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Collective Redundancy Consultation

BIS Call for Evidence - TUC response

Contents

Section one

Introduction

The Trades Union Congress (TUC) has 58 affiliated trade unions which represent more than 6 million members in a wide variety of sectors and occupations, including in the public, private and voluntary sectors.

Trade union officials and union workplace representatives have extensive experience of negotiating with employers over collective redundancies and restructuring exercises. Trade unions are currently representing members in many redundancy situations. Some involve small groups of employees. Others can involve many thousands of workers.

Wherever possible trade unions will seek to identify and convince employers of ways to avoid or reduce the level of redundancies. Where an employer fails to comply with their information and consultation obligations, trade unions will consider applying to an Employment Tribunal for a protective award.

There is widespread evidence that the threat of redundancies and restructuring exercises have a detrimental impact on the income and well-being of staff made redundant. It also has a negative effect on the sense of job security and health and well-being of staff who survive redundancy exercises.

Genuine consultation between trade unions and can help to ameliorate these effects by saving jobs and ensuring the processes are transparent and fair. It also brings benefits for employers by assisting them to avoid redundancy costs and litigation and to retain trained staff. Effective consultation can also benefit the wider economy by saving jobs, reducing unemployment levels and reliance on welfare benefits and by helping to retain high skill employment.

The damaging effects of redundancies

Working people have paid a heavy toll throughout the economic crisis, through the high level of redundancies, rising unemployment, particularly among young and women workers, and pressure on household incomes and living standards.

By January 2010, more than 1.3 million people had lost their job since the start of the downturn[1]. Redundancies continue to be announced at a rate of 164,000 per quarter. Although this figure is lower than the 300,000 at the height of the last recession (Spring 2009), in the meantime unemployment has

[1] http://www.cipd.co.uk/pressoffice/_articles/GDPworkaudit250110.htm

risen to more than 2.6 million or 8.4 per cent, meaning that those being made redundant face very difficult labour market conditions in which to find new employment. The CIPD research also revealed that two thirds of those who succeeded in finding employment were paid significantly less in their new job. The average pay penalty was 28 per cent.[2]

The recent Good Work Commission concluded, the experience of redundancy can have damaging impact on individuals who are made redundant:

> 'Textbooks on redundancy tell us that, technically, it is posts that are made redundant; not people. The theory is that if an organisation needs to reduce its labour costs and therefore the number of posts it has, the people in these posts have to move on, but no blame should attach to them; they shouldn't feel bad about it or any less of a person as a result. In practice, of course, that is not how it is experienced. For the employee, the dominant feeling is often a combination of anger, rejection and emptiness."[3]

Redundancies also have a serious impact on those who remain within workplaces. Findings from a CIPD survey in 2009 revealed that seven out of ten of employees whose organisations have made redundancies report that job cuts have damaged morale, with more than a fifth (22%) of employees so unhappy as a result of how redundancies are being handled that they are looking to change jobs as soon as the labour market improves.[4]

A TUC survey of union workplace reps conducted with the Labour Research Department (LRD) in 2010 also revealed that the absence of effective consultation between employers and unions could have a significant impact on staff morale and employment relations. We were able to collect responses in more than 80 workplaces with experience of recent or proposed redundancies. In half of these cases, union reps reported that staff morale and relations with management had clearly been damaged by the experience.

There are also strong links between job security and stress levels, with employers that are planning redundancies most likely to see a rise in mental health problems among staff. According to CIPD research, worries about job losses have helped stress become the most common cause of long-term sick leave in Britain, [5] overtaking other reasons for long-term absence such as repetitive strain injury and medical conditions such as cancer. Such problems appear particularly acute in the shrinking public sector with half of employers reporting an increase in stress-related absence over the past year.

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[2] Ibid

3 *Good Work and Our Times*, a report of the Good Work Commission, Lucy Parker and Stephen Bevan, July 2011. The Work Foundation.

[4] *'Employee Outlook: Job seeking in a recession'* CIPD Quarterly Survey Report Summer 2009.

[5] CIPD 2011 Absence Management Survey Report http://www.cipd.co.uk/hr-resources/survey-reports/absence-management-2011.aspx

Use of section 188 notices to reduce terms and conditions

Another issue of serious concern is the increasing use of section 188 notices in particular by public sector employers to pressurise staff to accept substantially reduced pay and conditions. In local authorities and public services across the UK employers have threatened entire workforces with dismissal unless they are willing to agree to significant pay cuts, cut in bonus payments and sick pay, maternity pay, allowances and other workplace benefits. Such practices have seriously damaged workforce morale. They lead to increased Employment Tribunal claims as employees and their unions seek to protect contractually agreed terms and conditions. In some instances they have led to industrial disputes.

The TUC believes that such practices conflict with the aims of the Collective Redundancies Directive, which was introduced with a view to saving jobs and avoiding needless redundancies. The Directive was not designed as a vehicle for the unilateral variation of pay and conditions by employers.

The TUC would call on the Government to consider ways of preventing the misuse of section 188 notices as part of this review.

Benefits of collective redundancies consultation

There is clear evidence that meaningful collective redundancy consultation can help to brings genuine benefits for employees, employers and the wider economy.

A recent TUC survey of workplace reps and case studies gathered by our affiliates all reveal that negotiations between employers and trade unions can reduce job losses. This in turn can avoid unnecessary unemployment and reliance on the welfare system. Effective redeployment exercises assist employers to avoid the costs associated with staff layoffs, including redundancy payments, the loss of skilled staff and institutional knowledge and recruitment and training for new staff. Longer consultation periods increase the prospects of avoiding redundancies, by providing unions and employers the time to identify efficiency savings, examine options for reorganising the organisations, generate increased orders and increase deployment opportunities. Longer consultation also provides time for Government agencies to identify investment opportunities and to provide support through job search and training for staff at risk.

Meaningful consultation can also maintain morale amongst 'surviving staff' and support good employment relations. The CIPD [6]research indicates that employees believe that frequent and honest communications (53%), more meaningful consultation (35%) and giving employees greater voice in the workplace (30%) would have the greatest impact on improving trust. The TUC survey also revealed that where management's decision to make

[66] Ibid

redundancies appeared justified and consultation had been taken seriously attitudes within the workforce were more likely to understand and accept the changes.

Key issues for the TUC

Against this backdrop, the TUC believes that it would be seriously counterproductive for the Government to weaken existing consultation arrangements. The TUC is concerned that any reduction in consultation rights would result in unnecessary redundancies, rising unemployment and rising job insecurity. The TUC is concerned that the current review focuses mostly on the length of consultation rather than the quality and potential benefits of consultation.

We are not convinced by the argument that current consultation arrangements unjustifiably constrain – or constrain at all - the ability of businesses to reorganise. The 90 day consultation period only applies in limited circumstances - 16% of all redundancy or restructuring situations. It therefore does not represent a significant burden on business. Most large redundancies involving 100 employees or more are likely to raise complex issues and to pose significant threats not only to the workforce which is at risk, but also to the surrounding community and the local economy.

Practical experience reveals that the minimum statutory periods provide insufficient time to explore and exhaust all alternatives to redundancies, to facilitate the redeployment of staff and to ensure staff at risk can access training needed to find new employment. It is therefore not surprising that the TUC survey and union reports reveal that many employers have negotiated longer consultation periods with unions or are willing to extend consultation periods. The TUC therefore believes there is no case for reducing the 90 day redundancy consultation period.

There is also clear evidence that trade union reps and officials bring added value to collective redundancy consultations, as compared with non-union workplace reps. Union reps are trained, have extensive experience and will have developed high trust relations with employers over periods of time. Any dismantling of the arrangements for who is consulted over collective redundancies could damage good quality employment relations; is likely to reduce the effectiveness of collective redundancy consultation and could increase workplace disputes.

Section two

Consultation Questions: Responses

Introductory questions

Questions 1 to 5:

In 2010, the TUC and the LRD circulated a request to affiliated unions and networks of workplace representatives requesting information about redundancies in their workplace, in particular where there had been efforts to avoid or mitigate job losses.

Altogether information was gathered from almost 120 workplaces and organisations. Three quarters of these had experienced recent or proposed redundancies. It is important to note that the TUC survey was completed before spending cuts announced in the comprehensive spending review were consulted on or took effect.

Although over half the workplaces where reps responded employed more than 500 staff, the survey also did not include workplaces experiencing very high levels of redundancies which often hit the headlines. The levels of redundancies proposed or implemented ranges from ones and twos to two thousand. The average number of redundancies proposed was 135.

Nevertheless the findings from the survey which are outlined in this response reveal that consultation between employers and unions is often successful in reducing job losses, ensuring staff are redeployed and in avoiding the need for compulsory redundancies.

Response to Question 4: Consultation periods in excess of the statutory minimum

There is clear evidence that many employers are willing to negotiate and agree consultation periods which exceed the statutory minimum periods, even where the legal obligations do not apply.

The findings from the TUC survey reveal that **between a third and almost a half of workplaces** appear to have consultation periods which exceed the statutory minimum (i.e. consultation of more than 90 days for 100-plus job cuts, more than 30 for 20-99 job cuts, and any collective consultation where less than 20 job cuts were involved). Most other employers complied with the relevant statutory minimum period. Although in a small minority of instances employers appeared not to have allowed enough time for consultation.

Examples of consultation lasting more than 90 days include:

- A chemical manufacturer was able to reduce108 proposed job losses down to 93 in a consultation period lasting seven months. The union rep involved welcomed the seriousness with which the employer approached the consultation, genuinely seeking to engage with the workforce and to avoid redundancies.
- One university operates a two-month 'at risk' period prior to three months formal notice of redundancy. The union rep reported: "We have found that during this five-month period some staff 'at risk' find other work within the institution". The employer had also agreed and implemented a new redeployment process which may also have contributed to the avoidance of redundancies.

The TUC survey also revealed examples of employers allowing for a 90 day consultation period even though significantly fewer than 100 employees were at risk of redundancy.

- A utilities company and a public service employer both consulted for more than 90 days, resulting in 20 and 30 redundancies respectively.
- An engineering firm consulted for 90 days even though fewer than 100 redundancies were proposed. The 61 proposed redundancies were cut to 50 after consultation with union and non-union reps
- Similarly at an educational institution 70 proposed redundancies were cut to 60 in over three months of "genuine consultations".

Even where fewer than 20 redundancies are proposed (i.e. where the statutory duty to consult is not triggered), it is not uncommon for employers nevertheless allow for a 90 days consultation period. Examples include:

- At one engineering company, open discussions over a small number of jobs took place for around six months, and discussions with the union for around 12 months. Staff were also provided with 90 days' notice
- At another manufacturing company where 18 proposed redundancies were cut by a third to 12, the union convinced the employer to agree to a 20-day "trial period" as well as 30 days consultation.

Employers are often willing to agree to longer consultation periods because they recognise the benefits of consultation in terms of retaining staff, avoiding training costs, maintaining morale amongst staff who remain in the organisation and in the interests of good industrial relations.

The TUC is concerned that any reduction in the 90 day consultation period would send a signal to bad practice employers that consultation is not important or beneficial.

Question 6: Are you aware of your rights and obligations under sections 188-198 of the Trade Union and Labour Relations (Consolidation) Act 1992?

Trade union reps and officials are aware of their rights under sections 188 to 198 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992). In response to the recession trade unions now regularly run courses to train workplace reps on consultation arrangements. Such training helps to ensure that consultation with employers is meaningful and that all alternatives to redundancies are thoroughly investigated.

The TUC is however concerned that many employers fail to understand their obligations to inform and consult with trade unions or workplace representatives in redundancy situations. In particular, some employers fail to appreciate that they are under an obligation to consult *with a view to reaching agreement*. Too often employers simply go through the motions when it comes to redundancy consultations. Although some are willing to hold regular meetings, too often decisions have been taken in advance and the employer is not willing to consider the union's views or proposals.

It would be helpful if guidance was prepared to raise awareness amongst employers of their obligations to inform and consult. The Acas Handling Redundancies guide provides a useful template. The guidance should emphasise:

- The benefits and importance of early consultation and the disclosure of information by employers
- Employers should not withhold information from worker representatives simply on the basis that it is confidential. The guidance should confirm that the disclosure of confidential information to employee representatives does not conflict with stock market rules.
- Employers are under a legal duty to consult on the economic reasons for proposed redundancies. This means that consultation must start early and must address whether the redundancies are necessary.
- Employers are under a legal duty to consult with a view to reaching agreement. As highlighted by the ECJ in the *Junk* case this is akin to negotiation. Employers must provide unions with the opportunity and time to develop and present alternative proposals. The employer should seek to adjust their proposals in response to union proposals. Wherever possible employers should seek to reach agreement with unions.

It would also be helpful if the law was clarified on when the duty to consult is triggered. This issue is likely to be clarified in the future by the CJEU in *USA v Nolan* case.

Question 7: With whom do you consult about collective redundancies? What are the advantages and disadvantages of engaging with different types of representative?

The TUC believes there are clear advantages for employers as well as employees where consultation on collective redundancies takes place with recognised trade union representatives.

Trade union reps are trained and experienced in negotiating with employers. The TUC survey revealed many positive examples of unions working to keep redundancies to a minimum. By being in touch with employees' concerns and helping members to understand what was happening, union reps made sure that employees have a voice and input into the employer's priorities. Union reps are a channel for two-way dialogue on how companies and organisations operate, and therefore how they could be restructured. When redundancies become necessary unions can communicate that message in a trusted way to the workforce.

Trade union reps can rely on the support and advice from full time union officials. Such officials will often have a wealth of experience of representing members in other workplaces in the same sector and sometimes beyond. Being able to access union networks, means that union reps are better placed to suggest practical and innovative solutions during negotiations.

Trade unions will often have developed good and high trust working relationships with employers. In a 2007 survey commissioned by the TUC and Personnel Today, the majority of responding HR professionals agreed that unions were an 'essential part of modern employer/employee relations', and that union officials approached meetings with managers in an 'open, constructive manner'.[7]

Almost four out of ten reps responding to the TUC survey reported that the length of time they spent on union business increased as a result, indicating the amount of work involved. Some of this additional time was likely to have been given voluntarily and out of the reps' own time. In a survey carried out by the TUC in 2005, 16 per cent of union reps said that less than a quarter of the time they spent on union duties was paid for by their employer. However some reps reported that their employers were willing to agree to extra days or a doubling of "facility time". One union rep suggested this was because their employer was "concerned about the effects any downturn in the organisation has on the morale of staff".

Trade union reps recognise the importance of dealing with equality related issues during the consultation processes, including ensuring that redundancy selection processes are non-discriminatory, that disadvantaged groups are fully consulted and their interests protected. This includes consulting women on maternity leave during redundancy processes and ensuring employers consider any reasonable adjustments necessary to enable disabled workers to be redeployed to new posts. By raising such issues during the consultation

[7] http://www.personneltoday.com/articles/2007/01/30/39034/hr-and-unions-relationship-cordial-relations.html

processes, unions help to reduce the need for future Employment Tribunal cases. Unions will also press public service organisations to comply with the statutory equality duty.

Union learning reps (ULRs) also support people at the workplace during redundancy exercises by:

- Finding out learning and support needs and organising learning activities in the workplace (such as CV workshops, job search, Skills for Life, ICT, financial management etc)
- Providing advice and information on learning opportunities including by referring people to adult career advice such as Next Step (or providing this service themselves if they are qualified)
- Working with external stakeholders such as learning providers and Jobcentre Plus

Examples of recent actions by ULRs include:

- In 2010 a PCS ULR in the HMRC helped to organise a management workshop for disabled workers in risk of redundancy. The workshops help disabled workers facing redundancy to consider their potential for line management and supervisory roles. They helped to boost confidence of staff and to open up new horizons for a group of workers whose morale was at rock bottom after learning that they would lose their jobs. The ULRs identified the learning need and contacted necessary partners to organise the workshop.
- A Britannia Staff Union (BSU) ULR helped to organise a learning programme for the staff when Co-op Financial Services (CFS) announced in 2010 that they were proposed to close a site. 91 members of staff were notified that they were at risk of redundancy. The ULR worked closely with their chosen provider as well as the Jobcentre Plus. This included individual Information, Advice and Guidance sessions, skills assessments and enrolment on appropriate courses. Staff was achieving NVQs and ITQs. 72 people attended CV writing workshops. Short courses on minute taking, report writing and time management were also popular. Many staff wanted to undertake several 'response to redundancy' courses, which involved learning skills outside of their normal work, such as food safety in catering, first aid and health and safety.

The TUC believes that union reps are better placed than non-union reps to communicate with workforces, to represent employees' interests, and to engage in meaningful consultation with employers. Non-union reps are often elected or appointed on a one-off basis to deal with a consultation on collective redundancies. They will often have no previous experience of negotiating with any employer. This increases the risk that consultation will be a formality and that alternatives to redundancies will not be fully investigated and explored.

The TUC is also concerned that the current rules for electing and appointing non-union workplace reps are inadequate and do not ensure that workplace representatives are genuinely independent from the employer.

The TUC would not support proposals to change existing rules on who is consulted on collective redundancies. Any changes which required employers to consult non-union reps at the same time or even instead of union representatives are likely to be counterproductive and will undermine or even damage existing good employment relations arrangements.

Process of consultation

Question 8: What factors make agreement more difficult or more likely?

The TUC believes that agreement is less likely where employers fail to take their legislative obligations seriously and present their redundancy proposals as a *fait accompli*. Lack of transparency by employers also discourages agreement.

Agreement is more likely to be reached where union reps and subsequently the wider workforce are convinced that any redundancies or reorganisation is justified and that all alternatives to redundancies have been fully explored.

Employers should therefore be willing to disclose financial and sales forecasts, full details of income and expenditure, the findings from any service reviews and any restructuring proposals at the outset of the consultation process. They should also be ready to engage with external agencies, public authorities, and Government departments where appropriate to seek avoid redundancies. Ample time should also be provided for redeployment exercises.

Research carried out by Acas[8] reveals that employers have been willing to take a different approach to the current economic downturn than in previous recessions, including 'taking a more long-term view, seeking to work in partnership with unions and their employees to avoid job cuts and find new ways of working.' As a result in some workplaces, agreements were reached on pay freezes, shorter working weeks and limited overtime. It is worth noting that such agreements were not simply the product of formal consultation periods. They were often the result of regular discussions over a long period of time, often years, and of well-established industrial relations between employers and unions.

Question 9: If agreement cannot be reached, when can an employer be confident that the consultation is finished and that redundancy notices can be issued?

[8] http://www.acas.org.uk/CHttpHandler.ashx?id=2694&p=0

In most cases, consultation is unlikely to have been completed until the end of the minimum statutory periods – whether it is 30 days or 90 days.

Early completion of the consultation process is only likely to be possible where the trade union or workplace representatives agree to it. Sections 188 to 198 of TULR(C)A 1992, the Directive on Collective Redundancies (EC 98/59), and decisions from UK and European courts all make clear that consultation on collective redundancies is akin to negotiation between employers and trade unions[9] and must be carried out *with a view to reaching agreement*.

Employers need to ensure that consultation takes place well in advance of any decision to dismiss staff. In its decision in *Middlesborough Council v TGWU and anor* [2002] IRLR 332, the EAT also made clear that consultation about ways of avoiding dismissals, reducing the numbers to be dismissed and mitigating the consequences of dismissals are to be viewed as three separate mandatory duties of consultation. Obligations in relation to consultation will therefore only be fulfilled where employers and unions have carried out detailed negotiations on all relevant issues.

Employers also are under an obligation to ensure that consultation is meaningful and is not a 'sham'. As a minimum, employers must ensure that unions have been provided with the time to consider the employers' proposals and to prepare and present any alternative proposals. The employer must consider the unions' proposals and seek to change or adjust their plans in the light of them.

The TUC is increasingly concerned that employers are seeking to use compromise agreements in order to close off the need for consultation and in an attempt to avoid future claims relating to the failure to inform and consult with trade unions or workplace representatives. We consider that such use of compromise agreements is not appropriate. Information and consultation rights pertain to trade union and workplace representatives. It is therefore not possible for individual employees to compromise these rights.

Question 10: What happens during consultation?

Consultation can vary in quality with some employers "going through the motions" without grasping the concept. This means that employers are more at risk of future Employment Tribunal claims.

Nearly all of the reps taking part in the TUC survey had had some consultation over proposed redundancies, although half a dozen said there had been none. In these cases employers appeared to have confused communication with consultation.

However in many workplaces employers adopt better practices, including ensuring that consultation take place at an early stage.

[9] See the decision of the ECJ in *Junk*.

- One finance company union rep acknowledged: "The employer does generally consult in good time and we can make a difference in TUPE transfer terms and sometimes reducing the number of proposed redundancies".
- In one public service company "management had a clear plan for managed shrinkage and a desire to avoid redundancies wherever possible". A union rep reported they were in discussion with the employer for almost a year looking at alternatives before official notification.

It is also important that union or workplace reps are informed first of any redundancy proposals. This helps to avoid bad practices such as employees being notified of redundancies via by email or intranet, or through letters to members' homes. In one workplace an employer hired extra security services so staff could be told and then sent home.

While early disclosure to reps can ease the path of consultation, it still needs to be part of a considered approach. Another union rep reported that a confidential meeting held a week before redundancy details were announced by one finance company came far too late because decisions had already been made. The rep explained that for good results "union involvement should be in the planning stage".

In terms of the subject matter for consultation, according to the TUC survey, subjects most frequently consulted on were the reason and necessity for redundancies and the number of employees at risk (which were reported in more than seven out of ten cases). Following that was the timescale for redundancies, possibilities for avoiding redundancies and selection criteria.

Meetings vary in format and frequency but were often weekly. With a longer consultation period a more measured approach becomes possible, especially where a large number of individuals are involved.

- In one rural workplace the employer has a policy of not moving to a formal state of redundancy until an individual has been "surplus" for six months or more. Once consultation starts face to face meetings are held at least once a month to discuss processes, procedures, and the emerging numbers.

Question 11: What impact does consultation have on the employer's business decision? (eg in terms of number of proposed redundancies actually effected?)

The findings from the TUC survey confirm that collective redundancy consultation can have a significant impact in terms of reducing job losses. Four out of ten reps responding to the TUC Survey reported a reduction in the number of job cuts implemented at the end of the consultation process.

It is also noteworthy that three quarters of jobs were saved in workplaces where – in the judgement of union reps – the proposed losses were not justified, but where the employer took the consultation "seriously". These

statistics however underestimate the effect of consultation as in many workplaces union reps also succeeded in reducing the number of compulsory workplaces.

- A North West manufacturing company, which had been affected Government spending cuts, initially proposed 800 compulsory redundancies. Through weekly meetings, led both by workplace reps and full-time officers from the three recognised unions – Prospect, GMB and Unite, negotiators secured an agreement for no compulsory redundancies. Just over 500 voluntary redundancies were ultimately agreed, 300 of which were drawn from the pool of agency workers. An on-site Union Learning Representative (ULR) also made sure that a full range of support services were available to those at risk.

Unions will often seek to develop alternative of proposals in order to avoid redundancies:

- At a food company which made 750 staff redundant, the union developed counter-proposals to the closure of their site. These, they argued, provided savings and better utilisation of the workforce and the site. Despite a high profile campaign around this, only a small part of the union plan was accepted. Even so, it resulted in about 230 jobs being saved.

In a few workplaces, unions convinced employers not to proceed with some redundancies as it would affect customer service or operational effectiveness.

- When 92 redundancies were proposed at utilities company, consultation due to last 30 days was "allowed to go over", enabling discussions of all the relevant issues, including the selection criteria for redundancies. In this instance, nine jobs were saved when union arguments that they were "leaving themselves short in the areas affected" were eventually recognised by the employer.

Recruitment freezes and a reduced role for agency workers is often seen by employers and union reps alike as a means to avoid redundancies. Two thirds of the workplaces in the TUC survey had been making use of agency workers before the recession and about two thirds of those saw agency workers being laid off or made redundant.

- One company combined a voluntary severance package with the release of some temporary workers to achieve a reduction of 800 in its workforce.

In some cases unions were prepared to negotiate temporary changes in terms and conditions in order to avoid the need to cut jobs.

- A Unison rep said: "The aim [of the temporary changes] is to avoid compulsory redundancies so once the reduction in posts has been achieved there is no need to continue with these arrangements".

It is important to note that where employers fail to engage in genuine consultation this can lead to unnecessary redundancy costs and mean the employer incurs unnecessary recruitment costs:

- One company in the TUC survey implemented 30 compulsory redundancies but then re-employed a number of operatives previously made redundant (at the lowest end of the skill level and on reduced terms and conditions). And more agency staff were subsequently engaged to replace permanent employees made redundant (swelling an already significant number of agency workers, none of whom were laid off).

  Describing the consultation, a Unite rep said: "I accompanied my full time officer at a number of meetings … and argued for redeployment, retraining, voluntary early retirement packages and any other possibilities within the group to keep the workforce together in anticipation of an upturn [beginning to happen, at the time of the study]. The company failed to explore any realistic alternatives."

Establishment

Question 12: Have you experienced specific difficulties when trying to determine what constitutes an establishment for the purposes of collective redundancy consultation? If yes, please describe them.

The issue of what constitutes an establishment creates uncertainty for employers and unions alike. The fragmented nature of the UK labour market, increasingly complex business structures and the increased use of fixed term and casual workers all add to these difficulties.

The recent experience of former Woolworths staff also illustrates the major anomalies and unjust outcomes which result from the combination of the establishment test and the 20 employee threshold for redundancy consultation. After the firm went into administration, the insolvency practitioners failed to consult with USDAW, the recognised trade union. USDAW subsequently brought a successful application for protective awards winning £67.8 million from the Redundancy Payments Office for 24,000 of its members. However 3,000 employees failed to receive compensation because the courts concluded they were employed in separate establishments which employed fewer than 20 employees.

The Woolworths case is not an isolated example. Unions regularly report that employers attempt to restructure businesses and organisations into smaller establishment units so as to avoid the duty to consult.

The current review provides an important opportunity to amend the 1992 Act to prevent such avoidance tactics and unfair outcomes. The TUC believes that the existing 'establishment' test should be replaced with the broader 'undertaking test. This would mean that the duty to consult would apply in virtually all instances where an employer was considering more than 20 redundancies. It would make no difference if the affected staff were dispersed across different departments, divisions, regional offices or retail outlets within a business. The use of the 'undertaking' test would also reduce uncertainty for

businesses and unions and the need for costly litigation on when the duty to consult applies.

The TUC also believes that the 20 employee threshold for information and consultation rights on collective redundancies should be removed. The current threshold means that employees working in small firms do not have the right to be informed and consulted where redundancies are being considered. As a result, employers in small firms are less likely to take employees' insights into account before making redundancies. This may lead to missed opportunities to rescue the organisation or to save jobs. It also means that employees receive far less notice of redundancies and have a shorter period of time to find alternative employment than those employed in larger workplaces. The 20 employee threshold also enables employers in larger organisations to stagger redundancies, in order to avoid consultation duties.

Question 13: BIS is aware that there are some issues around the interaction of fixed term contracts with collective redundancy consultation law. What problems do fixed term contracts create? What do you consider would be a potential solution?

The TUC believes that the duty to inform and consult on collective redundancies should continue to apply to both permanent and fixed term employees.

The TUC recognises that the Collective Redundancies Directive does not apply to the termination of contracts for limited periods of time or to complete specific tasks. However it is important to recall that this Directive has not been reviewed since the adoption of the Fixed Term Worker Directive which provides fixed term workers with the right to equal treatment including in redundancy situations.

These include:

- The right of temporary employees not to be selected for redundancy simply because they are employed on fixed term contracts;
- The right for fixed term employees to receive equal treatment on redeployment opportunities and redundancy pay
- The duty on employers to respect the particular rights of fixed term employees who are on maternity leave during any redundancy or restructuring exercise. This includes the duty to consult such employees.
- The requirement on employers to carry out individual consultation meetings with fixed term employees before dismissing them.

The TUC believes that excluding fixed term contracts from collective redundancy consultation rules would create significant uncertainty for employers, unions and employees. It could also encourage employers to ignore

temporary employees' rights to equal treatment during redundancy exercises. This would generate unnecessary Employment Tribunal claims.

Instead, the TUC would encourage the Government to extend the scope of collective redundancy consultation arrangements to cover agency workers and other workers who do not legally qualify as employees. Extending consultation arrangements to all workers would help to improve the employment security of vulnerable workers.

The TUC also believes that by excluding such workers from collective redundancy rights, UK law does not fully comply with the requirements of the Collective Redundancies Directive which applies to 'workers' rather than 'employees'. It is also likely that UK law also fails to comply with Article 8 of the Temporary Agency Worker Directive.

Question 14: What factors do you consider could determine what constitutes an 'establishment'?

As outlined above, the TUC believes that the 'establishment' test should be replaced by the 'undertaking' test.

Failing this, the TUC is not convinced that it would be helpful to amend the 1992 Act to define what is meant by an 'establishment'. The term 'establishment' is derived from the Collective Redundancies Directive and must be interpreted and applied in line with existing case law (see the decision of the ECJ in the *Rockfon* case [1993]). Any new definition is likely to create uncertainty and generate unnecessary litigation.

However it would be helpful if guidance was prepared to explain what is meant by an 'establishment'. Such guidance should set out the principles established by the ECJ in the *Athinaiki Chartopiia* case [2007] IRLR 284. In particular it should emphasise that the concept of an 'establishment' must be interpreted broadly and so as to limit the instances of collective redundancy to which the Directive does not apply. One of the main factors which must be considered is where the decision to dismiss staff is made. If the decision is taken centrally then the entire organisation should be treated as the establishment.

The guidance should also emphasise that where employers seek to stagger redundancies to ensure that there are fewer than 20 redundancies proposed in an establishment in any 90 day period, Employment Tribunals may decide that employers are intentionally attempting to avoid consultation obligations. This may amount to a breach of section 188 (see *Jones and ors v Sunlight Service Group Ltd*).

Duration of Consultation and Notification

Question 15: What are the advantages or disadvantages of the current 90 day minimum time period before redundancies can take effect, in your experience (a) for employers (b) for employees?

The TUC believes that the current 90 day minimum consultation period provides significant benefits for employees and employers.

Any redundancy exercise involving 100 or more employees will generate complex issues which it will take significant periods of time to resolve.

Factors requiring longer consultation include:

- Allowing time for union reps (or workplace reps) to be brought up to speed with the reasons for proposed redundancies
- Allowing time to ensure that all the information duties are handled properly; that reps are provided with all the information required
- Allowing time for unions to digest and understand the information provided; to ask questions and where appropriate to challenge the information
- Allowing time for union reps to examine the merits of the employers' proposals to assess whether they are justified
- Allowing time for service reviews to be carried out to assess whether efficiency savings can be generated; whether the proposed dismissals will have a detrimental impact on service delivery or product quality; and whether revised structures should be piloted before being permanently implemented.
- Ensuring that equality issues are properly considered by allowing time for an equality impact assessment to be carried out and properly scrutinised.
- Allowing time to assess the effects of the redundancies on the remaining workforce, including increased workloads, overtime costs; effects on morale and staff health and well-being and effects on staff turnover
- Allowing time for union reps to develop alternative proposals
- Allowing time for alternatives to redundancies to be fully explored and delivered, e.g. by identifying new orders to counteract the fall in demand or developing proposals for parts of the organisation to be outsourced in order to save jobs
- Allowing time to work in partnership with external agencies, including government departments, local authorities, commercial partners, funding bodies, etc

- Allowing time for measures short of redundancy to have an effect, e.g. the identification of deployment opportunities; for in-house training and trial periods moving to alternative employment
- Allowing time to negotiate voluntary redundancy packages and for volunteers to apply
- Allowing time to negotiate redundancy payment arrangements.
- Providing time for support to be provided to those at risk of redundancy, including engaging with external agencies which can provide advice, job search support and access to training and qualifications. Due to increasingly constrained resources and the break-up of the RDAs, etc, such bodies often need plenty of notice.

Meaningful consultation on any or all of the above factors is likely to reap benefits for employers and employees by saving jobs, ensuring organisations retain skilled staff, protecting employees' incomes and support staff morale.

The main disadvantage with the 90 day minimum consultation period for employers and employees is often too short to ensure that as many redundancies as possible are avoided.

In particular, what is the relevance of employees' statutory or contractual notice periods?

In the *Junk v Kühnel* case, the ECJ established the important principle that employers cannot issue notices of dismissal until consultation and negotiations with trade unions (or workplace representatives) have been completed. The Court ruled that the effectiveness of consultation with unions would be jeopardised if it took place after the decision to dismiss had been made. The TUC fully supports this principle.

In our view, TULR(C)A 1992 Act does not fully reflect the requirements of the ECJ decision in *Junk* and needs to be amended.

It is good practice for employers informally to consult with staff during the period of collective redundancy consultation. Nevertheless following the *Junk* decision, the TUC believes that employers should not commence formal individual redundancy consultation meetings with individuals until after collective consultations have been completed. Only once decisions to dismiss have been taken after these individual consultation meetings should redundancy notices be issued. The 1992 Act should be amended to reflect this point.

Question 16: What are the costs to business of the 90 day minimum time period over and above a 30 day period? What generates these costs?

The TUC believes that any costs which employers incur as a result of the 90 day period are more than offset by the financial and organisational benefits which are often achieved through longer consultation.

For example, where jobs are saved as a result of the consultation process, employers will avoid unnecessary redundancy payments and the costs associated with recruiting and training new staff. Employers also benefit from the retention of staff with specialist skills and organisational knowledge.

Question 17: If there were a statutory provision for employers and employee representatives to shorten the 90 day minimum time period by voluntary agreement, would this be used?

The TUC is not convinced that such a statutory provision would be used.

Unions are likely to be reluctant to reach such agreements as they would reduce job security and income protection for members and the wider workforce. We also believe that there is sufficient flexibility within existing legislation to enable employers and trade unions reps to agree that consultation should be completed quickly, for example, where a swift decision is needed in order to secure the longer term survival of a business.

Question 18

What would be the advantages or disadvantages of being able to shorten the period in this way?

The TUC is concerned that such provisions would be used by employers to pressurise non-union reps to agreeing shorter consultation periods even though this would reduce the rights of the wider workforce.

There is already significant evidence of employers seeking to use compromise agreements inappropriately to circumvent the duty to consult.

Question 19

What would be the advantages or disadvantages (a) for the employer and (b) for the employee of reducing the minimum times periods when 100 or more redundancies are proposed to 60, 45 or 30 days?

While some employers may welcome the ability to expedite consultation process, overall the TUC believes that any reduction of the 90 consultation period would bring disadvantages for employees and employers alike.

Union reps and officials consistently report that the statutory minimum consultation periods are too short to enable alternatives to redundancies to be explored and delivered. As noted in the response to question 4, employers are

often willing to negotiate longer consultation periods as standard practice for their workplace or to agree to the extension of consultation where necessary.

Recent high profile examples include:

- BAE Systems: The company agreed to extend the consultation period over the threat to 2,300 BAE Systems jobs in Yorkshire and Lancashire. Unite welcomed this move as it provided more breathing space for employees to try to find new jobs. It also created more time for Government departments to try to identify alternative employment opportunities on the site.
- In the case of Bombardier, extended consultation periods provided time for the business to identify new orders, following the loss of the Thameslink Order to Siemans. The longer consultation period also provided the employer and union with the opportunity to review staffing structures and shift patterns. It also provided time for Unite to negotiate robust selection criteria. It was also possible to engage with the relevant government departments and agencies which assisted with job search.

The TUC also understands that the CWU have agreed effective redeployment exercises with BT which have helped to prevent the need for any compulsory redundancies in recent years.

As the findings from the TUC survey reveal, the benefits of longer consultation periods are not limited to those redundancy situations which hit the headlines.

- At a utilities company, consultation went on for two years over a "worst case scenario" cut of 200 jobs, with the hope that the final figure would be between 100 and 150. At the time of the study just 20 redundancies had been implemented. The rep reported that "The company accepted applications for voluntary redundancy from people who were within two years of retiring, and had no wish to take on new skills as the company went forward. Additional training and support has and still is being offered via union learning reps (ULRs) and company training".

Any reduction in the 90 days minimum consultation period is likely to send a signal to employers that they need not prioritise exploring ways of saving jobs. This is likely to lead to increased unemployment and increased reliance on the welfare system. This would have a detrimental impact on local economies and communities, particularly in those areas of the UK where unemployment is high and there are limited employment vacancies. It may also lead to a further loss of manufacturing capacity in the UK. This would not assist in attempts to rebalance the economy and to reduce reliance on service sector employment.

High Impact Redundancies

Question 20: How critical is the length of the statutory minimum time periods in instances of high-impact redundancies? Why?

The TUC does not recognise the distinction between high and low impact redundancies. Most redundancy exercises, however large or small, have a

detrimental impact on those made redundant as well as the 'survivors' (see Introduction Section one above).

The TUC recognises that where a large company closes or relocates or where large groups of public sector staff are made redundant, this is likely to have a significant impact on the local community and local economy.

However, as noted above, the current 90 consultation period is too short to deal with the issues raised in most redundancy situations involving 100 or more employees. As a result there is no case for treating some large redundancy situations differently from others. The minimum 90 consultation period should be retained or even extended for all situations where an employer is proposing to make 100 or more employees redundant.

Question 21: What would be the advantages or disadvantages of increasing the threshold for the number of redundancies proposed for the 90 day notification period (i.e. increasing it to a number above 100 redundancies)? What should the threshold be?

The TUC believes that either the 90 day or an extended consultation period should continue to apply in all situations where an employer is contemplating 100 or more redundancies.

Question 22: What would be the advantages of disadvantages of a graduated threshold with different time periods applying for different numbers of redundancies?

As argued above the TUC believes that either the 90 day or an extended consultation period should continue to apply in all situations where an employer is contemplating 100 or more redundancies.

Fit with other legislation

Question 23: The Government is also calling for evidence on the Transfer of Undertakings (Protection of Employment) Regulations. Please identify any issues that you have in terms of how the TUPE Regulations and the rules on collective redundancy consultation fit together?

The TUC believes there is a strong case for extending information and consultation arrangements in situations where TUPE transfers are being considered. In particular, the TUC believes the TUPE Regulations should be amended to provide that consultation should take place between unions and the transferee before a transfer takes place.

Currently, the duty to consult set out in Regulation 13(6) only applies to employers who envisage they will take measures in relation to an affected

employee. In many cases, the transferor does not envisage taking any measures, although the transferee may well be planning changes including redundancies.

This creates a major gap in TUPE rights. It also means that staff who are being transferred receive limited notice of potential future redundancies. Currently, the first time that workplace representatives have discussions with a new employer and become aware of their plans for downsizing is after the transfer has taken place. Early consultation involving the union, transferor and transferee would enable earlier discussions over how future redundancies might be avoided once the transfer takes place.

Question 24: What special considerations relating to collective redundancy consultations arise from insolvencies?

The TUC is concerned that too often in insolvency situations, insolvency practitioners (IPs) fail to comply with their legal responsibilities towards employees. In particular, unions report that IPs, more often than not, fail to inform or consult with workplace representatives where collective redundancies are contemplated. This can lead to unnecessary job losses and costs for the exchequer and ultimately the taxpayer.

- When the Jarvis railway group collapsed in March 2010 the first the workforce heard about it was through the media: Administrators announced the redundancies without warning or consultation when it became clear that the government (ultimate owner of Network Rail, which Jarvis was contracted to) would not step in to help fund a rescue.

  In that case 1,200 jobs were lost but the taxpayer also lost out: The amount needed to keep the company afloat was reportedly less than the £3m finally awarded by the Leeds Employment Tribunal in August 2011 and, as the company no longer existed, that bill had to be picked up by the government.

- As outlined above, the failure by IPs to consult with USDAW when Woolworths went into administration meant that the Redundancy Payments Office (RPO) had to pay out £67.8 million in protective awards to affected staff.

The TUC believes that consideration should be given to imposing a financial penalty on IPs where they have failed to comply with their obligations under sections 188 to 198 of the 1992 Act. Currently there is no incentive on the IP to comply with the law as protective awards can be sought from the National Insurance Fund or from the assets of the insolvent business. This transfers all the costs onto the taxpayer.

We also believe that debts owed to employees in insolvency situations should be given preferential status. This would increase the likelihood that employees would be able to recover any monies owed for unpaid wages and holiday pay (which exceed the statutory limit recoverable from the RPO) from the assets of the business.

The TUC would be firmly opposed to any amendments which sought to extend the special circumstances defence to insolvency situations. The TUC believes that IPs should be under an active duty to seek to rescue the business and to save as many jobs and possible where companies face financial difficulties. Collective redundancy consultation can play a central role in achieving these objectives.

Trades Union Congress
Congress House
Great Russell Street
London WC1B 3LS

www.tuc.org.uk

contact:
Hannah Reed
020 7467 1336
hreed@tuc.org.uk

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