



Department
for Business
Innovation & Skills

COLLECTIVE REDUNDANCIES

Government Response to
consultation on changes to the
rules

DECEMBER 2012

Contents

Contents	1
Collective Redundancies: Government Response on consultation to changes to the rules	2
1. Ministerial Foreword	3
2. Executive Summary	5
3. Introduction.....	7
4. The Government’s Overall Approach	9
What did the consultation propose?.....	9
What was the response to the consultation?	10
What is the Government going to do?	11
5. Reducing the 90-day minimum period for larger redundancies	12
What did the consultation propose?.....	12
What was the response to the consultation?	12
What is the Government going to do?	14
6. ‘Establishment’	16
What did the consultation propose?.....	16
What was the response to the consultation?	16
What is the Government going to do?	17
7. Fixed-term appointees.....	19
What did the consultation propose?.....	19
What was the response to the consultation?	19
What is the Government going to do?	20
8. Improved Guidance	22
What did the consultation propose?.....	22
What was the response to the consultation?	22
What is the Government going to do?	26
9. Impact Assessment	28
What did the consultation propose?.....	28
What was the response to the consultation?	28
What is the Government going to do?	29

Collective Redundancies: Government Response on consultation to changes to the rules

The Department for Business, Innovation and Skills has reviewed the current rules on collective redundancy consultation as part of the wider review of employment law.

In response to the Call for Evidence conducted in late 2011, the Government proposed changes to the collective redundancy regime in a 12 week consultation which concluded on 19 September 2012. The consultation sought views on a package of changes which aim to encourage better quality consultation in large-scale redundancies.

Respondents to the consultation felt that a strong case had been made for a combination of legislative change and new guidance in this area. In light of this, this Government Response sets out its decisions in respect of the rules on collective redundancy consultation.

Issued: **18 December 2012**

Enquiries to: collectiveredundancies@bis.gsi.gov.uk

This Government Response is particularly relevant to employers, employees and trade unions.

1. Ministerial Foreword



1.1 Reforming Collective Redundancy rules forms a key part of the Government's wider review of Employment Law. Through the Employment Law Review we will maximise flexibility for both employers and employees, giving businesses the confidence and certainty to react to market conditions and create new opportunities in the UK labour market, whilst protecting fairness for all.

1.2 Business change is an inevitable consequence of modern competitive markets. Commercial and economic opportunities and pressures means companies will need to reorganise, merge, expand or contract in response. Employers will want to implement change as swiftly and efficiently as possible to limit the impact on productivity and morale. Employees will share the desire for the business to survive and prosper and will have a contribution to make on how that can be achieved. Employees will also want certainty about how change affects them individually and advice on their options. It is important, therefore, that in any restructuring process there is early and ongoing engagement between the employer and their employees. Where there is the potential for large-scale collective redundancies, legislation makes consultation a requirement.

1.3 A call for evidence conducted by my predecessor Norman Lamb demonstrated the need for a change to the rules governing collective redundancies, to:

- Improve the quality of consultation;
- Allow employers to react more flexibly to changing market conditions and restructure effectively; and
- Reduce uncertainty and clarify expectations for employees, both those facing redundancy and those who remain.

1.4 The subsequent consultation has made a strong case for a combination of legislative change and improved guidance and the details are set out in this Government Response. I intend, therefore, to implement a package of reforms that ensure employees are engaged in decisions about their future while allowing employers greater certainty and flexibility to take necessary steps to restructure.

1.5 I have decided to reduce to 45 days the current 90-day minimum period before dismissal can take effect for larger-scale redundancies. I believe that this change will allow businesses to restructure more effectively, and

give them flexibility to respond to changing market conditions. It will also ensure that employee uncertainty is not unnecessarily prolonged. The 45 days will be a minimum consultation period. We received plenty of evidence to show that consultations can and do last longer than the minimum period and I expect this practice to continue. I have also asked Acas to develop non-statutory guidance to ensure that the principles and practices of effective consultation are embedded. This will emphasise the need for meaningful consultation.

- 1.6 It is vital that there is effective consultation with employees about the potential for collective redundancies. At the same time, I want to ensure that businesses have the flexibility to respond to the particular circumstances of their restructuring situation. I believe that these reforms strike the right balance between the two.



Jo Swinson MP

Minister for Employment Relations and Consumer Affairs

2. Executive Summary

- 2.1 In early 2012, the Government concluded a Call for Evidence on the current collective redundancy consultation regime. Information from respondents had suggested that this regime was unsuitable for the current UK labour market. Legislation was too restrictive, while government guidance was not clear enough.
- 2.2 The Government decided to pursue reform with three objectives: to improve consultation quality; to improve the ability of employers to respond to changing market conditions; and to balance the interests of the employees who are made redundant with those who remain.
- 2.3 To create a more effective collective redundancy regime, the Government launched on 21 June 2012 a 12-week consultation on a package of reforms, based around:
- Reducing the 90-day minimum period for large redundancies;
 - Issuing a new, non-statutory, Code of Practice to address a number of key issues affecting collective redundancy consultations; and
 - Improving guidance for employers and employees on the support on offer from government.
- 2.4 There were 160 responses to the consultation, which closed on 19 September 2012. A clear majority of respondents supported a combination of legislative change and new guidance along the lines suggested by the Government in the consultation. The Government has therefore decided on the following reforms.
- 2.5 The 90 day period: while there is clear support from employers for a 30-day minimum period, the Government has considered carefully the detail of all representations around this issue. In particular, the Government recognises the level of concern that less responsible employers will treat the time period as a maximum instead of a minimum, as well as the risk that this could be seen as a signal that Government is placing less weight on the importance of consultation. The Government also notes the importance of having sufficient time for local Government organisations to respond to potential job losses. The Government will, therefore, remove the 90-day minimum period and replace it with a 45-day minimum period for redundancies of 100 or more. We will, however, review the operation and impact of the shorter statutory period on the labour market once we have had time to see its full effect.
- 2.6 Although not the 30 days most employers had hoped for, the Government believes that a 45-day period for large scale redundancies

will allow employers to restructure more quickly, and save them administrative and wage costs. Employees will benefit from greater certainty and a less marked impact on morale and productivity. The consultation has shown that both employees eventually made redundant, as well as those who retained their employment value certainty over their position as early as possible. Once the collective redundancy notice has been issued, those made redundant can take advantage of career resources and begin the alternative job search sooner. Those who are not made redundant will be better placed to focus on making the change a success and to continue their career in the organisation.

2.7 New non-statutory Guidance: the Government has asked the Advisory, Conciliation and Arbitration Service (Acas) to prepare new guidance on collective redundancy consultations. This will address the principles and behaviours behind a good quality consultation, with a particular focus on dealing effectively with the most contentious issues, such as providing guidance on 'establishment'. As collective redundancies happen in a variety of circumstances, which can be unpredictable and change rapidly, the Code will give guidelines but allow enough flexibility for parties to tailor the consultation process appropriately.

2.8 Fixed-term contracts (FTCs): the consultation demonstrated that employers, particularly those in the Higher Education sector, struggle with existing uncertainty around whether the natural ending of fixed-term contracts triggers a requirement for collective redundancy consultation. Employers therefore generally considered that legislation was necessary to exclude fixed-term appointees from the legislation, though trade unions were opposed to this.

2.9 The Government is not convinced by arguments that consultation about redundancy is necessary for fixed term contracts reaching the end of their natural life. Furthermore, the Fixed-term Workers Directive allows for an exemption to be made for such contracts from the requirements of collective redundancy consultation. The Government will, therefore, legislate to exclude FTCs which have reached their agreed termination point from collective redundancy consultation obligations, in line with the exemption allowed for in the Directive.

2.10 However, a fixed-term contract would need to have a clear termination point in order for it to benefit from this exemption. Further, the exemption would not apply where the employer is considering early termination of the contract as a result of redundancy.

2.11 Timing: the Government intends that the amended legislation and accompanying Acas guidance will be in place for the common commencement date of 6 April 2013.

3. Introduction

3.1 In 2010 the Government committed to review the rules around collective redundancy consultation as part of the wider review of employment law. The employment law review is intended to ensure that there are no unnecessary barriers to business success. The review of the collective redundancy rules is intended to support this aim by ensuring that the rules are fit for the UK's modern and flexible labour market.

3.2 On 21 June 2012 the Government launched a consultation on proposals to change the rules on collective redundancies. The consultation ran for 12 weeks and closed on 19 September 2012. In total 160 responses were received from a wide range of stakeholders including:

- 32 large businesses
- 30 individuals
- 25 trade unions
- 18 representatives of the legal profession
- 17 business representative organisations
- 7 local Government organisations
- 6 medium businesses
- 5 charities or social enterprises
- 3 micro businesses
- 1 small business
- 2 central Government organisations
- 16 other respondents

3.3 The proposals on which the Government consulted were put forward in response to a call for evidence conducted between November 2011 and January 2012. The call for evidence and the consultation included a number of meetings and focus groups with employers and trade unions. The comments received during these meetings have also been used to inform this response.

3.4 The consultation posed the following 12 questions:

Q1. Do you agree with the Government's overall approach to the rules on collective redundancy consultation?

Q2. Which of the two proposed options should replace the 90-day period?

Q3. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

- Q4. Will defining 'establishment' in a Code of Practice give sufficient clarity?**
- Q5. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**
- Q6. Have we got the balance right between what is for legislation and what is contained in Government guidance and a Code of Practice?**
- Q7. What changes are needed to the existing Government guidance?**
- Q8. How can we ensure that the Code of Practice helps deliver the necessary culture change?**
- Q9. Are there other non-legislative approaches that could assist – e.g. training?**
- Q10. Have we correctly identified the impacts of the proposed policies?**
- Q11. If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?**
- Q.12 If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time?**

3.5 This document summarises the responses received to these questions. It also sets out the Government's response to the evidence provided and explains the Government's decision in a number of policy areas. Finally, this document sets out the changes made to the Impact Assessment as a result of the evidence received and the decisions taken.

4. The Government's Overall Approach

Q1. Do you agree with the Government's overall approach to the rules on collective redundancy consultation

What did the consultation propose?

4.1 As part of its formal public consultation, the Government set out its aims and objectives for the review of the rules on collective redundancy consultation. We identified three objectives for reform:

- to improve the quality of consultation;
- to ensure that employers can restructure effectively to respond to changing market conditions; and
- to balance the interests of the employees made redundant with those who remain.

4.2 The proposals aimed to reinforce the message that good quality consultation is better for all parties and can:

- deliver better decisions;
- reduce loss of employee morale;
- increase the likelihood of reaching agreement more quickly; and
- leave those who are made redundant in a better position to find alternative employment, while providing certainty to those who are not made redundant.

4.3 To try to ensure that the framework is fit for purpose, we proposed a package of legislative and non-legislative change which leaves sufficient flexibility to allow each consultation to be tailored to its own unique circumstances, including the commercial environment.

4.4 We identified three key elements as being core to achieving these goals:

- a straightforward legislative framework;
- a positive relationship between the employer and the employees' representatives; and
- better mechanisms to allow for appropriate government engagement.

What was the response to the consultation?

4.5 Of the 97 respondents who answered Q1 on the overall approach, 55% (53 respondents) answered 'yes', 37% (36) answered 'no', and 8% (8) stated that they were unsure. Support came most strongly from business representative organisations, legal representatives and large employers. Trade unions and individuals were most strongly against the Government's overall approach.

4.6 Most respondents, from all respondent groups, agreed that there was a problem which needed to be addressed. A majority of respondents agreed with the Government's aims to improve the quality of consultation and to introduce improved guidance. However, the differing perspectives of the parties to consultation were reflected in the responses: employers felt that the regime was too rigid and opaque whilst unions believed that the rules were too vague and did not offer sufficient protection to employees.

4.7 Most respondents, including employers and trade unions, agreed that a simplified legislative framework would be advantageous. However, they disagreed on the areas where this simplification should focus. As described below, employers supported the Government's proposal for a simplified approach to minimum periods before redundancies could take effect.

4.8 Unions, on the other hand, preferred a more robust approach where simplification was achieved through a change to the definition of 'establishment' and through a removal of the 20-employee threshold for consultation so that any putative redundancies would require consultation.

4.9 Employers generally supported the Government's proposed approach as they felt that it would:

- help to strengthen the UK's competitive advantage;
- remove delays to restructuring, particularly in situations where the business is at risk;
- enable them to retain key staff during the consultation; and
- mitigate the negative effect on staff morale.

4.10 Unions were generally opposed to the Government's proposed approach as they felt that it would:

- lead to an increase in job losses and have a negative impact on growth and the economy;
- compound the view of the unions that the UK fails to implement fully the Directive on Collective Redundancies;
- do nothing to help encourage earlier engagement between employers and employee representatives; and

- not prevent employers from using dismissal and reengagement to change employees' terms and conditions of employment.
- 4.11 Some respondents also called for the Government to consider a legislative solution to ease the burden of consultation on employers in insolvency situations.

What is the Government going to do?

4.12 From the evidence submitted to the Government through the call for evidence, the consultation and various focus groups, the Government believes that there is a need to change the way collective redundancy consultations are conducted in the UK. There is a lack of clarity about the purpose of the consultation and about various elements of the law and there is strong support for the need to improve the quality of consultation. Whilst the Government notes the different views of employers and trade unions on how this should be achieved, we believe the case has been made for a combination of legislative change and new guidance. The Government has, though, concluded that it will not go as far as a reduction to 30 days of the current 90 day minimum threshold for 100+ redundancies. Instead there will be a change to 45 days for redundancies of 100+. With regard to guidance and a Code, the Government has agreed with Acas that they will produce non-statutory guidance. More details on this and how we will address other individual issues that have been identified are contained later in this document.

5. Reducing the 90-day minimum period for larger redundancies

Q2. Which of the two proposed options should replace the 90-day period?

What did the consultation propose?

- 5.1 The Government consulted on proposals to remove the 90-day minimum period for situations where 100 or more redundancies are proposed and to replace it with either a 30 day period (in line with smaller redundancies) or a 45-day period. The consultation document was clear that the period would be a genuine minimum and that employers would be encouraged to extend consultation beyond this period where necessary.
- 5.2 The aim was to improve employers' ability to react to changing market conditions and to reduce uncertainty and low morale amongst employees, while ensuring that there could still be full consultation and effective engagement from government agencies. The aim was also to simplify the consultation process.

What was the response to the consultation?

- 5.3 100 respondents to the consultation answered Q2 about the 90-day period. 52% favoured a reduction to 30 days, 19% supported 45 days and 22% declined to select either option as they stated a desire to retain the existing 90-day period. 9% of respondents were not sure.
- 5.4 As expected, the response was polarised. Employers and independent legal bodies generally supported a reduction to 30 days as they favoured the flexibility and legal simplicity that this provided. Unions took a very different view with most union respondents refusing to select either of the options offered by the question. Instead, most stated that they did not want to see any change to the current 90-day period. A small number argued that the 90 days should be increased.
- 5.5 Several respondents linked the 90-day period to other issues including the problems around 'establishment' and the difficulties with the inclusion of fixed-term appointees in the count for collective redundancies, particularly in the Higher Education sector.

5.6 It was clear from responses that there was a fear that any reduced period would be treated as a maximum by employers and unions during consultation. However, both employers and unions provided examples of situations where both parties to the consultation agreed to extend it beyond the current 90-day minimum. We have not seen any evidence to suggest that a reduction in the minimum period would mean that this practice would not continue.

5.7 As explained above, support for a standard 30-day minimum period came largely from employers and legal advisers. Employers in particular told us that meaningful consultation usually lasts for 30 days. Viable alternatives to their proposals were rarely received after the first thirty days and employees were often keen to move on with the process to minimise uncertainty and disruption. Employers also highlighted problems with the retention of skilled, key workers during the uncertainty of the longer period and explained how this impacted on the adoption of new working practices, with a knock-on effect on productivity.

5.8 Some respondents felt that the complexity of consultation is not dictated purely by number of potential redundancies so the longer period for larger redundancies is arbitrary and unnecessary. They also felt that the ability to restructure more quickly could result in better business outcomes and stronger businesses as new working processes could be adopted more quickly.

5.9 Those who supported 30 days did so because they believed it would:

- provide a simplified legal framework;
- help with UK competitive advantage;
- provide greater flexibility to allow a more responsive approach to restructuring;
- reduce employee uncertainty;
- be extended where necessary;
- avoid delaying tactics;
- reduce the financial burden on business;
- reduce situations where employers break-up redundancies to avoid the 90-day period;
- ease the impact of the 'establishment' issue;
- cause less disruption to businesses facing insolvency; and
- mitigate difficulties with fixed-term appointees.

5.10 A minority of respondents felt that the 90-day period caused difficulties for businesses and employees, but also felt that a 30-day minimum period would be too short. They felt that a 45-day period would be a sensible compromise which would still allow for greater flexibility for business but would provide more protection for employees than a 30-day period. However, some respondents pointed out that a 45-day minimum period would retain some of the current legal complexity.

5.11 Those who supported 45 days did so because they felt it would:

- reduce staff anxiety and lead to faster outcomes for business but would still allow time for staff to be properly consulted and seek alternative employment or training;
- prevent rushed consultations which could lead to a worse outcome for all concerned;
- clear up uncertainty, save costs and allow people back into the jobs market sooner; and
- assist with the quality of consultation.

5.12 Trade unions were, in general, opposed to any reduction in the 90-day period. Most trade union respondents (and some others) refused to select either 30 or 45 days. They felt that the 90-day period should be retained because:

- 90 days is required to carry out meaningful consultation;
- 90 days is required to give employees an opportunity to research and propose alternatives to redundancy, including revenue generation ideas;
- a shorter period would make it easier for unscrupulous employers to take advantage of employees;
- it takes time for large employers to respond to union comments on the redundancy proposals and business plan;
- employees need the additional time to help find new jobs or to retrain;
- a reduction in the minimum period would increase the number of tribunals; and
- a reduction in the minimum period would have a negative impact on workplace relations.

5.13 Some respondents also pointed to the importance of giving local government organisations time to respond.

What is the Government going to do?

5.14 The minimum period is designed to ensure that effective consultation takes place which gives the employees' representatives an opportunity to contribute constructively to the collective redundancy process. The evidence provided through the call for evidence and the consultation shows that this constructive dialogue is often completed well within the 90-day minimum period, though employers will extend beyond that period where necessary. Employers tell us that 30 days is a typical length of time for genuine consultation. The additional time in the minimum period delays necessary restructuring, hampers employees' ability to re-enter the jobs market quickly and has a significant negative impact on the morale of both those employees facing redundancy and those who remain in employment. Whilst the Government acknowledges the union stance that employees benefit from more pay

and longer to find alternative training or employment opportunities, it also reiterates its belief that this is not the primary purpose of the minimum period.

- 5.15 However, while there is clear support from employers for a 30-day minimum period, the Government has considered carefully the detail of all representations around this issue. In particular, the Government recognises the level of concern that less responsible employers will treat the time period as a maximum instead of a minimum, as well as the risk that this could be seen as a signal that Government is placing less weight on the importance of consultation. The Government also notes the importance of having sufficient time for local government organisations to respond to potential job losses. The Government will, therefore, remove the 90-day minimum period and replace it with a 45-day minimum period for redundancies of 100 or more. We will, however, review the operation and impact of the shorter statutory period on the labour market once we have had time to see its full effect.
- 5.16 Although not the 30 days most employers had hoped for, the Government believes that a 45-day period will deliver many of the same benefits and allow businesses to restructure more effectively and employees to re-enter the labour market in a better position to find alternative employment.
- 5.17 This statutory change will help the UK to maintain the current competitive advantage that our flexible labour market provides. It will also allow employers greater flexibility to introduce new working practices and initiatives and will leave them less exposed to the loss of key staff during the minimum period. While the issue of determining 'establishment' will remain, the Government believes that the problems are less acute with a 45-day period than a 90-day one as the implications of a decision about whether a consultation is for 20-99 redundancies or 100+ will be less. The provision of guidance will help to improve certainty.

6. 'Establishment'

Q3. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Q4. Will defining 'establishment' in a Code of Practice give sufficient clarity?

What did the consultation propose?

6.1 Based on responses to the call for evidence, the consultation document identified that there was confusion about how to define a relevant establishment for the purposes of deciding who should be consulted and when. The consultation cited European case law which would make it difficult to define 'establishment' in legislation and instead proposed that the issue be addressed in detailed guidance or in the proposed non-statutory code of practice. The Government also stated that it did not agree with union respondents to the call for evidence who believed that the establishment issue would be resolved if the law was changed to remove the 20-employee threshold and replace the 'establishment' test with an 'undertaking' test.

What was the response to the consultation?

6.2 88 responses were received to Q3 about the risks of a statutory definition of 'establishment'. A majority (65%, 57 responses) agreed with the risks identified by the Government. 18% (16 responses) disagreed and 17% (15) were unsure.~

6.3 77 responses were received to Q4 about clarifying 'establishment' in a Code. The response was divided with only 36 % (28 responses) believing that a Code would provide sufficient clarity. 35% (27) felt that it would not and 29% (22) were unsure.

6.4 Respondents accepted that there was a lack of clarity in relation to the term 'establishment' which was causing confusion for both employers and employees. A minority, largely trade unions, preferred a statutory approach to defining the term, though most felt that non-statutory guidance was more appropriate, in view of possible future judgments by the European Court of Justice (ECJ). A small minority felt that guidance was not likely to be effective and that clarity could only be provided through the courts.

6.5 Many respondents felt that defining 'establishment' was not possible and that instead, the guidance should focus on summarising case law,

providing examples, and listing the factors that need to be considered when determining what is an establishment for collective redundancy consultation. A number of respondents reiterated the factors listed in the consultation document, stressing that geographical location was not sufficient. Many respondents argued that we should seek to interpret establishment as widely and flexibly as possible, in particular to take account of the complexities in large organisations.

6.6 Though a minority of respondents, largely trade unions, preferred to use the term 'undertaking', the majority concurred with the Government's view that 'establishment' should be retained. Some respondents suggested that the 'establishment' should include the whole organisation, including its subsidiaries, arguing that this would provide better clarity and avoid the unfairness of some employees in large organisations being consulted and not others, simply due to the fact that their local place of work had less than 20 employees. Other respondents pointed out that any guidance on 'establishment' needed to be consistent with other areas of employment law.

6.7 A minority, largely trade unions, wanted the 20 employee threshold removed or reduced. Some suggested that the trigger for consultation should be based on the percentage of employees affected and not a minimum threshold.

What is the Government going to do?

6.8 Responses to the call for evidence and the consultation both strongly demonstrate that there is support for more information on how employers and employees' representatives can work out what an establishment is for the purposes of collective redundancy consultation. They also support the Government's assertion that it is not possible (either legally or technically) to introduce a definition into legislation.

6.9 The Government notes that union respondents to the consultation believe that the 20-employee threshold should be removed and that the 'establishment' test should be replaced with an 'undertaking' test. The Government rejects both arguments. The 20-employee threshold is an important exemption for small businesses which often need to restructure quickly in response to changing market conditions. And the 'undertaking' test is not appropriate in these circumstances. As explained in the consultation document, 'undertaking' has a very specific meaning in EU law. The Collective Redundancies Directive does not envisage the use of this test.

6.10 The Government will therefore ensure that the 'establishment' issue is as far as practicable addressed in guidance. The responses to the consultation supported the Government's assertion that referring simply to location was too restrictive and did not reflect the reality of collective redundancy consultations. The consultation document sets out a number of factors that, following responses to the call for evidence, the

Government believed would be most useful in helping employers and employees' representatives reach an informed decision. There was broad support for these in response to the consultation and so the Government will ensure that the guidance includes reference to the following factors and explains how they might impact on the definition of 'establishment':

- geographical location;
- management structure;
- management or financial autonomy;
- cohesion of the workforce;
- nature of the work undertaken or type of service provided;
- contractual relationship between employer and employee;
- and
- level within the company at which the decision to dismiss is taken.

7. Fixed-term appointees

Q5. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

What did the consultation propose?

7.1 The call for evidence identified that there was some confusion as well as concern about the way the end of fixed-term contracts (FTCs) are handled in collective redundancy situations. The consultation proposed that the Government address the issue in guidance to ensure that the recent Employment Appeal Tribunal (EAT) judgment in *University of Stirling v University and College Union* was understood and followed. It also suggested that a reduction in the 90-day minimum period would help to address many of the concerns, particularly those raised by employers in the Higher Education sector.

What was the response to the consultation?

7.2 86 responses were received to Q5 about fixed term appointees. A majority (58%, 50 responses) suggested that the Government's proposal to address the issue in guidance was not correct, instead favouring a legislative solution. 35% (30 responses) supported the Government's proposal and 7% (6 responses) were unsure.

7.3 Employers generally considered that legislation was necessary to exclude fixed-term appointees (FTAs) from the legislation. In particular, employers in the Higher Education sector felt that an exemption would remove the current requirement for them to engage in near-constant consultation over the end of fixed-term contracts. Some employers felt that the requirement to include the end of FTCs in the threshold and the consultation was distracting from important issues affecting permanent staff who may be facing redundancy at the same time.

7.4 One employer representative group explained that other EU Member States (including Ireland, the Netherlands and Italy) provide an exemption for FTCs. Another employer representative group stated that they believed that the purpose of the Fixed Term Workers Directive was to improve the quality of work and prevent abuse from use of successive fixed term contracts. They considered that the natural expiry of contract was not relevant to the quality of the work and argued that legislation could be crafted to exclude multiple successive contracts.

7.5 Unions were strongly against a legislative exemption for FTAs, considering that the principle of the Fixed Term Workers Directive is that fixed term workers should be treated equally with permanent workers;

FTAs should be considered for redeployment when their contract reached the end of its natural life as well as when it was terminated prematurely. Some argued for legislative change to provide certainty on this, making it clear that definition of dismissal includes the non-renewal or non-re-engagement of a fixed term appointee. Some also wanted to extend the scope of the legislation further to include agency workers and casual workers.

7.6 Comments from legal bodies focused on the Stirling judgment and on the reason for redundancy as defined therein. One legal body felt that, although Stirling gives a reasonable practical solution, it is unsound in terms of reasoning and could change. They felt that certainty can only be achieved through legislation to exclude the expiry of a fixed term contract from the scope of the collective consultation provisions. Another legal body felt that legislation is needed for clarity and that this should distinguish between a reason for redundancy relating to the employer and a reason related to the individual by applying the test of whether the reason relates to “something (s)he is or has done”. One legal body took a different view, arguing that the Stirling judgment is subject to appeal and that there is therefore no justification for a legislative exemption of fixed term appointees.

What is the Government going to do?

7.7 The Government notes the evidence provided, particularly by the HE sector, of the difficulties that the uncertainty over the inclusion of FTCs creates. We are not convinced by arguments that consultation about redundancy is necessary for fixed term contracts reaching the end of their natural life. Where the contract is clear about the point at which employment ends – either through the completion of a particular task, or through reaching a specified time – we can see no reason why the fixed term appointee would have a reasonable expectation that employment would continue beyond this point. We believe that the Fixed Term Workers Directive allows for an exemption to be made for such contracts from the requirements of collective redundancy consultation. The Government will, therefore, legislate to exclude FTCs which have reached their agreed termination point from collective redundancy consultation obligations in line with the exemption allowed for in the Directive.

7.8 However, a fixed-term contract would need to have a clear termination point in order for it to benefit from this exemption. Further, the exemption would not apply where the employer is considering early termination of the contract as a result of redundancy.

7.9 The Government believes that this will not drive an increase in the use of FTCs nor will it lead to widespread abuse of successive FTCs. Employees will retain the protection of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 which include provisions which limit the use of successive fixed term contracts.

Also, those who are dismissed as redundant before the agreed end point of their contract will still be within scope of the collective redundancy rules.

7.10 We believe that this approach will provide significant benefit to employers who make regular use of FTCs, especially where their use or extension is dependent on external funding or is for a specific, short-term purpose, such as maternity cover

8. Improved Guidance

Q6. Have we got the balance right between what is for legislation and what is contained in Government guidance and a Code of Practice?

Q7. What changes are needed to the existing Government guidance?

Q8. How can we ensure that the Code of Practice helps deliver the necessary culture change?

Q9. Are there other non-legislative approaches that could assist – e.g. training?

What did the consultation propose?

8.1 Following the call for evidence the Government identified certain issues which could not or should not be addressed in legislation but which would benefit from being explained in clearer, more reliable guidance. The response to the consultation on the issues of ‘establishment’ and fixed term appointees is addressed above. This section deals with the response to the Government’s proposals on guidance.

8.2 The consultation proposed that the Government would expand its current guidance and produce a new non-statutory Code of Practice. It stated that the aim of this proposal was to provide advice to help parties to consultation to reach agreement which will support effective restructuring and ensure that the reduction in the 90-day minimum time period would not lead to superficial consultation. It was proposed that the code would provide clarity on the most contentious issues, but allow enough flexibility for the parties to tailor the consultation process to best suit their needs.

8.3 It was proposed that the code should cover:

- when consultation should start;
- who the consultation should cover;
- who should be consulted;
- what should be discussed;
- how the consultation should be conducted;
- when consultation can be considered to be complete; and
- how to engage effectively with the Government and the benefits that this could bring.

What was the response to the consultation?

8.4 There were 83 respondents to Q6 about the balance between what is for legislation and what is for guidance. 37% (31 responses) answered ‘no’,

with 29% (35) answering 'yes' and 23% (29) not sure.

- 8.5 A significant number of respondents felt that it was difficult to give an assessment of the balance without seeing a draft of the proposed guidance and code.
- 8.6 In general, unions felt that the balance was not correct. They felt that guidance alone would not help to improve the quality of consultation. They felt that many of the issues proposed for inclusion in guidance were already addressed in legislation (such as the starting point of consultation and who should be consulted) or that further legislation was required to clarify and strengthen the law. In particular they wanted the law strengthened to:
- ensure that it covers all workers, including temporary, casual and agency workers;
 - remove the 20-employee threshold;
 - replace the 'establishment' test with an 'undertaking' test; and
 - ensure that redundancy notices cannot be issued until a consultation has finished.
- 8.7 Unions also felt that the law should be strengthened to clarify the position of FTAs and to clarify the interaction with Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).
- 8.8 They felt that the clarity brought about by these changes would help to reduce the number of Employment Tribunal cases and that a stricter penalty for non-compliance, such as providing tribunals with a power to reverse dismissals, would help to improve compliance.
- 8.9 Where employers disagreed with the proposed balance between guidance and legislation, it was primarily in relation to fixed-term appointees. They felt that guidance would not provide sufficient clarity and that it should be addressed in legislation. One employer's organisation stated a preference for the certainty brought about by legislative change as this would reduce the cost of legal advice for employers.
- 8.10 43 respondents provided comments on Q7 about the changes that are needed to existing Government guidance. A significant number of trade union respondents supported the TUC submission on this question. The TUC called for guidance to:
- promote the benefits of effective and meaningful consultation and negotiations between employers and trade unions on collective redundancies;
 - promote full compliance with EU law;
 - encourage employers to negotiate and agree redundancy policies with unions in advance of redundancy situations;

- emphasise that consultation must be undertaken with a view to reaching agreement which should be akin to negotiation;
- ensure that employers understand that they have a duty to provide time for unions to develop alternatives to redundancies and give serious consideration to their proposals;
- be sufficiently flexible, recognising that redundancy situations will vary significantly according to the circumstances;
- clearly explain the types of information which must be provided to employees' representatives;
- emphasise that consultation should start as early as possible, giving trade unions and workplace representatives the greatest possible opportunity to influence decisions and outcomes;
- emphasise that employers should seek wherever possible to avoid the need for redundancies including giving consideration to alternatives such as efficiency savings, redeployment exercises, identifying new orders or adjusting working patterns;
- emphasise the importance of consultation continuing until all avenues for avoiding redundancies have been fully exhausted, including after the minimum consultation period has ended;
- encourage employers to provide training and support to workers who are to be deployed to new jobs;
- encourage employers to negotiate clear and non-discriminatory redundancy selection criteria;
- deter employers from using section 188 notices to vary and reduce terms and conditions for the workforce;
- set out clear advice on rules relating to suitable alternative work;
- encourage employers to provide support to individuals at risk of redundancy, including access to training;
- encourage employers to assess and monitor the effect which restructuring has on the health and well-being of staff;
- encourage employers to provide facilities for union and workplace reps, including paid time off, office space and access to workplace email and communication systems; and
- confirm that the special circumstances defence only applies in exceptional situations.

8.11 Some unions also supported the inclusion of detailed guidance on the information that should be provided during consultation and how it should be provided, with particular attention to discouraging employers from keeping some information confidential. Others also felt that the guidance should include reference to consultation over the economic reasons behind the redundancies.

8.12 Unions gave strong support to Acas as the best producer of guidance and/or a Code of Practice and many believed that the current Redundancy Handling booklet was a good template.

8.13 Legal bodies felt that the current guidance needed to be expanded to provide useful practical support. It should consider issues including

around situations where some employees have already been made redundant and more redundancies subsequently become necessary within 90 days and how to deal with employees who wish to leave during the minimum period.

- 8.14 One legal body also felt that guidance was needed on the amount of detail that is required in information provided in order to strike balance between needs of employers and employees and on the relationship with TUPE.
- 8.15 Another legal body stated that the guidance must be clear and that checklists, examples and case studies are useful.
- 8.16 Employers largely agreed with the topics for inclusion proposed in the consultation. However, they wanted to see some additional elements covered, including:
- whether subjective redundancy selection criteria can be used and on selection pools;
 - how consultation should ‘look and feel’;
 - how employers can persuade union and non-union representatives to sit down together for joint consultation; and
 - advice on alternatives to redundancy (such as pay freezes, changes to terms and conditions).
- 8.17 43 respondents answered Q8 about delivering culture change. A significant number of respondents felt that a Code of Practice would need to have a statutory footing in order to help bring about the required culture change. A number of other respondents believed that it was impossible to judge without seeing the Code in draft.
- 8.18 Several respondents highlighted that, in order to be effective, a Code would need to be drafted clearly (by Acas) and that it would need to be disseminated widely. A trade union felt that the Code should promote the Information and Consultation of Employees Regulations as a way of changing organisational culture.
- 8.19 A number of respondents from all respondent types offered to assist in the development of the Code.
- 8.20 Several unions felt that guidance on its own was not enough to encourage culture change. They believed that it would not deter unscrupulous employers from truncating the consultation process and that tougher sanctions were required.
- 8.21 An employer’s group and a legal body felt that case studies and examples of tangible benefits to employers and employees from improved quality of consultation would be helpful.

- 8.22 Q9 about other non-legislative approaches prompted 71 responses. There was not an overwhelming call for other non-legislative approaches. 49% (35 responses) of the 71 respondents believed that there were other options with a majority of those favouring training of employers and/or employees' representatives.
- 8.23 There was no agreement on whether other non-legislative approaches might be useful in helping to improve the quality of consultation. A number of respondents from different respondent types supported online training for employees, employers and employees' representatives as a cost effective way of helping them keep their understanding of the law up to date.
- 8.24 Unions believed that the Government should resist attacks on facility time in order to help union reps better to engage in collective redundancy consultations. They also suggested that Union Learning reps be used as a source of training.
- 8.25 Unions also felt that Acas should offer joint training to employers and employees' reps in order to encourage a shared understanding of the consultation process.
- 8.26 Unions also felt that employers should be encouraged to negotiate redundancy policies with unions in advance.
- 8.27 One legal body felt that employees selected for redundancy should be provided with interview and training on curriculum vitae, possibly through Job Centre Plus.
- 8.28 Employers supported training, case studies and FAQs for employers and employees and favoured awareness-raising around both changes to the law and available guidance and support.
- 8.29 Employers were keen that the guidance should be as flexible as possible and should not have a statutory footing. They were keen to ensure that reps could not use the guidance in court and that it did not lead to 'tick-box' consultation that did not suit their circumstances.

What is the Government going to do?

- 8.30 The Government notes the comments made by some respondents about a non-statutory Code of Practice and the limits to its efficacy. These respondents argued that, without a statutory footing, a Code would have limited impact. Some respondents also thought it would be confusing to have a Code of Practice that had no statutory basis as this is what most people would expect of a formal Code.
- 8.31 The Government remains of the view that a statutory Code is inappropriate. It is not possible to prescribe in legislation a number of the issues that need to be covered (e.g. establishment). A statutory

Code would also encourage a ‘tick-box’ approach and reduce the flexibility to deal effectively with the diversity of collective redundancy consultations. We note, however, the concerns around terminology.

8.32 The Government has, therefore, asked Acas to draft detailed guidance which will address the key issues. It will address the items identified in the consultation and we will work with Acas and stakeholders to assess the merits of including the detail suggested by employers and the TUC in response to the consultation.

8.33 Due to a lack of consensus on the need for other, non-legislative, approaches the Government will not seek to introduce Government-run or funded training courses at this time but we will keep the situation under review.

9. Impact Assessment

Q10. Have we correctly identified the impacts of the proposed policies?

Q11. If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?

Q.12 If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time?

What did the consultation propose?

- 9.1 The consultation sought views on whether the BIS assessment of impact of the consultation proposals was appropriate.
- 9.2 In addition, BIS was looking for further evidence about how collective redundancy consultations currently operate (in particular how long consultation typically takes and how organisations are affected during that consultation).

What was the response to the consultation?

- 9.3 68 respondents answered Q10 about the impacts of the proposals. A majority (57%, 39 respondents) stated that we had correctly identified the impact of the proposed policies. 19% (13 respondents) felt that we had not and 24% (16) were unsure.
- 9.4 Of those who did not support the Government's assessment, the main areas of contention were around general lack of evidence, and a lack of consideration for the effect of the proposals across different sectors. However, there was no consensus on areas where the Government assessment was lacking.
- 9.5 We also received very little additional evidence on the possible impacts of the proposals.
- 9.6 21 respondents provided information in response to Q11 on length of time to reach agreement. There was little consensus amongst the responses with the timescales ranging from 14 days to 6 months. Some respondents commented that the length of time depended on the willingness of the employer to consult meaningfully, whilst others stated that union intransigence meant that agreement was rarely, if ever reached.
- 9.7 Focus groups held during the consultation period also covered the issue of how long it takes to reach agreement. Here, employers were saying

that consultation typically was complete within 30 days. There were some exceptions to this, and most acknowledged that there were occasions where the consultation did take longer and therefore in our impact assessment we assume 45 days is the average length for consultation.

- 9.8 Very little evidence was provided in response to Q12 on impact on business. But from the call for evidence and focus groups, employers stated that they could not quantify the impact. Focus groups suggest that the impact differs by sector and nature of the work carried out. Most felt that there was an impact on morale and productivity as a result of collective consultation. There was consensus that it is extremely difficult to implement changes to ways of working, or general innovations in the business.

What is the Government going to do?

- 9.9 An updated impact assessment accompanies this Government Response and sets out our best estimates on what the impact of the proposals will be.

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URN 12/1352