Collective Consultation FAQs - UK

By Caroline Baker - 17 June 2020

We have created a set of FAQs as a result of our webinar on Managing Large-Scale Reductions in Force in the UK on Friday, 12 June. Below we run through how to manage the process of collective consultation, employers' legal obligations, the challenges COVID-19 presents to the process and how to manage documentation requirements for redundancies.

Q1. What is collective consultation?

Collective consultation is consultation of an employer with employee representatives or union representatives about proposed dismissals. In particular, the consultation must cover ways of:

- Avoiding the dismissals
- Reducing the numbers of employees to be dismissed and
- Mitigating the consequences of the dismissals.

Q2. When is collective consultation required?

Collective consultation is required when an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less.

The obligation relates to a single employer not a group, therefore if two companies in a group are each proposing to dismiss 15 employees, the collective consultation obligation will not be triggered.

As the trigger for collective consultation relates to dismissals at a particular establishment, if the employees are being dismissed across multiple sites it is possible that collective consultation may not be required. However, identifying what is an establishment for a particular business is not simply about geographic location but is relatively technical and therefore specialist advice should be sought.

Q3. What if we have already started consulting with employees about another redundancy proposal?

If a redundancy consultation has already been commenced (individual or collective) in relation to a particular group of employees, these employees will not need to be considered as part of the numbers of proposed dismissals for the purposes of a collective consultation.

Q4. Does that mean that we can simply split the proposals into multiple proposals of fewer than 20 dismissals and therefore avoid collective consultation?

Not if they are to take place within the same 90 day period. If it can be shown that the proposal for all redundancies existed prior to commencing consultation for the first batch of redundancies, then the employer will be liable for a protective award.

Even though it is possible to avoid a collective consultation if a new proposal for dismissals genuinely arose after the first consultation began, there is always a risk that employees or their representatives may argue that an employer has deliberately split up the proposals into two or more batches so as to avoid consulting on the second batch.

However, it is possible to avoid collective consultation obligation by splitting the redundancies time wise so that fewer than 20 dismissals take place within any 90 day period.

Q5. Can we ignore collective consultation?

Yes, however the penalty for failing to carry out collective consultation obligations is up to 90 days' pay per affected employee – this is known as a "protective award". "Affected employee" covers all the employees who should have been consulted, not just those who are ultimately dismissed.

It should also be noted that, even if you would prefer not to consult and to offer compensation instead, it is technically not possible to waive an employee's rights to a protective award in a settlement agreement – this can technically only be done in a "COT3" (a quasi settlement agreement agreed through the government's conciliatory body, ACAS).

Q6. When is collective consultation deemed to start?

When the employee representatives are provided with the information required by legislation (s188 Trade Union and Labour Relations Consolidation Act 1992) about the proposed dismissals.

It is possible to commence the consultation with some of this information initially in high level or missing, to be provided during the course of consultation. However, if an employer chooses to do this, it will still need to provide the employee representatives with sufficient information to have some meaningful consultation from the outset. Nevertheless, the key to a successful consultation is planning and therefore it is strongly recommended that the employer has all of the information it will use before commencing the consultation wherever possible.

Q7. How do we provide the employee representatives with the information required?

Technically it is only permissible for the information required by legislation to be given to the representatives by hand or by post. Given the difficulties presented by COVID-19, many employers may nevertheless choose to send the information by email, particularly where timing is tight, and potentially follow up by post. In practice, the risk is likely to be low provided that all the required information is provided.

If an employer wants to carry out a perfect consultation, has a workforce without access to email, or a tricky union to navigate, it will need to allow for additional time for posted information to be received by the union or employee representatives. Find more information on employee representatives here.

Q8. How long does the collective consultation need to last?

There is no timeline for how long the collective consultation must last, however there is legislation which does not permit any dismissal to take place before a set number of days after it has commenced:

- If 20-99 dismissals are proposed, dismissals cannot take place until 30 days after the collective consultation has commenced.
- If 100 or more dismissals are proposed, dismissals cannot take place until 45 days after the collective consultation has commenced.

These should be viewed as minimum guidelines as the law also requires that the consultation begins in "good time" and should be undertaken with a view to reaching agreement with the employee representatives. Therefore, simply ensuring that dismissals do not commence before the dates set out above will not absolve an employer of a possible claim for a protective award if insufficient time is allowed for meaningful consultation (bearing in mind the specific proposals).

Q9. Who do we need to consult with?

You will need to consult with the employee representatives or the union representatives of the affected employees. Please note that, as referenced in Q5 above, affected employees can be wider than those who are at risk of redundancy and may include, for example, those whose roles may change somewhat as a result of the redundancies. However, one key issue that will need to be considered is how employee representatives will be elected where there is no recognised trade union or standing employee representative body – with employees working remotely or on furlough, an online voting application is likely to be required.

Please see our FAQs on electing employee representatives here.

Q10. Will conducting a collective consultation during COVID-19 create any particular challenges?

Practically running the collective consultation during COVID-19 is going to be more challenging. Rather than gathering the representatives into a room for consultation meetings, employers whose staff are working from home or who are furloughed will most likely be holding consultation meetings by video conference or by conference call. However, whilst this may not be ideal, the law does not prevent it.

A greater issue will be contact with employees on furlough, both providing initial information about the proposals and the election of representatives and then how such employees will interact with their representatives.

How this works in practice will depend on the specific nature of the workforce, but the key issues to consider and resolve are:

- The process must enable all employees to be notified of the proposals and to discuss the proposals and developments during the consultation process with their representatives.
- Whatever communication method is chosen must be confidential both in terms of protecting the information provided by the company to employees/employee representatives and the discussions between employees and their representatives.
- The way in which communication is facilitated must not breach the employees' GDPR rights. Particular care will need to be taken about how employee representatives are assisted by the company to contact the employees they represent.

This will mean that there will be more administration for the employer and therefore more time needs to be allowed than normal.

Q11. Can we close the consultation even if the representatives do not agree?

The consultation must be undertaken by the employer with a view to reaching agreement with the appropriate representatives, but their agreement does not ultimately need to be secured to end the consultation.

However, whilst it is possible to close the consultation without the representatives' agreement, doing so creates additional risk and we would recommend seeking legal advice if the consultation turns hostile.

Q12. Can we close different sections of the consultation separately?

Yes, it is possible to complete the consultation for some groups of employees whilst continuing it for others. However, you should have

the agreement of the representatives of those particular employees to close a particular section of the consultation early.

Q13. How does collective consultation interact with individual consultation?

Once collective consultation has closed, individual consultation should commence as normal, i.e. scoring any pooled employees against the relevant criteria, identifying those who are provisionally selected for redundancy and holding consultation meetings with all at risk employees before confirming their redundancy to give them the opportunity to challenge the proposals and their selection and to suggest alternatives.

As with any redundancy process, if no alternative to redundancy has been identified for a particular employee then that employee can be given notice of termination (or terminated immediately and paid in lieu of notice) so long as the effective date of termination is at least 30/45 days (as applicable) after the commencement of the collective consultation (see Q8 above).

Q14. Will conducting individual consultation during COVID-19 create any particular challenges?

Legally, there is no reason that individual consultation and dismissal meetings cannot happen by video conference or phone. However, there may be some significant practical challenges in relation to employees who are furloughed or working remotely:

- Employees may not accept invitations to remote meetings/may not attend meetings.
- Employees may go onto sickness absence citing stress/anxiety.
- When sending written confirmation of dismissal, some employees may not be residing at their normal address – for example some younger employees may have moved back to live with their parents during the lockdown.
- If the workplace has re-opened in a COVID-19 safe way and employees are invited to the workplace for meetings, they may refuse to attend on the basis that they consider it is unsafe to do so.

As with the collective redundancy stage, individual consultation may take longer to complete and some flexibility is likely to be necessary. However, it is essential that employers act reasonably in the circumstances.

Q15. Are there any other obligations that employers need to be aware of?

Employers are obliged to notify the Secretary of State on a Form HR1 when they are proposing to dismiss as redundant 20 or more employees at one establishment within a 90 day period. The notification must be made at least:

- 30 days before the first dismissal for 20-99 dismissals; and
- 45 days before the first dismissal for 100 or more dismissals.

This obligation should not be ignored as failure to provide the notification to the Secretary of State is a criminal offence.

Q16. How can we efficiently manage our document requirements for redundancies?

Traditionally, the required documents for each employee are drafted by amending templates or using mail merge (or a mixture of both). This is time-consuming and cumbersome. To improve this, we have developed an innovative, fixed price redundancy toolkit that brings together high quality strategic advice and document automation technology to mitigate legal risk and streamline the process. Our document automation solution assembles individualised Word documents for every employee from a single data source (e.g. an online form or Excel spreadsheet), making document production more efficient, reducing error and maintaining consistency.

If you would like to find out more about our toolkit, please contact our specialist team of lawyers at RedundancyToolkit@gqlittler.com.