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THE MOST EXPERIENCED TRADE UNION FIRM IN THE UK

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Getting informed

Richard Arthur, who leads Thompsons Trade Union Law Group, takes a detailed look at how the Information and Consultation Regulations work

THE INFORMATION and Consultation of Employees Regulations 2004, which implement EU Directive 2002/14/EC, are far from straightforward.

However, they can be useful to trade union reps as long as they remember the most important point of all – that the rights and obligations only apply if they (or the employer) actually trigger the procedures in the first place.

Numbers of employees

It is crucial to know how many employees are in the undertaking because the regulations only apply to those with 50 or more, and because of the threshold percentages of employees required to initiate the procedures. See "Negotiation" below"

The number of employees is calculated using the average for the preceding 12 months. Employees or their representatives can submit a request to the employer that must be in writing and dated. If the employer fails to disclose the information within a month, the reps can make an application to the Central Arbitration Committee (CAC) for disclosure.

Approval by trade union representatives counts as "approval by the employees"

Initiation

The process can be initiated either by the employer, or by a "valid employee request", but it must be in writing; be sent to the employer's registered or principal office, or the CAC; and specify the date on which it was sent.

What happens next depends on whether there is a "pre-existing agreement" (PEA) and the percentage of employees making the request.

Pre-existing agreements

A PEA is an agreement which:

- is in writing
- covers all the employees in the undertaking
- has been "approved by the employees" and
- sets out "how the employer is to give information to the employees or their representatives and seek their views on such information".

Existing collective agreements can be valid PEAs if they satisfy all the above requirements but they must set out how information and consultation is to be carried out. Approval by trade union representatives counts as "approval by the employees".

Negotiation

Once one of the following conditions is satisfied, the parties can move on to the negotiation stage:

- there is no PEA, but the request has been made by at least 10 per cent of the employees
- there is a PEA and the request is made by at least 10 per cent of the employees, but the PEA does not satisfy all the criteria set out above
- there is a valid PEA, but there has been a request by 40 per cent or more of the employees
- there is a valid PEA, but there has been a request made by between 10 and 40 per cent of employees and a majority of those voting and more than 40 per cent of the workforce has approved the request in a ballot or
- the employer has triggered the negotiations.

As soon as is reasonably practical after that, the employer must:

- make arrangements for the employees to appoint or elect "negotiating representatives"
- inform the employees in writing of the identity of the negotiating representatives once elected or appointed and
- invite the negotiating representatives to enter into negotiations to reach a negotiated agreement.

The regulations do not specify how many negotiating representatives there should be but they must represent all employees in the undertaking.

The negotiations to reach a negotiated agreement can last for a maximum period of six months from the end of the three-month period beginning with the date of the valid employee request. There are a few exceptions, but these are mainly to do with complaints to the CAC.

Negotiated agreements

A "negotiated agreement" must:

- set out the circumstances in which the employer has to inform and consult their employees
- be dated and in writing
- cover all the employees of the undertaking
- be "approved"
- be signed by or on behalf of the employer and

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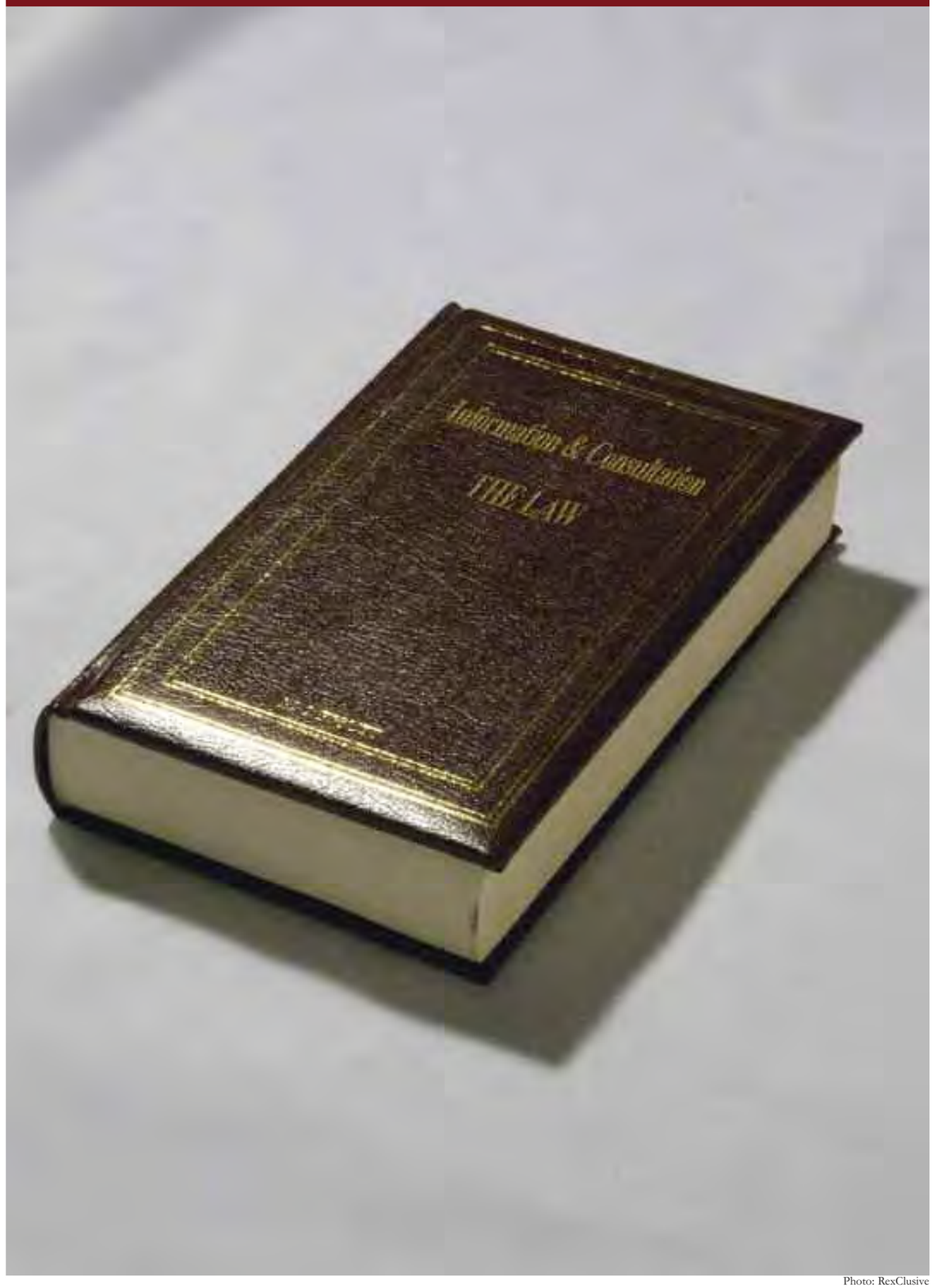

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- either provide for the appointment or election of "information and consultation representatives", or state that the employer must provide information directly to the employees of the undertaking and consult the employees directly.

There is no required subject matter for the negotiated agreement. That is for the negotiating representatives and the employer to agree on.

The negotiated agreement will be taken to have been "approved" if all the negotiating representatives sign it; or if a majority sign it and at least 50 per cent of the employees either approve it in writing or in a ballot.

Employees cannot trigger further negotiations for three years once they have concluded the negotiation stage.

Standard information and consultation provisions

The standard information and consultation provisions apply if the employer is supposed to initiate negotiations for a negotiated agreement but fails to do so. Either that or the negotiations to reach a negotiated agreement are not successful within the six month period.

If the standard provisions do apply, the employer must arrange to hold a ballot of their employees to elect the relevant number of information and consultation representatives – one representative per 50 employees, subject to a maximum of 25.

Employees cannot trigger further negotiations for three years once they have concluded the negotiation

The employer must then provide the information and consultation representatives with information about:

- the recent and probable development of the undertaking's activities and economic situation
- the situation, structure and probable development of employment within the undertaking and any anticipatory measures envisaged, in particular where there is a threat to employment within the undertaking and
- decisions likely to lead to substantial changes in work organisation or in contractual relations, including those referred to in collective redundancies legislation and TUPE.

That information must be given at such a time and in enough detail to enable the information and consultation representatives to prepare for consultation.

The employer must then consult the reps at the relevant level of management with a view to reaching decisions that are "within the scope of the employer's powers".

Compliance and enforcement

Reps can make a complaint to the CAC (within three months of the alleged infringement) if the employer fails to comply with a negotiated agreement, or fails to properly apply the standard information and consultation provisions.

The CAC can then order the defaulter to take steps to comply with their obligations under the negotiated agreement by a certain date. If the employer again fails to comply, the union can apply to the Employment Appeal Tribunal (EAT) for a penalty notice.

The maximum that can be awarded is £75,000, but this is payable to the Secretary of State. In **Amicus -v- MacMillan Publishers Ltd**, for instance, the EAT imposed a penalty of £55,000.

The CAC cannot actually restrain any action on the part of the employer and it cannot impose an injunction.

Confidential information

Negotiating representatives, information and consultation representatives and experts assisting them may not disclose confidential information, unless it would amount to a "protected disclosure" under the whistleblowing provisions of the Employment Rights Act 1996.

Anyone who receives confidential information can apply to the CAC for a declaration as to whether or not it was reasonable for the employer to impose such a requirement.

The employer is not required to disclose any information or document when the nature of the information or document is such that "… according to objective criteria, the disclosure of the information or document would seriously harm the functioning of, or would be prejudicial to, the undertaking."

If there is a dispute as to whether or not information can validly be withheld, either the employer or someone who receives it may apply to the CAC for a declaration as to whether it should be withheld.

Trade unions have not used the regulations much since they were introduced

Concluding remarks

With notable exceptions, trade unions have not used the regulations much since they were introduced. This may be because they do not give precedence to trade union representatives at the stage of election or appointment of negotiating or information and consultation reps.

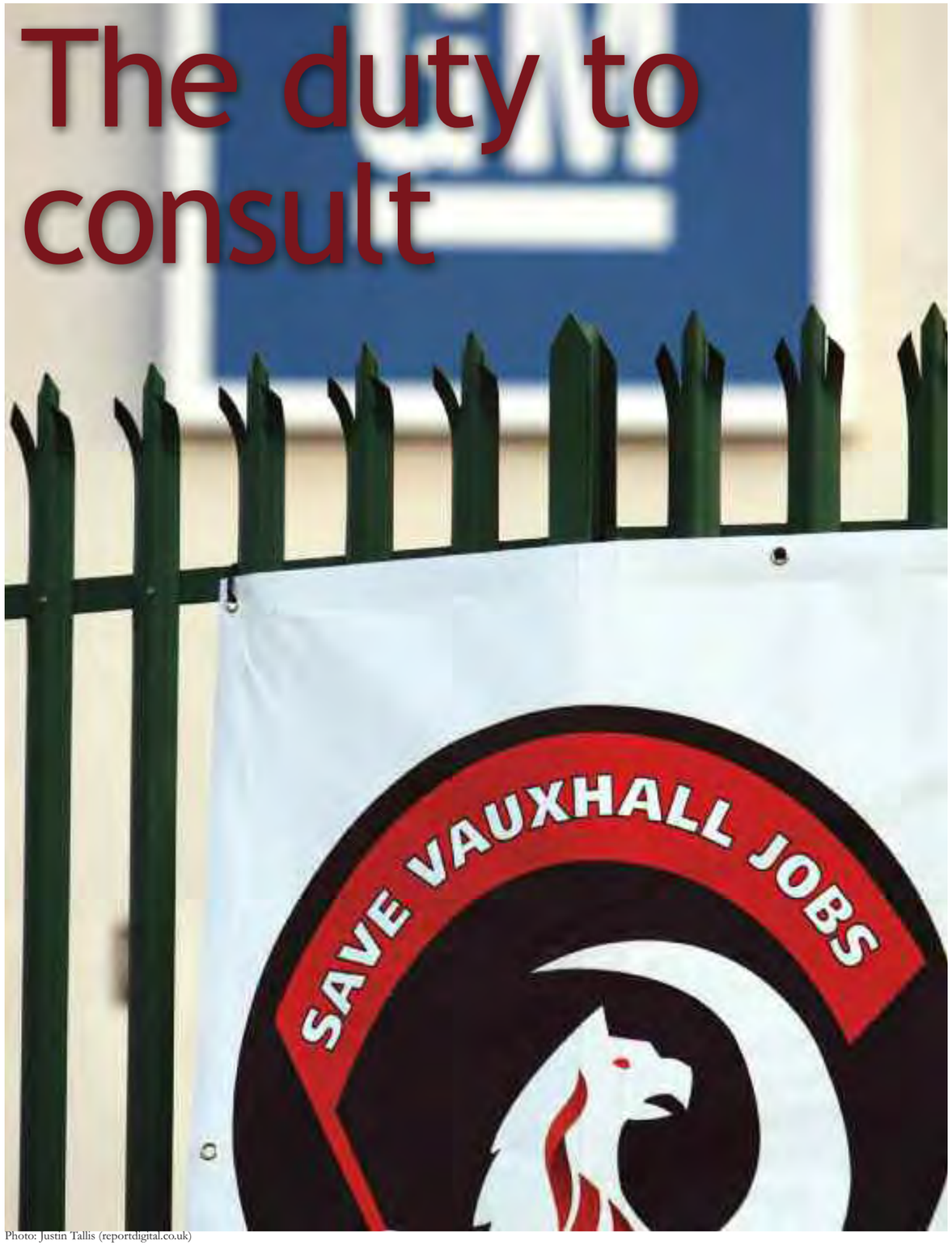
However, it could be argued that the procedures under the regulations can lead to the establishment of mechanisms outside recognised trade union collective bargaining and consultation arrangements, thus diluting the influence of the union.

That said, there may be circumstances in which using the regulations could be useful. Triggering the procedures might be viewed as a step along the way to recognition. Unions may also put forward their own candidates for election or appointment as negotiating and/or information and consultation representatives.

At the very least, the subject matter of the standard information and consultation provisions is wide-ranging and might be used as the basis for the negotiation of recognition and other collective agreements.

Photo: Neustockimages

The duty to consult



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Consultation under TULRCA

Joe O'Hara, of Thompsons Trade Union Law Group, looks at the consultation obligations on employers when making collective redundancies and what to do if they fail to honour them

THE DUTY TO consult, set out in section 188 of the 1992 Trade Union and Labour Relations (Consolidation) Act (TULRCA), is triggered when an employer proposes to dismiss as redundant 20 or more employees at one establishment within 90 days or less.

Collective consultation

The consultation has to begin "in good time" but, if the employer is proposing to dismiss 100 or more employees, it has to start at least 90 days before the notices of dismissal expire. If between 20 and 99, then at least 30 days beforehand.

Following the decision of the European Court in the case of **Junk -v- Kuhnel**, it is clear that the statutory consultation process must be completed before the employer issues any notices of dismissal.

What constitutes "in good time" is a question of fact and degree for a tribunal to decide. In **Leicestershire County Council -v- UNISON**, a proposal to dismiss a month before the decision to dismiss triggered the start date for consultations.

In **Amicus -v- Nissan**, the appeal tribunal said that, in deciding the issue, a number of factors have to be taken into account including the numbers of staff and unions involved; subjects to be discussed; and number of meetings likely to be required.

> Even those to be redeployed had to be included in the numbers the employer was proposing to dismiss

Employee representatives

If the employer recognises a trade union in respect of the workers being considered for redundancy, they have to consult with the union reps (even for non-members).

If an employer does not recognise a union in respect of the employees at risk, they must invite them to elect representatives. So, in circumstances where some employees fall outside a recognition agreement, the employer may have to consult union reps *and* elected employee reps. Union activists in the relevant group can, however, stand for election as employee reps.

Number of redundancies

The duty to consult still applies even if the employer proposes to make 20 or more employees redundant, but ends up only dismissing, say, 15.

In **Optare Group Ltd -v- TGWU**, the appeal tribunal held that volunteers who were accepted for redundancy should be included within the number of employees whom the company proposed to dismiss, bringing the numbers to over 20.

And in **Hardy -v- Tourism South East**, although the employer estimated that only 12 out of 26 staff would be made redundant (the rest were to be redeployed), the appeal tribunal said that even those to be redeployed had to be included in the numbers the employer was proposing to dismiss.

If the employer can show that the proposed redundancies have been deferred from a previous consultation, however, they do not have to consult again.

In **Vauxhall Motors Ltd -v- TGWU**, the employer consulted the union about proposed collective redundancies in February 2003. The redundancies were then deferred but, in September 2004, the employer decided that they were needed after all but did not reopen consultations with the union.

The union claimed this was a breach of the consultation obligations but the appeal tribunal held it was not necessary to consult again when the consultation "deals with the same employees and the same prospective redundancies." New consultation is only required "when a fresh proposal of redundancies arises".

Purpose of the consultation

Section 188(2) TULRCA states that, for consultation to be meaningful and genuine, employers must enter into it "with a view to reaching agreement with the appropriate representatives".

That means they have to consult on how they propose to:

- avoid dismissals
- reduce the number of employees to be dismissed
- mitigate the consequences of the dismissals.

Consulting just on the selection method is not enough. Discussions should cover whether the dismissals, or the number planned, are necessary at all. They should also cover all the information an employer is under a duty to give to the union, including the reasons for the redundancies or closure.

It is also arguable that the obligation to consult over the reason for redundancies applies not just in situations when the plant or factory closes but also when there is a reorganisation that results in dismissals with new contracts.

It is not possible for an employer to avoid consultation by saying it would be futile. Fair consultation means that reps have a proper chance to understand the matters under consultation and to express views which the employer must then genuinely consider.

Providing information

Representatives must be given written information about:

- the reasons for the employer's proposals
- the numbers and descriptions of employees at risk
- the total number of employees of any such description employed by the employer at the relevant establishment
- the proposed method of selection
- the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which they are to take effect
  and
- the proposed method of calculating the amount of any non-statutory redundancy payments.

The information must be sufficient for proper consultation. For example, it is not enough to state that the method of selecting employees "is to be determined". ➤

➢ The information must be provided by the employer to the representatives by hand or by post to an address provided to them. If the trade union is recognised, the information must be sent to the union's head or main office.

The reps must also have access to the affected employees and facilities to meet with them.

Special circumstances defence

Employers can only avoid the duty to consult if they can show that it was not reasonably practical and that they were doing all they could to comply.

In **Clarks of Hove Ltd -v- Bakers Union**, the Court of Appeal held that there must be a sudden disaster, whether physical or financial, that makes it necessary for an employer to close down the business. Insolvency by itself does not count. Tribunals will have little sympathy for an employer who is aware of the financial difficulties facing their business but does not consult.

Other examples that do not count as special circumstances include:

- an employer's belief that they could not genuinely consult on ways of avoiding redundancies in circumstances where they entered into genuine consultation on the other specified subjects
- shedding employees to make the sale of the business more attractive during a receivership, the failure to find a buyer and a lack of orders.

Protective awards

If an employer fails to comply with the duty to consult, the trade union (if recognised) must lodge a tribunal claim for a protective award within three months of the last dismissal taking effect on behalf of employees for whom it is recognised.

If there is no recognised trade union, and appropriate representatives have been elected, they bring the claim. Otherwise it is down to the individual employees.

If the tribunal finds against the employer, it will make a declaration to that effect and make a "protective" award. This is an order to the employer to pay remuneration to each employee for the "protected" period, which begins with the date on which the first dismissal takes effect, or the date of the protective award, whichever is earlier. The protected period is of such length as the tribunal considers just and equitable in all the circumstances having regard to the seriousness of the employer's default.

In **Susie Radin Ltd -v- GMB and ors** the appeal tribunal held that, if there was no consultation, tribunals should make the maximum award of 90 days unless there were reasons to justify a lower award.

When making an award, tribunals must take the following considerations into account:

- the purpose of the award – which is to punish the employer, not to compensate the employees for loss as a consequence of the employer's breach of duty to consult
- the seriousness of the employer's default (in a range from a technical to a complete failure to consult)
- whether the employer deliberately failed to consult
- whether the employer had access to legal advice.

Note that the maximum length of the protected period is 90 days, regardless of the numbers involved. The amount of a protective award is a week's pay per week of the protected period, pro rata, at the normal rate of pay.

It's good to talk

Claire Astin, of Thompsons Trade Union Law Group, looks in detail at the requirements that the law imposes on employers to inform and consult employees who are affected by a proposed TUPE transfer

WHEN A BUSINESS transfers to a new owner, workers' jobs are generally protected by the rules contained in the Transfer of Undertakings (Protection of Employment) Regulations 2006 (better known as TUPE).

Relevant transfers

The first thing to ascertain is whether TUPE applies, as not all transfers are covered. There are two kinds of relevant transfer under the legislation:

- a business transfer (when an economic entity which retains its identity) transfers from the old employer to the new employer, for example on the sale of a business
- a service provision change, which can apply to the contracting out, contracting in or re-tendering of a service contract.

Examples of TUPE transfers include:

- when a company or part of it is bought by another company (except for share acquisitions)
- when two companies merge to form a new company
- when there is a dedicated team of employees working on a particular contract and that contract is re-tendered or brought back in-house
- when activities such as cleaning or security are outsourced by a company to a contractor.

The union has a right to be consulted if either the old or new employer envisages taking measures that will affect the transferred employees

Generally, when TUPE applies, the jobs of employees who are "assigned" to the business or to the contract being transferred, will automatically transfer to the new employer. They then retain their current terms and conditions, as though their contract had always been between them and the new, transferee employer.

Appropriate representatives

Regulation 13 of TUPE states that "appropriate representatives" of the employees affected by the transfer must be given certain information.

If a union is recognised for collective bargaining purposes in relation to all or some of the affected employees, the employer must inform and consult that union as the "appropriate representative" for those employees.

If a union is not recognised, the "appropriate representative" will be either an existing employee representative or, if there are none, the employees must be allowed to elect a new rep.

Obligation to provide information

Regulation 13(2) of TUPE states that employers must provide the following information to the recognised union, or to the employee representatives:

- the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it
- the legal, economic and social implications of the transfer for any affected employees
- the measures the employer envisages taking in connection with the transfer (such as a business re-organisation) or, if they do not envisage taking any, they must make that clear
- the measures the employer envisages the transferee will take in relation to any employees who will transfer over or, if none are envisaged, they must make that clear.

In the recent case of **Cable Realisations -v- GMB**, the appeal tribunal stated that, even if the transferee did not envisage taking any "measures" in relation to the transfer, this duty to inform and consult still applied.

However, in another recent case (**Royal Mail Group Ltd -v- Communication Workers Union**), the Court of Appeal said that, if an employer thinks that no staff are to be transferred (whether rightly or wrongly), that will not necessarily amount to a failure to inform.

The employer only has to tell the union what steps they actually propose taking with regard to the transfer "not what [they] ought to be proposing to do" had they interpreted the law correctly.

Finally, the requirement to provide information about "measures" only applies to those measures that the transferor employer "envisages" that they and the new employer will take. That leaves union and employee representatives largely reliant on the new employer to provide all necessary information to the current employer regarding these likely measures.

As both the old and new employer may be found liable to pay the compensation, it is important to issue the claim against both

Duty to consult

The right to be consulted is separate from the right to be informed about a TUPE transfer. Under regulation 13(6) of TUPE, the union or employee representative has a right to be consulted if either the old or new employer envisages taking measures in relation to any of the employees affected by the TUPE transfer.

The measures must amount to definite plans and proposals and must be things that would not have happened but for the TUPE transfer. If no such measures are anticipated, there will only be an obligation to inform appropriate representatives of that fact and no duty to consult.

The consultation must also be undertaken with a view to seeking the agreement of the union or employee representative. The employer must consider and respond to any representations made by the union or the employee representative.

If the employer rejects the representations, they must give reasons for doing so.

Although this clause applies to both the new and old employers, the new employer does not have to consult following the transfer, according to the decision of the appeal tribunal in **Amicus -v- Glasgow City Council**.

Timing

Unlike the provisions governing collective consultation in redundancy situations, there are no precise time limits by which employers must provide the required information and consult in a TUPE situation.

Regulation 13 of TUPE simply states that the information must be provided "long enough before a relevant transfer to enable the employer ... to consult the appropriate representatives..." and is therefore a matter of fact and degree for the tribunal to decide.

However, following the decision in **Cable Realisations Ltd -v- GMB Northern**, employers must ensure that they provide the information in sufficient time for voluntary consultation to take place, even if they do not envisage taking any measures and there is therefore no statutory obligation to consult.

Special circumstances

Although there are no circumstances when employers do not have to consult, they can claim that there were "special circumstances" which meant it was not "reasonably practicable" for them to comply, in which case they only have to take such steps as are reasonably practicable in the circumstances.

As with collective redundancies, this "special circumstances" defence is only likely to succeed if the employer can convince an employment tribunal that a sudden and unforeseen event prevented full consultation from taking place.

Tribunal claims

If either the old or the new employer fails to comply with the obligations to inform and consult (either completely or in part), the union or employee representatives can pursue a tribunal claim under regulation 15.

If the appropriate representative is the union, the claim must be brought in the union's name. If there are any issues regarding the extent or scope of the union's recognition, however, the claim should also be issued in the names of the individual employees affected by the failure.

Likewise, if the appropriate representative is an employee representative, they must bring the claim. And, if there are no employee representatives, then it must be brought by the affected employees themselves.

If the claim succeeds, the tribunal may award compensation of up to 13 weeks' pay to each affected employee. This is based on the employee's actual gross pay and is not subject to a statutory cap.

It is a punitive award, based on the justice (or injustice) of the employer's actions, rather than being based on the amount of any loss sustained by the employee, according to the decision of the Court of Appeal in **Susie Radin Ltd -v- GMB and ors** (see previous article by Joe O'Hara for more detail).

As both the old and new employer may be found liable to pay the compensation (or it could be split between them both), it is important to issue the claim against both employers. This should be done within three months less one day from the date of the transfer.

TRADE UNION LAW GROUP

Thompsons has established a national Trade Union Law Group, comprising specialist lawyers at national level and in the regions. The group is led by Richard Arthur, who is based in the firm's Bristol office.

Operating in accordance with trade unions' usual arrangements with Thompsons, the group provides specialist advice and representation in all areas of trade union law such as industrial action, recognition, rule book issues, elections and complaints to the Certification Officer.

The group also acts as a specialist resource on all aspects of collective employment law, including TUPE, information and consultation and trade union victimisation.

Members of the group are regularly involved in high profile national industrial disputes.

The group aims not only to advise and provide representation on existing matters, but also to assist in strategic forward planning in relation to changes to the law and possible future legal challenges.

Examples include the issue of social clauses in public procurement, the implications of the Viking and Laval cases from the Court of Justice of the European Communities and the evolving law under Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Thompsons is the most experienced trade union firm in the UK with an unrivalled network of offices and formidable resources.

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LELR aims to give news and views on employment law developments as they affect trade unions and their members.

This publication is not intended as legal advice on particular cases.

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THOMPSONS SOLICITORS

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