Point of *order*

As Ruth Nodder reports, employers could pay the price if they don't know the trigger point for collective consultation on redundancies

Employers are under a legal obligation to consult, not only with individual employees, but also collectively if they plan to make more than 20 employees redundant in a 90-day period. Sadly, this duty to inform and consult has been triggered with alarming regularity in the manufacturing sector over the last couple of years.

Sections 188 and 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) implements the EU Collective Redundancy Directive ('the Directive') in the UK. Section 188 states that if an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, then before finalising such proposals and making any dismissals, it must consult collectively.

Such collective consultation must begin 'in good time' and should continue for a minimum of 30 days, if the employer is considering making 20-99 redundancies, or 90 days for 100 or more redundancies.

Failure to comply with collective consultation obligations can be expensive, with a maximum penalty of an award of up to 90 days' pay, uncapped, per dismissed employee.

The duty is to inform and consult with 'appropriate representatives' of those employees who may be affected by the proposed redundancies. If there is an independent trade union recognised for collective consultation purposes, the employer must consult with that union. If not, the employer can consult either with pre-existing representatives if they meet certain criteria, or arrange for the election of representatives specifically for the purpose of redundancy consultation. The statute sets out the specific information that must be given to representatives as part of consultation.

It is not always easy to decide when the duty to consult collectively is triggered. For example, what happens if an employer has already made some employees redundant recently, operates over several sites, or employs a lot of mobile workers? Who will count for the purposes of triggering collective consultation? These issues fall outside the scope of this article but one regular point of dispute between employers and representatives is how early the employer needs to begin collective consultation. A recent European Court of Justice (ECJ) case has shed some light on this issue.


Henning Löhlein

Article 2(1) of the Directive states that where an employer is 'contemplating' collective redundancies he should begin consultations with representatives 'in good time' and with a view to reaching agreement. However, TULRCA refers to the trigger as being when an employer is 'proposing' to make redundancies. The difference between 'contemplate' and 'propose' has been the subject of ongoing debate.

In the case of *Akavan Erityisalogen Keskuskitto AEK Ry v Fujitsu Siemens*, the ECJ considered the impact on consultation obligations within a group of companies where the decision leading to potential redundancies was made by the parent company, not the subsidiary which employed the affected individuals. Although the issue was referred by the Finish courts, the question is equally relevant to consultation requirements in the UK.

Fujitsu Siemens Computers Oy (FSC), a subsidiary of Fujitsu Siemens Computers (Holding) BV, owned a factory in Kilo, Finland. On 7 December, executive directors at the parent company made a proposal to divest the Kilo factory. On 14 December, the parent company's board of directors supported this proposal but didn't make any specific decision regarding the future of the factory. Further consultations took place between 20 December and 31 January. On 1 February, FSC's board decided to close down the Kilo factory and began making employees redundant from 8 February.

The employees claimed FSC had breached its collective consultation obligations. They argued that the decision to dismiss had been made by the parent company on 14 December, before consultations had even started, and therefore FSC had failed to consult 'in good time'.

The ECJ made it clear that where redundancies are contemplated within a group of companies, the consultation obligation falls squarely on the shoulder of the employer in which the headcount reductions are contemplated, even if the ultimate decision to affect redundancies was made by the parent company.

The ECJ confirmed that the trigger for the start of collective consultation requirements is when there are 'strategic decisions or changes in activity which compel the employer to contemplate or plan for collective redundancies'. Therefore, the subsidiary's consultation obligations will be triggered only once the parent company has identified which subsidiary will be affected by the potential redundancies. However, the obligation to start consultation arises even if the employer has not received all the information it needs to comply with obligations to inform employee representatives. This information can be drip fed as and when it becomes available, but the employer must complete the consultation process before any dismissals occur.

Ruth Nodder is principal legal adviser for the EEF. See www.eef.org.uk