Department for Business, Innovation & Skills

Collective Redundancies : Consultation on changes to the rules

Response from Thompsons Solicitors

September 2012

About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

Question 1	**Do you agree with the Government's overall approach to the rules on collective redundancy consultation?**

Thompsons welcomes the commitment to consultation which the government sets out in paragraph 3.3. Measures which genuinely facilitate consultation are to be welcomed. But Thompsons is keen to ensure that any changes do not throw the baby out with the bathwater.

We note that the consultation document acknowledges that many employers do not understand the help available to them. While this is true, it is not a justification for changing the rules. An employer who wishes to discover their options has plenty of opportunity to do so. Googling "redundancy" brings up numerous pages where advice to employers is readily and freely available. We are concerned that there should not be a repetition of earlier consultations where a significant part the problem lies in employer inertia, but safeguards are removed rather than that issue addressed.

The length of the consultation period does not increase the risk of 'superficial consultations'[1]. And changing the periods does not address the problem of employers who have no wish to consult. Some feel that doing so would be commercially disadvantageous, others that it is an unwelcome restraint on their ability to take decisions about their organisation . For this reason we have some concerns about the aims of allowing "*…each consultation to be tailored to its unique circumstances, including the commercial environment*" [2] and consider that it could be open to abuse and lead to poor decision-making, exposing employers to employment tribunal claims.

Employers who wish to discharge their obligations fully, and in good faith, should not be impeded by complexity. Nor should they be harshly penalised. The focus should be on securing the compliance of employers who do not. This paper's proposals do not do that.

Thompsons agrees that certain aspects of the consultation rules would benefit from reform, particularly the uncertainty over what constitutes an establishment[3] and circumstances where consultation is genuinely complete within the prescribed period.

[1] Paragraph 3.13
[2] Paragraph 3.4
[3] S.188(1) *Trade Union and Labour Relations (Consolidation) Act 1992*

Question 2	**Which of the two proposed options should replace the 90-day minimum period? Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

In our view, neither option in its current form is a desirable replacement as they do not tackle the qualitative nature of the consultation undertaken.

It is not uncommon for consultations to be sabotaged by the suppression of information, delay in correspondence, and congestion of diaries. This is employed deliberately by numerous unwilling employers and such tactics are only encouraged by a reduced period.

We are surprised to see the view that "…this approach would *encourage legal challenge*"[4] from a government so recently keen on reducing claims to Employment Tribunals. We would still prefer changes that focus on encouraging compliance.

Thompsons suggests a system whereby consultation is mandatory but can be brought to an end at any time where both sides certify their agreement to that result. By placing both sides in a position of reliance upon the other compliance is encouraged. A lengthier period would actually discourage time-wasting.

Thompsons recognises the uncertainty inherent in a redundancy situation. We are less convinced that lengthier consultations produce more uncertainty for anyone. The issue of whether to jump before being pushed is one faced by everyone in a redundancy situation. Those deciding to jump have less time to look for new employment where consultations are shorter. The observation about improving employee morale[5] misjudges the nature of being in a redundancy situation. Hastening a possible redundancy notice ought not to be considered a morale improving fillip.

Question 3	**Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'? Please provide comments to support your answer.**

No. Thompsons believes that the government has bottled out of this issue.

In the recent call for evidence on compensated no fault dismissals[6] the government showed an interest in the Australian model and the "greater certainty" which it provided. Thompsons notes with interest that in that model the Australian approach is not to slice employers up into individual sites or locations, but to treat them as a whole. The definition of 'genuine redundancy' is an example:

> *(2) A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:*
>
> > *(a) the employer's enterprise; or*
> >
> > *(b) the enterprise of an associated entity of the employer.* [7]

A solution to the 'establishment' problem could be to look at the employer as a whole. This approach has the advantage of meeting the government's objective of being "a straightforward legislative framework'.[8]

We also note that in Australia only 15 proposed redundancies are required to trigger consultation requirements.[9]

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[4] Paragraph 3.13
[5] Paragraph 3.16
[6] *Dealing with Dismissal and 'compensated no fault dismissal' for micro-businesses*, March 2012
[7] S.389 Fair Work Act 2009
[8] Paragraph 1.3
[9] Impact Assessment, Table 2

Question 4	Will defining 'establishment' in a Code of Practice give sufficient clarity?

Until the government publishes the proposed definition this is impossible to comment upon. We repeat our observation that some employers simply fail to inform themselves properly or at all. For those, even the clearest definition will be of little use.

We also note that for so long as s.188(1) bears that phrase, and there is dispute over it, a non-binding definition in a Code of Practice is unlikely to resolve anything, especially where the government looks to "…*encourage legal challenge*"[10] in cases of alleged failure.

Question 5	Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation? Please provide comments to support your answer.

Thompsons does not see any justification for any 'legislative exemption' for fixed-term appointees. The Stirling case mentioned in paragraph 3.20 is subject to appeal and any Code of Practice should bear that in mind. We do not understand the assertion that reducing the period of consultation addresses the fixed-term appointee problems. It appears to have no logical basis, and it is notable that it is not explained in the consultation.

Question 6	Have we got the balance right between what is for statute and what is contained in government guidance and a Code of Practice?

Until the government publishes the proposed definition it is impossible to comment fully. Thompsons considers that the matters in paragraph 3.24 should properly be in both statute and any Code of Practice. It is impossible for a Code of Practice to explain how to discharge an obligation if no such obligation exists. For the same reason any failure to observe a Code of Practice is with remedy in those circumstances.

Question 7	What changes are needed to the existing government guidance?

Thompsons has not undertaken a review of current government guidance, but all guidance must be clear and simply put. Checklists are useful, as are examples and case studies.

Question 8	How can we ensure the Code of Practice helps deliver the necessary culture change?

Until the government publishes the proposed definition it is impossible to comment fully. Culture change cannot be achieved unless the willing are helped, and the unwilling compelled. Moving away from obligations to non-binding Codes of Practice may assist the former but is unlikely to compel the latter. Yet, by doing so, the government risks undermining the ability of anyone affected to address that in litigation.

[10] Paragraph 3.13

Question 9	**Are there other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.**

There are plenty of sources of free information in existence already. What would help is not more material but an enhanced knowledge of it. Trade unions are aware of the various approaches and benefits to consultation and greater government encouragement to engage with, and recognise, trade unions would no doubt reap regards. We note that this is consistent with the government's stated aim in of having at the core of promoting improvements in the quality of consultation:

> ***A positive relationship between the employer and employees' representatives****. Ongoing engagement and a positive working relationship between the employer and employees' representatives* [11]

Question 10	**Have we correctly identified the impacts of the proposed policies? If you have any evidence relating to possible impacts we would be happy to receive it.**

Thompsons does not propose to comment in detail. One of the stated purposes of consultation is to avoid redundancies entirely[12] and the assumption that savings can be made in wages assumes that redundancies are inevitable. This will be true on many occasions but Thompsons feels that inadequate account is taken of the possibility that all redundancies can be avoided. We have seen this particularly in recent years where consultations have resulted in agreements with staff to, for example, forgo wage increases and reduce hours.

Question 11	**If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?**

No comment.

Question 12	**If you have carried out a collective redundancy consultation in the last five years, what**

No comment.

Further information:
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[11] Paragraph 3.6
[12] S.188(2) *Trade Union and Labour Relations (Consolidation) Act 1992*