that was not the point. What was important was that Ms Paul believed that she was suitable for the post and that Visa's failure to notify her of it, especially after her 12 years' service, breached the implied term. She therefore did not need to show that she actually would have had a chance of obtaining the job.

1.4.2 Tolson EAT2003 IRLR842 -v- Governing Body Mixenden Community School

In another case relating to trust and confidence and absent employees, Ms Tolson, a senior teacher was absent from work for about two months

in early 2002 because of a medical problem. She returned to her job to find that a new headmistress had made significant changes to her timetable and duties. Not happy with the change, Ms Tolson initiated a formal meeting with the school, which took place on the 7 May 2002, at which her union representative was present. Not happy with the outcome of the meeting, she went off sick again the next day. She resigned a week later and claimed unfair constructive dismissal. Her employer argued that she ought to have evoked the school's grievance procedure. The Tribunal agreed and took into account her response to the changed arrangement. Ms Tolson appealed to the Employment Appeal Tribunal, who allowed her appeal and stated that Ms Tolson's decision not to raise a grievance had been irrelevant and that "the conduct to be considered when determining an issue as to constructive dismissal is that of the employer".

- 1.4.3 The Paul and Tolson cases highlight the importance of keeping employees informed whilst on leave. Employers should consider asking employees to attend at 'Exit' or 'Leave' interview in which the employee's expectations are clarified and an information procedure explained. However, it should be borne in mind with the Tolson case that the Employment Act 2002 sets out a new statutory workplace dispute resolution framework, which includes statutory grievance procedures (see speech 6). Although an employee will be expected to follow the minimum statutory grievance procedure, the statutory procedure is not intended to prevent an employee from resigning in response to a fundamental breach of contract. This would suggest that an employee will not be prejudiced if no grievance is raised before resigning where trust and confidence has been breached.

2. MATERNITY LEAVE, MATERNITY PAY AND ANNUAL LEAVE

2.1 Alabaster -v- Woolwich plc and Anor ECJ, 30.03.04 (C-147/02)

The European Court of Justice has recently ruled in the Alabaster case that a woman on maternity leave who is awarded a pay rise after the beginning of the period used to calculate statutory maternity pay is entitled to have that pay rise

included in the calculation of the amount of statutory maternity pay payable. This is the case even if the employer has not agreed to back date the pay award.

The background to this is that SMP is paid at 90% of a woman's normal weekly earnings for the first six weeks of her 26 week ordinary maternity leave pay period. "Normal weekly earnings" are calculated by taking the eight week period ending with the 15th week before the expected week of child birth.

It has already been established that a pay rise back dated to the calculation period means a recalculation of the woman's normal weekly earnings, on the basis that if the back dated pay rise were not taken into account, it would breach the principle of non discrimination in Article 141 of the EC Treaty of Rome. As a result of the Alabaster decision, the Department for Work and Pensions will have to amend Regulation 21(vii) of the Statutory Maternity Pay (General) Regulations 1986 so that all pay rises that fall between the start of the eight week calculation period and the end of maternity leave are taken into account, not just those that are back dated to the calculation period.

2.2 Gomez -v- Continental Industrias del Caucho ECJ, 2004 IRLR407

Another recent European Court of Justice case is that of a worker who was held not to be obliged to take statutory annual leave during the maternity leave period, despite the fact that the employer's annual shut down occurred during the maternity leave period by collective agreement. The ECJ held that allowing the two periods of agreed staff holiday and maternity leave to overlap would result in one of them being lost to the woman, in this case the annual leave. The ECJ emphasised that the Working Time Directive was intended to safeguard the health and safety of workers, and that the purpose of maternity leave was different. Maternity leave was to protect a woman's biological condition during and after pregnancy and to protect the special relationship between a woman and her child after childbirth. The ECJ held that Ruling Article 11(2)(a) of the Pregnant Workers Directive, which provides that a worker's contractual rights must be ensured during maternity leave, applied to Ms Gomez's right to annual leave too.

Employers are now advised to allow a maternity leaver to take holiday either before going on maternity leave or upon return, even if there are agreed shut down periods. What is unclear, however, is what happens to leave which the woman cannot take during maternity leave but which, as a consequence, can only be taken in the next holiday year. The Working Time Regulations 1998, which implement the Working Time Directive into UK law, prohibit a worker carrying over annual leave from one year to the next (for health and safety reasons). The ECJ's ruling also raises another question. Should women on maternity leave be able to take bank holidays occurring during maternity leave in the periods before or after maternity leave?

3. STRESS

Marshall Specialist Vehicles Limited v Osborne

In the 2002 case of *Hatton*, the Court of Appeal laid down very useful guidelines on how an employer would escape liability for an employee's psychiatric injuries. Whilst these still stand, one of the employees (Mr Barber) recently won his appeal to the House of Lords (see below). The *Hatton* Guidelines are as follows:-

- Liability would only arise where it was reasonably foreseeable that the employee in question would suffer such an injury as a result of occupational stress.
- There are no occupations so intrinsically stressful that psychiatric injury is always reasonably foreseeable - foreseeability will depend on the relationship between the particular demands of a job and the particular characteristics of the employee concerned.
- Factors relevant to the issue of foreseeability can be split into two groups, the first relating to the demands of a job and the other to the employees circumstances.

The Demands of the Job

- the nature and extent of the work done by the employee;

- whether the employee's workload is much greater than is normal to the kind of job that he/she performs;
- whether the employees work is particularly intellectually or emotionally demanding;
- whether the demands being made on the employee are unreasonable when compared with the demands made of others in comparable jobs;
- whether there are signs that others doing the same job are suffering harmful levels of stress;
- whether there is abnormal level of sickness or absenteeism in the employee's job or department.

The Employee's Circumstances

- whether there are signs from the employee of impending harm to health;
- whether the employee has a particular problem or vulnerability;
- whether the employee has already suffered from an illness attributable to stress at work;
- whether there have recently been frequent or prolonged absences uncharacteristic and whether there is reason to think that these are attributable to stress at work.

Basically an employer is entitled to assume that the employee can cope with the normal pressures of a job unless he knows of something specific about the job or individual concerned that should make the employer consider the issue of psychiatric injury. An employer is not obliged to make intrusive enquiries into the employee's circumstances and is generally entitled to take what he is told by his employee at face value (but bearing in mind the above points).

Example: Somerset County Council -v- Barber (one of the Hatton cases) - Mr Barber was a teacher, Head of Maths, at East Bridgewater Community School from 1984 until

1996. He developed symptoms of depression in 1995, when all other teachers at his level of Head of Department, were being overworked. He did not tell anyone of his depression before taking three weeks off from work in May 1996, but did mention on his return to work that he was having trouble. His symptoms continued throughout the summer holidays and the headmaster, when Mr Barber returned after the break, was sufficiently aware of Mr Barber's problems to ask a colleague to keep an eye on him. A few months later in November 1996 Mr Barber had a breakdown and was advised to stop work forthwith. He claimed for personal injury (psychiatric) in the County Court and was awarded over £100,000 in damages. However, the Court of Appeal overturned this decision. The Court noted that Mr Barber had not let his employer know that he was still experiencing problems after the summer holidays and the school could therefore not have been expected to realise that his problems were continuing when he did not give any indication of that fact. The Court held that the School (as employer) had not been under a duty to take steps to prevent the psychiatric injury occurring (see below on House of Lords ruling).

In the Autumn 2003 case of **Marshall Specialist Vehicles** (mentioned previously in relation to trust and confidence), the Employment Appeal Tribunal gave further guidance helpful to employers on workplace stress. The case was not one of personal injury but one of the breach of the implied health and safety term in relation to a contract of employment leading to stress.

The case centred on whether the employer's failure to deal with an employee's complaint that she was overworked caused her to have a nervous breakdown and breached the implied terms in the employee's Employment Contract that the employer should take reasonable steps to ensure the health and safety of employees. Whilst the Employment Appeal Tribunal confirmed what is widely known that such an implied term exists, it held there was no fundamental breach by this employer, nor was the employer in breach of the implied contractual term of mutual trust and confidence.

The EAT used the Hatton guidelines and emphasised

- the need to consider whether the indications of the employee's illness have been plain enough for any reasonable employer to realise that it should act in order to prevent it.

- that information which "might have lead" the employer to suppose that the employee was over burdened, together with, for example tearful episodes at work, were insufficient to amount to a plain indication that the employer should have taken specific action.
- that there was no need for the employer to be "reasonably proactive" by enquiring about the employee's psychological health as this can be regarded as high-handed.
- that if an employer is under a duty to take steps, it could only have been reasonably expected to take steps which would do some good. Here the employee had been enthusiastic about her work and had actually rejected offers of help. It was also held that failure to make specific enquiries about her health was not conduct which destroyed the trust and confidence between the employer and employee.

HATTON REVISITED

The employee, Mr Barber, in one of the Hatton cases, appealed and was recently successful in his appeal. Whilst the Court of Appeal guidelines remain good, the House of Lords did shift slightly the employer's in the test of reasonable foreseeability, restoring the employer's responsibility for taking the initiative when employees notify them of stress (see above for facts of Barber case).

The House of Lords said

- the employer paid insufficient regard to the fact that Barber had had time off for illness and that he had raised the problem with his line managers on return to work after the summer term when the duty of care had been triggered. Barber did not need to remind his employer and the school should have reduced his workload.

Question

How much support should an employer give in these circumstances?

Answer

Unlimited support is not required, but for example, employers should take care not to reduce an employee's pay because of a reduction in their duties due to stress as, even if the contract allows it, it may be a breach of the employer's duty of care. Reasonable steps, depending on resources, and sensitivity, are required.

4. DISABILITY DISCRIMINATION

The Disability Rights Commission published a code of practice on disability discrimination in employment and occupation in April this year. It replaces the code of practice for the elimination of discrimination in the field of employment against disabled persons or persons who have had a disability which was issued by the Secretary of State for Education and Employment in 1996.

Whilst the Code does not impose legal obligations, it can be used in evidence by a tribunal which *must* take into account any part of the code as appears to be them relevant to any question arising in those proceedings. Being familiar with the Code will help your organisation avoid litigation or successfully defend it.

The Code explains how discrimination may be avoided. Its recommendations include the following:

1. That you recognise the diverse nature of disability.
2. That you avoid making assumptions - for example, it should not be assumed that a person with a mental problem cannot do a demanding job or that because a disabled person may have less paid employment experience than a non disabled person that he or she has left to offer.
3. That you should find out about disabled people's needs - this includes in an interview.

Whilst there have been some discussions about whether asking whether the person is disabled is in itself discriminatory, many organisations do now ask whether applicants are disabled, this being justified on the basis that it helps the organisation assess whether any reasonable adjustments should be made and what these should be. If you are asking whether a person is disabled or not on an application form, but never explore the nature of the disability and how it might affect their work, you run the risk of having the

knowledge of their disability but being perceived to have rejected their application because they are disabled, without any manifestation of your consideration of reasonable adjustments. Whilst it may not be necessary in all interviews with disabled applicants to discuss their disability in detail, you should not necessarily be afraid of discussing with a disabled applicant (or indeed a disabled employee) what is required and what suitable adjustments can be made. If yours is a larger charity, it may even be wise to establish a committee for views of disabled people to be formerly represented. Even smaller charities should consult with disabled employees through less formal means.

4. It is not necessary for your charity to obtain expert advice about making reasonable adjustments.

Indeed it is clear from case law (*Cosgrove -v- Caesars and Howie* [2001] IRLI653 EAT) that it is for the employer to show that they have properly considered the making of reasonable adjustments, whether or not the employee or an expert has any views. The Code, however, suggests that expert advice may help your organisation to comply with the duties in the Act, and may be especially useful if a person is newly disabled.

5. Employers should implement anti discriminatory policies and practices. The Code states "in the event that legal action is taken, employers may be asked to demonstrate to an Employment Tribunal that they have effective policies and procedures in place to minimise the risk of discrimination". Large and small employers will have different policies and practices, but all should have something.

We have already seen from the notes on bullying and harassment that having such policies can, if properly implemented with training, reduce or eradicate the employer's liability. This applies to disability discrimination, especially as the Disability Discrimination Act 1995 is to be amended shortly, with the amendments coming into force in October 2004 as follows.

The Disability Discrimination Act 1995 (Amendment) Regulations 2003

These Regulations are currently in draft. The meaning of disability discrimination remains largely unchanged, although conditions such as HIV and multiple sclerosis are defined expressly as falling within the meaning of disability. Cancer is also included, although regulations may be made in future to limit it to certain types of cancer.

A significant addition is the outlawing of harassment in the employment and occupation field, where, in similar terms to harassment for a reason relating to sexual orientation and religion or belief, a person engages in unwanted conduct which has the purpose or effect of violating the disabled persons dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Again, if the intent is to harass but the effect is not harassment, harassment will still have occurred. There is again the exclusion of the hyper sensitive employee, because regard must be had to all the circumstances in establishing what the effect of the conduct was, which, whilst to include the perception of the disabled person, is tempered by the need to look at what should reasonably be considered as having the effect of violating dignity or creating an intimidating etc environment.

The amended Act expressly applies to discrimination against contract workers. It is also unlawful for a placement provider of practical work experience to discriminate against the disabled person in the terms on which the disabled person is afforded access to all facilities concerned with a work placement, refusing or deliberately omitting to afford such access, terminating the placement or subjecting the disabled person to any other detriment during the placement. It will also be unlawful for a placement provider to subject a disabled person to harassment in providing a work placement or applying for a work placement. "Placement provider" means any person who provides a work placement to a person whom he does not employ. This could include volunteers. However, the work placement section does not apply to local education authorities or responsible bodies, which include further and a higher education establishments.

Post employment discrimination on the basis of disability will also be outlawed, for example an employer refusing to write a reference for a reason connected to disability.

5. **INFORMATION AND CONSULTATION : WHEN, WHAT, WHO AND WHY?**

The present regime in the UK

All companies including charitable companies have a duty under Section 309 Companies Act 1985 to have regard for the interests of employees as well as its members.

Statutory information and consultation is required in certain specified circumstances, such as large-scale redundancies, business transfers, health and safety and European Works Councils

Redundancy Consultation and Notification

The redundancy consultation and notification provisions are contained in Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992, as amended by the Trade Union Reform and Employment Rights Act 1993, the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 and the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999. These provisions implemented the EEC Collective Redundancies Directives (98/59/EC).

When? What are the circumstances that trigger the current statutory obligations?

Employers are required to inform and consult appropriate representatives of employees who may be affected by proposed collective redundancy dismissals, or measures taken in connection with them. The collective redundancy situation arises where the employer proposes to dismiss as redundant at least twenty employees at one establishment within a 90 day period. If this is the case the employer is required to notify the Department for Trade and Industry of the proposed dismissals.

Points to Note

- The provisions only cover employees (not independent contractors)
- They do not apply to employees employed on a fixed term contract of three months or less

- The definition of "redundancy" differs slightly from that used to establish statutory redundancy payment entitlement. Here it is not a dismissal for a reason related to an individual employee, but where there is closure or downsizing or where an employer no longer needs as many employees to carry out a particular task or where there is reorganisation or reallocation of work
- There is no specific legal obligation to inform and consult employee representatives in cases falling below the 20 redundancy at one establishment threshold. (But see unfair dismissal below).
- The meaning of establishment - has been held to be a unit to which employees are assigned. In the recent case of *MSF v Refuge Assurance plc*, redundancies at multiple branch offices were centrally decided but applied locally. The EAT held that each branch was a separate establishment, despite sensible industrial relations suggesting otherwise.

When should the process begin?

The 1992 Directive states that information should be given and consultation started *in good time*. The 1998 Directive sees the trigger for consultation as where an employer is *contemplating* redundancy measures.

Section 188 of TULRCA 1992 as amended states that the trigger for consultation should be where an employer is *proposing* redundancies.

There has been much discussion over the years about what these words mean. *Proposal* has been described as going beyond the mere contemplation of a possible event (APMAC -v- Kirvin 1978 EAT) and relating to a state of mind which is *much more certain and further along the decision making process than the word contemplate* (R -v- British Coal Corporation and Secretary of State for Trade and Industry, ex parte VARDY 1993, CA). It seems that the European Directive envisaged consultation at an earlier stage.

In any event, the employer must begin the process of consultation

- at least 30 days before the first of the dismissals takes effect where 20-99 redundancy dismissals are proposed at one establishment within a 90 day period

- 90 days before the first of the dismissals takes effect in a case where 100 or more redundancy dismissals are proposed at one establishment within a 90 day period

However in the recent case of *MSF -v- Refuge Assurance PLC* 2002 EAT, which favoured the private sector employer with several premises, the Employment Appeal Tribunal stated that Section 188 of TULRCA could not be construed to comply with the directive. They said that:

"Contemplated" means "envisages the possibility that the employer may have[redundancies]" and that:

"Proposing to dismiss means the employer has reached the stage when he has proposals to make, as distinct from a plan having been formulated at management level which may have the likely consequence of redundancies".

In other words it is likely that the Government will need to amend Section 188 in order to comply with the Directive.

Who must be informed and consulted under the present regime?

If there is a trade union recognised for collective bargaining purposes then the employer must inform and consult an authorised official of that union. In this case there is no requirement to inform and consult any other employee representatives although this may be done voluntarily by the employer.

If the trade union is recognised for one group of employees but not another then the employer must inform and consult appropriate representatives of those other employees, whether this be existing representatives or new ones specially elected for the purpose. If there are existing employee representatives, they must have suitable authority from the employees concerned to deal with redundancies (i.e. they should not have been elected for different separate purpose).

If there is a general committee of employees fairly elected for general personnel matters then these would be appropriate to inform and consult. If there are no employee representatives then the employer should give the employees a genuine opportunity to elect representative(s) and if they fail to do so then the employer must provide relevant information to the employees direct. Even those employees who are not to be dismissed

may be affected by the proposed measures and in this case they too should be informed and consulted.

Where employee representatives are to be specially elected the employer should make reasonably practical arrangements to ensure that the election is fair and determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all the affected employees, having regard to the number and classes of those employees. The employer can determine whether the employees should be represented as a whole or whether representatives of particular classes ought to be elected and before the election the employer must determine a sufficient term of office to enable information and consultations to be completed. There is further guidance in the regulations.

What must be disclosed?

If there is a transfer of an undertaking then Regulation 10 of the Transfer of Undertakings (Protection of Employment) Regulations 1981 dictates that certain information must be given in writing, including the social, economic and legal implications of a transfer and any measures envisaged (eg redundancies or a change in terms and conditions).

In the case of redundancies, employee representatives will need enough information about the proposals to be able to take a useful and constructive part in the process of consultation. The employer must disclose, in writing and hand to each of the appropriate representatives or send by post to an address notified to the employer, or the Union's Head Office or main address, the following:

- The reasons for the proposals
- The numbers and descriptions of employees it is proposed to dismiss as redundant
- The total number of employees of such description by the employer at the establishment in question
- The proposed method of selection
- The proposed method of carrying out the dismissals (taking into account agreed procedure)

- The period over which the dismissals are to take effect
- The proposed method of calculating any non-statutory redundancy payments proposed

Scope and reasons for consultation

Scope

From a UK prospective, many businesses have used the *proposal* interpretation in the Vardy case above as simply producing a business plan and making it clear that the redundancies are needed before initiating consultation. There is certainly no duty to bargain, but the obligations extend further than merely telling employees about the redundancies and listening to what they have to say. The consultation should include ways of avoiding the redundancy situation or dismissals or of reducing the number of dismissals involved and mitigating the effects of the dismissals. TURERA 1993 states that the consultation should be "with a view to reaching agreement". A safer approach would be a genuine attempt to reach some form of accommodation or understanding on the issues raised. This may involve consultation before the formal information giving.

The Information and Consultation of Employees Regulations

These Regulations, which give effect to the Information and Consultation Directive (Directive 2002/24/EC) are currently in draft form. It is anticipated that the final version of the Regulations will be published by September this year. They will apply, unless your organisation has under 50 employees, in addition to the present regime outlined above. There are staggered start dates:

The Regulations will apply to:

1. Undertakings with a 150 or more employees from the 23 March 2005.
2. Undertakings with a 100 or more employees from the 23 March 2007.
3. Undertakings with 50 or more employees from the 23 March 2008.

Undertakings employing 49 employees or less will not need to comply (but will still need to comply with statutory obligations above).

The Regulations require information and consultation with employees in certain circumstances such as large scale redundancies, business transfers and health and safety.

If your charity already has an agreement you may be able to have a ballot of all employees and keep that agreement, which will apply after the regulations come into force. Failing this, you may wish to look towards drafting such an agreement, either to impose it now or to keep it on the back burner until it is needed as a draft for negotiation. What you should be aware of is that, under the new regulations, if they applicable to your charity, in the absence of either a pre-existing or negotiated agreement, there are default provisions which entitle employees to request information in writing. This request must be from at least 10% of employees, with a minimum of 15, and can be an anonymous request. The employer should initiate negotiations within one month of the request and have six months to reach a "negotiated agreement"

What if no agreement can be negotiated? In such cases, the Standard (default) Provisions apply (see below).

Basic requirements - "the Standard Provisions"

The Regulations contain default provisions which will apply if an employer does not establish formally an Information and Consultation Committee by agreement.

1. There will be a duty of co-operation on both sides - both employer and employee - with a requirement on the employer to consult and inform *on the recent and probable development of the undertaking's activities and economic situation.*
 - it is not clear what is meant by "economic situation". It is unlikely that it will be interpreted as free reign for employees to delve into the finances of the company in detail, for example through management accounts, but there will be an obligation to disclose certain financial information, which will probably include profit and loss accounts and a balance sheet.
2. Information and Consultation is to be on the situation, structure and probable development of employment within the undertaking and on any anticipated measures envisaged, in particular, where there is a threat to employment in the undertaking
 - it has been suggested that it is unclear whether this obligation to consult extends to situations where employment within a third party organisation is affected (such

as where an employer envisages changing a key supplier). However, as the wording does say "within the undertaking", in my view it is unlikely that it would be interpreted as such.

3. It should be in time for the Information and Consultation Committee to conduct an adequate study and prepare for consultation, with the employer meeting with the committee, responding to its concerns with a view to reaching an agreement. Consultation under the Default Provisions must be at undertaking level. However, with pre-existing or negotiated agreements, consultation can take place at establishment or group level
 - arguably, particularly because of the committee needing time to conduct an adequate study, this provision requires pre-decision consultation.

The following may be appropriate issues on which an employee could consult.

1. Working time and practices.
2. Training and development.
3. TUPE/Transfers.
4. Pensions and other benefits.
5. Secondments.
6. Collective redundancies and restructuring, merger and acquisitions.
7. Health and Safety

It is not clear whether pay should be the subject of consultation.

Confidentiality

The employee representative has a statutory duty not to disclose information if requested by the employer, although the employer's request should be reasonable and the employee will still be able to make protected disclosures. It will be breach of contract by the employee representative of his contract of employment should he breach this duty. What will be a reasonable request by the employer will be judged according to whether

the disclosure would seriously harm the functioning of the employer or would otherwise be prejudicial to it.

What to do to challenge a demand for an agreement

If you consider that the demand is not valid (for example if not enough employees have requested it), you may refer the matter to the Central Arbitration Committee, which is the arbitrary body for all matters relating to the information and consultation regulations.

What to do if the demand is valid

You must organise the election of the representatives to the Information and Consultation Committee

What should you do now?

Whether or not you aim to work towards a pre-existing agreement (if you have time), you should at least, if you have 50 employees or more, begin to audit your current consultation processes to assess whether they bear any resemblance to the Standard Provisions, or with a view to drafting a negotiated agreement. It would also be wise to train your trustees and senior management on these regulations and to look at the structure of your business with a view to assessing whether a negotiated agreement (or a pre-existing agreement) should have consultation at establishment, undertaking or group level.

All employers with 50 employees or more, and particularly those with 150 or more, should plan whether to work towards compliance to pre-existing agreements, because they will apply notwithstanding the provisions of the new Regulations. Such agreements must be in writing, cover all employees in an "undertaking", be approved and set out how the employer is to give information to employees or reps, and seek their views on such information.

However, employees (at least 40% required) can challenge the agreement. Alternatively, you should consider whether to initiate negotiations for a negotiated agreement in compliance with the Regulations. Otherwise, negotiations can be triggered by employee demand (see above). This may not be the most sensible approach because the time between the demand for a negotiated agreement being made and negotiations starting is only one month. Employers should perhaps look towards drafting an agreement which

can be used in the event that employees demand a negotiated agreement. Obviously when you go about drafting the agreement is dependent upon how many employees you have, bearing in mind the above trigger dates.

If your organisation requires advice on the contents of an agreement then please contact Clare Booth or Chris Billington.

6. General

6.1 New Compensation Limits

The Employment Rights (Increase of Limited) Order 2003 has increased the cap on a week's pay relevant to several Tribunal awards, including the basic award for unfair dismissal and a week's pay for redundancy purpose,s from £260 to £270. The maximum compensatory award for unfair dismissal has increased from £53,500 to £55,000. These increased amounts apply where the "appropriate date" (for example, the date employment terminates on expiry of a redundancy notice) falls on or after 1 February 2004.

6.2 Liability for Employee's use of Mobile Phone - The Road Vehicles (Construction and Use) (Amendment) (No.4) Regulations 2003

These Regulations came into force on 1 December 2003. They make it unlawful to use a handheld phone or similar communication device when driving. The offence is subject to a £30 fixed penalty or a maximum fine of £1,000 for conviction in Court. There are already suggestions that the penalties are to be increased.

As the Regulations apply to "anyone who causes or permits any other person" to use a handheld mobile phone whilst driving, the Society may be liable, for example,

- if it requires employees to use a handheld mobile phone whilst travelling
- if it fails to communicate to employees that use of phones whilst driving on company business is both a criminal and disciplinary offence

- where an employee uses a handheld mobile phone while driving if that act is committed by the employee "in the course of his employment" and is either authorised by the Society, or was so closely connected with an act authorised by the Society that it might be regarded as a method of doing the unauthorised act.

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