BIS | Department for Business Innovation & Skills

Collective Redundancies: Consultation on changes to the rules : Response form

A copy of the consultation on **Collective Redundancies: Consultation on changes to the rules** can be found at:

http://www.bis.gov.uk/consultations

You can complete your response online through Survey Monkey :
(https://www.surveymonkey.com/s/36S3QYT**)**

Alternatively, you can email, post or fax this completed response form to

Email:

collectiveredundancies@bis.gsi.gov.uk

Postal address:

Carl Davies
Department for Business, Innovation and Skills (BIS)
3 Abbey 2
1 Victoria Street
London SW1H 0ET

Fax: 0207-215 6414

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: **19 September 2012**

Your details

Name: Gwyn Bates, Secretary

Organisation (if applicable): Alliance for Finance

Address:

Telephone: 7802845918

Fax:

Please tick the boxes below that best describe you as a respondent to this

- ☐ Business representative organisation/trade body
- ☐ Central government
- ☐ Charity or social enterprise
- ☐ Individual
- ☐ Large business (over 250 staff)
- ☐ Legal representative
- ☐ Local government
- ☐ Medium business (50 to 250 staff)
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☒ Trade union or staff association
- ☒ Other (please describe) Alliance of Staff rep bodies

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

Yes ☐ **No** ☒ **Not sure** ☐

Alliance for Finance is an alliance of 9 staff representative bodies representing workers in the finance industry.

Reducing the consultation period for larger scale redundancy situations gives the green light for less scrupulous employers to rush through their obligations to mitigate the effects of redundancies through redeployment, retraining, voluntary redundancy exercises etc. Ultimately this would lead to more workers facing compulsory redundancy

placing an increased financial burden on the state.
The proposed reduction will also undermine the important role played by staff representative bodies and have detrimental impact on collective bargaining.

Question 2: Which of the two proposed options should replace the 90-day minimum period?

30 days ☐ **45 days** ☐ **Not sure** ☐

Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Neither option is reasonable.We believe "good" employers will continue to consult for longer to ensure good support to those affected whilst "bad" employers will benefit from these changes.Ultimately, bad practice places a greater burden on the state.

Question 3: Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes ☐ **No** ☒ **Not sure** ☐

Please provide comments to support your answer.

The use of the term "establishment" has enabled some employers to evade due consultation where large numbers of workers engaged in the same activities, albeit based in small geographically spread units with less than 20 workers, face redundancy for the same reason at the same time. For example the closure of a number of banking branchesThe term "establishment" should be more clearly defined in line with recent ECJ judgements.

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

Yes ☐ **No** ☒ **Not sure** ☐

The Code needs to have legally binding status.

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?

Yes ☐ **No** ☒ **Not sure** ☐

Please provide comments to support your answer.

Fixed Term workers are entitled to equal treatment on redundancy pay and right to redeployment consideration and therefore it makes no sense to leave the need for them to be included in consultations a matter of following a code of practice. Issues relating to fixed term contract employees should be a matter of the wider consultation arrangements.

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?

Yes ☐ **No** ☒ **Not sure** ☐

Non-statutory Codes of practice will not have enough impact on unsrupulous employers.

Question 7: What changes are needed to the existing Government guidance?

See the answer to Q 8

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

Only by making adherence to the code a legal obligation.

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

Yes ☒ **No** ☐ **Not sure** ☐

The Government should support collective bargaining in line with its stated aim of having "a positive relationship between the employer and employees' representatives". The Government should more strongly encourage employers to ensure they provide training in employment law matters to staff consultative forums where these exist in the absence of collective bargaining agreements.

Question 10: Have we correctly identified the impacts of the proposed policies?

Yes ☐ **No** ☐ **Not sure** ☒

If you have any evidence relating to possible impacts we would be happy to receive it.

The issues covered in points 100-104 in the impact assessment have been inadequately considered. We believe these are serious risks not to be dismissed lightly.

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?

Our partner organisations have numerous examples of where adequate responsible consultation has resulted in better outcomes for those affected. many of these have been reported in other union's and organisations' direct submissions.

Question 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?

N/A

This publication is also available on our website at www.bis.gov.uk
Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

If you require this publication in an alternative format, email enquiries@bis.gsi.gov.uk, or call 020 7215 5000.

URN 12/808

1. Your name:

Association of Colleges

2. What organisation do you represent (if any)?

Association of Colleges

3. E-mail address:

kanchan_jadva@aoc.co.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Business representative organisation/trade body

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

No Response

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

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

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

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

No Response

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

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

REPRO DTP

From: Kanchan Jadva [kanchan_jadva@aoc.co.uk]
Sent: 10 September 2012 11:30
To: Collective Redundancies
Subject: AoC submission paper to Collective Redundancies: Consultation on changes to the rules
Importance: High
Attachments: AoC submission paper - Collective redundancies - consultation on changes to the rules.pdf

Dear BIS,

Please find attached the response to the consultation on 'Collective redundancies: Consultation on changes to the rules' from the Association of Colleges (AoC) on behalf of its members. We would be grateful if you could take these views and comments into consideration as part of the consultation and before any changes are confirmed.

We would appreciate if you could confirm receipt of this email and the attached submission paper by replying to this email.

If you require any further information, please feel free to contact me.

Kind regards

Kanchan

Kanchan Jadva
Employment Adviser
Association of Colleges
2-5 Stedham Place
(Off New Oxford Street)
London
WC1A 1HU

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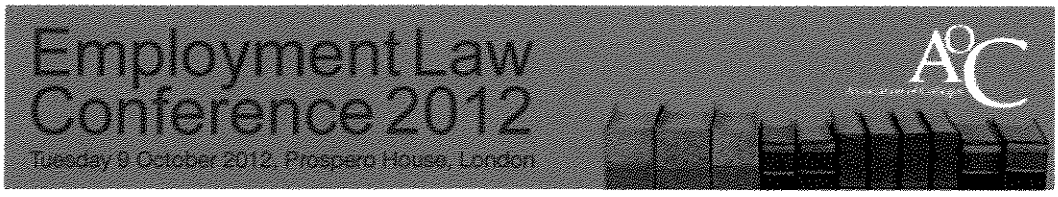
Email: kanchan_jadva@aoc.co.uk
Web: www.aoc.co.uk/employment



Communications via the GSi may be automatically logged, monitored and/or recorded for legal purposes.

Association of Colleges

Collective Redundancies: Consultation on changes to the rules

A submission from the Association of Colleges
Date: 10 September 2012

Association of Colleges
2 – 5 Stedham Place
London WC1A 1HU
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Fax: 020 7034 9950
Email: employment@aoc.co.uk
Web: www.aoc.co.uk

Introduction

The Association of Colleges (AoC) exists to represent and promote the interests of Colleges and provide members with professional support services. AoC was established in 1996 by Colleges themselves to provide a voice at national and regional levels for further education and higher education delivered in Colleges. 95% of Colleges are in our membership, including general and tertiary Further Education Colleges, Sixth Form Colleges and specialist Colleges in England, Wales and Northern Ireland. Colleges employ 245,000 people, 128,000 of whom are teachers and lecturers and staff costs (excluding restructuring) total £5 billion, accounting for 65% of total College spending. In some towns in England, Colleges are one of the major local employers after the NHS and/or local authority.

The AoC employment team provides advice, policy guidance and representation to members in areas of employment law, industrial relations and HR practice, including collective redundancy consultation. Over the last year, redundancy and restructures has been ranked the highest of the enquiry topics of all enquiries received on the AoC Employment Helpline. AoC devised a short survey for members to complete to assist with responding to this consultation. AoC has reviewed the feedback received from member Colleges, including from Principals and Human Resources Directors on the current collective redundancy consultation rules. Below is a summary of the key issues highlighted and areas of concern. Responses have been provided to those areas of most relevance to Colleges.

Timeframes for collective redundancy consultation

AoC members were asked to feedback their views on the proposals to reduce the minimum timeframe for collectively consulting over large-scale redundancies. The majority of respondents expressed their view that the minimum 90-day consultation period for large-scale redundancies should be replaced with a single 30-day minimum meaningful collective consultation period for all redundancies.

This would be consistent with the existing minimum timeframe for collective consultation where 20-99 redundancies are proposed. Feedback received from members is summarised below.

A shortened 30-day consultation period for all redundancies, where 20 or more employees are affected, would allow both Colleges and employees to have clarity, in a short timeframe and would assist to expedite the redundancy process. As this is a minimum timeframe, Colleges can collectively consult for longer, if necessary, to allow for the process to be fair, objective and meaningful. In turn, it is expected that this would alleviate some of the anxieties that employees often face during times of uncertainty and change, which applies to

both employees 'at risk' of redundancy and those who are not. Employee morale and productivity are often affected during such times.

If the consultation timeframe is reduced to 30-days, Colleges will be able to respond rapidly to funding issues, income shortfalls and plan their businesses and workforce more effectively. This would also help ease the administration and would not lead to confusion over how many minimum days the consultation period applies.

In the further education sector, many Colleges have contracts of employment in place that require the College to issue a contractual notice when the College is terminating an employee's contract which can often be between two to three months, and sometimes longer, depending on the nature of the post being carried out. Redundancy notices can only be issued when the consultation process has been completed, and where Colleges have explored and exhausted all possibilities of avoiding the redundancies. With this in mind, depending on the number of redundancies proposed, and the length of collective consultation required, this can, in some circumstances, make the redundancy process from the beginning (consultation) to the end (dismissal and the effective date of termination) quite drawn out.

Non-statutory Code of Practice

Our members welcome the proposal that Government intend to develop and introduce a new non-statutory Code of Practice that addresses key issues around the processes that detract from quality consultation and seek to facilitate better working relationships between employers and employer representatives.

Feedback received from our members is that they would like to see the following issues covered within the non-statutory Code of Practice, in the form of guidance:

- The level of detail required for business case rationale.
- Equality and diversity impact assessment requirements.
- Defining what is meant by 'proposing to dismiss'.
- How to ascertain the number of redundancies.
- Defining what is meant by 'to begin consultation in good time'.
- The role of trade union representatives/work colleagues when representing an employee during consultation meetings. Acceptable standards of conduct and the parameters of their role as a representative.
- Summary of how to move from collective consultation to individual consultation.

- What individual consultation means and what should be covered, with particular focus on what is expected from Colleges when there is non-engagement from employees and representatives during the consultation process. Guidance on what is expected of reasonable employers as part of the individual consultation process.
- Content and level of detail of consultation notes.
- Examples of fair selection criteria and good practice in this area.
- Further information on re-deployment.
- Timetabling the process would be useful. For example, guidance on when consultation must first begin, the meaning of 'contemplating' redundancies and, when notice of dismissal can be given.

Meaning of 'establishment'

Our members embraced Government's proposal to clarify the definition and meaning of 'establishment' within the non-statutory Code of Practice. Clarity is required in the following areas:

- How to identify discreet business entities within an organisation.
- Multi-site campus operations and off site employees.

Fixed-term contracts

Government intends for the issues related to fixed-term contracts and collective redundancy consultation to be addressed through guidance and the non-statutory Code of Practice, rather than legislation. The majority of our members welcomed this as this would provide Colleges with greater clarity on whether or not employees on fixed–term contracts should be included in the collective redundancy consultation. Some members however felt strongly that the issue should be covered in legislation, requiring all employers to act in compliance with legal requirements and apply the rules consistently, rather than following guidance covered in a non-statutory Code of Practice.

Our position, as advised in our response to the call for evidence still stands, that fixed-term contracts are a significant issue for Colleges as these are utilised to deliver services on a termly-basis or for the duration of the academic year only. This flexibility is needed to serve business needs that are specific to the further education sector. Staffing needs do fluctuate depending on student enrolment figures and Government funding allocations, which determine whether courses will run. For example, some services are not required during the

summer holiday period, but will often resume at the start of the Autumn term; and some courses and training services are time-limited based on Government funding and targets for the learning and skills sector. This flexibility is limited by the collective consultation rules, particularly when notice cannot be served until consultation is completed. In some cases, the collective redundancy consultation process takes place on an annual basis for the same group of employees. This is considered an unnecessary burden, both administratively and financially, when the cessation in the work is often temporary.

Both employer and employee know from the outset that employment will terminate on a specified date. The job is advertised as temporary employment, and described as such throughout the recruitment process, so there is a full understanding by all parties that employment is not permanent and it will terminate at the end of the fixed-term. The obligation to consult collectively is burdensome when several fixed-term contracts are due to end at the same time - which is inevitable in further education which operates on the basis of academic years. Such contracts are used for a specific purpose; for example to support an increase in demand for a particular course that will run for a specific period, or to deliver a time-limited project. This calls into question whether any collective consultation exercise can really be meaningful.

A fair process to end a fixed-term contract is still required; however it may not be necessary to include them within the collective redundancy process, as highlighted in the points above.

Government guidance

Employers and employees are not fully aware of the support and resources available to them and when to take advantage of these in redundancy situations. Government intends to address these issues by reviewing existing guidance available on the Directgov and Business Link websites to make improvements, ensuring that guidance is accurate and fit for purpose.

Our members would like the following areas to be covered as part of the guidance:

- The full redundancy process to be made clear, along with an explanation of the legal obligations placed on Colleges.

- Useful links and organisations that can offer support and advice to employees and employers, for example contact details for Jobcentre Plus, Citizens Advice Bureau, Insolvency Service, BIS redundancy payments helpline and ACAS.

1. Your name:

Association of School and College Leaders - Martin Ward

2. What organisation do you represent (if any)?

Association of School and College Leaders

3. E-mail address:

Martin.Ward@ascl.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No Response

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

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

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

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

No Response

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

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

REPRO DTP

From: Martin Ward [Martin.Ward@ascl.org.uk]
Sent: 20 August 2012 16:36
To: Collective Redundancies
Cc: Consultations
Subject: Collective redundancies consultation ASCL ref 12.077
Attachments: Collective redundancies.docx

Please find attached the response of ASCL.

Best wishes

Martin Ward
Public Affairs Director
Association of School and College Leaders

ASCL
130 Regent Road
Leicester
LE2 1RE

07734 030023

ASCL Association of School and College Leaders

Collective redundancies

Response of the Association of School and College Leaders

1 The Association of School and College Leaders (ASCL) represents over 17,000 heads, principals, deputy heads, vice-principals, assistant heads, business managers and other senior staff of maintained and independent schools and colleges throughout the UK. ASCL has members in more than 90 per cent of secondary schools and colleges of all types, responsible for the education of more than four million young people. This places the association in a unique position to consider this issue from the viewpoint of the leaders of secondary schools and of colleges.

2 Redundancy of 20 or more employees has been rare in education. Regulations pertaining to such situations have therefore not been relevant to the majority of school and college leaders. ASCL would expect this situation to continue.

3 Where Burgundy Book conditions operate, either because the employer is the Local Authority or because terms and conditions have transferred under TUPE, the length of notice generally means that employees have sufficient time to put their affairs in order or find alternative posts. In consequence, the difference between 90 days and 45 days is not significant. This is the more so because the timing of education funding decisions and the arrangements for amalgamations (generally to take effect during the summer holiday) mean that longer notice periods apply.

4 We would endorse the view that the threat of legal challenge would in most cases ensure that education employers did not enter upon consultation as fait accompli.

5 We are not convinced that staff morale would be higher because of a shorter period of consultation. The damage to morale is not caused only by uncertainty but also by a dislike of redundancy and the fact that valued colleagues are being dispensed with. Even when the process is complete those who have not been selected for redundancy still suffer from a loss of morale caused by sympathy for colleagues and the fear that further redundancies may follow. Where redundancy is suspected to be a way of removing colleagues whose faces do not fit, this effect is multiplied. The length of consultation can do nothing for this.

6 Experience shows that a statutory code of practice that can be relied upon to indicate reasonable practice at tribunal is a better security of good practice than

legislation which leads to legal wrangling and legal distinctions never intended by legislators. ASCL would support this approach.

7 The issue of an 'establishment' has been mostly a dead issue in education since Local Management of Schools was introduced. (The Modification Order has maintained continuity of service rights while not confusing the establishment issue). Incorporation of colleges and later the shift of many schools to academy status have confirmed this. However, the introduction of academy chains may potentially reintroduce confusion on this issue to education, as staff may not be regarded as employees of a school in the chain but of the chain as a whole. So clear statutory guidance would be welcome. We would endorse the government's view that to replace 'establishment' by 'undertaking' would open the issue to litigation that would do little for flexibility or for certainty.

8 Thank you for the opportunity to comment on this issue. I hope that this is of value to your consultation. ASCL is willing to be further consulted and to assist in any way that it can.

Martin Ward
Public Affairs Director
Association of School and College Leaders
20 August 2012

1. Your name:

BECTU - Tony Lennon

2. What organisation do you represent (if any)?

BECTU

3. E-mail address:

tlennon@bectu.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

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

No Response

9. Please provide comments to support your answer.

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17. If yes, please explain what other approaches you consider appropriate.

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No Response

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

No Response

21. 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?

No Response

REPRO DTP

From: Tony Lennon [tlennon@bectu.org.uk]
Sent: 19 September 2012 17:28
To: Collective Redundancies
Subject: Response from BECTU to consultation on Collective Redundancies
Attachments: bis_cons_redundancy_20120919.pdf

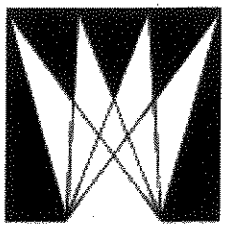
Please find attached the response to the Collective Redundancy consultation from the Broadcasting, Entertainment, Cinematograph and Theatre Union.

Regards,

Tony Lennon

BECTU Research
020 7346 0900
07789 501242

373-377 Clapham Road
London SW9 9BT



BECTU

BIS consultation on collective redundancies June 2012

Response from BECTU

The Broadcasting Entertainment Cinematograph and Theatre Union represents over 26,000 workers in the broadcasting and entertainment industry, employed in a wide variety of contractual relationships. Many of them are employees, either permanent or on fixed-term contracts, with small, medium, and large enterprises.

As noted in our response to the earlier Call for Evidence, our team of 22 National Officials has extensive experience of participating in consultations over workplace redundancies.

Based on this experience, BECTU does not believe there is any justification in reducing the statutory period for redundancy consultation. Far from supporting any diminution in employees' rights in this respect, we would like to see these being extended, for example by extending statutory consultation to groups numbering fewer than 20.

Our comments on the consultative paper are in line with those expressed in the response due to be tabled by the Trades Union Congress, and we wholeheartedly endorse the TUC position. We would however like to amplify one comment that we made in the call for Evidence on the alleged difficulties employers endure because of the 90-day statutory consultation period.

Our officials continue to report that, in the many dozens of redundancy consultations they undertake each year, although some enterprises are able to complete an adequate process of dialogue with trade unions, many are unable to achieve this.

The most common cause of extended consultation is not obstructiveness or lack of engagement by our union, but the manifest lack of preparation that some employers display before announcing the potential need for redundancies.

It is very common for even large, household name, employers to be unable to answer some of the most basic questions about the business and economic reasons for redundancies.

Frequently employers commence consultation without being able to: define the pool of workers for redundancy selection; state clearly their preferred criteria for selection; or, clarify whether or not fixed term contract workers are in or out of the selection process.

These common instances of inadequate preparation by the employer, sometimes coupled with an incomplete understanding of the legalities of redundancy, put our officials in a position where even with the current consultation periods there is insufficient time to explore alternatives to redundancy. The time is used instead to tease out a coherent explanation of the proc-

ess by which reduncancies will be executed.

We are deeply concerned that any reduction in the statutory consultation period will leavemany more members in a predicament where, at the end of consultation, there are still fundamental questions about their treatment that remain unanswered by employers.

These questions range aross pension entitlement, notice periods and pay in lieu of notice, non-contractual benefits, taxation of severance payments, and others. It is unacceptable in our view that employers should exacerbate the stress workers are already under at a time of redundancies by issuing notice of termination before these questions have been dealt with. A reduction in the 90-day consultation period will inevitably increase the number of occasions when this happens.

We would be grateful if you can take this specific concern into account when reviewing responses to the consultation on collective redundancies.

T.L. 20120918

1. Your name:

NHS - Jacqueline Kurt

2. What organisation do you represent (if any)?

NHS

3. E-mail address:

jkurt@nhs.net

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

British Dietetic Association

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

No Response

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

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No Response

21. 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?

No Response

1. Your name:

CWU - Billy Hayes

2. What organisation do you represent (if any)?

CWU

3. E-mail address:

DLOVETT@cwu.org

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No Response

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No Response

12. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

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

No Response

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

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

REPRO DTP

From: Dorothy Lovett [DLOVETT@cwu.org]
Sent: 13 September 2012 12:21
To: Collective Redundancies
Attachments: cwu submission to BIS CONSULTATION - CHANGES TO COLLECTIVE REDUNDANCY RULES.docx

Dorothy Lovett
PA to General Secretary
CWU

150 The Broadway
Wimbledon
London
SW19 1RX

Our Ref: GS 1.1
13 September 2012

Carl Davies
Department for Business, Innovation and Skills (BIS)
1 Victoria Street
London
SW1H 0ET

Dear Mr Davies

CWU SUBMISSION TO BIS CONSULTATION :
CHANGES TO COLLECTIVE REDUNDANCY RULES

Please find attached the CWU submission to BIS Consultation: Changes to Collective Redundancy Rules.

I would appreciate you confirming receipt.

Yours sincerely

W HAYES
General Secretary

CWU SUBMISSION TO BIS CONSULTATION
CHANGES TO COLLECTIVE REDUNDANCY RULES

1. The Communication Worker's Union (CWU) is the largest union in the communications sector in the UK, representing over 200,000 employees in the postal, telecommunications and financial services industries.

2. Following its 'Call for Evidence' earlier in the year, the Department for Business Innovation and Skills (BIS) is consulting on changes to the rules on collective redundancy consultation. This forms part of the government's ongoing Employment Law Review.

3. Collective redundancy consultation rules require employers proposing to make 20 or more employees redundant to consult with the appropriate representatives of the affected employees. The consultation period is a minimum of one month where between 20 and 100 employees are affected and three months where over 100 employees are affected.

4. The government proposes to:

   - Reduce the 90 day minimum consultation period for 100 employees or more to either 30 days or 45 days;
   - Make no legislative change to the definition of 'establishment' or the position of fixed-term employees; and
   - Review guidance and issue a non-statutory Code of Practice.

5. The CWU does not support the government's proposals. We believe they will hinder not help the collective redundancy process. We are also concerned by the way these proposals have been developed; we do not believe there is a sufficient evidence base to justify the changes proposed to minimum consultation periods.

<u>The consultation process</u>

6. We have serious concerns that these proposals are put forward despite a lack of robust evidence to support them. Instead they are based on the disputed assumption that reduced employment protection will bring economic benefits.

7. The government recognises that "the UK has one of the most lightly regulated labour markets amongst developed countries, with only the US and Canada having lighter overall regulation"[1]. There is no evidence to suggest that further diminishing labour market regulation will achieve the "strong, sustainable and balanced growth"[2] the government wishes to see. Indeed, the experiences of other European countries show us there is little correlation between the success of their economies and the extent of employment legislation. Moreover, the claim

[1] BIS (2011), *Flexible, effective, fair: promoting economic growth through a strong and efficient labour market*
[2] BIS (2011), *Collective redundancies: consultation on changes to the rules, June 2012* (p. 4)

that "we do not want this flexibility to create an uncaring, hire and fire culture"[3] is undermined by these proposals; instead they imply acceptance of the disputed position that employee protection is necessarily at odds with successful business.

8. This consultation was preceded by a 'Call for Evidence' from the government on the current collective redundancy consultation regime. The government received little robust data in response to this consultation and is now proceeding on the basis of what it acknowledges to be anecdotal evidence only: "Although it prompted a disappointingly small amount of quantitative data on the impact of the current rules, the anecdotal evidence was sufficient for us to conclude that there is a need for change to the current system"[4]. We find this approach - developing policy without a firm evidence base - to be of serious concern.

Reducing the 90-day consultation period for redundancies of 100 or more

9. We do not accept the government's assertion that "It is clear from the Call for Evidence that the 90-day minimum period is affecting behaviour in a way that is not conducive to good consultation"[5]. Adequate evidence has not been provided to support this claim.

10. As we stated in our response to the 'Call for Evidence', in our experience longer consultation periods are advantageous, giving employer and employee the opportunity to discuss the situation in detail, seek alternatives to compulsory redundancies, where possible, and achieve the best possible outcome for all parties. Even where prevention of redundancies is not possible, the three-month consultation period is necessary for effective discussions on the implementation of redundancies to take place. This helps all parties. Employers have time to communicate change effectively with staff and a climate of anxiety and uncertainty among employees can be avoided. This is clearly better from an employee perspective; ultimately it is also preferable for employers as it better enables continuity of service and service standards.

11. We do not support proposals to reduce the length of the consultation period. We believe this will increase the problem of superficial consultations leaving little opportunity for the outcome for employees and employers to be improved upon. Moreover, it sends out the wrong message to employers, questioning the value of consultation and implying that successful consultation takes little time or resource.

'Establishment' and fixed-term appointees

12. Collective redundancy consultation rules apply where 20 or more employees in one 'establishment' are at risk of redundancy. The lack of definition of 'establishment' in this context causes uncertainty for employers and employees. We support calls for the current 'establishment' test to be replaced by an 'undertaking' test. This would mean all employees working for the same undertaking would be considered together for collective redundancy consultation.

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[3] *Ibid.*, p. 4.
[4] *Ibid.*, p. 12
[5] *Ibid.*, p. 17

This would end the current uncertainty and provide a fairer level of protection to employees. We also support calls to remove the 20-employee threshold for redundancy consultation.

13. The consultation paper's response to the 'Call for Evidence' described these views as those of a "small number of trade union respondents"[6]. It is important to note that these are the views put forward by the TUC on behalf of the overwhelming majority of the trade union movement, 54 unions representing over six million working people.

14. We believe the collective redundancy legislation should continue to apply to all permanent and fixed term employees. Moreover, we believe the legislation should be extended to apply to all workers – including agency workers – improving employment security and providing a fairer system of employment protection.

Improved guidance and a new code of practice

15. The CWU welcomes proposals for improved guidance and a code of practice and looks forward to the opportunity to contribute to this process in due course. As outlined above, we do not support the government's proposals and believe that non-statutory codes of practice are a poor substitute for genuine employment protection. However, we would wish to see every opportunity taken to encourage employers to engage in meaningful consultation over redundancy situations. It is also important that the opportunity is taken to make the case for effective engagement with employees and their representatives.

For further information on the view of the CWU contact:

Billy Hayes
General Secretary
Communication Workers Union
150 The Broadway
London
SW19 1RX

Tel: 020 8971 7251
Fax: 020 8971 7430
Email: bhayes@cwu.org

[6] *Ibid.*, p. 18

1. Your name:

GMB - Barry Smith

2. What organisation do you represent (if any)?

GMB

3. E-mail address:

Barry.Smith@gmb.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - Neither

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

No

9. Please provide comments to support your answer.

Line1 - Undertaking argument

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

No

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

No

12. Please provide comments to support your answer.

No Response

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

No

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

No Response

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

No Response

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

Yes

17. If yes, please explain what other approaches you consider appropriate.

Line1 - Training

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

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

REPRO DTP

From: Barry Smith [Barry.Smith@gmb.org.uk]
Sent: 19 September 2012 10:37
To: Collective Redundancies
Subject: Fw: BIS Consultation: Collective Redundancies: Consulation on chages to the rules

Attachments: COLLECTIVE REDUNDANCIES.responseonchangestotherules.doc; COLLECTIVE REDUNDANCIES.responseonchangestotherules.docx


COLLECTIVE DUNDANCIES.respo COLLECTIVE DUNDANCIES.respo

Dear Mr Davies
I also attach the response in a different format in case there are difficulties in opening the docx document.
Many thanks
Barry Smith
GMB Legal Officer

(See attached file: COLLECTIVE REDUNDANCIES.responseonchangestotherules.doc)

----- Forwarded by Barry Smith/EW/GMB on 19/09/2012 10:33 -----

From: Barry Smith/EW/GMB
To: collectiveredundancies@bis.gsi.gov.uk,
Date: 19/09/2012 10:29
Subject: BIS Consultation: Collective Redundancies: Consulation on chages to the rules

Dear Mr Davies
I am writing to you on behalf of GMB trade union. I attach below the response from GMB to the consultation as above.

I would be grateful if you would confirm safe receipt. I have also sent a hard copy by post.

Yours sincerely

Barry Smith
GMB Legal Officer

(See attached file: COLLECTIVE REDUNDANCIES.responseonchangestotherules.docx)

REPRO DTP

From: Barry Smith [Barry.Smith@gmb.org.uk]
Sent: 19 September 2012 10:29
To: Collective Redundancies
Subject: BIS Consultation: Collective Redundancies: Consulation on chages to the rules

Attachments: COLLECTIVE REDUNDANCIES.responseonchangestotherules.docx

COLLECTIVE
DUNDANCIES.respo

Dear Mr Davies
I am writing to you on behalf of GMB trade union. I attach below the response from GMB to the consultation as above.

I would be grateful if you would confirm safe receipt. I have also sent a hard copy by post.

Yours sincerely

Barry Smith
GMB Legal Officer

(See attached file: COLLECTIVE REDUNDANCIES.responseonchangestotherules.docx)

GMB

RESPONSE TO CONSULTATION: COLLECTIVE REDUNDANCIES: CONSULTATION ON CHANGES TO THE RULES

GMB, Britain's general union, represents over 600,000 members throughout the UK in both the private and the public sectors. We have members working in the following areas of:

Financial, commercial and professional services

Clothing and textiles

Construction

Furniture Manufacturing

Energy and Utilities

Engineering

Food and Leisure

Process Industries

Public Services

Voluntary and Community/Third Sector

GMB welcomes the opportunity to respond to the consultation. GMB members in all of these areas have first-hand experience of redundancy. GMB has extensive experience in addressing issues that arise in these circumstances, providing collective and individual support to members affected.

GMB responded to the earlier consultation on Collective Redundancy in November 2011 and repeats the points made in that response. GMB welcomes the recognition in the present consultation of the primacy of trade unions in collective redundancy consultation at 3.31 which reflects the practicalities of the process.

GMB is a TUC affiliated union. GMB draws attention to the response from the TUC in this regard.

GMB, like other trade unions, is a not for profit organisation, and exists to protect and support its members. GMB believes that there are key reasons for maintaining all of the existing redundancy consultation rules, and to extend these where appropriate. GMB works with employers through the consultation process to identify ways of avoiding or reducing the level of redundancies. GMB will, where appropriate, challenge employers who do not comply with their obligations to inform and consult over redundancies.

GMB notes that the consultation recognises at 3.13 that there is a risk that a shorter minimum consultation period could lead to superficial consultations which close at the end of the minimum period even if not complete: in our view the present proposals to reduce the minimum consultation period are a charter for precisely this

type of unsatisfactory "consultation", and GMB urges the Government not to proceed with them.

This response will now go on to consider the specific questions in the consultation.

QUESTIONS

Question 1

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

No. As recorded in our earlier response it is now 37 years since EEC Directive 75/129 first required that proposed redundancies should be the subject of consultation with the appropriate recognised trade union. In that time the Directive, and now the EC Collective Redundancies Directive 98/59, have played an important role in safeguarding employees from unscrupulous employers. The UK legislation in Chapter II of the Trade Union and Labour Relations (Consolidation) Act 1992 (sections 188 – 198) has been key to mitigating the impact of redundancies, and whilst GMB believes that there are areas where it should be strengthened, GMB is very concerned that at this critical moment in time the UK Government is considering weakening those protections.

GMB has long argued that redundancy consultation provides real benefits to the UK economy. The fact and the threat of redundancies for ordinary workers is a feature of the present economic crisis, and who have paid a heavy price for the banker's recession. Rising unemployment, particularly amongst the young and women, has caused severe pressure on incomes and living standards for many.

Those faced with the threat of redundancies at work face the prospects of job and financial insecurity, low morale, and associated stress and ill health. One of the major benefits of redundancy consultation is that it gives those affected a voice which could lead to an improved situation by fewer jobs being lost, fewer compulsory redundancies, re-deployment opportunities, improved training, and better redundancy pay. Another major benefit is for business, reducing financial and organisational costs, helping employers to retain skilled workers, reducing costs in training and recruitment, cutting the risk of disputes. Importantly in any re-structuring that may arise from the consultation, the employer gains the benefits of the workers supporting the process.

We gave examples of where the consultation process has provided real assistance to all concerned over the last 5 years and has reflected positive industrial relations:

- In November 2008, JCB, manufacturers of construction equipment in the midlands, announced a further wave of redundancies due to the economic downturn. GMB members had shown great collective unity by reducing the working week to 34 hours in order to avoid redundancies. Unfortunately although some members did lose their jobs the commitment from the workforce collectively in supporting a shorter working week saved the jobs of more than 500 members.
- In December 2011, International Consultants in Targeted Security, a company which provides security services to British Airways announced a reduction in 50 security guards on the particular contract. Through consultation all GMB members have been able to be retained in alternative roles. This is the third occasion in the last 3 years that the contract has been cut and through

consultation with GMB redundancies have been avoided (this would have been 100 or more)

- At Bayer Crop Science in Norwich, GMB has been successful in negotiating the safeguarding of 250 members who will transfer to a new employer in April 2012. This includes redundancy payments and pension protections, a proportion of which will be supported by Bayer Crop Science. This has averted a potential site closure and the loss of up to 250 jobs. This example links in with TUPE consultation.
- In December 2011 the consultation over plans to cut 2,300 jobs from BAE Systems announced in September 2011 was extended for more talks to continue. The 90 day consultation on the cuts in Warburton, Samelsbury, and Brough had been extended to allow for more consultation. In January 2012 reports show that more than half of the 1,400 jobs under threat in the Lancashire area have been cut without compulsory redundancies. All parties continued to explore all opportunities for mitigation, and considerable efforts have been made to secure continued employment at Brough in East Yorkshire.

The above examples illustrate how unions and employers utilise the consultation process responsibly for the benefit of all concerned including the wider UK economy.

GMB opposes any proposal to reduce the minimum consultation period where an employer is proposing redundancies affecting 100 or more employees. As the recent experience at BAE Systems highlights, there are real benefits for all in maintaining and extending the period. GMB strongly disagrees with the suggestion that present collective redundancy consultation requirements constrain employers from being

able to restructure their businesses. There is no evidence to support this and indeed our experience is the opposite.

Collective consultation provides worthwhile benefits in terms of reducing the numbers to be made redundant, allowing for re-deployment, retention of skilled workers, avoiding or cutting the numbers of workers to be made compulsorily redundant, and also in improvements in redundancy pay. Some larger employers have consultation periods that are greater in length which facilitates redeployment and reduced costs. These factors all benefit the wider economy.

In our experience 90 days is often too short a period of time to really explore alternatives to redundancies, a fact recognised recently at BAE Systems by all those concerned. Cutting the consultation period is likely to lead to unnecessary redundancies and costs to business. It will also lead to increased redundancy payments and costs for the employer as well as future recruitment and training costs. Whilst redundancies may be associated with the closure if a business they may also, of course, arise in the context of a business re-organisation. GMB notes that no evidence has been provided to support the comment referred to in the consultation that some employers feel that "effective" consultation is often completed within a shorter timescale. It is the view of GMB that the present minimum periods should be retained.

GMB remains concerned about the use of section 188 notices in the public sector, and in particular affecting GMB members in local authorities. GMB is disappointed at the approach taken by the Government to this issue in the consultation. As recorded earlier, the section 188 notice has been used as a formality to threaten employees with dismissal unless they agree to detrimental changes to pay and

conditions. This has had a negative impact on employee morale, and in some areas industrial disputes. This is not in accord with the objective of the Collective Redundancies Directive or case law – the procedure has never been intended to act as a means of cutting pay and conditions of vulnerable workers. GMB believes that this abuse of the procedure should be addressed.

Question 2

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

GMB is opposed in principle to the reduction in the 90-day minimum period. Neither a 30 day nor a 45 day period will conceivably cover all the key issues that arise in a redundancy consultation in such cases.

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.

The present review has provided an opportunity to address the abuse that can arise where an employer artificially attempts to divide employees into smaller establishments with a view to reduce or eliminate their obligations to consult. This has been recognised by European case law; see for example *Rockfon AS v*

Specialarbjderforbunt I Denmark. The European Court of Justice has also provided guidance on the issue, see for example *Athinaiki Chartopoii AE v Panagoitidis*: an establishment is a distinct entity, having a certain degree of performance and stability, which is assigned to perform one or more given tasks and which has a workforce, technical mans and a certain organisational structure allowing accomplishment of those tasks.

It is our experience that some employers will attempt to restructure their businesses into smaller units to artificially to avoid the obligations, which has featured recently in the high profile protective award case involving former employees at Woolworths.

GMB believes that the use of legislation to address this abuse would carry more weight than a non-statutory Code of Practice in addressing the issues that arise in this area. In this respect section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 should be amended to reflect European case law. GMB opposes rewarding employer avoidance tactics by reducing the 90-day minimum consultation period.

GMB repeats our belief that the duty to inform and consult should apply to an undertaking rather than to an establishment. This would more closely reflect European case law and translate it into what is intended to apply to the situation in the UK. Thus an undertaking would include all departments, structures divisions, regional offices, outlets and so on within a business which has common ownership. This would clarify that the duty to inform and consult arises regardless of the geographical locations of where employees work.

GMB also repeats the argument that the 20-employee threshold should be removed. This excludes those working for small employers from these rights and exposes

them to the loss of the benefits of collective consultation and to exploitation from unscrupulous employers. It also allows for abuse in that some employers may seek to stagger their redundancies in order to avoid redundancy consultation obligations.

Question 4

Will defining "establishment" in a code of Practice provide sufficient clarity?

Whilst guidance on the meaning of "establishment" is likely to be helpful, as indicated above GM believes that this should be in the form of legislation in order to have the greatest effect in addressing abuse.

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.

GMB opposes any proposals to exclude those on fixed-term contracts from the consultation requirements. Instead GMB believes that the focus should be ion strengthening the rights of those on fixed-term contracts. In this regard whilst guidance on the fixed-term contract issue is likely to be helpful, as with the issue of "establishment" GMB believes this would be more effective in the form of amended legislation (an amendment to section 188 of TULRCA as above would be appropriate).

As indicated in our earlier consultation response GMB believes that the duty to inform and consult should continue to apply to both permanent and fixed-term employees. GMB believes that it would be a retrograde step to exclude them from the duty. It would create uncertainty for all and would undermine the effectiveness of UK legislation on Fixed Term Employees generally which implements the 1999 European Directive. This includes:

- The right of temporary employees not to be selected for redundancy because they are on fixed term contracts
- The right to receive equal treatment on redeployment and redundancy pay
- Their right in respect of maternity leave
- Their right to individual consultation meetings before dismissal

Excluding such employees may give rise to litigation for example over how this might interact with the fact that after being on a succession of contracts for 4 years or more the employee becomes permanent. GMB would oppose any proposal to exclude fixed term employees.

GMB believes that collective redundancy consultation should be extended to agency workers and those who may not satisfy the definition of employees. By excluding such workers GMB believes that the UK is not complying with Article 8 of the Temporary Agency Worker Directive or the Collective Redundancies Directive which applies to "workers" and not just "employees".

Question 6

Have we got the balance right between what is for statute and what is contained in Government guidance and Code of Practice?

No. Whilst guidance is to be welcomed, legislative amendment is far more likely to have an impact in affecting employer behaviours in the first instance and thus reduce the likelihood of litigation in the tribunals.

Question 7

What changes are needed to the existing Government guidance?

GMB believes it would be appropriate for Guidance on Redundancies to be reviewed to stress:

- The advantages and importance of early consultation and disclosure of information
- The desirability of avoiding the withholding of information considered to be "confidential" as being unhelpful in the context of negotiations
- Employers are under a duty to consult over the economic reasons for redundancy so that consultation begins early (as confirmed in recent case law)
- The duty to consult is with a view to reaching agreement. The European case of *Junk v Kuhnel* [2005] IRLR 310 ECJ highlights this requirement and that it is akin to negotiation. Thus unions should be given time to develop and present alternatives, the employer should seek to adjust their proposals in response to the employer's proposals. Employers should provide enough

information so that the union can understand, assess and devise a response, and in a time frame that facilitates genuine exchange and reflection.

Question 8

How can we ensure the Code of Practice delivers the necessary culture change?

GMB believes that the Code of Practice on its own is unlikely to affect employer behaviours, and that legislative amendment as above is required in order to achieve this. In addition the sanctions for non-consultation should be strengthened as effective way of ensuring consultation and compliance.

Question 9

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

GMB believes that training would be appropriate, and indeed like most trade unions provides training to representatives. In this regard the use of Union Learning Representatives provides valuable assistance.

Question 10

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

GMB does not believe that the present proposals, particularly those aimed at reducing the consultation period for larger redundancies, will promote growth or good quality consultation. Instead they are likely to encourage the uncaring, hire and fire culture that consultation document refers to.

GMB notes that according to the Impact Assessment that only 17% of those employees consulted over the last five years were actually made redundant. As redundancy arises not only in closure situations but also often in re-organisation situations, this reinforces the need for adequate consultation. In our experience the circumstances that give rise to potential redundancies rarely happen overnight, particularly in the case of larger employers. Reducing the consultation period shifts the responsibility on to the workforce rather than address the issues that may have given rise to the employer's difficulties. GMB deals with a considerable number of larger employers and we do not pick up a call from them to reduce the consultation period, and we remain surprised that the Government is continuing to pursue the proposed reduction in the consultation period.

Question 11

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

Question 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?

As GMB understands it, Questions 11 and 12 of the consultation paper are aimed at individual employers, and GMB is not in a position to answer these two specific questions. GMB has been involved in redundancy consultations over the last 5 years with employers in all sectors and our response to this and the earlier consultation reflects this experience.

Do you have any other comments that might aid the consultation process as a whole?

As indicated above, GMB opposes the proposals to reduce the minimum consultation period. GMB believes that amendments to legislation alongside guidance will be the most effective way of addressing the abuses that can arise in this area.

GMB

National Office Legal Department

September 2012

1. Your name:

Hewlett Packard and PCS - Adrian Wood

2. What organisation do you represent (if any)?

Hewlett Packard and PCS

3. E-mail address:

adrian.wood@hp.com

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Large business (over 250 staff)

Trade union or staff association

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

No Response

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

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

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

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

No Response

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

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

1. Your name:

National Association of Head Teachers - Dave Beresford

2. What organisation do you represent (if any)?

National Association of Head Teachers

3. E-mail address:

dave.beresford@naht.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - The NAHT does not support the move to reduce the 90 day minimum period where the dismissal of 100 employees or more is being contemplated for the following reasons. Firstly, the 90 day allows both the

Line2 - trade union and employer time to enter into and cpmplete full and detailed consultations on ways to avoid the redundancies. Secondly, the potentilal impact on the local community and economy when a

Line3 - hundred or more employees are made redundant needs time to be assessed and provided for.

Line4 - Thirdly, the NAHT fails to understand how the 90 day consultation period is not conducive to good consultation. Fourthly, the NAHT believes that employees would wish to remain in paid

Line5 - employment as long as possible, even if "the longer minimum period can actually make it harder for employees to plan for life after redundancy...."+

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

No Response

9. Please provide comments to support your answer.

Line1 - If it is possible to provide a definition of establishment in the guidance that gives sufficient clarity, it should be possible to provide a definition that meets the current legislative requirements

Line2 - To simply leave the definition in the Code of Practice, may allow employers to create their own definitions in an effort to avoid the 100 employee/90 day consultaion limits.

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

No

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

Not sure

12. Please provide comments to support your answer.

Line1 - The NAHT firmly believes that employee on fixed term contracts should remain within the scope of the collective redundancy procedure.

Line2 - Whether this is through legislation or the proposed Code of Practice is a moot point.

Line3 - On balance the NAHT would favour adressing the fixed term contract issue through legislation.

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

Not sure

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

Line1 - It is difficult to comment on the balance between guidance, code of Practice and legislation until all the drafts are available for consultation.

Line2 - However, the statement that the guidance will be reviewed to ensure that it is accurate and fit for purpose and the indetification of the areas that will be covered in the Code of Practice are all

Line3 - welcome. The NAHT would be very willing to become involved in the development of guidance.

Line4 - If the Government Guidance is considered to be that palaced on the Direct Gov web site, the NAHT believes that this does

Line5 - not require change other than to reflect any changes that occur following this consultation.

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

Line1 - Culture change can only be achieved by placing greater emphasis on traing and publicity surrounding the good practise promoted in the guide.

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

Not sure

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

REPRO DTP

From: Dave Beresford [dave.beresford@naht.org.uk]
Sent: 19 September 2012 12:48
To: Collective Redundancies
Subject: Consultation on Collective Redundancies
Attachments: Collective redundancy consultation sept12.doc

Please find the NAHT response to the consultation on Collective Redundancies.

NAHT is an independent trade union and professional association with 28,500 members in England, Wales and Northern Ireland. Members include head teachers, deputies, assistant head teachers, bursars and school business managers. They hold leadership positions in early years, primary, special, secondary and independent schools sixth form colleges, outdoor education centres, pupil referral units, social service establishments and other education settings. The membership represents 85 per cent of primary and 40 per cent of secondary schools in England, Wales and Northern Ireland.

Dave Beresford
Policy Adviser
National Association of Head Teachers
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01444 472445
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BIS | Department for Business Innovation & Skills

Collective Redundancies: Consultation on changes to the rules : Response form

A copy of the consultation on **Collective Redundancies: Consultation on changes to the rules** can be found at:

http://www.bis.gov.uk/consultations

You can complete your response online through Survey Monkey : **(**https://www.surveymonkey.com/s/36S3QYT**)**

Alternatively, you can email, post or fax this completed response form to

Email:

collectiveredundancies@bis.gsi.gov.uk

Postal address:

Carl Davies
Department for Business, Innovation and Skills (BIS)
3 Abbey 2
1 Victoria Street
London SW1H 0ET

Fax: 0207-215 6414

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: **19 September 2012**

Your details

Name: Dave Beresford

Organisation (if applicable): National Association of HeadTeacher

Address: 1 Heath Square, Boltro Road, Haywards Heath, RH16 1BL

Telephone: 01444 472445

Fax:

Please tick the boxes below that best describe you as a respondent to this

- ☐ Business representative organisation/trade body
- ☐ Central government
- ☐ Charity or social enterprise
- ☐ Individual
- ☐ Large business (over 250 staff)
- ☐ Legal representative
- ☐ Local government
- ☐ Medium business (50 to 250 staff)
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☒ Trade union or staff association
- ☐ Other (please describe)

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

Yes ☐ **No** ☒ **Not sure** ☐

The NAHT does not support the move to reduce the 90 day minimum period where the dismissal of 100 employees or more is being contemplated for the following reasons. Firstly, the 90 day allows both the trade union and employer time to enter into and cpmplete full and detailed consultations on ways to avoid the redundancies. Secondly, the potentilal impact on the local community and economy when a hundred or more employees are made redundant needs time to be assessed and provided for.

Thirdly, the NAHT fails to understand how the 90 day consultation period is not conducive to good consultation. Fourthly, the NAHT believes that employees would wish to remain in paid employment as long as possible, even if "the longer minimum period can actually make it harder for employees to plan for life after redundancy...."+

Question 2: Which of the two proposed options should replace the 90-day minimum period?

30 days ☐ **45 days** ☐ **Not sure** ☐

Please explain why you think your choice would better deliver the Government's aims than the alternative option.

N/A

Question 3: Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes ☐ **No** ☐ **Not sure** ☐

Please provide comments to support your answer.

N/A

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

Yes ☐ **No** ☒ **Not sure** ☐

If it is possible to provide a definition of establishment in the guidance that gives sufficient clarity, it should be possible to provide a definition that meets the current legislative requirements. To simply leave the definition in the Code of Practice, may allow employers to create their own definitions in an effort to avoid the 100 employee/90 day consultaion limits.

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?

Yes ☐ **No** ☐ **Not sure** ☒

Please provide comments to support your answer.

The NAHT firmly believes that employee on fixed term contracts should remain within the scope of the collective redundancy procedure. Whether this is through legislation or the proposed Code of Practice is a moot point. On balance the NAHT would favour adressing the fixed term contract issue through legislation.

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?

Yes ☐ **No** ☐ **Not sure** ☒

It is difficult to comment on the balance between guidance, code of Practice and legislation until all the drafts are available for consultation. However, the statement that the guidance will be reviewed to ensure that it is accurate and fit for purpose and the indetification of the areas that will be covered in the Code of Practice are all welcome.
The NAHT would be very willing to become involved in the development of guidance.

Question 7: What changes are needed to the existing Government guidance?

If the Government Guidance is considered to be that palaced on the Direct Gov web site, the NAHT believes that this does not require change other than to reflect any changes that occur following this consultation.

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

Culture change can only be achieved by placing greater emphasis on traing and publicity surrounding the good practise promoted in the guide.

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

Yes ☐ **No** ☐ **Not sure** ☒

Question 10: Have we correctly identified the impacts of the proposed policies?

Yes ☐ **No** ☐ **Not sure** ☐

If you have any evidence relating to possible impacts we would be happy to receive it.

N/A

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?

N/A

Question 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?

N/A

This publication is also available on our website at www.bis.gov.uk
Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

If you require this publication in an alternative format, email enquiries@bis.gsi.gov.uk, or call 020 7215 5000.

URN 12/808

REPRO DTP

From: Andrew Sladen [Andrew.Sladen@mail.nasuwt.org.uk]
Sent: 24 September 2012 18:57
To: Collective Redundancies
Subject: Collective redundancies consultation - FAO Carl Davies
Attachments: Collective Redundancies Consultation.pdf

Dear Carl

In accordance with the extension of time agreed for the submission of our response, I attach a copy of the NASUWT's response to the consultation on changes to the rules for collective redundancies.

Kind regards

Andrew Sladen

Andrew Sladen
Senior Official (Legal & Casework)
NASUWT
0121 453 6150

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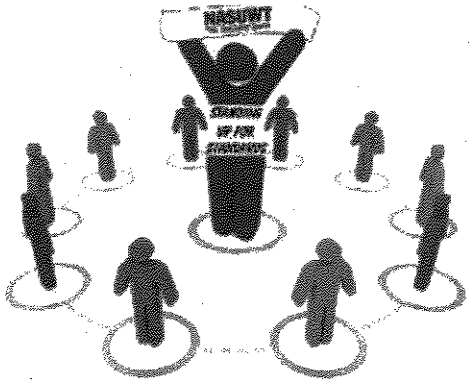
NASUWT
The Teachers' Union



THEROBINHOOD

The largest teachers' union in the UK

NASUWT
The Teachers' Union

CONSULTATION RESPONSE

Department for Business, Innovation and Skills

Collective Redundancies:

Consultation on changes to the rules

19 September 2012

1. The NASUWT welcomes the opportunity to comment on the Department for Business, Innovation and Skills (BIS) consultation on collective redundancy consultation rules.

2. The NASUWT is the largest teachers' union in the UK representing teacher and school leaders.

3. As a leading trade union, the NASUWT has extensive experience of operating the current procedures and has drawn on this experience to inform this response to this important consultation.

GENERAL COMMENTS

4. The NASUWT works in partnership with education employers to improve the working conditions of teachers, as a basis for delivering improved educational outcomes for children and young people. The Union welcomes, therefore, the statement of the Minister for Employment Relations, Consumer and Postal Affairs that 'it is important for employers to consult their workforce over the big issues, including restructuring and redundancy. Asking for their employees' input helps businesses to make better decisions.' The NASUWT contends that this sentiment must be

reflected in the proposed guidance and Code of Practice. The Union promotes the vision of a workforce working constructively with management, supported by a strong system of workplace representatives operating in partnership with employers. The Union believes that where employers consult and work constructively with their employees and trade unions to solve problems together, this will result in more productive workplaces.

5. The NASUWT is, however, deeply concerned that the proposed changes to the rules pertaining to collective redundancies, as detailed within the Consultation Document, would, if implemented, have a negative and damaging impact throughout the UK on employment relations in schools, colleges and businesses in all other sectors of the economy.

SPECIFIC COMMENTS

Proposals

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

6. The NASUWT's comments regarding the specific proposals to change the rules on collective redundancy consultation are set out in the rest of this response.

7. It is our view that the proposals reflect a view that rules on collective redundancy consultation act only as a burden on employers, and that proposals have been made without a full appreciation of the benefits collective consultation can bring.

8. While one of the stated aims is to improve the quality of consultation, it does not appear to the NASUWT that the proposals achieve that aim.

9. In our view, an opportunity has been missed to genuinely engage with the possibility of making changes that would focus on improving the quality of

consultation for all parties concerned, and instead there has been a rush to accede to the perceived demands of employers.

Reducing the 90-day minimum period for larger redundancies

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.

10. The NASUWT is deeply concerned about the proposal to reduce the minimum consultation period from 90 days to either 30 or 45 days before redundancies of 100 or more employees can take effect. As previously stated in the NASUWT's response to the Call for Evidence, the Union believes that: 'effective consultation with trade union representatives forms solid foundations on which good employment relations and employee engagement can be built, which in turn can result in increased worker motivation, job satisfaction and performance. The 90-day minimum consultation period facilitates employer and state intervention when there are large-scale redundancies. For example, successful state intervention, such as that seen when MG Rover Group went into administration in 2005, where people were retrained and found other jobs, saves the Government money in the long run.'

11. The crux of our concerns with any reduction from 90 days can be summarised in two points. Firstly, it will mean consultation is less likely to succeed and achieve the alternatives to and mitigation of redundancies that it so often does. Secondly it will send a strong signal to employers that consultation is nothing more than a burden to be reduced, rather than something of importance that can benefit both the enterprise and workers.

12. The reduction of the 90 day limit is too blunt a tool in seeking to achieve the aim of improving the quality of consultation. It instead reflects a demand from employers for the process simply to be completed quicker. There are numerous instances where a 90 day period is beneficial to all parties. Indeed, the Consultation Document recognises this at paragraph

3.11, where it is stated that reducing the period would not automatically mean a reduction in the time taken for consultation. If that is the case, and in line with the first stated objective of improving the quality of consultation, it is difficult to see why there is any proposal to reduce the period. Instead, it appears to the NASUWT that the second objective of ensuring employers can effectively restructure has been given a far greater precedence than the first objective.

13. In the experience of the NASUWT, where there are large-scale redundancies and in areas of high unemployment, a 90-day minimum consultation period is crucial as it facilitates both employer and state intervention to support workers into new jobs. Reaching agreement and supporting the workforce, their families and the community must always remain the focus of consultation and in cases of large-scale redundancies, this will inevitably require more time.

14. The Consultation Document states that any guidance will make clear that a new time period would be a minimum and consultation should continue wherever necessary. However, no mechanism is suggested as to how this would be done and in many cases an employer simply wishing to push through its changes will have no reason to extend consultation. The 90 day period provides a safeguard against rushed consultation and builds into the legislative framework an incentive to engage in full and meaningful consultation.

15. The Consultation Document also recognises the NASUWT's second concern; namely, that a signal will be sent indicating that consultation is not important and simply a burden to be overcome as soon as possible. This is reflected at paragraph 3.13 where the risk of superficial consultations is recognised. However, no real steps are proposed to address that risk save for the suggestion that employees and their representatives engage in legal challenge. That is not in any way a responsible suggestion from the Coalition Government, and we note that it is clearly at odds with many of the other strands of their employment law

review; which appears to be premised on the belief that the employment tribunal system is plagued by weak and vexatious claims. If the Coalition Government recognises that engaging in legal challenge is very often the only remedy that employees have, we are left to wonder why that has not been accepted previously in the employment law review.

16. Rather than the current proposal of reducing the 90 day period, the NASUWT believes there is an opportunity for thought to be seriously given to other changes to the legislative framework that encourage all the stated objectives of the consultation and reflect the need for flexibility in redundancy situations.

17. It is currently possible for consultation to be treated as completed before the full 90 day period where all parties are in agreement, but the NASUWT recognises that in such circumstances, no decisions reached can be implemented before the end of the 90 day period. It may therefore be possible to devise a system where such an agreement would bring an early end to the 90 day period and allow the employer, in accordance with the agreement, to proceed with decisions reached.

18. Without going into detail on the potential benefits and pitfalls of such a system, it appears sensible to the NASUWT that if changes to the length of the consultation period are felt to be needed, such a system ought to be investigated. It would better meet all the stated objectives of the Consultation. It would encourage meaningful consultation, no party would have an interest in drawing the process out unnecessarily and it would assist in achieving clarity for all employees, whether made redundant or not.

19. If the Coalition Government does however insist on reducing the 90 day period, the NASUWT assert that a period of 45 days for redundancies of over 100 should be retained, rather than the proposal to equalise the period of consultation for all redundancies above 20.

'Establishment' and fixed-term appointees

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.

20. The NASUWT agrees that attempts to define 'establishment' in legislation would be problematic, both due to the constraints of European law and also the wide range of factors that need to be taken into account.

21. However, part of the difficulty also derives from the concept of 'establishment' itself and the fact that it encourages employers to seek to artificially break up their undertakings in order to reduce or eliminate obligations to consult around redundancies.

22. This has long been recognised as a problem with the concept of 'establishment'. The NASUWT is particularly concerned of the potential for this difficulty to impact on our members. As the Coalition Government's programme of academies and free schools continues, there is a greater and growing diversity of employers of school teachers and college lecturers. The growth of organisations operating a number of schools, such as academy chains, is a part of this changing landscape and we are concerned that the division of such undertakings into separate establishments to avoid redundancy consultation obligations is an approach that these organisations may seek to pursue.

23. For this reason the NASUWT believes that the Consultation offered an opportunity to re-examine the concept of 'establishment' as a whole. It supports the view of the TUC that the Government should reconsider the replacement of the term 'establishment' with the term "undertaking" and the points made by the TUC as to the consistency of such a suggestion with European law.

24. While the Union does recognise the difficulties in taking a legislative approach to the meaning of establishment, we are also of the view that the

Government has taken this position to justify its decision to refuse to re-consider the concept of 'establishment'.

25. Should the concept of 'establishment' remain, the NASUWT advances the view that the threshold of 20 employees needed to trigger the duty to consult should be removed to ensure that all employees can benefit from the advantages redundancy consultation brings.

26. The NASUWT would further point out that we are somewhat confused by the reference in paragraph 3.21 of the Consultation Document to a reduction of the 90 day period mitigating the problem caused by the 'establishment' issue. We can only take this to mean that by reducing the period of consultation from 90 days, the incentive on employers to artificially break their undertakings into separate establishments to try and come below the 100 threshold, will be reduced.

27. If we are correct, it appears the proposal to reduce the 90 day period has been taken in recognition of the fact that the concept of 'establishment' is abused by employers in order to avoid their obligations. This is a wholly inappropriate way to deal with the issue, and in any event will do nothing as regards the problems of the concept of 'establishment' being used by employers to avoid their obligations altogether by artificially breaking their undertakings into separate establishments below the 20 threshold.

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

28. It will only be possible to determine whether guidance within a Code of Practice will give sufficient clarity in defining an establishment on inspection of the detail of the text. It is essential, therefore, that further consultation is undertaken on the content of a new Code of Practice. In reality, any Code of Practice will need to be constantly updated to reflect changing case law decisions.

29. However, it is imperative that the definition clearly reflects both domestic and European case law, sets out the relevant factors that will be taken into account and states that the definition should not be used as a way of avoiding duties to collectively consult.

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.

30. The premise of this question appears to be that fixed term employees should be subject to a legislative exemption from the obligation to consult.

31. The NASUWT does not agree with that premise and sees no reason for any such legislative exemption to be put in place.

32. The *Stirling* case is subject to appeal so no change to legislation on the basis of that decision should be made.

33. Further, no guidance or Code of Practice should be prepared on the basis of *Stirling* until its appeal has been heard.

Improved guidance and a new Code of Practice

34. It is essential that BIS consults fully on the new Code of Practice and guidance to ensure the full range of views are considered. It would be wholly inappropriate to use selective focus groups only to review both the proposed changes to guidance and the text of the new Code of Practice. The NASUWT has a wealth of experience of dealing with collective redundancy consultations and would be keen to be involved in any future development of guidance and case studies.

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?

35. Our comments earlier in this response indicate there are matters which the NASUWT believes could be addressed in statute, and for which we believe greater consideration could have taken place.

36. Further, until a draft Code of Practice is published and consulted upon, it is difficult to determine whether the balance between statute and guidance is correct.

37. The matters listed at paragraph 3.24 of the Consultation Document should all be properly addressed in a Code of Practice. However, it must be clear that many of these matters are dealt with and defined in the body of case law that has built up, both domestically and from European law. Any Code of Practice must accurately reflect this case law.

38. Paragraph 3.23 states that any Code of Practice will "provide clarity on the contentious issues whilst allowing enough flexibility for the parties to tailor the consultation process to best suit their needs". To the NASUWT this suggests a belief on the part of the Coalition Government that a Code of Practice can somehow present a set of options that an employer can pick and choose from to "best suit their needs". It must be made clear that such an approach is not permitted and where there is a clear legal obligation imposed by case law, that has to be followed.

Question 7: What changes are needed to the existing Government guidance?

39. Any guidance produced should encourage genuine consultation, compliance with the law and the following of best practice in order to meet the aim stated within the consultation paper – 'to improve consultation quality'. Specific changes should include the following:

- Clarification of 'in good time' and when consultation should begin, including confirmation that the trigger for consultation to start is the point at which a strategic decision has been taken which makes redundancies likely at an identifiable establishment.

- A clear statement that consultation must take place at a formative stage, while the employer is still contemplating or drawing up a plan for collective redundancies and before decisions have been taken, so that employees and employee representatives can genuinely exercise influence, have adequate time to fully consider and respond to proposals and make counter-suggestions.
- Clarification that notifying an employee that their contract has been terminated, or will be terminated at the end of their notice period, signifies that a decision has been made and should not therefore happen until the consultation process has concluded.
- Clarification of what 'genuine, fair and meaningful consultation with a view to reaching agreement' should look like, which stipulates that this should include:
  - consultation at a formative stage;
  - the provision of adequate information and time to employees and their representatives to enable trade unions to fully consult with their members and to formulate a considered response;
  - consultation on the reasons for the proposed redundancies.
- Guidance on producing fair, objective and non-discriminatory redundancy selection criteria.
- A statement supporting best practice that includes recommending that employers consult and engage with trade unions in all cases of collective redundancy (including where fewer than 20 employees are being considered for redundancy) and which recognises the positive outcomes that can be achieved through consulting with trade unions at a formative stage in the process.
- The inclusion of case studies demonstrating best practice to provide practical examples of how employers genuinely consulting with trade unions in good time and providing trade union representatives with appropriate facilities, including making time for consultative meetings with employees, can produce beneficial outcomes for both the company and the workforce, which include avoiding compulsory

redundancies, reducing the number of redundancies and mitigating the consequences of redundancies.

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

40. Guidance and a Code of Practice written in strong clear terms is no doubt of benefit but to achieve a cultural change, and persuade all employers of the benefits of engaging in full and meaningful consultation, guidance will need to make clear how successful consultation benefits all parties concerned, and not simply present the guidance and Code of Practice as a set of obligations that have to be complied with.

41. This will involve a recognition that going beyond the bare obligations very often brings the best results. As mentioned above, we have grave concerns that a reduction in the 90 day period is a move in the opposite direction, and that consideration of other approaches may be more conducive to real cultural change.

42. It is also important to note that if, in common with all changes to employment law that have been made by the Coalition Government, the approach taken to collective redundancy law, and any new guidance or Code of Practice, is one viewed solely through the prism of the "reduction of red tape", and one that ignores the rights of employees and their representatives, that is unlikely to do anything to foster cultural change.

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

43. It is essential that training is made available for employers on both any changes to the collective redundancy rules and on best practice in handling collective redundancies. The Coalition Government must make resources available to local Job Centres and employment services to help

employees find alternative work and access appropriate training opportunities.

Impact assessment

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.

44. The Impact Assessment must identify the risk that, if allowed, employers will reduce their consultation periods without improving the quality of consultation. There is no evidence to suggest that employer behaviour will improve as a result of the publication of non-statutory guidance that is intended to improve the quality of consultation. The NASUWT believes that a reduction in the statutory consultation period will lead to more industrial conflict and an inevitable deterioration in industrial relations..

Chris Keates
General Secretary

For further information on the Union's response, contact:

Jim Quigley

National Official (Legal & Casework)
NASUWT
Hillscourt Education Centre
Rose Hill
Rednal
Birmingham
B45 8RS

0121 453 6150
www.nasuwt.org.uk
nasuwt@mail.nasuwt.org.uk

1. Your name:

NATIONAL UNION OF TEACHERS - Louisa Staples

2. What organisation do you represent (if any)?

NATIONAL UNION OF TEACHERS

3. E-mail address:

l.staples@nut.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No Response

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

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

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

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

No Response

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

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

REPRO DTP

From: Louisa Staples [L.Staples@nut.org.uk]
Sent: 18 September 2012 11:33
To: Collective Redundancies
Subject: Collective redundancies consultation BIS
Attachments: Colllective redundancies consultation BIS September.doc

Dear Sirs

Please find enclosed the response of the National Union of Teachers to the above consultation.

Kind regards

Louisa Staples
Employment Conditions & Rights - ECR
NATIONAL UNION OF TEACHERS
☎ +44 (0)20 7380 4776
✉ l.staples@nut.org.uk
http://www.teachers.org.uk/

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THE RESPONSE OF THE NATIONAL UNION OF TEACHERS TO THE BIS COLLECTIVE REDUNDANCIES: CONSULTATION ON CHANGES TO THE RULES

September 2012

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1. The National Union of Teachers (NUT) welcomes the opportunity to respond to the above consultation. The NUT has not responded to every question raised in the consultation, but prefers instead to focus on proposals in the consultation document which are of greatest concern to teachers.

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

2. When responding to the BIS call for evidence on collective redundancy rules in January 2012, the NUT highlighted a number of legitimate concerns expressed by local representatives regarding plans to reduce the minimum consultation period from 90 to 60, 45 or 30 days. These concerns remain valid and are summarised below as follows:

- NUT local representatives felt that the longer the period of consultation, the more likely it was to achieve staffing reductions through natural turnover and avoid compulsory redundancies. They felt that this was better in the long run both for teachers – in that it increased their chances of finding alternative employment – and employers, in that they were able to reduce some of their redundancy costs and possibly the costs of litigation.

- Local representatives also felt that any costs which employers incur as a result of the longer consultation period is more than offset by the financial benefits and organisational benefits which are often achieved through longer consultation periods. For example, where jobs are saved as a result of longer consultation, employers increase morale. In addition, employers benefit from the retention of staff with organisation knowledge.

- Finally, local representatives saw no advantage to employees in reducing the minimum time periods to 60, 45 or 30 days. For employers, they felt there would be major disadvantages in that they would lose credibility as caring employers, prepared to spend time and money investigating alternatives to compulsory redundancies; they would portray an image of panic and destroy any perception by those relying on their services that they were doing their best to maintain or improve standards through careful planning; and they were more likely to make mistakes and prompt costly litigation.

Question 2: Which of the two proposed options should replace the 90-day minimum period?

3. Neither. The NUT does not share the view that the 90 day minimum consultation period represents a gold-plated enactment of the Collective Redundancies Directive. The NUT believes the current statutory minimum time period is likely to be critical to ensuring that employers take a considered commercial view whenever cuts are contemplated; that they do not rush to dismissal in circumstances where it may not be justified and that they can be satisfied of making a good case that the duty to consult has been properly discharged.

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

4. The Union believes that defining 'establishment' in a Code of Practice will help explain the current state of the law, but will not necessary provide sufficient clarity. That is perhaps a matter for the European court. The NUT would, however, support any attempt to guide employers and employees through relevant case law.

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

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

5. Any new code should emphasise the following:

- The benefits and importance of early consultation and the disclosure of information by employers;
- Employers should not withhold from worker representatives information material to the consultation process on the basis that it is confidential;
- Employers are under a legal duty to consult on the economic reasons for proposed redundancies. This means that consultation must start early and must address whether the redundancies are necessary;
- Employers are under a legal duty to consult with a view to reaching agreement. Employers must provide unions with the opportunity and time to develop and present alternative proposals.
- The employer should seek to adjust its proposals in response to union proposals.
- Wherever possible, employers should seek to reach agreement with unions;

- Employers are often advised, contrary to case law (and the decision of the ECJ in *Junk v Kuhnel*) that employers do not necessarily have to consult for at least 90 or 30 days before issuing notices of dismissal. It is very gratifying to note the Government's assertion that this is wrong and evidently in conflict with the aims of negotiation (para 3.14 of the consultation document). Guidance on this point should be much clearer.

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?

6. The NUT has been involved in approximately eight consultations in the past year involving 100 or more proposed redundancies. The duration of each consultation was 90 days or more.

7. In one case, the consultation exercise required a further two months to allow the parties to consider the prospects of suitable redeployment opportunities for those finally selected for redundancy. In another case, an additional three months was required to allow the options of voluntary redundancy, job share and retirement to be fully explored.

1. Your name:

PCS - Jan Lane

2. What organisation do you represent (if any)?

PCS

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No Response

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

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

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

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

No Response

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

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

1. Your name:

PCS - Natasha Burgess

2. What organisation do you represent (if any)?

PCS

3. E-mail address:

Natasha@pcs.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

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

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

12. Please provide comments to support your answer.

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

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17. If yes, please explain what other approaches you consider appropriate.

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19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

REPRO DTP

From: Natasha Burgess [Natasha@pcs.org.uk]
Sent: 18 September 2012 17:39
To: Collective Redundancies
Subject: PCS consultation response to BIS
Attachments: PCS consultation response to BIS.doc

Hello,

Please find attached the PCS response to the BIS consultation on collective redundancies and changes to the rules.

Many thanks,

Natasha

Natasha Burgess, Campaign Officer
Campaigns and Communications
Public and Commercial Services Union
Tel: 020 7801 2749
Web: www.pcs.org.uk
PCS, 160 Falcon Rd, London SW11 2LN

****
Please consider the environment before printing this e-mail.
To find out more about our campaigns go to www.pcs.org.uk.
If you're a PCS rep, read Activate - online www.pcs.org.uk/activate
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PCS response to BIS consultation on collective redundancies and changes to the rules
September 2012

Introduction and summary

1. The Public and Commercial Services Union (PCS) is the largest civil service trade union in the UK, representing about 270,000 members working in government departments, non-departmental public bodies (NDPB), agencies and privatised areas.

2. As the largest and leading union within the Civil Service National Trade Union Committee (NTUC – the interface for civil service unions with government), PCS is centrally involved in consultations and negotiations with Cabinet Office and separate departmental/NDPB employers on redundancies, and helps to manage the process of voluntary and compulsory redundancy to ensure that, where possible, skills and expertise are retained within the public sector, avoiding unnecessary redundancy costs to the exchequer. PCS's commercial sector also negotiates restructuring and, where unavoidable, redundancies with private sector employers.

3. We are providing comment because we feel the proposals and direction of travel outlined in the BIS consultation document will damage the process of dealing with redundancies in a rational and considered manner, within both the public and private sectors. Therefore PCS views this as a welcome opportunity to share our experiences to inform government policy.

Main proposals
Reducing the 90 day minimum period for large redundancies

4. PCS believes the main proposals of the consultation exercise – specifically the proposals to reduce the current 90 day consultation period in cases of significant redundancies – are driven by ignorance of industrial reality and second hand reports, and will create more problems than they set out to solve.

5. The underlying analysis of the 'problem' of the current 90 day consultation period is fundamentally flawed, and leans uncritically towards the CBI's evidence that the 90 day period is a 'burden on business'. Yet at the moment only 16% of all redundancy or restructuring situations are of a size and significance that they actually require the 90 day consultation period, and in those cases the 90 day period provides a welcome opportunity – usually welcomed by both employers and unions – to discuss viable and constructive ways forward and to examine options to redeploy or otherwise lessen what sometimes prove to be unnecessary redundancies. This, and the relatively low number of instances in which the maximum consultation period is actually invoked and used, can hardly be said to constitute a burden on business.
6. The BIS proposals assume that in most cases redundancy is a 'last option', and therefore in some sense inevitable and justified. This is not the case, especially in the

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Tel: 020 7801 2725, e-mail johnme@pcs.org.uk
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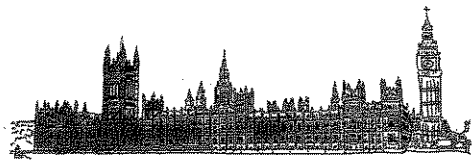
160 Falcon Road, London, SW11 2LN



private sector, where redundancy payments and packages are not particularly generous. In many cases in the private sector redundancy simply is more cost-effective in the short term than other options such as re-skilling.

7. BIS also appears to assume – on a very flimsy evidence base – that most job losses arise as a result of improved mechanisation or a streamlined, superior work process. Yet increasingly most of the bigger private sector public contractors, for example, run routine top-down redundancy rounds whose only rationale and goal is to maximize short-term profits – exercises which every business unit needs to buy into regardless of longer term efficiency or profitability. More responsible employers will acknowledge this.

8. The consultation document also fails to recognise the benefits of the current 90 day consultation to the settlement of important and pensions issues, which benefit employees and thereby the economy in the longer term. Access to pensions advisors and decision makers are all guaranteed under consultation. Representatives are entitled to answers, but the 30/45 day timescale will provide little chance for a proper considered discussion.

9. The widespread outsourcing of company pension provision affects the quality of service provided to employees in these most difficult of circumstances. Unfortunately, incorrect calculations are the norm in the private sector for staff on terms above the minimum, and this can leave staff having to make a choice to volunteer without a full and correct explanation of their entitlements. Again, cutting the time worsens the problem.

10. It should be noted that where companies do not have existing works councils, then an election will also need to be called within the time limit. The requirement to consult with staff on maternity leave, annual leave, sick leave etc also takes time – and it is unlikely that 30 days (for example) would be anywhere near enough time to do this in a responsible and legally sound manner. There will be issues selecting or representing surplus staff in these circumstances, and the increased possibility that the results of such exercises will result in indirect discrimination.

11. In this context PCS supports and endorses the TUC's conclusion (in its response to the BIS call for evidence, January 2012) that these proposals will be 'seriously counter-productive' and could well exacerbate an already fragile and damaged economic future through creating 'unnecessary redundancies, rising unemployment and rising job insecurity'.

12. The TUC rightly pointed out that the proposal to institute a 30 or 45 days consultation period for collective redundancies regardless of the number of employees being made redundant is fundamentally misconceived, as it misunderstands the process and its purpose. The current consultation period is not only about 'delaying the inevitable'– it is there to enable workers and employers to jointly find alternatives to redundancy, and thereby save not only jobs but also the long term future and success of the business.

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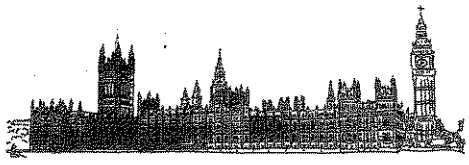

13. There are simply too many examples to cite to substantiate and confirm this. Many have been cited in the TUC response to the January 2012 call for evidence. PCS has many more. As just one example, in February-April 2007 the private sector contractor Capgemini conducted a redundancy exercise in several sites across the UK, though mainly in Telford. The company began from a position of 600-1000 compulsory redundancies; it was not until day 40 or 50 of the programme that the figure came down to something equivalent of a final position of 250 compulsory and 150 volunteers.

14. The 90 day consultation period enabled PCS to negotiate a successful agreement with the employer, whereby the number of initial compulsory redundancies was reduced, a voluntary exit/redundancy package was implemented, and at least 300 (possibly 600) Capgemini staff retained their jobs. The Telford site went on to be more productive, and the retained staff were able to contribute to Telford's local economy instead of claiming unemployment benefit.

15. Similarly, PCS has many examples of negotiating restructuring and downsizing in the civil service, where the current procedures for doing so – codified and agreed in the 'Efficiency and Relocation Programme: Protocols for handling surplus staff situations' (the Protocols) between the Council of Civil Service Unions and the Cabinet Office – mandate that there be a period of 'Meaningful Consultation' between trade unions and employer (whether civil service department of NDPB) to avoid or mitigate recourse to compulsory redundancies. This means that institutional knowledge and expertise are retained and taxpayers' money is not wasted on unnecessary redundancy payouts.

16. The Protocols – which have been very successful in avoiding recourse to compulsory redundancies, and in redeploying staff who wish to continue their careers within the civil service – mandate that 'a formal Meaningful Consultation period (90 days) should be set up during the above process when robust efforts should be continued to avoid recourse to compulsory redundancies'. During this period, the employer is required to provide staff identified as 'surplus' (usually due to budgetary cuts alone, not to any shortfall in performance or knowledge) access to the 'Civil Service Jobs' portal. However, it is also required to interview all surplus staff individually to determine circumstances and preferences, and then do its best to offer a range of options suited to those individuals. It should facilitate re-training, re-location, redeployment internally and externally, different patterns of working etc.

17. Because of this, the amount of staff facing possible compulsory redundancy is progressively reduced as the period proceeds. Some staff choose to take a voluntary exit or a voluntary redundancy. But those staff who do not wish to exercise this option receive a wide range of support and other options. If, after this period, there are still staff at risk of compulsory redundancy, a six-week 'Period of Reflection' (POR) is instituted during which those staff are considered on an individual case by case basis by the employer, the unions (local and national) and Civil Service Resourcing. In this

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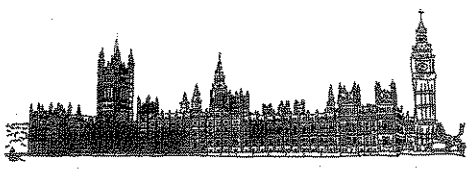
160 Falcon Road, London, SW11 2LN



way the number of at risk staff is further reduced. Only at the need of the POR are compulsory redundancy notices issued.

18. This system has been, by the common consent of the unions, the Cabinet Office, and CSR, a great success in avoiding ill thought out or unnecessary compulsory redundancies. For example, in March 2012 at the beginning of a POR for the Department of Communities and Local Government (DCLG) – and after 400 staff had taken a VE or VR package - 35 staff who wished to continue their careers were still at risk of compulsory redundancies. At the end of the POR (after intensive discussion, redeployment either within DCLG or to other government departments with vacancies and a skills set match) the number of compulsory redundancies was reduced to four. There was thus a cost saving to the taxpayer, and experienced, capable staff were retained in the jobs market, paying taxes and contributing to the wider economy. PCS believes that there is a clear case for this positive and constructive approach to be replicated in the private sector, but the proposed changes make it harder to do this.

19. There are also important legal issues to consider and predict, before making such a change to the current consultation periods. In the opinion of Professor Keith Ewing (Professor of Public Law, Kings College, London, and President of the Institute of Employment Rights) it would not be legally permissible to move to a fixed 30 day consultation period, 'and any attempt to do so would be illegal'. The possible illegality would arise from a divergence from EU law – the Collective Redundancies Directive (Directive 98/59) – which imposes two duties on employers in the event of a collective redundancy.

20. The first of these is a duty to inform the government of the mass redundancies. This must be 30 days before the first dismissals take effect. The second duty is to inform workers' representatives (the recognised trade unions). This must be done 'in good time with a view to reaching an agreement'.

21. Under current law, the 90 day consultation period in the case of redundancies of more than 100 workers is likely to meet this obligation. Although not laid down by the Directive, it is a very clear objective, both feasible and broadly compatible with the aims of the Directive. It therefore provides a floor of certainty and reliability for both employer and workers.

22. If the 90 day consultation period is removed and replaced with a lower (e.g. 30 day) period, this would, in the opinion of Professor Ewing,
'.... be as much a disaster for employers as it will be for nasty for workers faced with the risks of redundancy and cuts. This is because the 30 day period is too short and will not be consistent with EU law. In every collective redundancy situation employers will be in legal 'no man's land', required to consult 'in good time', but not knowing what that means on a case by case basis'. (Institute for Employment Rights, May 25th 2012)

23. Professor Ewing predicts – and this has subsequently been confirmed by the TUC, Unison and Unite, and is now being confirmed by PCS – that unions will 'rightly

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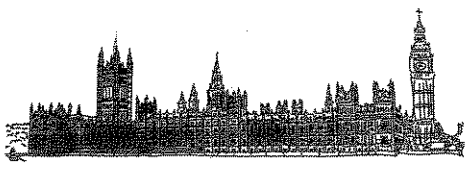

challenge every collective redundancy in the employment tribunals on the grounds of shortage of notice, until eventually the matter ends up in the European Court of Justice, until the government is required to change the law'.

24. This problem – a self created one if the change to the current 90 day period is made UK law – would serve to exacerbate already existing legal problems with UK compliance with the EU Directive. The UK has not implemented the Junk ECJ decision (Junk v Kuhnel, 2005, IRLR 310 ECJ) and it is already therefore possible for UK employers to issue redundancy notices before consultation is completed. In addition, the current duty to consult in UK law only applies to employees in the UK, whereas the EU Directive has a broader scope.

25. Instead of making UK law even less compliant with EU law, and thereby increasing the likelihood of an ECJ ruling against the UK, BIS would do better to consider ways in which UK law could harmonise with the areas of the EU Directive that it has not yet properly implemented.

26. To summarise, in response to question 1 of the consultation, PCS does not agree with the government's approach, and we therefore reject the options of question 2 for a reduced 45 or 30 day consultation period. We believe that the current 90 day period should remain. Our analysis and argument above explains why this would better deliver the government's aims, and why the proposed reduction is misconceived and will very probably be counter-productive.

Issuing a new, non-statutory Code of Practice

27. PCS can see no reasons – other than making it easier to avoid or mitigate remaining duties to consult with workforce representatives in genuine attempts to manage redundancies in a responsible and sustainable manner – why the relevant Code of Practice should not be binding and statutory.

28. The negative effects of reduced, 'light touch' regulation were starkly demonstrated by the collapse of the financial sector in 2008; from this disaster some lessons were learned. The adoption of a similarly hands-off approach to collective redundancies policy will, it is predictable, lead to further negative results, both in terms of increased unemployment and the continuing failure of the economy to emerge from recession.

Improving guidance for employers and employees

29. By definition, PCS does not believe that revised guidance on a much weakened policy with reduced protections against unnecessary redundancies can or will be 'improved' as part of this process.

For more information please contact John Medhurst, Policy Officer, PCS National Bargaining, Pay and Pensions Department johnme@pcs.org.uk

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Tel: 020 7801 2725, e-mail johnme@pcs.org.uk
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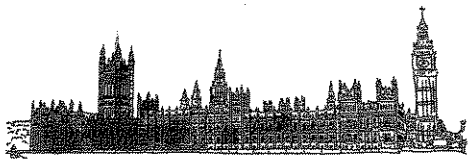

1. Your name:

Prison Governors Association - Carl Davies

2. What organisation do you represent (if any)?

Prison Governors Association

3. E-mail address:

carl.davies@prison-governors-association.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Business representative organisation/trade body

Trade union or staff association

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

No Response

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

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

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

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

No Response

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

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

1. Your name:

Prospect - Linda Sohawon

2. What organisation do you represent (if any)?

Prospect

3. E-mail address:

Linda.sohawon@prospect.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - Neither

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

No

9. Please provide comments to support your answer.

No Response

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

No

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

No

12. Please provide comments to support your answer.

No Response

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

No

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

No Response

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

No Response

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

Yes

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

REPRO DTP

From: Linda Sohawon [Linda.Sohawon@prospect.org.uk]
Sent: 19 September 2012 15:50
To: Collective Redundancies
Subject: Collective redundancies: consultation on changes to the rules
Attachments: Consultation doc 19.9.12.doc

Dear Carl Davies
Please find attached Prospect trade union's response to the above consultation.
Regards
Linda Sohawon
For Prospect

Linda Sohawon
Legal Officer
T: 020 7902 6610
F: 020 7902 6686
M: 07595 204497
www.twitter.com/prospectunion

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SE1 7NN
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prospect
union for professionals

Collective Redundancies: Consultation on changes to the rules response form

Submission by Prospect

20 September 2012
www.prospect.org.uk

Prospect is an independent trade union representing over 102,000 members in the public and private sectors. Our members work in a range of jobs in both the public and private sectors in a variety of different areas including in aviation, agriculture, defence, energy, environment, heritage, industry, telecommunications and scientific research.

Prospect welcomes the opportunity to respond to the consultation on **Collective Redundancies: Consultation on changes to the rules response form**

Response completed by (name):	Linda Sohawon
Position in organisation (if appropriate):	Legal Officer
Name of organisation (if appropriate):	Prospect
Address:	New Prospect House 8 Leake Street London SE1 7NN
Contact phone number:	020 7902 6610
Contact e-mail address:	Linda.sohawon@prospect.org.uk
Date:	19 September 2012
Organisation:	A trade union

Summary

- Prospect opposes the proposal to reduce the 90-day consultation period.
- We further believe that a non-statutory Code of Practice will be insufficient in itself to improve the quality of consultation.
- We support the TUC position that the 20 employee threshold should be removed from the consultation provisions, ensuring that the consultation provisions apply equally to all workplaces. Otherwise there should be a duty to consult where there are proposals to dismiss 20 more employees in an 'undertaking.'
- The Government should actively promote the benefits of meaningful consultation between employers and trade unions and the use of the Information and Consultation Regulations 2004 [the ICE Regulations].

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

Yes No **X** Not Sure

Comments:

Prospect has extensive experience of dealing with large-scale and small-scale redundancy exercises over many years. Whilst negotiating with employers to achieve their objectives on a fair basis and with due regard to retain jobs where possible, Prospect has developed constructive working relationships with employers to retain workplace morale and to protect mature industrial relations between the union and the workforce before, during and after the redundancy exercise.

Prospect does not believe that the Government's proposals will achieve their objectives to improve the quality of consultation; allow employers to restructure effectively in response to changing markets; or to balance the interests of redundant employees with those who remain. In the consultation document, there is little to reflect the overwhelming evidence presented by trade unions and the TUC, who represent a large proportion of working people in the UK and whose members have been affected by redundancies over many years. Nor does the consultation suggest that the Government is prepared actively to promote wider engagement between employers and unions in the interests of creating successful businesses and developing the economy.

By weakening workers' rights, rather than ensuring that employers adhere to their legal duties to inform and consult, this will encourage bad employers to dismiss staff more quickly, rather than seeking ways to reach agreement on restructuring or effecting economies. This will have a negative effect on the general economy, leading to more people becoming unemployed and increasing the welfare bill.

Prospect agrees with the TUC that mature economies in the EU, such as Holland and Germany, have complex consultation arrangements with trade unions and this has not lead to significant problems for economic growth. Indeed, such countries continue to have good economic and labour market performance. By weakening workers' rights in the UK, this will make it even easier than it is now to close UK plants and dismiss staff in

multinational restructuring exercises. This can only have a detrimental effect on UK economic performance and workplace morale.

The overriding issue for trade unions is the persistent failure of certain employers to effect meaningful consultation, whether the period for consultation is 30 days or 90 days. Prospect believes that meaningful consultation is the key to achieving the Government's objective of good quality consultation; by allowing mature and informative discussions and negotiations between employers and trade union representatives to take place in order to assist the employer with their restructuring plans and to mitigate the effects of redundancies; thus creating less uncertainty and anxiety for all employees in the workplace, whether they be at risk of redundancy or not. Building good industrial relations between managers, HR and trade union representatives not only creates the confidence to handle redundancy exercises in a fair and efficient process, but also promotes and retains workplace morale.

Therefore we believe that the proposal to reduce the period for consultation would be counter-intuitive and would have the opposite effect on the objectives which the proposals are trying to achieve. Lower consultation thresholds will lead to greater job losses and will not achieve the objective of boosting the economy, because of potential increases in unemployment and consequent increase in welfare benefits. By employers concentrating solely on reducing immediate labour costs, this will also have an impact on long-term investment in skills, productivity and R&D. It will also lead to greater stress and anxiety in the workplace, both for those faced with immediate redundancy, with little time to plan for the future, and those left behind who may fear for their futures in a downturn.

Prospect's evidence in the response to the Call for Evidence process is that the better employers, such as the COI, DCLG and BAE were prepared to extend consultation beyond the 90 days in complex restructuring exercises in order to reach agreement with the trade unions. This meant that agreements were reached to mitigate the effects of redundancies and retain key professions and skills, whilst at the same time giving those faced with redundancy the opportunity to have their voices heard and sufficient time to plan ahead. Contrary to the suggestion that employees left behind felt they had been ignored or left without sufficient support, the consultation process allowed representatives sufficient time to deal with the anxieties of members not directly affected by redundancy who may have concerns about the outcomes of the redundancy process, for example, restructuring of their roles or taking on extra duties.

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.

30 45 Not Sure

Comments:

We do not consider it appropriate to reduce the 90 day consultation period in large redundancy exercises, for the reasons given above. It is impractical to conduct complex, large-scale redundancy exercises in a short period, particularly since there is a need for

consultation on the reasons for the redundancies, the selection process and redeployment, and ways of avoiding redundancies with a view to reaching agreement with the trade union/employee representatives. However, if it is the Government's intention to reduce the period for consultation, this should not be less than 45 days.

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

Yes No **X** Not Sure

Comments:

Prospect recognises that uncertainty is created when employers use the establishment test to sub-divide redundancy exercises in such a way as to avoid full consultation. Prospect members have been affected by this process. This problem is acknowledged in the Government's consultation document at para. 3.8. However, we totally object to the Government's response to this which is to acknowledge and condone these avoidance tactics by reducing employee rights even further. Prospect agrees with the TUC that the Government should be taking steps to prevent employers from avoiding the duty to consult on collective redundancies with a view to reaching agreement and mitigating the effects of redundancies; not rewarding bad employers who seek to avoid their statutory duties and responsibilities.

Prospect would support the proposal by the TUC that the 20 employee threshold be removed to provide equal rights to all employees in the workplace, particularly those working in small business who are in danger of being denied a voice in the workplace.

We agree with the TUC that the concept of 'establishment' should be interpreted purposively, but that it will be a matter for community law, rather than Member States to define 'establishment' [*Rockfon A/S,ECJ, C-449/93.*]

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

Yes No **X** Not Sure

Comments:

The development of a non-statutory Code of Practice is unlikely to be adequate to improve the quality of consultation. The only way in which this can be achieved is through strengthened legislation. However, if a Code is produced, it is essential for a wide range of factors to be considered when deciding what constitutes an 'establishment'. The Code should actively discourage employers from dividing their businesses in order to avoid their duties to consult fully with employees.

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.

Yes No **X** Not Sure

Comments:

Prospect is strongly opposed to the weakening of the rights of fixed-term workers to be consulted in collective redundancies. To exclude them would be in breach of the Fixed Term Employees [Prevention of Less Favourable Treatment] Regulations 2002 and would deny equal treatment. We agree with the TUC that the EAT's decision in *Stirling*[1] is not consistent with previous case law and is likely to be revisited by tribunals and courts in the future. It is also the case that by including fixed term workers in the consultation process, this encourages workplace morale and team building.

The guidance should remind employers of their obligations to provide equal treatment to fixed term workers in selection for redundancy; general terms and conditions; and redundancy pay. It should also remind employers of the risk of an unfair dismissal claim if they fail to offer individual consultation meetings before dismissing a fixed term worker with a view to looking at redeployment.

Prospect supports the TUC position that the Directive refers to 'workers' rather than employees and therefore it would be appropriate to amend UK law to comply with the Directive to include agency workers and other casual workers in the consultation process.

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?

Yes No **X** Not Sure

Comments:

Prospect is of the view that clear guidance on collective redundancies would be helpful. However, guidance by itself is insufficient to improve the quality of consultation or comply with EU law. Prospect supports the position that UK law should be strengthened to include:

a) The duty to consult on collective redundancies should be extended to include agency workers, casual workers and freelancers.
b) The 20 employee threshold should be removed.
c) The 'establishment' test to be replaced with the 'undertaking' test.
d) The ECJ decision in *Junk*[2] should be applied to the statute so that no notices of dismissal should be issued before consultation has been completed.
e) The sanctions for failure to consult should be reviewed and strengthened.

Question 7:

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[1] *Stirling v UCU, p.19 consultation*
[2] Junk v Kuhnel C-188/03

What changes are needed to the existing Government guidance?

Prospect welcomes clear guidance for employers, employees and trade unions. ACAS should be encouraged to develop a Code of Practice or Guidance and the *Handling Redundancies* booklet produced by ACAS is a useful template for such an exercise. In addition, we fully support the TUC's recommendations for future guidance as follows:

- promote the benefits of benefits of effective and meaningful consultation and negotiations between employers and trade unions on collective redundancies
- promote full compliance with EU law[3]
- encourage employers to negotiate and agree redundancy policies with unions in advance of redundancy situations. This will assist employers and unions to focus on ways of avoiding redundancies rather than on how consultation should be conducted.
- emphasise that consultation must be undertaken with *a view to reaching agreement*. The guidance should reflect ECJ case law which states that consultation should be akin to negotiation.[4] Employers have a duty to provide time for unions to develop alternatives to redundancies and give serious consideration to their proposals. There should also be evidence that employers have adjusted their plans in the light of proposed alternatives.
- be sufficiently flexible, recognising that redundancy situations will vary significantly from according to the circumstances.
- explain the types of information which must be provided to union reps and workplace reps.
- 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. The guidance could helpfully set out a range of options which employers and unions might consider, including efficiency savings, redeployment exercises, identifying new orders, 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

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[3] *European Commission v United Kingdom: C*-484/04 [2006] 3 CMLR 1322

[4] *Junk v Kuhnel* C-188/03 (ECJ); [2005] IRLR 310

- encourage employers to provide support to individuals at risk of redundancy, including access to training.
- should encourage employers to assess and monitor the effect which restructuring has on the health and well-being of staff. Research confirms that there are strong links between job security and stress levels, with employers that are planning redundancies being most likely to see a rise in mental health problems among staff. The guidance should encourage employers to negotiate and agree action plans with recognised unions on ways of ameliorating the effects of restructuring on stress levels and staff health and well-being.
- encourage employers to provide facilities for union and workplace reps, including paid time off, office space and access to workplace email and communication systems.
- confirm that the special circumstances defence only applies in exceptional circumstances.

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

Prospect does not believe that guidance in itself will be sufficient to improve the quality of consultation or to ensure compliance with employer duties to consult. Guidance can be a helpful tool, but will not deter unscrupulous employers who wish to truncate the consultation process.

It would be appropriate for consideration to be given to improving remedies and strengthening the sanctions against employers who do not comply properly with the duty to consult. Prospect agrees with the TUC that tribunals should have the power to order that dismissals should not take effect until consultation arrangements have been completed.

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

Yes **X** No Not Sure

Comments:

Prospect welcomes the proposal that employers should have access to training in handling redundancies and meaningful consultation. Prospect provides such training to its own representatives who have to deal with collective redundancies in the workplace. Therefore the Code of Practice should emphasise the benefits of such training for managers and HR professionals. Prospect would welcome joint training for management and trade union representatives, as this would ensure that both parties have a common understanding and agreement about handling redundancies.

Prospect has collective agreements on redundancy policies and procedures with many employers with whom it negotiates and these provide a valuable mechanism for conducting discussions and negotiations in a mature and open fashion. Confusion and

miscommunication are avoided and the anxiety and mistrust which may be generated in the workplace between employer and union, and between employees with competing interests is reduced or eliminated. The guidance should encourage employers to negotiate such policies with its workforce as a contingency for redundancy.

Prospect agrees with the TUC that union learning reps can play a valuable role in assisting employees at risk of redundancy or redeployment to access new skills and support. In our response to the Call for Evidence we referred to the role of our Members' Assistance Programme which is aimed at those facing redundancy or organisational change and is ably supported by our union learning representatives with a view to updating skills, lifelong learning and practical assistance for those facing redundancy.

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.

Yes No Not Sure

Comments:

Prospect believes that the Government's proposals do not fully reflect the impact assessments and are not based on substantive evidence justifying a decision to weaken consultation rights. As previously indicated in this response, there has been little regard to, or acknowledgement of, the views of many major trade unions who represent a large number of employees in the workplace and are experienced in handling redundancy exercises. Instead, it has relied on 'anecdotal evidence' and the perceptions of business and employer lobbyists, plus a very small group of individual employees [13] to justify its proposals. It has acknowledged, however, that experienced trade union representatives play a valuable role in the workplace and that employers prefer to work with such representatives in redundancy situations. If this is the case, then there should be greater emphasis placed on the evidence and experiences provided by Prospect and other trade unions and the TUC.

The Impact Assessment confirms that reducing the period for consultation may not result in increased quality of consultation. It states, '*this could result in significant reductions in consultation periods over and above those envisaged.... and worse outcomes for employees.*' In the response to the Call for Evidence, Prospect referred to certain employers who failed to meaningfully consult, resulting in displaced employees not being allowed the opportunity to apply for posts which had been advertised externally without consultation, for example, at the VOA. With a shorter consultation period, this type of practice would increase.

It is to be noted that it is suggested that trade unions will play a greater role in ensuring compliance. However, Prospect's view is that whilst we will take our role seriously in this regard, the Government has an obligation to ensure compliance by having effective legislation and enforcement of consultation rights.

At para. 102 of the Assessment, it states that '*a shorter minimum period could reduce the Government's ability to intervene in redundancies that could have a high social, economic or political impact. This could result in greater expense to the Exchequer due to longer-term unemployment of those affected.*' Whilst it is suggested that employers

will voluntarily acknowledge their obligations by extending consultation or notice periods, Prospect believes it is inappropriate to rely on voluntarism, and the Government should ensure that employers comply with EU standards.

Prospect also agrees with the TUC that weakening consultation rights may lead to good employers watering down workplace consultation in order to avoid being undercut by competitors.

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?

Please refer to Prospect's response to the Call for Evidence dated 31 July 2012 which was supplied by Linda Sohawon at Linda.sohawon@prospect.org.uk In that evidence it was shown how consultation had been extended beyond 90 days in large-scale redundancy exercises at the COI, DCLG and BAE in order to ensure meaningful consultation took place and to effect redeployment where practical.

Question 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?

Prospect has provided examples in the Call for Evidence about the advantages of meaningful consultation between employers and recognised trade unions. We welcome the Government's commitment to retain the 90 days' pay per employee for the Protective Award, given that this is a penalty is linked to the seriousness of the employer's default and is regarded as effective, proportionate and dissuasive.

Prospect further welcomes the Government's commitment to the role of recognised trade unions in the information and consultation process, given that employers have emphasised the value of experienced, well-trained representatives in the information and consultation process.

Do you have other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed

1. Your name:

RCN - Gerry O'Dwyer

2. What organisation do you represent (if any)?

RCN

3. E-mail address:

Gerry.O'Dwyer@rcn.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - Neither

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

No Response

9. Please provide comments to support your answer.

No Response

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

No

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

No

12. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

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

No Response

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

Yes

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

REPRO DTP

From: O'Dwyer Gerry [Gerry.O'Dwyer@rcn.org.uk]
Sent: 19 September 2012 13:56
To: Collective Redundancies
Subject: Final Response to BIS consultation on Collective Redundancies
Attachments: Final Response to BIS consultation on Collective Redundancies.doc

Dear Sirs

Please fined enclosed or response to the above consultation.

Kind regards

G O'Dwyer
RCN
20 Cavendish Sq
London W1G 0RN

Royal College of Nursing

Response to BIS Consultation on Collective Redundancies

Introduction

With a membership of over 410,000 registered nurses, midwives, health visitors, nursing students, health care assistants and nurse cadets, the Royal College of Nursing (RCN) is the voice of nursing across the UK and the largest professional union of nursing staff in the world. RCN members work in a variety of hospital and community settings in the NHS and the independent sector. The RCN promotes patient and nursing interests on a wide range of issues by working closely with the Government, the UK parliaments and other national and European political institutions, trade unions, professional bodies and voluntary organisations.

Question 1

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

No

Comment: The approach gives greater emphasis to the needs of business and employers than those of employees or wider social implications. The proposals also seem to be based on the premise that it is bad consultation that is causing issues and delays, if this is the case why does this equate to a whole scale review and restructure of the consultation framework as opposed to a review and reissue of new, revised and more detailed guidance for employers and employees.

The proposal consultation document refers to a shortened consultation period reducing stress and anxiety for employees and will enable the employer to be more flexible and adaptable to the changing economic climate. This does not take in to account the increase demand on trade union (or elected representative) capacity which would result from a foreshortened consultation period. This may in turn result in more stress and anxiety for employees if they are unable to access support and or advice from their union or representative.

Additionally, this increase in intensity may fall on work place representatives. If these members of the workforce are to be released to ensure they are available to support employees through the consultation period then this may have a negative effect / impact on productivity and might limit the suggested gains in productivity by lessening the consultation period.

A foreshortened consultation period may not allow for employers, trade unions and employees to work in partnership to find possible alternative proposals / solutions such as accessing training where they need to be in employment to access such training.

The concept of improved and more meaningful consultation is a positive step and we would welcome the introduction of better guidance and core principles.

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.

We do not agree with a reduction in the 90 day minimum period. It is felt that a simple reduction in the consultation period would not produce the desired effect of ensuring better and more meaningful consultation. The proposals for reducing the 90 day consultation period it is believed are based on the requirements of the employer rather than looking at a reasonable approach across the board of how this may impact on the employer, the employee and representatives / trade unions. It has not gone without notice that there is also running in parallel an argument in some quarters that the amount of trade union facility time should be reduced.

Essentially we are being asked to consider doing the same level of consultation and negotiation that is now done in 90 days over 30 or 45 days.

Reducing to a 30 day consultation period were there are large number of employees affected would be unrealistic and would potentially mean that employees would be attending several group meetings regarding the consultation and one to one meetings during this very foreshorten time and hence again productivity during this time would be reduced rather than increased as indicated within the proposal documentation.

The proposal only refers to timely consultation with Job Centre Plus but there are other external agencies that maybe involved such as ACAS which has an enhanced role.

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.

Comments: Defining 'establishment' in a non-statutory Code of Practice carries the risk of greater variance in interpretation and resultant uncertainty particularly at a time of economic uncertainty when there is the potential for this to be interpreted to suit the needs of the employer.

Question 4

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

No: we are not sure that defining 'establishment' in a Code would be beneficial given the lack of clarity in EU and national case law on its meaning.

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.

No.

Comments: It is unclear what the problems are associated with fixed term contracts are. Voluntary guidance and a non-statutory Code of Practice are unlikely to be robust enough to provide a greater degree of certainty on this issue. There would also be a need to ensure that the use of fixed term contracts was not abused as a way of ensuring employees did not obtain employment rights

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?

No comment

Question 7

What changes are needed to the existing Government guidance?

Support/measures/guidance to promote genuine and meaningful consultation on redundancies should be explored. Additionally changes to time off for trade union representatives instead of being "reasonable" it should potentially be mandatory. It needs to be accepted that detailed discussions /consultation on reducing redundancies is a labour intensive issue and the development of IT and other communication systems does not make it quicker it just means information is transferred quicker.

Question 8

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

That it provides for clear guidance regarding the routes of communication
Timeframes for involvement of all key stakeholders and for this to be as early as possible
To include a non exhaustive list of potentially who those stakeholders may be
For the Code to be written in plain English and as clear as possible

Question 9

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

Yes

Comments: Timely and targeted training that is mandatory for all employers (especially if employing over 20 employees) and other stakeholders. If these sessions were jointly given to employers and employee representatives this would also help to assist, foster and develop partnership working.

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.

No comment

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?

In some consultations that have been reported to us a number would not have been able to meet the 30 day consultation period even where there was meaningful consultations and there had been good partnership working. This is for a variety of reasons such as capacity of union representatives, consideration of alternatives, mixed groups of employees and professions the need to ensure all employee groups are covered especially where there are employees working shifts, on maternity leave or any Equality Act issues.

Question 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?

(Question addressed at businesses)

Do you have any other comments that might aid the consultation process as a whole?

The consultation document makes a distinction between the issues around collective redundancies for 'employees' and for 'employees' representatives'. The document places a significantly different emphasis between the important issues arising for these respective categories. The issues for 'employees' may well have some relevance but some caution should be used in accepting that these things represent the genuine views of employees. Details about the Call for Evidence, conducted by BIS, do not make clear how the specific issues and concerns of employees have been gauged. The largest and most compelling body of evidence about the issues for employees should be the responses received from a significant number (23) of trade unions.

Large-scale consultations and reorganisation are relatively frequent within the health service and, given the scale of the changes often envisaged, any reduction in the current 90 day consultation period would present major challenges to effective and meaningful consultation. In many cases the discussions that take place can be detailed and multi-professional in that they deal with both employee issues as well as the management of care and the impact of changes on care pathways. The current consultation on the transfer of functions and staff to CCGs, CSS and other receiver organisations demonstrates the importance of the 90 day consultation process. The current time period of 90 days barely allows PCTs and SHAs sufficient time to consult unions on any legal, social and economic implications resulting from the transfer of functions and services or any measures which could be identified as putting employees at risk of redundancy. .

Consultation must be genuine and meaningful and must be undertaken with a view to reaching agreement with the employees' representatives. Employers and employee representatives should work together to try to find common solutions. Where possible the rationale for redundancies should be challenged and the Employer is obliged to explain and justify business decisions. For this to be meaningful and worthwhile it is essential that there is sufficient time to enable employee's representatives to consult with their members and provide views and feedback to employers.

Current ACAS guidance on redundancy recommends the need for consultation as early as possible to "share the problem and explore the options." ACAS emphasises that it can stimulate better cooperation between employers and employees, reduce uncertainty and lead to better decision-making. When faced with a redundancy situation, trade union or employee representatives or individual employees may be able to suggest acceptable alternative ways of tackling the problem or, if the redundancies are inevitable, ways of minimising hardship. The employer will then be in a better position to decide whether the needs of the organisation can be met in some way other than by redundancy.

The measures for minimising or avoiding compulsory redundancies may include:

- restrictions on recruitment
- retraining and redeployment to other parts of the organisation
- seeking applicants for early retirement, or voluntary redundancy and
- termination of the employment of temporary or contract staff.
- natural wastage
- agreement to a reduction in hours for some staff

It would be difficult at a practical level to consider fully the potential effectiveness of such measures to the benefit of the employer and employees if there is a shortened consultation period.

G O'Dwyer

RCN Employment Relations Department

0207 647 3661

Gerry.o'dwyer@rcn.org.uk

1. Your name:

Royal College of Midwives - Amy Leversidge

2. What organisation do you represent (if any)?

Royal College of Midwives

3. E-mail address:

Amy.Leversidge@rcm.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No Response

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

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

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

12. Please provide comments to support your answer.

No Response

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No Response

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

No Response

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

No Response

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

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

REPRO DTP

From: Amy Leversidge [Amy.Leversidge@rcm.org.uk]
Sent: 04 September 2012 12:01
To: Collective Redundancies
Subject: Royal College of Midwives response to collective redundancies
Attachments: Royal College of Midwives response to the consultation on Collective Redundancies.pdf

Dear Sir/Madam

Please find attached the Royal College of Midwives response to the consultation on collective redundancies.

Best Wishes

Amy

Amy Leversidge
Employment Relations Advisor

Royal College of Midwives
15 Mansfield Street
London
W1G 9NH

Tel: 020 7312 3457 Mobile: 07703321577
Email. Amy.Leversidge@rcm.org.uk
www.rcm.org.uk

To all RCM accredited Workplace Representatives we invite you to the RCMs annual FREE TO ATTEND 'Workplace Representatives Conference' on Wednesday 14 November at the Brighton Centre, Brighton. Click here for further details and to book your place. You are also entitled to a reduced price entry to attend the main RCM annual conference on Tuesday 13 November, details of this and the conference party can also be found here.

The Royal College of Midwives

Response

Response to the Department of Business Innovation and Skills Consultation on Collective Redundancies

September 2012

15 Mansfield Street
London W1G 9NH
Tele: 020 7312 3535
Fax: 020 7312 3536
Email: info@rcm.org.uk

The Royal College of Midwives
15 Mansfield Street, London, W1G 9NH

The Royal College of Midwives' response to the Department for Business Innovation and Skills consultation on Collective Redundancies.

The Royal College of Midwives (RCM) is the trade union and professional organisation that represents the vast majority of practising midwives in the UK. It is the only such organisation run by midwives for midwives. The RCM is the voice of midwifery, providing excellence in representation, professional leadership, education and influence for and on behalf of midwives. We actively support and campaign for improvements to maternity services and provide professional leadership for one of the most established clinical disciplines.

The RCM welcomes the opportunity to respond to this consultation and our answers to the consultation topics are set out below.

The Royal College of Midwives
September 2012

General Comments

The Royal College of Midwives (RCM) welcomes the opportunity to respond to the Department for Business, Innovation and Skills consultation on collective redundancies. The majority of the RCM's members work in the NHS so the RCM is party to a collective agreement called Agenda for Change which incorporates provisions for redundancy including entitlements.

The RCM is disappointed that following the consultation in January the Government still wants to reduce the minimum consultation period. The existing thresholds for consultation ensure genuine and meaningful consultation and there is no evidence to suggest that employers are constrained by existing thresholds. The current 90 day consultation period is critical in reducing the number of redundancies and mitigating the impact of redundancies. When employers can demonstrate good industrial relations, particularly in difficult periods, this can have benefits such as retaining experienced and knowledgeable staff.

The RCM can see no reason why the rules for collective redundancy consultations should be changed and the time periods for consultation reduced. If anything, in the current economic climate, every effort should be made to ensure that the consultation period is as meaningful and productive as possible since the result could be fewer redundancies.

We are pleased that the Government is seeking to improve the guidance and will introduce a Code of Practice to address a number of key issues around the processes that detract from quality consultation, seeking to facilitate a positive relationship between the employer, the employees and the trade union. We welcome the Government's invitation to contribute to the development of the guidance.

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

The RCM is concerned by the Government's overall approach to the rules on collective redundancy consultation as frequently throughout the consultation and impact assessment the document makes statements such as:

"The minimum time periods relating to the consultation are not required by the Directive and as such represent gold plating."[1]

The use of the term 'gold plating' is subjective and unhelpful; we do not believe that any protections that are over the minimum requirement automatically make them 'gold plated'. Comments like this imply that the Government is only interested in having the most basic protection available to employees.

The RCM is disappointed that following the consultation in January the Government still wants to reduce the minimum consultation period. The existing thresholds for consultation ensure genuine and meaningful consultation and can be critical in reducing the number of redundancies and help to retain experienced and knowledgeable staff by demonstrating good industrial relations.

[1] Department for Business, Innovation and Skills Collective Redundancies: Consultation on changes to the rules June 2012

We are also concerned that the Government states that:

"The Government acknowledges that there is a risk that a shorter minimum period could lead to superficial consultations which are closed at the end of the minimum period even if they are not complete. However, this approach would encourage legal challenge."[2]

The RCM believes this is exactly what will happen, the 'minimum' consultation period will be seen as the 'maximum' consultation period and therefore the extent to which consultations are genuine and meaningful will be hampered. We agree that this would increase the number of legal challenges which would damage workplace morale and employee relations to the extent that skilled and knowledgeable employees who are not affected by redundancy will seek alternative employment. Given that the Government has acknowledged that this is a potential outcome it is curious that they still want to go ahead.

Moreover, the Government's consultation document states that:

"It is important for employees to consult their workforce over the big issues, including restructuring and redundancy. Asking for employees' input helps businesses to make better decisions. But it is not the role of Government to dictate how that input should be sought. It is our role to create a flexible framework to support high quality consultation and to allow employers and employees' representatives to conduct it in a way that suits their unique circumstances."[3]

We are pleased that the Government recognises the benefits of a genuine and meaningful consultation. However, we believe that it is the role of the Government to set the framework for consultations as employers will look to legislation and to the Government to set the standards and frameworks for employing people, this ensures that there is a fairness for employees. Again, this type of language implies that the Government's overall approach is to reduce legislation so that only the most basic protection is available to employees

We are generally supportive of a Code of Practice on the condition that it is developed with a view to all parties concerns, not just employers, and would probably be best developed through ACAS. However, we do have concerns that a number of unscrupulous employers will not follow a Code of Practice as will not be obliged to and would therefore do nothing to improve the quality of consultation or industrial relations.

Question Two: 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.

As above, the RCM is disappointed that following the consultation in January the Government still wants to reduce the minimum consultation period. The existing thresholds for consultation ensure genuine and meaningful consultation and can be critical in reducing the number of redundancies and help to retain experienced and knowledgeable staff by demonstrating good industrial relations.

[2] Department for Business, Innovation and Skills Collective Redundancies: Consultation on changes to the rules June 2012

[3] Department for Business, Innovation and Skills Collective Redundancies: Consultation on changes to the rules June 2012

The RCM believes that the 'minimum' consultation period will be seen as the 'maximum' consultation period and therefore the extent to which consultations are genuine and meaningful will be hampered. We agree that this would increase the number of legal challenges which would damage workplace morale and employee relations to the extent that skilled and knowledgeable employees who are not affected by redundancy will seek alternative employment.

We feel that the Government's two options for a 30 day minimum period for all collective redundancies or a 45 day minimum period for all planned redundancies of 100 or more employees are both arbitrary and the Government has not presented any evidence to show how an effective and meaningful consultation could be carried out in such a short time period.

The Government states that:

"The Government intends to reduce the minimum period before redundancies of 100 or more employees can take effect and is seeking views on the impacts of using either 30 or 45 days. This change will allow employers to restructure more quickly and save the administrative and wage costs, potentially reducing the number of redundancies. Employees will benefit from greater certainty and a less marked impact on morale and productivity."[4]

We are concerned by comments like this as it implies that the short term cost of the consultation period is more important than the long term costs of poor employment relations and making skilled and knowledgeable employees redundant when they could be redeployed.

We agree with the Government that increased uncertainty can have a negative effect on employee relations and morale in the workplace. However, this can only be mitigated by good communications and a desire by employers to have a genuine consultation, it can not be mitigated by just shortening the time period of the consultation.

Redundancy consultation must include ways of avoiding dismissals, reducing the numbers of employees to be dismissed, and mitigating the consequences of the dismissals. This should be undertaken by the employer with a view to reaching agreement with the appropriate representatives. The law recognises that the reasons for dismissals are consulted on in order that the body being consulted with can challenge the basis of dismissing employees for redundancy at an early stage if the reasons are not considered to be those the employer states they are. It is very difficult to see how this can be done in such a short time period.

Therefore, the RCM does not agree with the Government's proposal to replace the 90 day minimum period as both the 30 days and 45 days appear to be too short to carry out a meaningful consultation. We would argue that the minimum 90 day time period should remain, however we would support the legislation being amended to allow for consultation to end at any time before the 90 day period if agreement has been reached and all sides have signed off on it. This would be the most sensible solution as would allow for a shorter time period but only if the consultation has been finished.

[4] Department for Business, Innovation and Skills Collective Redundancies: Consultation on changes to the rules June 2012

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

and

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

As stated in our response to the redundancy consultation in January the RCM believes that the issue of what determines an establishment is complex and would be useful for employers and employees to have more guidance on this issue. There is concern that employers could use the establishment provisions to artificially divide employees into an establishment with a view to reduce or eliminate their duty to consult.

According to the European Court of Justice an 'establishment' is the unit to which workers are assigned to carry out their duties, whether or not there is a separate management. There is no definition of establishment in the Trade Union and Labour Relations (Consolidation) Act 1992 and that can result in serious injustice, as illustrated by recent experiences of staff following the collapse of the Woolworths retail chain.

The Government has determined that it is very difficult to create a definition of 'establishment' that would create any degree of certainty so intends to address the issue in the Code of Practice.

We would welcome guidance on the issue 'establishment' in the Code of Practice, however, whether that leads to sufficient clarity will be dependent on how clear the guidance is and whether it properly and sufficiently considers all the complexities of the issue.

Question Five: 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.

In the RCM's response to the redundancy consultation in January we stated that we were unclear what the issues with fixed term contracts were and if it were that employers were not aware of their obligations with regards to employees on fixed term contracts then we stated that it would be appropriate for the Government to introduce guidance to employers to inform them of their duty to do so.

In the consultation document the Government has highlighted how the respondents answered this question and stated that they will produce guidance on the issues raised. However, unsurprisingly, the various respondents raised differing and sometimes contradictory views and it is still unclear what the Government believes the issues are and therefore what the Code of Practice will say on this issue.

We believe that the Government's decision to address the fixed term contract issue in the Code of Practice rather than in legislation is consistent with the way they are dealing with other issues e.g. the establishment issue. We would like the Government to ensure that the guidance states that the fixed term workers should be treated no less favourably than permanent employees as determined under the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

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

We have concerns that good employers who already work in partnership and have good employee relations will already demonstrate the best practice that will hopefully be presented in the Code of Practice. It is the employers that do not currently have good partnership working, particularly those that do not even recognise a Trade Union that need to comply with the Code of Practice. However, without any sanctions for not doing so it is difficult to see how the Government can ensure that employers comply with it.

The consultation document states that:

"A new Non-Statutory Code of Practice – the Code would address the principles and behaviours behind a good quality consultation, with a particular focus on dealing effectively with the most contentious issues. As collective redundancies happen in a variety of circumstances, which can be unpredictable and change rapidly, the Code would give guidelines but allow flexibility for parties to tailor the consultation process appropriately."[5]

While we appreciate that the Code of Practice will need to be generic enough to be applicable to a variety of circumstances we are unsure of whether this equates to flexibility. We would not want to see the Code of Practice as being so flexible that it provides meaningless protections for employees and allows unscrupulous employers a justification for their unfair treatment of employees.

We welcome the Government's invitation to contribute to the development of the Code of Practice as we believe if it is developed with a view to all parties concerns, not just employers, it will aid meaningful consultation.

However, our concerns remain that a number of unscrupulous employers will not follow a Code of Practice as will not be obliged to and would therefore do nothing to improve the quality of consultation or industrial relations.

Question Seven: What changes are needed to the existing Government guidance?

We feel that all existing Government guidance should be reviewed on a regular basis as a matter of course to ensure that it continues to be relevant; it would seem logical that when the Code of Practice is developed the existing Government guidance can be reviewed.

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

As above, the RCM is supportive of a Code of Practice particularly the Governments comments that state:

"To help devise the new guidance the Department for Business, Innovation and Skills will work with employers and trade unions to ensure that we capture the right information. We

[5] Department for Business, Innovation and Skills Collective Redundancies: Consultation on changes to the rules June 2012

will conduct focus groups to help ensure that the guidance present sufficient details and is based on strong examples of good consultation."[6]

We are pleased that the Government wishes to work in partnership with Trade Unions on this issue rather than just focussing on employers.

However, we have concerns that good employers who already work in partnership and have good employee relations will already demonstrate the best practice that will hopefully be presented in the Code of Practice. It is the employers that do not currently have good partnership working, particularly those that do not even recognise a Trade Union that need to comply with the Code of Practice. However, without any sanctions for not doing so it is difficult to see how the Code of Practice on its own will deliver the necessary culture change.

We believe that the Government should lead by example, while we are pleased that the Code of Practice will be developed in partnership with trade unions, thus showing some desire for fairness towards employees, as we stated above we are not pleased with derogatory comments in the consultation document such as describing any protection above the minimum as 'gold plated'. These types of comments feed into the negative viewpoint that employee rights are burdensome on business in the short term whereas actually good employee relations improves productivity, retains skilled and knowledgeable employees in the workplace and is good for business, and employees, in the long term.

Therefore, we believe that to deliver a culture change the Government should start by leading by example and showing a genuine commitment to fairness for employees in general and indeed as an employer themselves.

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

The RCM believes that training is an appropriate option. Often times employers' responses to consultations like these are that they would like legislation changed to be simpler to understand therefore by offering training through organisations such as ACAS this could combat this difficulty.

Question Ten: 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

We were surprised by the lack of detail in the impact assessment. The document makes statements such as:

"Expected impacts are not yet monetised due to uncertainty around the impacts... Potential for higher quality consultations between employers and employees ensuring a more constructive relationship... Possible increase in employment tribunal claims during assimilation period... Possible very small increase in Job Seeker's Allowance claims... There is a risk that employers will reduce their consultation periods without addressing quality."[7]

[6] Department for Business, Innovation and Skills Collective Redundancies: Consultation on changes to the rules June 2012

[7] Department for Business, Innovation and Skills Collective Redundancies: Consultation on changes to the rules – Impact Assessment June 2012

It is unacceptable that the impact assessment uses such vague language and lacks any quantitative evidence to support the case for change.

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

The RCM responds to redundancy consultations from local NHS employing bodies. We regularly respond to and engage with these consultations at local level. However, we do no collate this information centrally so the RCM is unable to provide an answer to this question.

Question Twelve: 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?

The RCM responds to redundancy consultations from local NHS employing bodies. We regularly respond to and engage with these consultations at local level. However, we do no collate this information centrally so the RCM is unable to provide an answer to this question.

Summary

The Royal College of Midwives (RCM) welcomes the opportunity to respond to the Department for Business, Innovation and Skills consultation on collective redundancies. The majority of the RCM's members work in the NHS so the RCM is party to a collective agreement called Agenda for Change which incorporates provisions for redundancy including entitlements.

The RCM is disappointed that following the consultation in January the Government still wants to reduce the minimum consultation period. The existing thresholds for consultation ensure genuine and meaningful consultation and there is no evidence to suggest that employers are constrained by existing thresholds. The current 90 day consultation period is critical in reducing the number of redundancies and mitigating the impact of redundancies. When employers can demonstrate good industrial relations, particularly in difficult periods, this can have benefits such as retaining experienced and knowledgeable staff.

The RCM can see no reason why the rules for collective redundancy consultations should be changed and the time periods for consultation reduced. If anything, in the current economic climate, every effort should be made to ensure that the consultation period is as meaningful and productive as possible since the result could be fewer redundancies.

We are pleased that the Government is seeking to improve it's guidance and will introduce a Code of Practice to address a number of key issues around the processes that detract from quality consultation, seeking to facilitate a positive relationship between the employer, the employees and the trade union. We welcome the Government's invitation to contribute to the development of the guidance.

1. Your name:

STUC - Ian Tasker

2. What organisation do you represent (if any)?

STUC

3. E-mail address:

itasker@stuc.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

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

No

9. Please provide comments to support your answer.

Line1 - Should be 'undertaking' - see word response form for details

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

No

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

No

12. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

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

No Response

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

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

REPRO DTP

From: Ian Tasker [ITasker@stuc.org.uk]
Sent: 12 September 2012 12:59
To: Collective Redundancies
Cc: Rory McPherson (Rory.McPherson@thompsons-scotland.co.uk)
Subject: Consultation Response - Collective Redundancies
Attachments: Collective Redundancy STUC Response.doc

Please find attached the response from the STUC for the above consultation.

Regards

Ian

Ian Tasker
Assistant Secretary

STUC
333 Woodlands Road
Glasgow G3 6NG
Tel: 0141 337 8112 (direct line)
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Email: itasker@stuc.org.uk

http://www.thereisabetterway.org/

http://www.ajustscotland.org

http://www.stuc.org.uk/20-oct

Response to the Department of Innovation and Skills consultation on Collective Redundancies and changes to the rules.

Introduction

The STUC is Scotland's Trade Union Centre. Its purpose is to coordinate, develop and articulate the views and policies of the Trade Union Movement in Scotland; reflecting the aspirations of trade unionists as workers and citizens.

The STUC represents over 632,000 working people and their families throughout Scotland. It speaks for trade union members in and out of work, in the community and in the workplace. Our affiliated organisations have interests in all sectors of the economy. Our representative structures are constructed to take account of the specific views of women members, young members, Black/minority ethnic members, LGBT members, and members with a disability, as well as retired and unemployed workers.

The STUC is taking the opportunity to respond to this consultation although we have significant concerns that the Government is consulting on a predetermined position that the statutory consultation period will be reduced, the only question you are seeking responses to in this regard is by how much.

The STUC's responses to the individual questions in the consultation are as follows;

Question 1

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

The STUC does not agree with the Government's approach to the rules on collective redundancy consultation. We can see no evidence in the consultation paper to support the Government's proposals and we are of the view these changes are further evidence of employment rights being undermined.

We believe that the legislation has served its purpose well and the current 90 day period allows adequate time for meaningful consultation to take place and provides a reasonable amount of time for trade unions to work with employers and other agencies to mitigate job losses.

Therefore we see the elements that the Government sees as core to improving consultation as outlined in Section 3.6 of the consultation as being flawed. There is no evidence presented to suggest that well informed employers find the current legislation too complex; neither do we feel that the proposed changes will do anything to improve the relationship between employers and employees. This relationship is dependent on a wide range of determining factors and it is wrong to suggest that a detrimental change to this legislation or any other relating to workers rights will do anything to improve what is often a difficult relationship further complicated by the current deregulatory agenda in this area.

Furthermore the STUC is concerned that the proposals being put forward in Section 3.7 will not improve the rights of individual workers facing difficult times but will allow for unscrupulous employers to move faster towards the point where redundancy notices are issued.

Question 2

Which of the 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?

The STUC is not in a position to support either of the two options, our position continues to be that the 90 day minimum period provides the best possible opportunity for trade unions and employers to seek a solution and, at the same time engage with external agencies to reduce the impact on individuals and communities where job losses become inevitable. We feel it is unrealistic to suggest that this can be done in either 30 or 45 days and there is no evidence presented by the Government within the consultation document to provide any reassurances to the trade union movement that a move away from the 90 day consultation is necessary or justified.

The Parliamentary Secretary of State for Business, Innovation and Skills said in Parliament that current rules are too restrictive to allow employers to restructure effectively, distracting from initiatives to mitigate the impact of redundancies by allowing too much focus on process.

We dispute this assertion and trade unions, as acknowledged in the consultation document, should have primacy in these processes and our affiliates sole purpose is to protect the livelihoods of their members while, at the same time seeking to ensure a future for the employing organisation.

The impact assessment outlines arrangements in place in other countries and the information supplied, while being correct in relation to the statutory time limits applicable in these states is not a true reflection of the reality of the situation. In Germany, Spain and France trade unions or work councils can by law delay the consultation process and consultation periods of over 90 days are not uncommon. The STUC believes having a minimum consultation period is not gold plating as the impact assessment suggests but providing a reasonable time frame for positive dialogue in order to reach a satisfactory conclusion on collective redundancies.

Question 3

Do you agree with the assessment of taking a legislative route on the issues of "establishment"? Please provide comments to support your answer.

The STUC is deeply disappointed that the Government has dismissed the views of trade unions put forward in the Call for Evidence that legislation should be amended to ensure that the threshold covered an undertaking rather than an establishment. Employees in an "establishment" have the same contract of employment, the same employer, the same head office and common employment policies irrespective of whether their physical workplace provides employment for 20 or 100 of the employing company's workers.

Therefore there is something inherently unfair when workers in smaller workplaces owned by the same company who all contribute to a company's success in the good times can be treated so poorly by the law in bad times. There is no evidence or opinion put forward in the consultation to say why the Government feels adopting an "undertaking" for the purposes of applying the threshold feels this is incompatible with the Directive other than the word undertaking has a very specific meaning at European level.

The STUC believes that if there was a will to protect workers in smaller workplaces who share one employer with others in larger company sites then legislation could be framed accordingly.

Question 4

Will defining "establishment" in Code of Practice give sufficient clarity?

The STUC has considerable difficulty regarding attempting to seek clarity on what appears to be a complex legal definition of an "establishment" in a non statutory Code of Practice. This particular proposal has to be re-examined and a resolution sought that is a statutory obligation on employers to consult with all their employees.

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?

The STUC believes that the issue of fixed term contract and when they should or should not be included for the purposes statutory should be determined by legislation. This would provide clarity and a legal foundation on which decisions in which circumstances fixed term contract holders should be included in the trigger for collective redundancies and when they should not. There appears to be varying opinions on the reasoning of the Employment Appeal Tribunal in reaching the conclusion of the University of Stirling v UCU case and the consultation concedes this is a departure from previous thinking.

The Government's reasoning behind proposing changes to the consultation arrangements is to ensure that the legislation is suitable to the labour market it supports. The increased flexibility in our labour market has been driven by increased use of temporary labour including fixed term contracts. If our employment law is to reflect this change and protect fixed term contract holders then they should have equal rights in law, including in collective redundancy situations.

If, as we expect, the Government seeks to clarify the position on fixed term contracts purely by guidance and a non statutory Code of Practice then our fear is that any code will only be followed by employers who are already aware of their obligations and recognise the benefit of

meaningful consultation. It may provide clarity where uncertainty exists but non statutory Codes of Practice and guidance will not hold employers to account where they ignore their legal obligations.

Additionally for anyone who feels their employer has failed to consult properly and is not supported by a trade union it is unlikely, following the introduction of fees for lodging employment tribunal cases, that they will be able to proceed with a case to afford to take action to resolve their issues.

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?

The STUC is concerned that the Government continues to deregulate our labour market despite the fact that there is no evidence such a policy creates economic growth. Furthermore we do not believe that developing guidance or a non statutory Code of Practice can ever provide the change in corporate culture that is being suggested will happen in the impact assessment. The STUC is aware of many employers who work with trade unions to provide a work environment and corporate culture within the existing legislative framework that is beneficial to the company and to its workforce. We are also aware of others who chose not to engage with trade unions and our fear is that deregulation will have the opposite effect to that imagined by the Government. These changes will lead to work environments, where in the absence of statutory obligations, regulatory enforcement and funded dispute resolution through employment tribunals, unscrupulous employers will use the shorter consultation period and light touch regulation to hire and fire without fear of being held to account.

Question 7

What changes are needed to the Government guidance?

The STUC believes that this should be statutory guidance to ensure employers follow and meet their obligations to their workforce. Furthermore, any guidance should ensure that employers have to provide financial information to support their redundancy proposals including the impact any restructuring is likely to have on the remaining workforce.

We believe it is wrong to assume, as the consultation does that any uncertainty is miraculously lifted after the redundancies take place. This is not the case and many of those who survive redundancy continue to face uncertain futures, increased workloads, exposure to occupational ill-health and sometimes guilt that they have retained their jobs.

Any guidance should be comprehensive and explicit on steps that employers have to take to protect their workforce after restructuring.

Question 8

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

The STUC believes that this should be a statutory Code of Practice that provides some level of legal protection to workers but also to employers who recognise the benefits of following such codes while at the same time ensuring employers who fail to follow a statutory code can be held to account for their failures

Question 9

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

Trade unions already provide training to officials and representatives negotiating and implementing agreements including employment law updates to ensure awareness of new or amended legislation. Larger employers and others who wish to comply with their legal obligations will also access appropriate training.

The Government should consider how training could be developed and how this could be obligatory for employers where no collective agreements exist. It should also introduce monitoring to ensure any Code of Practice or guidance is being followed

Question 10

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

The STUC believes the Government is mistaken in its core policy objective that these proposals along with further deregulation of the labour market will create economic growth. There is no evidence to support that light touch regulation creates growth or long term sustainable employment and there is ample evidence available from the OECD to suggest that the Government is wrong in this assumption

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?

While the STUC does not have direct involvement in cases of collective redundancies we do support affiliated trade unions and their efforts to mitigate the impact or redundancies in communities throughout Scotland.

On the 5th July Vion a meat processing business in Broxburn, West Lothian announced the potential closure of its plant and that a 90 day consultation period would commence. The company claimed to be losing £70000 per day at this plant despite previous efforts to restructure the factory and work processes.

On the 5 July, the Scottish Government Cabinet Secretary for Finance, Employment and Sustainable Growth established a Taskforce comprising company representatives, USDAW, West Lothian Council, the MP and MSP for the area, Scottish Enterprise, Scottish Development International, Skills Development Scotland, Job Centre Plus and Quality Meat Scotland. This task force continues to meet and is now in week eight of the consultation period. The members of the task force are committed to retaining as many jobs as possible at the plant and are examining every option consistent with that outcome.

An external examination of the finances of the company by the Scottish Manufacturing Advisory Service has and identified operational areas where some potential savings could be achieved. Skills Development Scotland is also working with the company and the Unions, primarily through the Partnership Action for Continuing Employment (PACE) team, to explore necessary workforce support.

The STUC welcomes the efforts of the Scottish Government to protect the livelihoods of Vion's workers but we have severe concerns that given

the shorter consultation period it would be possible to deliver these types of positive interventions in any meaningful way.

This would be even more likely where an employer has a predetermined outcome and has little or no intention of carrying out meaningful consultation. A shorter statutory consultation period of 30 days could result in redundancies taking place at the earliest opportunity before any constructive dialogue. As outlined earlier we see no indication that the Government intend to provide similar protection to UK workers as exists in other European countries with 30 day consultation periods where trade unions or employee representatives have the right to extend the period of consultation to provide every opportunity to protect employment.

Question 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 that time?

The STUC has no response to make to this question.

1. Your name:

The Chartered Society of Physiotherapy - Jessica Belmonte

2. What organisation do you represent (if any)?

The Chartered Society of Physiotherapy

3. E-mail address:

belmontej@csp.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

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

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

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

No Response

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

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

REPRO DTP

From: Jess Belmonte [belmontej@csp.org.uk]
Sent: 19 September 2012 16:04
To: Collective Redundancies
Subject: CSP response to collective redundancies consultation Sept 2012
Attachments: FINAL CSP response to Collective Redundancy Consultation.docx

Dear Sir / Madam,

Please find attached the response to the following consultation form the Chartered Society of Physiotherapy:

Collective Redundancies: consultation on change to the rules.

I would be grateful if you would acknowledge receipt of this document.

Yours faithfully,

Jess Belmonte

Jess Belmonte
National Officer
Chartered Society of Physiotherapy

Direct dial: 020 7306 6671

<<FINAL CSP response to Collective Redundancy Consultation.docx>>

CHARTERED SOCIETY OF PHYSIOTHERAPY

Collective Redundancies: Consultation on changes to the rules

The Chartered Society of Physiotherapy consultation response

To: Carl Davies
3rd Floor Abbey 2
1 Victoria Street
LONDON
SW1H 0ET

By email: collectiveredundancies@bis.gsi.gov.uk

1. The Chartered Society of Physiotherapy (CSP) is the professional, educational and trade union body for the UK's 51,000 chartered physiotherapists, physiotherapy students and support workers.

2. The CSP welcomes the opportunity to respond to the proposals published in the consultation document *Collective Redundancies: Consultation on changes to the rules.*

3. Our response is focussed on the areas of the consultation on which we feel we can most effectively contribute to the debate. We would be pleased to supply additional information on any of the points raised in our response at a later stage.

Introduction

4. The Chartered Society of Physiotherapy has over 51,000 members. Over half of our members are employed in the NHS with the others working in a number of other settings such as private practice, private hospitals, charities, the Ministry of Defence and as self employed practitioners.

5. Physiotherapy enables people to move and function as well as they can, maximising quality of life, physical and mental health and well-being. With a focus on quality and productivity, it puts meeting patient and population needs, and optimising clinical outcomes and the patient experience, at the centre of all it does.

6. The CSP has a number of concerns regarding the proposals contained within the consultation document. These are outlined below.

Reduction of the 90 day consultation period for collective redundancies

7. The CSP believe that any reduction of the 90 day consultation period disadvantages both employers and employees. In the current climate our members are increasingly working unsocial hours, shift work and across a number of

geographical sites. A consultation period of 45 calendar days is totally inadequate to carry out meaningful consultation with all affected staff and for staff to come up with alternative proposals.

8. It is widely documented that effective and meaningful consultation with staff can reduce the number of compulsory redundancies and increase productivity and effectiveness (see TUC evidence on *Collective Redundancy Consultation* January 2012). It is in the interests of employers to retain skilled staff and avoid the financial outlay of redundancy payments and recruitment costs in the future.

9. The CSP is also concerned that a shortened consultation period and inadequate communication regarding changes to the workforce can have a devastating effect on the staff left behind. Loss of colleagues in a short period of time, increased workload and uncertainty about job security for the future will undoubtedly decrease morale of the remaining staff. They in turn will look for alternative work further stripping the employer of skills and commitment.

10. It is clear that where the financial situation and need for cost savings is explained clearly to employees and their ideas and proposals are considered in a meaningful way then there is increased trust within the employment relationship. Remaining staff are less likely to be demoralised and looking for alternative work.

11. The CSP has supported a number of members in redundancy situations where a 90 day consultation period has been essential for a meaningful exchange of views and an improved outcome benefiting both the staff and employer:

Example

A large teaching hospital was proposing to reduce physiotherapy headcount by 10 WTE following the loss of a musculoskeletal outpatient contract. In line with the local Managing Change Policy they launched a 90 day consultation.

Therapy management met with all staff on a fortnightly basis to update them on the consultation and answer questions. These were then published and circulated by email for staff who could not attend. CSP stewards were able to attend one to one meetings with staff who requested them and meet with groups of staff on an ad hoc basis.

CSP stewards supported staff individually and as a group to respond to the consultation in writing. A 90 day consultation enabled reps to meet with all staff affected including a member of staff on maternity leave and still manage their clinical workload.

Following the end of the consultation period therapy management collated all written submissions. Initially a two week period had been allowed for reflection and response. This was extended by a further two weeks in order to give fuller consideration to alternatives proposed by staff. CSP stewards met regularly with management during this period.

Following the four week period of reflection management were able to agree an alternative structure which entailed only the loss of four full time posts. Two members of staff accepted voluntary severance, one was redeployed within the organisation and one took early retirement. The remaining staff accepted the new structure and ways of working more easily as they had been involved and felt that their opinions were valued and considered.

Proposed Code of Practice

12. The CSP has concerns regarding the proposed Code of Practice and believe that the issues outlined in paragraph 3.24 should be dealt with both in statute and through an accompanying Code of Practice.

13. The CSP believes that culture change cannot be brought about by a document containing non-statutory guidance. We have seen numerous examples of employers carrying out "paper exercise" consultations, withholding information, delaying meetings with staff and timetabling unfeasibly short periods to consider the responses of staff. This behaviour is unlikely to change under the proposed system.

14. Likewise there is no remedy in law for staff treated unfairly by an employer carrying out poor or no consultation on changes to the workforce.

Summary

15. The CSP is opposed to any reduction of the 90 day consultation period as we believe this gives inadequate time to carry out a meaningful process. This is detrimental to both employees and employers alike.

16. The CSP believe that consultation rights should be enshrined in law with an accompanying Code of Practice. Non-statutory guidance is highly unlikely to bring about any meaningful culture change.

For further information on anything contained in this response or any aspect of the Chartered Society of Physiotherapy's work, please contact:

Jessica Belmonte
National Officer (Legal)
Employment Relations and Union Services
The Chartered Society of Physiotherapy
14 Bedford Row, London, WC1R 4ED
Telephone: 020 7306 6671
Email: belmontej@csp.org.uk
Website: www.csp.org.uk

1. Your name:

The Institute of Employment Rights - Carolyn Jones

2. What organisation do you represent (if any)?

The Institute of Employment Rights

3. E-mail address:

office@ier.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

Independent Think Tank

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

No

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - Neither

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

No

9. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

12. Please provide comments to support your answer.

No Response

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

No

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

No Response

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

No Response

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

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

REPRO DTP

From: Carolyn Jones [cad@ier.org.uk]
Sent: 19 September 2012 18:18
To: Collective Redundancies
Subject: IER response to consultation on Collective Redundnacies
Attachments: Collective Redunancies Response 2012.pdf

Carl Davies,

Attached is a response to your consultation on Collective Redundancies from IER.
Please feel free to contact me if you have any queries.
Yours

Carolyn

Carolyn Jones
Director
The Institute of Employment Rights
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AN IER RESPONSE

Collective Redundancies: Consultation on changes to the rules.

A Department for Business, Innovation & Skills consultation document
Published 2 June 2012.
Closing date 19 September 2012

By Felicia Epstein

THE INSTITUTE OF EMPLOYMENT RIGHTS

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The Institute of Employment Rights is an independent think tank involving academics and lawyers specialising in labour law. IER is supported by trade unions representing over six million workers.

Felicia Epstein is a solicitor in the Employment Department of Pattinson & Brewer Solicitors, London.

This IER Response, kindly drafted by the lawyer named, reflects the author's own work not the collective views of the Institute. The responsibility of the Institute is limited to approving its publications, briefings and responses as worthy of consideration.

Carolyn Jones
Director, Institute of Employment Rights
19th September 2012
cad@ier.org.uk
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Summary

The 90 day consultation period works in the interests of employers in many cases and its purpose includes protecting employees. It also reduces the prospect of challenge regarding meeting the requirements of consultation. Any reduction in consultation periods will have a negative impact on the quality of consultation. The reduction will limit the ability of employers and unions to develop alternatives to redundancies including redeployment and short-term working. As a result, unnecessary redundancies will take place, employers will lose skilled staff, and unemployment levels are likely to rise.

We support the TUC and Unite in their contention that collective redundancy consultation obligations have been of significant benefit to both workers and employers. We also agree that the proposals will limit the opportunities for unions to seek agreement from employers on alternatives to redundancies and that this will increase job insecurity, damage workforce morale and reduce the incomes of those facing redundancy. Reducing consultation will shift the burden from the business to the government as employees have increased reliance on welfare benefits.

The IER disagree with the government that the UK law is gold plated and that the legislation is too restrictive. Arrangements regarding redundancy fall short of the practices of other EU member states. Reducing the consultation period will make UK workers more vulnerable to redundancies when multinationals decide to restructure.

The impact assessment document states that even though other countries may have shorter consultation periods their broader employment rights regimes are much stronger. In the UK there is heavy reliance on the trade unions to ensure that genuine consultation occurs. If the period of consultation is shortened employees in places of employment without trade union involvement will find it difficult to organise and effect meaningful consultation.

The IER is not convinced that development of a non-statutory Code of Practice or guidance will be sufficient by itself to improve the quality of consultation. This will only be achieved through the adoption of strengthened legislation.

Finally, the IER believes that the government should promote engagement between employers and unions through wider use of the Information and Consultation of Employee Regulations 2004.

Questions

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

1.1 General approach

We do not agree with the overall approach. The consultation document sets out the key objectives for reform:

a. To improve the quality of consultation

b. To ensure that employers can restructure effectively to respond to changing market conditions
c. To balance the interests of the employees made redundant with those that remain

a) Improving the quality of consultation

The IER support the TUC's contentions that the government's proposals will prove counter-productive and will weaken worker protection. We agree that by reducing the minimum 90 days period there is a risk that the proposals will send a clear message to employers that there is no need to engage in meaningful consultation. We agree with the contention that the proposed changes are likely to undermine good practices of seeking alternatives to redundancies and will actively deter good employers from engaging in more comprehensive consultation.

b) Ensuring that employers can restructure effectively to changing market conditions

The TUC has made a strong argument as to why there is no need to change existing consultation arrangements to respond to changing market conditions. They have brought evidence from competitive countries in the OECD which confirms this contention.

c) Balancing the interests of employees made redundant with those who remain

The TUC submission in the call for evidence brought case studies to show how unions and employers successfully used longer consultation periods to identify ways of avoiding redundancies through efficiency, savings, winning new contracts or negotiating short term working patterns.

Shorter consultation periods will mean that employees receive less pay to meet their household expenses and less time to look for new employment. We note the evidence brought by the TUC that it is often not possible for individuals to find work during their statutory or contractual notice period the contrary to the consultation document. Contrary to the government consultation document the TUC contend with supportive evidence that shorter consultation periods are also likely to have a detrimental impact on morale amongst the remaining staff.

We support the TUC proposal that the government should raise awareness of the fact that the duty to consult applies not only to those employees who the employer proposes to dismiss but also to those who might directly or indirectly be affected by the proposed dismissals. The future code of practice or guidance should encourage employers to consult on the impact of redundancies and restructuring on the remaining workforce.

The IER is disappointed that the government has decided not to take steps to deter or prevent employers from using s188 redundancy notices to impose cuts in pay and conditions.

1.2 When consultation commences

It is often difficult to determine when the consultation process should commence and the case law in this area remains ambiguous. The guidance provided to employers could provide clarification and direction on this point. The guidance could propose that consultation commence at the latest when the strategic business decision is made so as to include employees at an earlier stage. Agreement during consultation is more likely when the provision of sufficient information by management for employee representatives to understand at an early stage the business reasons for the proposals and the wider context.

1.4 Insolvency

The government has not made any suggestions as to how to address and improve compliance by insolvency practitioners with the collective redundancy consultation rules. As the consultation points out this would benefit employers, employees and the Exchequer. The consultation document also states that insolvency is rarely a surprise to the employer.

And yet, the consultation document merely states that *"the Government is keen to explore options for improving understanding of obligations in these circumstances and on raising levels of compliance"*. However, no proposals have been made to achieve these goals.

It would be beneficial to provide some form of incentive for insolvency practitioners to comply with their consultation obligations. For example, the consultation requirements could make insolvency practitioners personally liable for complying with the obligations

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.**

2.1 There are a number of advantages for longer consultation periods that will be compromised with the proposed changes.

(a) Where consultation takes less time, they are likely to have a longer period of employment and so earn salary for a longer period than they would do if the period was shorter.

(b) Where consultation takes less time, they are also likely to have more notice of their eventual dismissal and so longer to look for alternative employment, whilst still in employment.

(c) Although the requirement to consult "in good time" ensures that there would still be a legal obligation to consult to the same standard as at present, the minimum period of consultation may tend to set expectations as to how long consultation should last and so lead to

longer consultation in practice. A shorter minimum period may lead to increased pressure from employers to end consultation before it is actually complete, reducing the time employee representatives have to consider the proposals and affect the consultation process.

(d) Employers would potentially be at a disadvantage with a reduction of the number of days for consultation as there would be greater uncertainty as to whether adequate consultation had taken place in line with the European Directive. Please see comments above for additional advantages for employers with longer consultation periods.

The IER supports the TUC contention that 30 or 45 day consultation periods are not practical especially with large redundancy situations which are complex. They contend that it is feasible for employers to cover all the key stages, including consultation on the reasons for redundancies, and the ways of avoiding redundancies; selection processes and redeployment exercises, within 45 days.

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.

3.1 The two leading cases at ECJ level are *Rockfon A/S v Specialarbejderforbunet i Danmark and Athinaiki Chartopoiia.* Both cases state that the meaning of "establishment" is a term of Community law and cannot be defined by reference to the Member States.

In *Rockfon* the ECJ held that "establishment" means (depending on the circumstances) the unit to which workers are assigned to carry out their duties and stated that this did not have to have management which can independently effect collective consultations.

The ECJ states that there is a term of Community law, which cannot be defined according to Member States. However they state that there is scope to vary the meaning depending on the circumstances.

A recent ET decision of *USDAW, Unite and Wilson v WW Realisation 1 Limited* ("Woolworths") Judge Auerbach found that each individual Woolworths store was a separate establishment for the purpose of the sec 188 of TULRCA. This decision highlighted the serious problem with regards to the way collective consultation has been addressed in relation to establishment. It illustrates the problem of defining establishment too narrowly and not in line with the intent of the Directive.

The issue of whether domestic legislation differs from the European Directive was raised referring to the case of *MSF v Refuge Assurance* when the EAT was of the view that UK law was not compliant with the Directive in this regard and that an obligation to consult should be triggered where 20 or more

redundancies are contemplated across *all* establishments. It then went on to follow the approach in *Rockfon* adopting a broad interpretation of "establishment".

3.2 The establishment test means that businesses can subdivide into different units to avoid consultation duties. As such, the IER supports ways to avoid employers duty to consult on collective redundancies with a view to reaching an agreement on the ways of avoiding redundancies or mitigating the effects of necessary job losses.

We support the TUC proposal that the 20 employee threshold for consultation should be removed. This would help to ensure that the rights to consultation apply equally to all.

Alternatively, we support the proposal to replace the establishment test with an undertaking test which has been proposed by the TUC.

4. Will defining "establishment" in a Code of Practice give sufficient clarity?

A Code of Practice which was clearly drafted would be more helpful than simply retaining the current statutory provisions with no guidance and might help to establish a common approach. The Code should actively discourage employers from breaking up businesses into separate units to avoid EU consultation duties.

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.

The IER objects to any attempts to exclude fixed term staff from consultations. In UK law failure to renew fixed term contract s in considered as a redundancy and fixed term employees are included in collective redundancy arrangements. The IER does not believe that this should change.

The future Code of Practice or guidance should not suggest that employers can exclude staff on fixed-term contracts from consultation arrangement. This approach would not be compatible with the requirements of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

The IER believes that the duty to consult on collective redundancies should be extended to cover agency workers and other casual workers. The terms in the Directive are not limited to employees, as in the case in the UK. The Directive applies where an employer contemplates making workers redundant.

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

We do not believe that the Government has got the right balance. We are not convinced that the introduction of guidance without any strengthening of the law will improve the quality of consultation on redundancies or improving compliance with EU law.

The IER would argue that the law should be amended in line with *Junk v Kuhnel* to clearly state that redundancy notices cannot be issued before consultation has been completed.

7. What changes are needed to existing government guidance?

The existing guidance is very short and would need to be substantially expanded to provide useful practical support. It should also:

a) Promote the benefits of effective and meaningful consultation and negotiations between employers and trade unions on collective redundancies
b) Encourage employers to negotiate and agree redundancy policies in advance of redundancy situations.
c) Emphasise that consultation must be undertaken with a view to reaching agreement
d) Be flexible and vary according to the circumstances
e) Explain the types of information which must be provided to union reps and workplace reps
f) Emphasise that consultation should start as early as possible
g) Emphasise that employers should seek wherever possible to avoid the need for redundancies
h) Emphasise the importance of consultation continuing until all avenues for avoiding redundancies have been fully exhausted
i) Encourage employers to negotiate clear and non-discriminatory selections criteria
j) Deter employers from using section 188 notices to vary and reduce terms and conditions
k) Set out clear advice on rules relating to suitable alternative work
l) Encourage employers to provide support to individuals at risk of redundancy, including access to training
m) Encourage employers to assess and monitor the effect which restructuring has on the health ans well being of staff
n) Encourage employers to provide facilities for union and workplace reps
o) Confirm that the special circumstances defence only applies in exceptional circumstances

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

Clear guidance will not be enough to improve the quality of consultation or to improve compliance with consultation duties.

Strengthening sanctions which apply to employers that fail to consult on collective redundancies is more likely to deliver the culture change.

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

In our experience consultation is more productive when both employee representatives and employer representatives know what is expected of them and how the process should work. Where representatives are inexperienced, training is very helpful in improving the quality of consultation.

It could also be beneficial for employees at risk of redundancy to have access to interview and CV training during the collective consultation process. This might be achieved through links between BIS and charities that provide outplacement and through working closely with the Job Centre Plus. In the event that the affected employee's employment is terminated on the grounds of redundancy and they have received outplacement during the redundancy process then they may be able to obtain re-employment quicker than if they had to wait until their dismissal for such training.

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

The government has not provided substantive evidence to justify the decision to weaken collective consultations. The government has relied on anecdotal evidence and perceptions of businesses and employers lobbying organisations.

The government has stated that one of the principle objectives of the proposed reforms is to improve the quality of consultation. However, the proposed changes mean that there is a significant risk to the quality of consultation. The TUC has detailed further risks associated with the proposed changes to collective redundancy consultations.

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

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 dealings during this time?
N/A.

1. Your name:

The National Union of Mineworkers - The Secretary

2. What organisation do you represent (if any)?

The National Union of Mineworkers

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No

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

Not sure

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

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

Yes

9. Please provide comments to support your answer.

No Response

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

Yes

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

Yes

12. Please provide comments to support your answer.

No Response

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

Yes

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

No Response

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

No Response

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

Yes

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

Raleys
Solicitors

Our Ref: HE/TP/N1155/118
Your Ref:

FAO: Carl Davies
Department for Business, Innovation and Skills
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SW1H 0ET

BY FAX: 0207 215 6414

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We do not accept service by email.

Direct Dial: 01226 603124

18 September 2012

Dear Mr Davies

Re: Collective Redundancies: Consultation on Changes to the Rules
Response from: The National Union of Mineworkers

We write with reference to the above and enclose our instructed client, The National Union of Mineworkers, response to the consultation on the proposed changes to the time scale for collective redundancies.

We enclose the response form that BIS have provided but have been instructed to provide a position statement from the National Union of Mineworkers to be read alongside the consultation response which is also enclosed.

Yours sincerely

Raleys

RALEYS

BIS | Department for Business Innovation & Skills

Collective Redundancies: Consultation on changes to the rules : Response form

A copy of the consultation on **Collective Redundancies: Consultation on changes to the rules** can be found at:

http://www.bis.gov.uk/consultations

You can complete your response online through Survey Monkey : (https://www.surveymonkey.com/s/36S3QYT)

Alternatively, you can email, post or fax this completed response form to

Email:

collectiveredundancies@bis.gsi.gov.uk

Postal address:

Carl Davies
Department for Business, Innovation and Skills (BIS)
3 Abbey 2
1 Victoria Street
London SW1H 0ET

Fax: 0207-215 6414

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: **19 September 2012**

Your details

Name: The Secretary

Organisation (if applicable): The National Union of Mineworkers

Address: Miners' Offices, Huddersfield Road, Barnsley, South Yorkshire, S70 2LS

Telephone: 01226 215555

Fax:

Please tick the boxes below that best describe you as a respondent to this

- ☐ Business representative organisation/trade body
- ☐ Central government
- ☐ Charity or social enterprise
- ☐ Individual
- ☐ Large business (over 250 staff)
- ☐ Legal representative
- ☐ Local government
- ☐ Medium business (50 to 250 staff)
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☒ Trade union or staff association
- ☐ Other (please describe)

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

Yes ☐ **No** ☒ **Not sure** ☐

The consultation on changes to the rules on collective redundancy is wholly focussed on enforcing a reduction of the time period for large scale redundancies. The Government, whilst stating that they are looking for better quality consultation have focussed solely on allowing redundancies to take place in a much reduced time frame. The consultation seems to synonymise shorter length of time with better quality and this is simply not the case.

In the mining industry large scale redundancies predominantly take place for geological reasons. Knee jerk reactions by employers and a vastly reduced consultation time will rob the Union of vital additional time to work with the employer to reduce the effect of the redundancy situation. The approach the consultation has taken misses this point entirely and is totally geared towards making redundancies easier for the employer.

Question 2: Which of the two proposed options should replace the 90-day minimum period?

30 days ☐ **45 days** ☐ **Not sure** ☒

Please explain why you think your choice would better deliver the Government's aims than the alternative option.

The consultation does not adequately specify the proposed rule changes. The 30 day and 45 day minimum periods are separated and appear to be mutually exclusive. If the government chooses the 45 day minimum period for redundancies of over 100 employees it does not specify what the lower level will be. Is the government intending to have no mandatory consultation period for redundancies of fewer that 100 employees? As the consultation notes the collective redundancy period is not for individual

employees to begin to sort their personal affairs. The consultation period is to allow representatives time to meet with employers and begin to establish the reasons for redundancy and how to minimise its effect. To say that reduction in this period will give greater certainty to employees is farcical. Mineworkers would rather have the security of 3 months wages and the knowledge that employers are consulting with Union officials. The purpose of meaningful consultation is to avoid redundancies.

Question 3: Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes ☒ **No** ☐ **Not sure** ☐

Please provide comments to support your answer.

There is a risk entailed in defining 'establishment' especially within the mining industry. It has always been the view of the NUM that where large scale redundancies by a single mine owner across different pits are being undertaken then a fact based assessment must take place. Defining this in legislation would lead to employers hiding behind the rules and separating quite clearly linked redundancies at different pits by saying that they are too far removed geographically.

Although the definition of 'establishment' should be fact based the use of this term in legislation should always be applied with caution and the Union's view is that the reasons for any redundancy should be explored. The Union agrees that taking a solely legislative definition of the term "establishment" would not provide sufficient flexibility and could lead to employers hiding behind statute.

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

Yes ☒ **No** ☐ **Not sure** ☐

Guidance on this must be given to employers so that they understand their duties when the redundancies will take place over a number of geographical sites. This is particularly important not only in the mining industry but also for the infastructure of the country. Employers must be held to the minimum periods of consultation where redundancies take place across different establishments and should not be able to claim that they are far enough removed geographically to count as separable

establishments. The Goverments Code of Practice should guide employers to a fact based finding of what consititutes a single 'establishment' even though this can be across different sites and encourage them to err on the side of caution and not try to avoid consultation which can benefit the business. If this definition remains unregulated then there is a real potential for manipulation by unscrupulous employers in vital industries to seek to avoid consultations altogether.

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?

Yes ☒ **No** ☐ **Not sure** ☐

Please provide comments to support your answer.

The protection of Fixed Term Contract (FTC) employees already exists in legislation and they are prevented from being treated less favourably. The current redundancy legislation and the case of University of Stirling v University and College Union EATS/0001/11 shows that it is always important to look at the reasons for any dismissal. Although FTC employees cannot have the same expectation of continuous employment, a termination of their contract still amounts to a dismissal. If the reason for

the termination is not a 'personal reason' then this is normally because of redundancy and so should attract the same protection. Employers should be guided to this fact in the COP, as enforcing this through legislation could potentially muddy the waters. This question appears to seek a reversion to the historic position for FTC's that could limit the rights to redundancy payments as a contractual term. This would not be a beneficial position to return to and would be unacceptable to the NUM

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?

Yes ☒ **No** ☐ **Not sure** ☐

Over legislation simply confuses employers. The Code of Practice should encourage employers to engage with Union representatives and this includes discussing the reasons for the redundancies. UK Coal Mining Ltd v NUM (Northumberland Area) and British Association of Colliery Management UKEAT/0397/06/RN demonstrates the importance of the employer being upfront and truthful about the reasons for the redundancies.

If employers are required in the Code of Practice to be realistic, truthful and properly engage with Union officials then the consultation is more likely to have the desired effect of reducing redundancies. This can only be done if proper consultation is entered into for an appropriate amount of time which the Union states should remain as a minimum of 90 days.

Question 7: What changes are needed to the existing Government guidance?

The current government guidance does not go far enough to encourage the employer to be frank and honest with Union representatives about reasons for the redundancies. The guidance specifies that they should discuss ways of avoiding the process, but does not state that employers should be open about the real reasons for a redundancy situation. If employers were encouraged by guidance to have better quality redundancy consultation this might in the past have saved collieries from closing and

in future avoid the need for redundancies altogether. The guidance needs to focus more on engaging with Trade Unions at an earlier stage so that the Union can protect the rights of the worker. This can only be achieved by engaging with the employer to ensure that jobs remain open. The guidance also needs to go into further detail about when a consultation can be considered closed and that the minimum periods are just that and are not to be considered as a maximum.

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

The changes that the government has made will develop a hire and fire culture. The changes have made it easier and quicker for employers to dismiss staff at a time when employment opportunities are low. This will do little to encourage employers to hire new staff and develop their business but will allow them to make mass redundancies and hire cheaper less skilled workers.

The Code needs to specify that redundancies are always a last resort. The Code must promote engagement and honesty with Trade Unions and support for the workers. Keeping people in employment should be the focus for all legislation and guidance and should not be centred on making redundancies and dismissals easier and damaging the protection that Trade Unions have fought so hard to establish. The necessary culture change here is that of trust. (see attached position statement)

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

Yes ☒ **No** ☐ **Not sure** ☐

Mandatory training for employers considering redundancy to ensure that they understand what consultation means and specifically when a consultation can be considered closed. Training should focus on the agreement that is required from the Union when closing a consultation. Employers should be required to provide reasons for the redundancies and engage more thoroughly with Union and employee representatives.

Employers must be required to engage earlier with Trade Unions and to let them assist in protecting their members. This can be achieved by regularly meeting with Trade Union representatives and engaging with them in meaningful discourse. The government should do more to encourage this by providing guidance.

Question 10: Have we correctly identified the impacts of the proposed policies?

Yes ☐ **No** ☒ **Not sure** ☐

If you have any evidence relating to possible impacts we would be happy to receive it.

The impact assessment focussed too heavily on the impact that uncertainty has on morale. The Union agrees that the prospect of redundancy engenders low morale and this is an issue. However where a worker can remain in employment for a 3 month period and only be dismissed for redundancy if it becomes inevitable. the effect a dismissal will have is likely to be substantially ameliorated.

More weight needs to be given in the impact assessment to problems that will be caused by mass unemployment should the collective redundancy periods be unreasonably shortened. The Union

understands the position of the employer as wanting to preserve and increase profitability, but this cannot come at the expense of workers rights.

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?

The case of UK Coal Mining Ltd v NUM (Northumberland Area) and British Association of Colliery Management UKEAT/0397/06/RN shows that if the employer is willing to enter into consultation and be reasonable and truthful then the redundancies can potentially be avoided which will benefit both employer and employee.

The minimum periods for agreement with the Union representatives are designed to protect employees and allow them to retain their positions before individual consultation starts. In the mining industry all geological, geographical and economic factors require consideration and to reduce the time when employers are required to consult will damage workers rights to employment.

Question 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?

The NUM believes that where consultation is open and reasonable this will actively benefit business as the Union can assist in avoiding redundancies.

The consultation period is between the Union and the employer, this should not effect the business as the workers can be secure in the knowledge that their Union is fighting for their rights and they are not arbitrarily being dismissed without a consideration of all the options available.

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URN 12/808

THE NATIONAL UNION OF MINEWORKERS

COLLECTIVE REDUNDANCIES: CONSULTATION ON CHANGES TO THE RULES

POSITION STATEMENT

This document is to be read in conjunction with the National Union of Mineworkers response to the consultation on the proposed changes to the time scale for consultation in the event of collective redundancies.

The National Union of Mineworkers' position is that the consultation itself proposes a solution without a problem. The Union is not convinced that the available evidence supports the view that a shorter period of consultation on collective redundancies will result in a more flexible workforce or that the existing arrangements necessarily inhibits growth.

Where meaningful consultation is entered into at an early stage this is likely to encourage co-operation between employers and Trade Unions which in turn will enhance the prospects of an agreeable resolution to the issue.

Moreover the proposal to shorten the minimum time that employers are required to consult is contrary to the provisions of the European Directive on collective redundancies.

At present s.188 (1A) Trade Union & Labour Relations (Consolidation) Act 1992 states that the proposed consultation *'shall begin in good time and in any event – (a) where the employer is **proposing** to dismiss... '*.

The Council Directive 98/59/EC Article 2 states *"Where an employer is **contemplating** collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement"*

The changes to the consultation period, if there are to be any, should focus on the early establishment of a consultation in line with the European Directive. Employers should be guided to consult with Trade Union representatives when redundancies are contemplated and not solely when they are proposed.

The Code of Practice, if it is to have any constructive purpose, should at least be designed to promote mutual trust and confidence between employers and workers. In the opinion of the NUM this is unlikely to be achieved unless employers are encouraged to make full disclosure and enter into consultation with worker representatives from the moment redundancies are contemplated and certainly prior to any proposals that dismissals take place.

Meaningful consultation should come as early as is possible and should begin at an informal stage. Encouraging employers to "put their cards on the table" and provide adequate information in the context of a fair and proper consultation procedure is more likely to have the desired effect of avoiding redundancies. Given the specific conditions that confront employers and workers in the mining industry the NUM considers that this outcome would be prejudiced if the period of consultation in collective redundancy situations was reduced.

In such circumstances the assurance of a minimum of 90 day period where an employee will continue to be paid a salary and will have the opportunity to seek alternative employment within the company or outside with the knowledge that their employer is engaging in meaningful consultation with their Trade Union. This will be a more effective way of ameliorating the uncertainty of the redundancy situation.

The morale issue that is so focused on in the consultation proposal is not explained in sufficient detail. Is it correct to state that the Government proposes that reducing the timescale for redundancies from 90 days to 30 days will actually boost morale? There is nothing in the consultation which makes reference to the shortening of the consultation period as having an adverse effect on morale. As the Government seeks to remove and reduce workers rights systematically they are creating a hire and fire culture which treats workers as an expendable commodity which can be manipulated at the whim of an employer.

As is stated in the consultation response by the National Union of Mineworkers the cultural change here needs to be one of establishment of trust. Employers need to stop viewing their workers as commodities to be changed and exchanged as and when it suits them. The vast majority of employees and trade unions understand the difficulties that are faced by businesses. If Trade Unions and employees are engaged at a time when redundancies are being 'considered' and not 'proposed' then the consultation can have a significant effect by to reducing the outcome of the level of redundancies. If employers took sufficient time to consult with their employees this may create opportunities for workers to make constructive proposals to avoid the necessity for redundancies.

The Consultation response form provides little opportunity for this issue to be addressed. The Code of Practice should encourage businesses to enter into consultation with representatives from the moment the redundancies are contemplated and before having to make proposals that the dismissals be made.

Good quality consultation should come as early as is possible and should begin at an informal stage. Encouraging employers to provide adequate information along with a fair and proper procedure will allow for consultation to have the desired effect of avoiding redundancies.

Where the consultation period is reduced dramatically the present law will become even more remote from the objectives of the European Directive and will allow employers to propose mass redundancies with little regard as how best to avoid them. Inevitably this will have the consequence of more, not less, litigation and industrial unrest.

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Permanent Building
Regent Street
Barnsley
South Yorkshire
S70 2AF

Ref: HE/TP/N1155/118

1. Your name:

TSSA

2. What organisation do you represent (if any)?

TSSA

3. E-mail address:

stansfieldv@tssa.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - We do not agree that there is a need for changes to current arrangements. The Impact Assessment, while providing no empirical evidence whatsoever, accepts

Line2 - anecdotal evidence that a 45 day period would improve the 'quality' of consultation while dismissing evidence that average consultation takes 86 days.

Line3 - This is a loaded question. We do not agree with either proposal

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

No

9. Please provide comments to support your answer.

Line1 - There is no government "assessment" in the Impact Assessment. The matter is hardly mentioned, other than to confirm that current guidance does not address the issue and to confirm that employers are

Line2 - able under current rules to circumvent the 90 day consultation requirement by manipulating the concept of an 'establishment'. This suggests they will continue

Line3 - to do so under the proposed 30/45 day limit unless the definition of establishment is contained in legislation.

Line4 - It may, depending on how well and precisely it is defined, but guidance is only that, it would have no standing in statute and without the certainty of legislation it would be subservient

Line5 - to current and new case law, meaning there would still be insufficient clarity

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

No

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

No

12. Please provide comments to support your answer.

Line1 - Codes of Practice have no authority within themselves, their only value is that they may be referred to by a tribunal. As the government's forthcoming charging regime

Line2 - is designed to make it virtually impossible for claimants to go to a tribunal, employers will have carte blanch to ignore them

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

No

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

Line1 - Our experience is that it is a very rare employer who will follow guidance and Codes of Practice unless they are forced to by legislation.

Line2 - The current guidance is clear and comprehensive. It was issued in 2006 so needs to be regularly updated to take account of changes to case law, but it is safe to assume that employers

Line3 - large enough to be contemplating redundancies of this magnitude would have, or have access to, Human Resource departments with sufficient expertise to understand

Line4 - and be able to explain consultation requirements to line mangers involved in the redundancy process

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

Line1 - If, as the Impact assessment states, there is confusion among employers over a system that has remained in place since 1974, then it is unlikely that a new Code of Practice

Line2 - is likely to improve matters. Therefore, in order to effect the 'necessary culture change' it will be necessary to make it a statutory requirement to follow the Code of Practice throughout

Line3 - the consultation/redundancy process, backed up by legal sanctions for not doing so.

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

Yes

17. If yes, please explain what other approaches you consider appropriate.

Line1 - Part of the reason for the minimum consultation period is to allow time to train staff representatives sufficiently to achieve the 'quality' consultation this reduction of the minimum periods is

Line2 - supposed to achieve. This move from a 90 day to a 30/45 day period must have a negative impact on that, especially in organisations where there is no trade union recognition and therefore no or very

Line3 - few trained representatives. It is also ironic that at a time when the government claims to want to improve consultation it is attacking the facility time afforded to staff representatives. This is

Line4 - time that they use not only for training, but for consulting with the workers who will be affected by redundancy as well as with management.

Line5 - In the large organisations where this consultation requirement exists it will necessarily take longer to consult fully.

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

Yes

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

Line1 - Insufficient data

21. 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?

No Response

REPRO DTP

From: Val Stansfield [stansfieldv@tssa.org.uk]
Sent: 19 September 2012 08:06
To: Collective Redundancies
Subject: TSSA submission

Attachments: Collective Redundancies consultation form.doc

Collective
edundancies consul.

Val Stansfield
Employment Rights Adviser
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Join TSSA on-line at:
http://www.tssa.org.uk/en/join-us/join-intro.cfm

BIS | Department for Business Innovation & Skills

Collective Redundancies: Consultation on changes to the rules : Response form

A copy of the consultation on **Collective Redundancies: Consultation on changes to the rules** can be found at:

http://www.bis.gov.uk/consultations

You can complete your response online through Survey Monkey : **(**https://www.surveymonkey.com/s/36S3QYT**)**

Alternatively, you can email, post or fax this completed response form to

Email:

collectiveredundancies@bis.gsi.gov.uk

Postal address:

Carl Davies
Department for Business, Innovation and Skills (BIS)
3 Abbey 2
1 Victoria Street
London SW1H 0ET

Fax: 0207-215 6414

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: **19 September 2012**

Your details

Name:

Organisation (if applicable): TSSA

Address: Walkden House, 10 Melton Street, London, NW1 2EJ

Telephone: 2073872101

Fax: 2073830656

Please tick the boxes below that best describe you as a respondent to this

- ☐ Business representative organisation/trade body
- ☐ Central government
- ☐ Charity or social enterprise
- ☐ Individual
- ☐ Large business (over 250 staff)
- ☐ Legal representative
- ☐ Local government
- ☐ Medium business (50 to 250 staff)
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☒ Trade union or staff association
- ☐ Other (please describe)

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

Yes ☐ No ☒ Not sure ☐

We do not agree that there is a need for changes to current arrangements. The Impact Assessment, while providing no empirical evidence whatsoever, accepts anecdotal evidence that a 45 day period would improve the 'quality' of consultation while dismissing evidence that average consultation takes 86 days.

Question 2: Which of the two proposed options should replace the 90-day minimum period?

30 days ☐ 45 days ☐ Not sure ☐

Please explain why you think your choice would better deliver the Government's aims than the alternative option.

This is a loaded question. We do not agree with either proposal

Question 3: Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes ☐ No ☒ Not sure ☐

Please provide comments to support your answer.

There is no government "assessment" in the Impact Assessment. The matter is hardly mentioned, other than to confirm that current guidance does not address the issue and to confirm that employers are able under current rules to circumvent the 90 day consultation requirement by manipulating the concept of an 'establishment'. This suggests they will continue to do so under the proposed 30/45 day limit unless the definition of establishment is contained in legislation.

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

Yes ☐ No ☒ Not sure ☐

It may, depending on how well and precisely it is defined, but guidance is only that, it would have no standing in statute and without the certainty of legislation it would

be subservient to current and new case law, meaning there would still be insufficient clarity

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?

Yes ☐ No ☒ Not sure ☐

Please provide comments to support your answer.

Codes of Practice have no authority within themselves, their only value is that they may be referred to by a tribunal. As the government's forthcoming charging regime is designed to make it virtually impossible for claimants to go to a tribunal, employers will have carte blanch to ignore them

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?

Yes ☐ No ☒ Not sure ☐

Our experience is that it is a very rare employer who will follow guidance and Codes of Practice unless they are forced to by legislation.

Question 7: What changes are needed to the existing Government guidance?

The current guidance is clear and comprehensive. It was issued in 2006 so needs to be regularly updated to take account of changes to case law, but it is safe to assume that employers large enough to be contemplating redundancies of this magnitude would have, or have access to, Human Resource departments with sufficient expertise to understand and be able to explain consultation requirements to line mangers involved in the redundancy process

Caveat: see our answer to Q8

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

If, as the Impact assessment states, there is confusion among employers over a system that has remained in place since 1974, then it is unlikely that a new Code of Practice is likely to improve matters. Therefore, in order to effect the 'necessary culture change' it will be necessary to make it a statutory requirement to follow the Code of Practice throughout the consultation/redundancy process, backed up by legal sanctions for not doing so.

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

Yes ☒ No ☐ Not sure ☐

Part of the reason for the minimum consultation period is to allow time to train staff representatives sufficiently to achieve the 'quality' consultation this reduction of the minimum periods is supposed to achieve. This move from a 90 day to a 30/45 day period must have a negative impact on that, especially in organisations where there is no trade union recognition and therefore no or very few trained representatives.

It is also ironic that at a time when the government claims to want to improve consultation it is attacking the facility time afforded to staff representatives. This is time that they use not only for training, but for consulting with the workers who will be affected by redundancy as well as with management. In the large organisations where this consultation requirement exists it will necessarily take longer to consult fully.

Question 10: Have we correctly identified the impacts of the proposed policies?

Yes ☒ No ☐ Not sure ☐

If you have any evidence relating to possible impacts we would be happy to receive it.

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?

Insufficient data

Question 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?

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URN 12/808

1. Your name:

TUC - Hannah Reed

2. What organisation do you represent (if any)?

TUC

3. E-mail address:

HReed@TUC.ORG.UK

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No

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

45 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - But would rather keep 90.

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

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

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

Yes

12. Please provide comments to support your answer.

No Response

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

No

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

No Response

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

No Response

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

Yes

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

Repro Colour

From: Hannah Reed [HReed@TUC.ORG.UK]
Sent: 19 September 2012 16:10
To: Davies Carl (RGFL); Collective Redundancies
Cc: Hannah Reed; Sarah Veale
Subject: TUC response to the BIS consultation on collective redundancies

Attachments: Collective Redundancies TUC FINAL Response to BIS Consultation.docx

Collective
edundancies TUC FI

Please find attached the TUC response to the BIS consultation on collective redundancies.

Please feel free to contact us if you have any questions.

With best wishes

Hannah

Hannah Reed
TUC Senior Employment Rights Officer
Tel: 020 7467 1336
Mob: 07766 250083

Collective Redundancies

TUC Response to BIS Consultation on changes to the rules

Executive Summary

The Trades Union Congress (TUC) has 53 affiliated trade unions which represent around 6 million members working in a wide variety of sectors and occupations, including in the public, private and voluntary sectors.

Trade union officials and union workplace representatives have extensive experience of negotiating with employers over collective redundancies and during restructuring exercises. Trade unions are currently representing members in many redundancy situations. Some involve small groups of employees. Others can involve many thousands of workers.

It is a matter of serious concern to the TUC that the government has decided to consult on proposals which would substantially weaken the rights of working people and their representatives in collective redundancy situations. There is substantial evidence that collective rights, including the rules on collective redundancies make an important contribution developing high trust, high productivity workplaces. Trade union reps also play an important role on promoting good employment relations and in resolving disputes in the workplace

The TUC is firmly opposed to plans to reduce the minimum consultation period where employers are proposing to make 100 or more employees redundant. This proposal will do nothing to save jobs or to improve UK economic performance. Rather the government appears intent on enablingemployers to lay off staff more quickly and to cut their wages bill.

The proposals will limit the opportunities for unions to development and seek agreement from employers on alternatives to redundancies. This will increase job insecurity, damage workforce morale and reduce the incomes of those facing redundancy, making it more difficult for them to cover their household bills or to fund the training needed to find new employment.

Reducing consultation periods is likely to have cost implications for the Exchequer through the increased the reliance on welfare benefits. There is also evidence that job losses and spells of unemployment lead to lower future earnings.[1]Gregg, Knight and Wadsworth have estimated that job losses result in wage losses of ten per cent on average.[2] If, as projected, weakened redundancy rights leads to increased job turnover, this will mean that household incomes will fall, levels of demand will be suppressed, and tax revenues will decline.

The government has also failed to provide any substantial evidence justifying the proposed changes. As the consultation document and Impact Assessment acknowledge,

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[1] BIS (2012) *Collective Redundancies: Consultation on changes to the rules – Impact Assessment* p.17

[2]Paul Gregg, Genevieve Knight and Jonathan Wadsworth (2000), *'Heaven knows I'm miserable now: Job insecurity in the British Labour market'* in *'The insecure workforce'* ed. Edmund Heery and John Salmon, Routledge Studies in Employment Relations. London: Routledge

the government's decision to weaken redundancy rights is based on anecdotal evidence and the perception of employers.

The TUC does not accept the argument that UK law 'gold-plates' the Directive. Current arrangements in the UK fall far short of practices in other EU Member States. Reducing consultation rules will make UK workers more vulnerable than their EU counterparts to plant closures and job losses where multinationals decide to restructure.

The TUC also strongly refutes the proposition that existing consultation arrangements are outdated and damage the competitiveness of British businesses. Such arguments are not substantiated by evidence from other EU countries, many of which have more complex consultation arrangements.Nevertheless their productivity levels, economic and labour market performance match, if not exceed, that of the UK.

On the issue of the development of a non-statutory Code of Practice, the TUC recognises the benefits of clear guidance for employers, workers and trade unions. It is essential, however, that any future guidance encourages the adoption of best practice by employers and full compliance with EU law obligations.Given its expertise and experience, we believe that Acasshould play a central role in developing either a Code of Practice.The TUC is willing to participatein future consultations and working parties on guidance.

We are not convinced however that the development of a non-statutory Code of Practice or guidance will be sufficient by itself to improve the quality of consultation. This will only be achieved through the adoption of strengthened legislation. In particular the TUC believes that 20 employee threshold for when the duty to consult applies should be removed. This change would help to ensure that the duty to consult applies equally to all redundancies and in all workplaces. Failing this, employers should be under a duty to consult where they are proposing to make 20 or more employees redundant within an 'undertaking'.

The TUC believes that the government shouldplay an active role in promoting the benefits of meaningful consultation and negotiations on collective redundancies. Consideration should be given to ways of promoting wider engagement between employers and unions, including through wider use of the Information and Consultation of Employee Regulations 2004.

The following sections provide detailed responses to the questions raised in the call for evidence.

Response to consultation questions

Question 1:

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

The TUC fundamentally disagrees with the government's overall approach to the rules on collective redundancy consultation. We are strongly opposed to the proposals to reduce the minimum period of consultation from 90 days to 45 days or even 30 days.

The consultation document sets out three key objectives for reform:

- To improve the quality of consultation

- To ensure that employers can restructure effectively to respond to changing market conditions
- To balance the interests of the employees made redundancy with those who remain

Whilst the TUC agrees with some of the stated objectives, we believe that the government's proposals will prove highly counter-productive and will weaken worker protection. These proposals will do nothing to create jobs or improve economic performance.

Rather the introduction of shorter consultation periods will lead to a loss of jobs; mean that businesses are less likely to retain skilled staff; damage workplace morale and productivity; and reduce the incomes of individuals and households affected by redundancies and restructuring. Increased job insecurity is also likely to damage consumer confidence and suppress demand.

a) Improving the quality of consultation

The TUC disagreesthat reducing the minimum 90-day period will improve the quality of consultation. Instead, there is a serious risk that the proposals will send a clear signal to employers that there is no need to engage in meaningfuldialogue.

The TUC recognises that many employers engage in genuine negotiations with trade unions with a view to avoiding job losses and to mitigating the effects of redundancies and restructuring exercises. The TUC and union submissions to the BIS call for evidence highlighted how by working constructively together during the 2008 recession unions and private sector employers succeeded in saving jobs, avoiding business failures and in reducing the skills drain from the manufacturing and service sectors.The proposed policy changes will undermine such good practice and will actively deter good employers from engaging in more comprehensive consultation.

The proposed reduction in the time set aside for consultation will reduce the capacity of union representatives to develop alternatives to redundancies. Shorter consultation periods will mean also that employers are less likely to exhaust all options for avoiding redundancies. This will lead to unnecessary job cuts and the loss of skilled staff for businesses.

b) Enabling businesses to restructure in response to changing market conditions

The TUC does not agree that consultation rules need to be revised in order to ensure that employers can restructure effectively in response to changing market conditions. As the consultation document and the accompanying impact assessment acknowledge, the UK labour market is already very flexible and characterised by a high degree of churn.[3]The OECD ranks the UK as the thirdleast regulated out of 36 countries when it comes to overall employment protection legislation.[4]

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[3] BIS (2012) *Collective Redundancies: Consultation on changes to the rules – Impact Assessment* p.6

[4] OECD 2008; BIS (2012) *Dealingwithdismissal and 'compensated no fault dismissal' for micro businesses Call for Evidence* p32

The TUC contests the proposition that existing consultation arrangements are outdated and damage the competitiveness of British businesses. As the OECD evidence confirms collective redundancies and restructuring is highly regulated in countries such as Germany, the Netherlands and Scandinavia. Nevertheless their labour markets performance matches, if not exceeds, that of the UK.[5] It is widely recognised that the German system of co-determination and collective bargaining has made a significant contribution to the delivery of an effective industrial policy; to the performance of the German labour market, including the sustained period of employment growth since 2008; and the overall success of the German economy.

The TUC also does not accept the argument that UK law gold-plates the Directive and therefore that the rights of UK workers should be reduced. The rules in the UK fall well short of practices in other parts of the EU. According to OECD analysis the UK ranks 14th out of 33 countries on employment protection legislation for collective dismissals, and is less regulated than Norway, the Netherlands, Denmark, Germany, Sweden, Luxembourg, Spain and Italy.[6]

The law in other EU member states may not specify minimum periods of consultation. However, their consultation arrangements are far more complex than those in the UK and take longer to complete.[7]In some countries, public authorities play an active role in determining whether redundancies are justified. For example, in the Netherlands, the regional employment office can extend the consultation period if they determine that alternatives avenues have not been fully explored.[8]

In other countries, works councils play an active role, including in redundancy consultations and in negotiating a social plan. In Germany, when agreement cannot be reached on the social plan,the issue can be referred to arbitration for determination. Other countries also have more rigorous penalties than the UK where an employer fails to carry out proper consultation. In some countries a declaration can be issued stating that dismissals cannot take place until consultation procedures have been properly observed.

Compared with many other EU counterparts, UK workers already enjoy very limited protection in collective redundancy situations. If law is weakened further UK workers will become be even more vulnerable to redundancies where multinationals decide to close a plant in one country or to lay off staff.

The TUC is also concerned that the government's proposals will encourage employers to take a short–term approach to restructuring exercises. Research carried out by Acas suggests that during the 2008 downturn private sector businesses were willing to take a different approach to the current economic downturn than in previous recessions.

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[5] TUC (2012) *Dealingwithdismissal and 'compensated no fault dismissal' for micro businesses* TUC responseto the BIS Call for Evidence: http://www.tuc.org.uk/workplace/tuc-21225-f0.pdf

[6] OECD 2008; BIS (2012) *Dealingwithdismissal and 'compensated no fault dismissal' for micro businesses Call for Evidence* p34

[7] IDS (2000) Employment Europe 458 pp 11-16

[8] Ibid

'Although unemployment continues to rise there appears to be a widely held view that this time round there has been less of a 'slash and burn' approach by employers.'

'The view of some commentators, including employer groups such as the Engineering Employers Federation (EEF), is that employers are including 'taking a more long-term view, seeking to work in partnership with unions and their employees to avoid job cuts and find new ways of working.'[9]

The proposed changes to collective redundancy consultation rules threaten to undermine or even reverse these trends. They will create a clear financial incentive for businesses to cut consultation processes short in order to save on immediate wage costs rather than focusing on the need for long term investment in skills, productivity and innovation.

The TUC believes that effective information, consultation and collective bargaining arrangements can make a major contribution to the development of high trust, high productivity workplaces in the UK. Rather than trying to create economic growth through deregulation, the government should:

- Develop and strengthen the role for worker participation within businesses.
- Introduce a modern industrial strategy that focuses on those strategic sectors in which the UK could compete in the age of globalisation. This should focus on important existing sectors, but also support the growth of those new industries, most obviously in green technology, which are not yet established, but in which the UK could become a world-beater for decades to come;
- Create a business bank, with the same borrowing powers enjoyed by a normal bank, to ensure that strategic industries have access to funding;
- Reform procurement policy, so that rather than buying on the basis of low cost, the spending power of government can be used to increase skills, sustainability and equality in the workforce.

c) Balancing the interests of employees made redundant with those who remain

The TUC agreesthat collective redundancy consultations should seek to balance the interests of employees made redundant with those who remainin employment.It is well documented that redundancies and restructuring have adetrimental impact on the morale and well-being of those who remain within organisations[10] as well as those who are made redundant[11]. However, shorter consultation periods will not serve the interests of either those facing redundancy or those who remain in employment.

Whilst the introduction of shorter consultation periods may provide greater certainty for those at risk of redundancy; it will also mean that employees are less likely to retain

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[9] http://www.acas.org.uk/CHttpHandler.ashx?id=2694&p=0

[10] Thomas Kieselbach et al, (2009) *Health in restructuring: Innovation Approaches and Policy Recommendations.* Project supported by DG Employment, Social Affairs and Equal Opportunities, European Commission. University of Bremen.

[11] *Good Work and Our Times*, a report of the Good Work Commission, Lucy Parker and Stephen Bevan, July 2011. The Work Foundation.

their jobs or to benefit from redeployment opportunities. The TUC submission to the call for evidence included case studies illustrating how unions and employers successfully used longer consultation periods to identify ways of avoiding redundancies through efficiency savings, winning new contracts or negotiating short term working patterns.

Employees facing redundancyrely on the pay they receive during the 90 day consultation to meet their household bills and to access training. They also use the 90 day period to start to look for new employment. Contrary to the view expressed in the consultation document, it is often not possible for individuals to find work during their statutory or contractual notice period. This is particularly the case in times of recession when there is a high ratio of job seekers to each vacancy.According to official statistics published in July 2012, in some parts of the UK, there are 21 job seekers to each vacancy[12].Recent unemployment figures also reveal that nearly half (44.5 per cent) of unemployed workers aged over 50 have now been out of work for a year or more. The number of 18-24 year olds out of work for at least six months has increased, rising by over a third in the last 12 months to reach 403,000.[13]

Shorter consultation periods are also likely to have a detrimental impact on morale amongst the remaining workforce and will make it more difficult for management to retain valued staff. Findings from a CIPD survey in 2009 revealed that seven out of ten of employees whose organisations have made redundancies report that job cuts have damaged morale, with more than a fifth (22%) of employees so unhappy as a result of how redundancies are being handled that they are looking to change jobs as soon as the labour market improves.[14]

If the government is serious about seeking to balance the interests of employees made redundant with those who remain, they should abandon the proposal to reduce the minimum 90 consultation period.

Instead, the government should raise awareness of the fact that the duty to consult applies not only to those employees who the employer proposes to dismissbut also to those who might directly or indirectly *be affected* by the proposed dismissals, or by measures taken in connection with those dismissals. The future Code of Practice or guidance should encourage employers to consult on the impact of redundancies and restructuring on the remaining workforce, including the effects of the redistribution of tasks and responsibilities, increased workloads, and changes to working patterns.

The law should also be amended to allow employment tribunals to make protected awards in respect of those individuals who remain in employment and who were *affected* by any redundancies or restructuring exercise. Although duty to consult was extended in 1999 to include those affected by redundancies, the rules relating to protected awards did not change. Protected awards can currently only be made in relation to individuals who have been dismissed as redundant. Extending protected

[12] http://www.tuc.org.uk/economy/tuc-21326-f0.cfm

[13] http://www.tuc.org.uk/economy/tuc-21226-f0.cfm

[14] *'Employee Outlook: Job seeking in a recession'* CIPD Quarterly Survey Report Summer 2009.

awards would increase the incentive on employers to take the interests of the remaining workforce into account when reorganising their workplace.

Wider issues

The TUC welcomes the government's decision not to reduce the level of protected awards in situations where employers fail to consult properly in larger redundancy situations. However unions report that employers often fail to take consultation seriously, refuse to meet or engage with unions and are not willing to countenance any changes to restructuring proposals. In some workplaces, employers completely ignore their legal obligations. The proposed policy changes will do nothing to remedy this state of affairs. The TUC believes that the sanctions for failures to consult should be strengthened. Employment tribunals should have the power to rule that redundancies dismissals cannot take effect until proper consultation has taken place.

The TUC is seriously disappointed that the government has decided not to take steps to deter or prevent employers from using s188 redundancy notices to impose cuts in pay and conditions. In our opinion, such practices represent a serious abuse of EU collective redundancy consultation rules. The TUC particularly objects to comments contained in paragraph 4.68 suggesting that the proposed reduction in the 90 day consultation period should reduce delays in such restructuring exercises. Such practices lead to a reduction in household incomes, seriously damage workforce morale and in some instances lead to industrial disputes. The TUC believes that the government should focus on deterring such practices, rather than promoting them.

The TUC supportsproposals which ensure that employees, trade unions and employers can access support and advice from government agencies at an early stage. This will assist employees to carry out job searches, develop their CVs and to find alternative employment.

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.

As outlined above the TUC is fundamentally opposed to any reduction in the 90-day minimum consultation period. This move will do nothing to protect jobs or improve economic performance but it will substantially weaken worker protection.

The TUC believes that the proposals for a minimum consultation period of 30 or 45 daysare not practical.Larger redundancy exercises are complex and the issues involved will evolve over time. We do not believe it will be feasible for employers to cover all the key stages, including consultation on the reasons for redundancies and ways of avoiding redundancies; selection processes and redeployment exercises, within 45 days.

If the government is intent on reducing the consultation period in redundancies affecting 100 or more employees, then theminimum period of consultation should be 45 rather than 30 days.However the TUC emphasises that we believe the 90 day period should be retained.

Questions 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.

The TUC recognises that the issue of what constitutes an 'establishment' creates uncertainty for employers and unions alike. The establishment test means that it is all too easy for businesses to be sub-divided into different units in order to avoid consultation duties. Paragraph 3.8 of the consultation document acknowledges that employers have attempted to break up redundancies into small units in order to avoid longer consultation arrangements.

However the TUC strongly disagrees that the best way to address this issue is reduce the 90-day consultation period.In our opinionit is fundamentally wrong for the government to reward employer's avoidance tactics by reducing basic rights for working people.

Insteadthegovernmentshould take active steps to prevent employers from avoiding the duty to consult on collective redundancies with a view to reaching agreement on ways of avoiding redundancies or mitigating the effects of necessary job losses.

To this end, the TUC proposes that the 20 employee threshold for consultation rights should be removed. This change would help to ensure that the rights to consultation apply equally to all workplaces in the UK and to all redundancy situations. It would ensure that employees working in small businesses were not deprived of the basic right for their workplace representatives to be consulted on ways of avoiding or mitigating the effects of redundancies. It would addressed the anomalies and injustice exposed by the recent experience of Woolworths employees, some of whom missed out on protected awards because fewer than 20 employees were employed in their store. It would limit the ability of employers to fragment their businesses to avoid their employment law obligations. It would enable employees in small firms to have a voice and to contribute to decision making in their workplace.

Failing this approach, the TUC believes that the 'establishment' test should be replaced with an 'undertaking' test. We disagree that this amendment would not be in keeping with the Directive. Arguably the requirement that an employer must be proposing to make 20 or more employees redundant in each single establishment for the rights to consultation to apply is itself inconsistent with EU law. Article 1(a) of the Directive permits Member States to choose from different thresholds. However none of the prescribed thresholds relates to the number of employees to be made redundant in a *single establishment*. Rather the Directive refers to different numbers of employees in *'establishments'* in the plural. A literal interpretation of the Directive would mean that when determining whether the duty to consult applies the relevant factor is the accumulated number of employees the employer is contemplating making redundant in any*one or more* establishments. The TUC understands this legal point has already been raised before an employment tribunal and it is foreseeable that the courts will revisit it in the near future.

The TUC's proposal to replace the term 'establishment' with 'undertaking' isa straightforward way of giving effect to Article 1(a) of the Directive. Alternatively, UK law could state that the duty to consult applies where an employer contemplates making 20 or more employees redundant in any one or more establishments, although this would mean that the courts and tribunals would need to continue to interpret and apply the 'establishment' test.

The TUC hopes that the government will reconsider our proposals.

Beyond this, the TUC agrees UK legislation should not be amended to define what is meant by an 'establishment'. In *Rockfon A/S v SpecialarbejderforbundetiDanmark*[15], the ECJ confirmed that 'establishment' is a term of community law and cannot be defined by Member States. In the *AthinaikiChartopiia* case [2007] IRLR 284 the ECJ also stated that the concept of an 'establishment' must be interpreted purposively.

Question 4:

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

If the governmentdecides that a non-statutory Code of Practice should be developed, it is essential that the Code defines what is meant by an establishment in very broad terms. The TUC agrees that a wide range of factors need to be taken into account when deciding what constitutes an 'establishment'[16] The Code should activelydiscourage employers from breaking up businesses into separate units to avoid EU consultation duties.

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.

The TUC would strongly oppose any change to UK legislationwhich sought to exclude individuals employed in fixed term contracts from the scope of the right to consultation on collective redundancies.

Similarly, the future Code of Practice or non-statutory guidance should not suggest that employers can exclude staff on fixed term contracts from consultation arrangements. This approach would not be compatible with the requirements of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

The TUC agrees that the EAT decision in the *Stirling* case is not consistent with previous case law on this issue and is now the subject of an appeal. Therefore it should not form the basis of guidance.

Rather the guidance should highlight employers' obligations not to treat fixed term employees less favourably in relation to:

- selection for redundancy. It is unlawful for an employer to select an individual for redundancy on the grounds that they are employed on a fixed term contract
- general terms and conditions of employment and
- redundancy pay

It should also remind employers that before deciding to dismiss a fixed term employee as redundant they are required to carry out individual consultation meetings and to

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[15] C-449/93

[16] BIS (2012) *Collective Redundancies: Consultation on changes to the rules*, p 27.

explore any redeployment opportunities. Failure to do so can result in a successful complaint to an employment tribunal for unfair dismissal.

The guidance should also highlight the benefits of including fixed term workers in consultation arrangements in terms of workforce morale and team-building. It also reduces the risk of employment tribunal complaints.

The TUC believes thatthe duty to consult on collective redundancies should be extended to cover agency workers and other casual workers. The terms of the Directive are not limited to 'employees', as is the case in the UK. Rather the Directive applies where an employer contemplates making 'workers' redundant. The TUC therefore believes that UK law is not consistent with the Directive and should be amended.

Question 6:

Have we got the balance right between what is for statute and what is for guidance and a Code of Practice?

No.

The TUC recognises that employers, employees and trade unions could benefit from clear guidance on collective redundancy rules. However, we are not convinced that the introduction of guidance by itself will improve the quality of consultation on redundancies or improving compliance with EU law.

As argued throughout this response, the TUC believes that UK law should be strengthened in a number of key respects. In summary:

- The duty to consult on collective redundancies should be extended so that it applies to all workers, including agency workers, casual workers and freelancers.
- The 20 employee threshold should be removed.
- The 'establishment' test should be replaced by an 'undertaking' test.
- The law should be amended in line with the ECJ decision in *Junk*.[17]It should clearly state that redundancy notices cannot be issued before consultation has been completed.
- The sanctions for failure to consult should be reviewed and strengthened.

Question 7:

What changes are needed to the existing government guidance?

The TUC recognises the potential benefits of clear guidance for employers, employees and trade unions. Given its expertise and experience, we believe that Acas should play a central role in developing either a Code of Practice or guidance. TheAcas' *Redundancy Handling*booklet provides a useful template for the guidance. The TUC is willing to participate in future consultations and working parties.

In addition, the TUC believes that future guidance should:

- promote the benefits of effective and meaningful consultation and negotiations between employers and trade unions on collective redundancies

[17] *Junk v Kuhnel* C-188/03 (ECJ); [2005] IRLR 310

- promote full compliance with EU law[18]
- encourage employers to negotiate and agree redundancy policies with unions in advance of redundancy situations. This will assist employers and unions to focus on ways of avoiding redundancies rather than on how consultation should be conducted.
- emphasise that consultation must be undertaken with *a view to reaching agreement*. The guidance should reflect ECJ case law which states that consultation should be akin to negotiation.[19] Employers have a duty to provide time for unions to develop alternatives to redundancies and give serious consideration to their proposals. There should also be evidence that employers have adjusted their plans in the light of proposed alternatives.
- be sufficiently flexible, recognising that redundancy situations will vary significantly from according to the circumstances.
- clearly explain the types of information which must be provided to union reps and workplace reps.
- 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. The guidance could helpfully set out a range of options which employers and unions might consider, including efficiency savings, redeployment exercises, identifying new orders, adjusting working patterns.
- emphasisethe 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.
- should encourage employers to assess and monitor the effect which restructuring has on the health and well-being of staff. Research confirms that there are strong links between job security and stress levels, with employers that

[18] *European Commission v United Kingdom: C*-484/04 [2006] 3 CMLR 1322

[19] *Junk v Kuhnel* C-188/03 (ECJ); [2005] IRLR 310

are planning redundancies being most likely to see a rise in mental health problems among staff.[20] The guidance should encourage employers to negotiate and agree action plans with recognised unions on ways of ameliorating the affects of restructuring on stress levels and staff health and well-being.

- encourage employers to provide facilities for union and workplace reps, including paid time off, office space and access to workplace email and communication systems.
- confirm that the special circumstances defence only applies in exceptional situations.

Question 8:

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

Whilst the TUC recognises the potential benefits of developing clear guidance for employers, employees and trade unions, this will not be sufficient to improve the quality of consultation or to ensure improved compliance with consultation duties.

Consideration should also be given to strengthening the sanctions which apply where an employer fails to consult on collective redundancies. The TUC believes employment tribunals should have the power to order that dismissals cannot take effect under consultation arrangements have been completed in full.

The government should actively promote the benefits of employers seeking to negotiate and reach agreement with trade unions on restructuring, work organisation, and where necessary redundancies. Effective negotiations can assist maintaining workforce morale and achieving increased workforce engagement. It can help to avoid and resolve workplace disputes.

Question 9:

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

The TUC agrees that employers should be able to access training on how to handle redundancies and how to carry out meaningful consultation. Acas should be provided with additional resources, enabling them to promote and provide such training.

The Code of Practice should encourage employers to ensure that all managers and HR professionals with responsibility for redundancies or restructuring are fully trained. The guidance should highlight the potential benefits of joint training for management and union reps. Joint training can help to develop a common understanding and agreement on how redundancy situations should and will be handled.

Employers should also be encouraged to negotiate and agree redundancy policies and procedures with trade unions in advance of any redundancy situations. Agreed policies

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[20]Thomas Kieselbach et al, (2009) *Health in restructuring: Innovation Approaches and Policy Recommendations.* Project supported by DG Employment, Social Affairs and Equal Opportunities, European Commission. University of Bremen; CIPD 2011 Absence Management Survey Report http://www.cipd.co.uk/hr-resources/survey-reports/absence-management-2011.aspx

can avoid the need for lengthy discussions on the processes which will be followed in redundancy situations and enable employer and unions to focus on identifying ways of avoiding redundancies.

The guidance should also profile the important role which union learning reps can play in assisting individuals who are to be deployed or at risk or redundancy to access new skills and support.

Question 10:

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

In the TUC's opinion the government has not provideda substantive evidence base to justify the decision to weaken collective redundancy consultation rules. The consultation document acknowledges that the government has based the policy conclusions on 'anecdotal evidence'[21] and the perceptions of businesses and employers' lobbying organisations. Undue weighting also appears to have been given to the views of a very small group of individual employees who responded to the consultation (13 in total). In contrast, the views of trade unions, which represent more than 6 million working people in the UK and are daily involved in redundancy exercises in a variety of workplaces, appear to have been largely disregarded.

The government has stated that one of the principle objectives of the proposed reforms is to improve the quality of consultation. However as paragraphs 98 – 104 of the Impact Assessment confirms there is a significant risk that the government's proposals will mean that *'some employers will reduce the amount of time for which they consult without addressing the quality of consultation.'*

The TUC agrees with the Impact Assessment that '*This could result in significant reductions in consultation periods over and above those envisaged ... and worse outcomes for employees.*' The Impact Assessment's proposed solution to this problem is that '*It will be necessary to ensure that employees' representatives, in particular unions, understand their roles both in contributing to an effective consultation process and in ensuring employers' compliance.*'

Whilst the TUC agrees that trade unions make a major contribution ensuring meaningful collective redundancy consultation takes place, in our opinion it is unacceptable for the government to attempt to delegate its responsibilities to ensure compliance with UK law and EU law in this manner. The government has an obligation to ensure there is compliance with and effective enforcement of consultation rights. To this end, the TUC believes that the sanctions for failing to consult should be strengthened.

Paragraph 102 also acknowledges that '*There is a further risk that a shorter minimum period could reduce the Government's ability to intervene in redundancies that could have a high social, economic or political impact. This could result in greater expense for the Exchequer due to longer-term unemployment of those affected.*' However the TUC does not share the government's optimism that in such cases *'the employer tends to recognise the significance of their actions and runs either an extended consultation or*

[21] BIS (2012) *Collective Redundancies: Consultation on changes to the rules*, p 12.

offers an extended notice period. 'In our opinion the government should not seek to rely on the voluntary choices of employers to ensure there is proper compliance with EU law standards.

Shortening consultation periods will also mean that good practice employers will face increased pressure to water down their workplace consultation arrangementsin order to avoid being undercut by their competitors. The only way of ensuring that proper consultation takes place in larger redundancies situation is by retaining the 90 day consultation period.

Question 11:

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

We would refer you to the TUC response to the BIS call for evidence on redundancies rules which can be found at http://www.tuc.org.uk/tucfiles/223.pdf.

Trades Union Congress
Congress House
Great Russell Street
London WC1B 3LS

contact:
Hannah Reed
020 7467 1336
hreed@tuc.org.uk

1. Your name:

UBS - Stephen Richardson

2. What organisation do you represent (if any)?

ubs

3. E-mail address:

stephen.richardson@ubs.com

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

Yes

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

45 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - It seems that most large companies are not entering into the spirit of the legislation and merely consult to tick the box on the form.

Line2 - We have seen our company start multiple 30 day periods within days to avoid a 90 day period.

Line3 - The 90 day period is useful as its gives reps time to canvass opinion, but shortening it employers will see it as a target to reach

Line4 - As employee reps we do not have much power, but being able to talk about redundancy for 90 days is useful and allows affected staff more time to plan for their next roles.

Line5 - As we still have to perform our day jobs in this period, its difficult to be seen to consult fully in a shorter period of time.

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

Yes

9. Please provide comments to support your answer.

No Response

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

Not sure

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

Yes

12. Please provide comments to support your answer.

No Response

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

Not sure

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

No Response

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

No Response

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

Not sure

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

Not sure

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

1. Your name:

UCATT - Kate Purcell

2. What organisation do you represent (if any)?

UCATT

3. E-mail address:

KPurcell@ucatt.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - UCATT is opposed to any reduction to the 90 day minimum period. However, UCATT would also strongly oppose a consultation period of 30 days

Line2 - 30 days will be wholly inadequate for any sort of meaningful negotiation to take place and will not allow adequate time to find solutions to avoiding job losses as set out above.

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

No

9. Please provide comments to support your answer.

No Response

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

No

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

No

12. Please provide comments to support your answer.

No Response

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

No

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

No Response

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

No Response

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

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No

19. If you have any evidence relating to possible impacts we would be happy to receive it.

Line1 - A reduction in the consultation period from 90 days to 45 or 30 days would have a disproportionate effect in the construction industry which has been hit particularly

Line2 - hard by the economic crisis and has seen a significant number of mass redundancies in recent years as outlined in the introduction.

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

Line1 - In UCATT's experience, this has varied widely, depending on how genuine the consultation was.

Line2 - Examples of companies failing to engage with any collective redundancy consultation are listed in response to question 7.

21. 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?

No Response

Repro Colour

From: Kate Purcell [KPurcell@ucatt.org.uk]
Sent: 18 September 2012 15:41
To: Collective Redundancies
Subject: Response from UCATT to consultation
Attachments: 120913 UCATT's submission to the collective redundancies consultation.pdf

Please find attached the submission from UCATT to the consultation on collective redundancies.

If you have any queries, please don't hesitate to get in touch.

Kate Purcell
Researcher
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UCATT House
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http://www.ucatt.org.uk

UCATT's response to the Department for Business, Innovation & Skills

Collective redundancies: consultation on changes to the rules

September 2012

Introduction

UCATT is the largest specialist trade union for construction workers in the UK and the Republic of Ireland, with members both in the public and private sectors. UCATT is the lead union among the signatories to the *National Working Rule Agreement of the Construction Industry Joint Council* and the *Joint Negotiating Committee for Local Authority Craft and Associated Employees*. UCATT is represented on a number of construction industry related bodies by the General Secretary including the *Strategic Forum for Construction*, the *Construction Industry Training Board* and the *Construction Skills Certification Scheme*.

UCATT's members in private companies are builders and craftspeople, refractory users, steeplejacks and lightning conductors and workers in the demolition industry. UCATT also represents workers in Local Government, the NHS, the Prison Service and the Ministry of Defence.

The construction industry has been badly affected by the recession and has seen a high level of redundancies in recent years: 112,000 in 2008, 166,000 in 2009, 92,000 in 2010 and 71,000 in 2011 according to national statistics. [i] UCATT therefore has significant experience of collective redundancies consultation.

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

No. UCATT does not agree that the period for collective consultation where more than 100 redundancies are proposed should be reduced from a minimum of 90 days. UCATT considers that the 90 day consultation period brings many benefits. It gives employees an

opportunity to access internal redeployment opportunities as well as training. It also enables them to seek alternative external employment.

The longer consultation period enables the employer to consider options such as selling off part of the business or find alternative income streams. It gives enough time for both the employee representatives and the employer to negotiate and try to find solutions. A shorter consultation period will result in a more rapid loss of jobs and mean less time for genuine consultation and alternatives to be found.

It can be time-consuming to find alternatives to redundancies in companies that are facing financial problems. In September 2010, UCATT was notified about the difficulties facing Connaught, a private contractor undertaking outsourced work for local government. As Connaught employed over 10,000 staff, it took many meetings to consult with its staff and also to liaise with the companies who expressed an interest in taking over some of the work. Construction company, Morgan Sindall, bought a proportion of Connaught's contracts, protecting 2,500 jobs and Sefton Housing Association, One Vision, decided to take their repairs and maintenance service in-house providing employment for an additional 90-100 workers. However, it takes time to finalise agreements as can be demonstrated by the plight of Connaught workers in Hull. It took 5 months to resolve the transfer of contracts to Kier and KWL, after Hull Council were unhappy with the initial proposed transfer to Lovells.

Additionally, a shorter consultation period puts both sides under strain and in UCATT's experience, this will invariably lead to escalations and potential disputes. If a consultation is to be "meaningful" then it will take time. The 90 day period offers a level of protection to the employer, reducing time pressures and offering the opportunity to explore options. UCATT has evidence of many employers who have failed to enter into meaningful consultations during collective redundancy processes and as a result UCATT has won employment tribunal cases. In February 2010, UCATT members were awarded £1.5 million against Atlas Holiday Homes, a Hull-based caravan company, for failing to consult sufficiently when making 333 employees redundant. The number of employers failing to fulfil the criteria for meaningful consultation will only increase if the process becomes truncated by time constraints.

Mass redundancies can have an enormous impact on the local economy, especially in areas of high unemployment. Reducing the consultation period in order to make it quicker and easier to make large-scale redundancies will have far reaching implications for areas of existing economic deprivation. Local job markets will be unable to accommodate the demand for alternative employment in a more compressed time-scale.

Furthermore, the 90 day consultation period can facilitate state intervention and in turn allows people to be re-trained and given help with finding new jobs. This clearly benefits the economy as a whole. Any cost to business by having a longer consultation period are offset

by the benefits such as finding a way of keeping jobs and allowing time for solutions to be found.

In fact, some employers have extended the 90 day consultation period to ensure that they undertake as exhaustive an investigation as possible into the options available and so that they can offer their staff the best possible support. It would be impossible in a 30 day period to fulfil obligations such as negotiating with trade union representatives, setting up meetings with staff affected, offering one-to-one consultations and counselling, liaising with local job centres, organising training for writing CVs and attending job interviews, providing debt management courses. The pressure would be increased for employers who do not recognise trade unions as they would have insufficient time to make the necessary arrangements to allow staff to elect representatives and set up a mechanism for consultation.

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.

UCATT is opposed to any reduction to the 90 day minimum period. However, UCATT would also strongly oppose a consultation period of 30 days. 30 days will be wholly inadequate for any sort of meaningful negotiation to take place and will not allow adequate time to find solutions to avoiding job losses as set out above.

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. UCATT has many examples of employers trying to avoid their duty to collectively consult where they close three or four construction sites but argue that they are different establishments.

Whilst paragraph 4.22 of the consultation suggests that geographical location will not be the only factor to take into account, the factors listed there are vague and are likely to raise as many questions as they answer. It is likely that this would lead to further litigation in relation to the issue of establishment and is unlikely to simplify the law.

Furthermore, under the Government's proposals, the issue of establishment would be in code form only. It would therefore lack legislative teeth and it is unclear what sanctions there would be, if any, in the event that the code is breached. As a result, it is likely that many of the issues around establishment would not be resolved.

UCATT recognises the Government's concern about defining establishment as an undertaking. However, a simple legislative definition would be a duty to collectively consult where an "employer" proposes to dismiss 20 or more employees within their organisation.

4. Will defining establishment in a code of practice give sufficient clarity?

No. See answer to Question 3 above.

5. Is the government right to address the fixed term contract issue in guidance under the proposed code of practice rather than in legislation? Please provide comments to support your answer.

No. It should be made clear in legislation that employees on a fixed term contract are included for the purpose of collective consultation. Employers need to be made more aware of their obligations to include fixed term workers in the numbers for collective consultation and if this is not put in a legislative footing, it does not provide sufficient clarity.

In addition, it is not clear whether a breach of a code would lead to any sanction. Therefore, employers may find that they inadvertently breach the Fixed Term Employees (prevention of less favourable treatment) Regulation 2002.

6. Have we got the balance right between what is for statute and what is contained in government guidance and a code of practice?

No. See answers above in relation to the need for legislation on the issue of establishment and fixed term contracts. Clear definitions are needed to provide clarity and certainty for both employers and employee representatives.

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

The guidance needs to make clear that consultation should be meaningful. In other words, this involves negotiation between the employer and the employee or any employee representatives. Consultations should not just be a tick box exercise.

UCATT also has evidence of companies trying to massage the number of redundancies that they actually intend to make by dividing the redundancies into smaller groups, in order to fall under the threshold of 100 employees and reduce their obligation to consult. Because of on-going negotiations, UCATT is not prepared to name companies guilty of this practice at this point but there are 2 companies in the Yorkshire region that have recently announced

redundancies. One company announced 70 redundancies, then shortly after the 90 day period, announced a further 50 redundancies. Another company announced 33 redundancies followed by a further 68 redundancies, bringing the total to 101.

UCATT accepts that redundancies can come in waves, especially if a company is facing financial difficulties that are not resolved as quickly as anticipated. However, in both of these cases, it was clear that the intention was to subvert the current legislation on the necessary 90 day consultation and to reduce their obligation to pay staff, as termination notices cannot be issued until after the consultation has been completed. Reducing the consultation period from 90 to 30 days will reduce the payments that staff are currently entitled to and will make it easier for employers to claim that connected redundancies are separate rounds.

The guidance should make it clear that the 30 day and 90 day consultation periods are the minimum requirement. If a longer period is needed for negotiations to be meaningful and for agreement to be reached, then this should be encouraged.

The guidance also needs to be clear that consultation has to begin when proposals are at a very early stage, not when a final decision has been made. This is particularly important for companies facing financial difficulties. Rather than alerting staff and stakeholders and putting staff on a 90 day notice period, which could be withdrawn if new orders materialise or a buyer is found, companies are concealing their financial difficulties and then going into administration. This results in no notice for staff, who are often informed by the media or by a notice on the locked gates of a site. It also has financial implications for the state as the Government then has pay for outstanding wages, holiday pay and redundancy from the National Insurance Fund. There is a growing trend of companies trying to hide the scale of their financial problems and UCATT has dealt with mass redundancies at construction company Rok with 1,800 redundancies nationally in November 2010; R. & D. Construction, Dumfries, 205 redundancies in April 2011; W. J. Harte, South Lanarkshire, 700 redundancies in January 2012; Brown Construction, Dundee, 100 redundancies in August 2012. None of these companies carried out any consultation and as a result, UCATT has and is still pursuing, in many cases, protective awards through the Employment Tribunal system because of the employers' failure to consult. If there had been timely and earlier consultation, there may have possible alternatives to closure.

8. How can we ensure that the code of practice helps deliver the necessary culture change?

As set out above, UCATT considers that change would be most effective through legislative change. For example, a clear and broad statutory definition of establishment would

facilitate a culture change whereby employers do not artificially try to avoid their duties to consult by making redundancies at lots of different sites.

However, as set out above, the code needs to make clear that consultation includes negotiation, that it must start at a very early stage and that a longer period than the minimum set out in statute may be necessary to reach agreement.

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

As outlined in the response to question 8 above, UCATT believes that a legislative approach is most effective.

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.

A reduction in the consultation period from 90 days to 45 or 30 days would have a disproportionate effect in the construction industry which has been hit particularly hard by the economic crisis and has seen a significant number of mass redundancies in recent years as outlined in the introduction.

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

In UCATT's experience, this has varied widely, depending on how genuine the consultation was. Examples of companies failing to engage with any collective redundancy consultation are listed in response to question 7.

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?

Not applicable.

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[1] http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/february-2012/table-red02.xls

1. Your name:

UFS - Lynda Merrett

2. What organisation do you represent (if any)?

UFS

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - Don't want either time period. See word form for reason

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

Not sure

9. Please provide comments to support your answer.

Line1 - UFS agrees that there are risks in creating a legislative definition and that it is likely that any such attempt would find itself subject to further legal challenge and interpretation in the courts.

Line2 - However UFS is concerned that, whilst there is room for interpretation, some employers, who do not wish to follow good employment relations,

Line3 - will continue to abuse the uncertainty in order to avoid the need to consult with trade unions.

Line4 - This will very much depend on how well drafted the code of practice is and how much emphasis is placed on employers to follow such a Code

Line5 - Again this will be particularly evident in employers who do not, as a matter of course, seek to follow best practice, which is unfortunately where the greatest need for such practice exists.

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

Not sure

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

Yes

12. Please provide comments to support your answer.

Line1 - It is agreed that attempting to exclude fixed-term workers from collective consultation processes would create a distinct conflict with the less favourable protections.

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

No

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

Line1 - Guidance and a code of practice will assist, but only if nothing is taken away from the current legislative requirements. As stated earlier, employers who are committed to best practice employment

Line2 - relations and who already understand the benefits of effective consultation are also likely to follow a Code of Practice. However those employers who are yet to understand the benefits are unlikely

Line3 - to implement improvements unless they are legally required to do so.

Line4 - The main hurdle is to ensure that employers are aware of the guidance and are in a position to fully understand the recommendations. Guidance is only effective if it is followed appropriately.

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

Line1 - The main difficulty here is that a culture change will only occur if the parties involved are willing or made to undertake such change. Simply creating a Code of Practice will not deliver any change,

Line2 - particularly if there is no incentive for it to be followed. As previously mentioned, the employers that already conduct positive employment relations practices may find clarity, but for those

Line3 - employers not invested in meaningful consultation, it is likely that no attention will be paid to it.

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

Yes

17. If yes, please explain what other approaches you consider appropriate.

Line1 - Training may assist and certainly in our experience we have ensured that any party to the consultation process (reps or managers) receives appropriate training before the consultation process begins

Line2 - (which would also be hindered by a shorter period). This has ensured that those involved understand what is required of them and can therefore add value to any discussions/activity.

Line3 - In fact, we have been involved in delivering training to other employee representative bodies in non-unionised organisations to great effect.

Line4 - However, it is difficult to see how this could be implemented from outside the organisation and, if not compulsory, would not reach the employers that are in most need of upskilling.

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

No

19. If you have any evidence relating to possible impacts we would be happy to receive it.

Line1 - The government has seriously under-estimated the detrimental impact of reducing the length of consultation and has missed the opportunity to

ensure that all employers approach consultation in a

Line2 - meaningful manner. It is our concern that these changes will result in more compulsory redundancies, more challenges to redundancy dismissals and may damage relationships between employers and

Line3 - employee representatives. By restricting the time for consultation it will also restrict the ability of employers and unions in gaining understanding and support for proposals from the affected

Line4 - workforces. The recent experience of UFS is that the extended 90-day period has given oppportunity to explain any proposals fully, to explore mitigate compulsory redundancies,

Line5 - e.g. to operate effective voluntary exercises, to liaise with other business areas to explore redeployment and retraining.

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

Line1 - UFS has been involved in numerous consultations. Time to reach agreement has varied depending on the proposals and the willingness of the employer to seriously consider alternatives. However we have

Line2 - certainly noticed a difference in the effectiveness of the process between individual, 30-day and 90-day periods and most shorter periods needed to be extended anyway, mainly due to the employer

Line3 - needing that time to refine its proposals. In the shorter consultations, there were missed opportunities and many more challenges to redundancy decisions as not all alternatives were properly explored

Line4 - and there was less time to effectively communicate with staff to ensure that they understood the process. There were also many logistical problems, mainly for employers, in arranging sufficient

Line5 - discussions within such short timescales particularly with larger exercises where many managers had to approve any decisions.

21. 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?

No Response

Repro Colour

From:
Sent: 18 September 2012 16:32
To: Collective Redundancies
Cc: lynda.merrett@ufsdirect.org
Subject: Response from UFS
Attachments: 12-808rf-collective-redundancies-consultation-form[1].doc

Dear Sir

Please find attached the response to the consultation on collective redundancies from UFS.

Regards

Lynda Merrett
Deputy General Secretary
UFS

BIS | Department for Business Innovation & Skills

Collective Redundancies: Consultation on changes to the rules : Response form

A copy of the consultation on **Collective Redundancies: Consultation on changes to the rules** can be found at:

http://www.bis.gov.uk/consultations

You can complete your response online through Survey Monkey : (https://www.surveymonkey.com/s/36S3QYT)

Alternatively, you can email, post or fax this completed response form to

Email:

collectiveredundancies@bis.gsi.gov.uk

Postal address:

Carl Davies
Department for Business, Innovation and Skills (BIS)
3 Abbey 2
1 Victoria Street
London SW1H 0ET

Fax: 0207-215 6414

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: **19 September 2012**

Your details

Name: Lynda Merrett

Organisation (if applicable): UFS

Address: Seasons Business Complex, Quat Goose Lane, Swindon Village, Cheltenham, GL51 9RX

Telephone: 1242263463

Fax: 1242263813

Please tick the boxes below that best describe you as a respondent to this

- ☐ Business representative organisation/trade body
- ☐ Central government
- ☐ Charity or social enterprise
- ☐ Individual
- ☐ Large business (over 250 staff)
- ☐ Legal representative
- ☐ Local government
- ☐ Medium business (50 to 250 staff)
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☒ Trade union or staff association
- ☐ Other (please describe)

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

Yes ☐ **No** ☒ **Not sure** ☐

UFS agrees with the core elements stated, but does not agree that the proposed changes will bring about improvements in these core elements. In fact, UFS believes that the proposed changes may actually hinder such improvements. By reducing the 90-day minimum this would actually restrict the opportunity to engage in quality consultation and limit the opportunity to improve positive relationships between employers and employee representatives.

The proposals of guidance and clarity is welcomed, but UFS is concerned that restricting this to non-statutory guidance will not address the confusion in employers with fewer HR resources and/or limited experience of effective consultation and may encourage employers currently undertaking effective consultation to allocate less importance to this. This will restrict the opportunity for both employers and employees to benefit from the positive aspects that constructive consultation can provide.

Question 2: Which of the two proposed options should replace the 90-day minimum period?

30 days ☐ **45 days** ☐ **Not sure** ☐

Please explain why you think your choice would better deliver the Government's aims than the alternative option.

UFS does not believe that the 90-day minimum should be replaced. If it was necessary to do so, then the longer the period the better, but any reduction would seriously impede the effectiveness and meaningfulness of any consultation process. In the experience of UFS, the use of a shorter consultation period is not only logistically difficult, but also means that many alternatives to redundancy are missed or not able to be pursued.

In fact our reps reported that "HR struggle to manage such exercises in 90 days. Reducing the period will inevitably result in further disarray and mean that employees will suffer extra stress at an already difficult time".

Question 3: Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes ☐ **No** ☐ **Not sure** ☒

Please provide comments to support your answer.

UFS agrees that there are risks in creating a legislative definition and that it is likely that any such attempt would find itself subject to further legal challenge and interpretation in the courts. However UFS is concerned that, whilst there is room for interpretation, some employers, who do not wish to follow good employment relations, will continue to abuse the uncertainty in order to avoid the need to consult with trade unions.

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

Yes ☐ **No** ☐ **Not sure** ☒

This will very much depend on how well drafted the code of practice is and how much emphasis is placed on employers to follow such a Code. Again this will be particularly evident in employers who do not, as a matter of course, seek to follow best practice, which is unfortunately where the greatest need for such practice exists.

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?

Yes ☒ **No** ☐ **Not sure** ☐

Please provide comments to support your answer.

It is agreed that attempting to exclude fixed-term workers from collective consultation processes would create a distinct conflict with the less favourable protections.

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?

Yes ☐ **No** ☒ **Not sure** ☐

Guidance and a code of practice will assist, but only if nothing is taken away from the current legislative requirements. As stated earlier, employers who are committed to best practice employment relations and who already understand the benefits of effective consultation are also likely to follow a Code of Practice. However those employers who are yet to understand the benefits are unlikely to implement improvements unless they are legally required to do so.

Question 7: What changes are needed to the existing Government guidance?

The main hurdle is to ensure that employers are aware of the guidance and are in a position to fully understand the recommendations. Guidance is only effective if it is followed appropriately.

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

The main difficulty here is that a culture change will only occur if the parties involved are willing or made to undertake such change. Simply creating a Code of Practice will not deliver any change, particularly if there is no incentive for it to be followed. As previously mentioned, the employers that already conduct positive employment relations practices may find clarity, but for those employers not invested in meaningful consultation, it is likely that no attention will be paid to it.

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

Yes ☒ **No** ☐ **Not sure** ☐

Training may assist and certainly in our experience we have ensured that any party to the consultation process (reps or managers) receives appropriate training before the consultation process begins (which would also be hindered by a shorter period). This has ensured that those involved understand what is required of them and can therefore add value to any discussions/activity.

In fact, we have been involved in delivering training to other employee representative bodies in non-unionised organisations to great effect.However, it is difficult to see how this could be implemented from outside the organisation and, if not compulsory, would not reach the employers that are in most need of upskilling.

Question 10: Have we correctly identified the impacts of the proposed policies?

Yes ☐ **No** ☒ **Not sure** ☐

If you have any evidence relating to possible impacts we would be happy to receive it.

The government has seriously under-estimated the detrimental impact of reducing the length of consultation and has missed the opportunity to ensure that all employers approach consultation in a meaningful manner. It is our concern that these changes will result in more compulsory redundancies, more challenges to redundancy dismissals and may damage relationships between employers and employee representatives.

By restricting the time for consultation it will also restrict the ability of employers and unions in gaining understanding and support for proposals from the affected workforces. The recent experience of UFS is that the extended 90-day period has given oppportunity to explain any proposals fully, to explore mitigate compulsory redundancies, e.g. to operate effective voluntary exercises, to liaise with other business areas to explore redeployment and retraining.

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?

UFS has been involved in numerous consultations. Time to reach agreement has varied depending on the proposals and the willingness of the employer to seriously consider alternatives. However we have certainly noticed a difference in the effectiveness of the process between individual, 30-day and 90-day periods and most shorter periods needed to be extended anyway, mainly due to the employer needing that time to refine its proposals.

In the shorter consultations, there were missed opportunities and many more challenges to redundancy decisions as not all alternatives were properly explored and there was less time to effectively communicate with staff to ensure that they understood the process. There were also many logistical problems, mainly for employers, in arranging sufficient discussions within such short timescales particularly with larger exercises where many managers had to approve any decisions.

Question 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?

n/a

This publication is also available on our website at www.bis.gov.uk
Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

If you require this publication in an alternative format, email enquiries@bis.gsi.gov.uk, or call 020 7215 5000.

URN 12/808

1. Your name:

UNISON - Sampson Low and Michelle Singleton (Policy Unit) and Camilla Belich (Legal Officer)

2. What organisation do you represent (if any)?

UNISON – the public service union

3. E-mail address:

s.low@unison.co.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - Neither

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

Yes

9. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

12. Please provide comments to support your answer.

No Response

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

No

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

No Response

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

No Response

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

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

Repro Colour

From: Low, Sampson [S.Low@unison.co.uk]
Sent: 19 September 2012 16:03
To: Collective Redundancies
Subject: DBIS Collective redundancies consultation September 2012
Attachments: DBIS Collective redundancies consultation September 2012.docx

Please find attached the UNISON response.

Sampson Low
Policy Officer
UNISON
130 Euston Road
London NW1 2AY

Tel: 020 7121 5484
Fax: 020 7121 5101
Mobile : 07944 119552
Email: s.low@unison.co.uk

Website: www.unison.org.uk

UNISON switchboard: 0845 355 0845

UNISON is marching with the TUC against public service cuts at a Future that Works on Saturday October 20th 2012, join us:

http://www.unison.org.uk/20102012/

Collective redundancies: Consultation on changes to the rules

The Department for Business, Innovation and Skills is reviewing 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 is now proposing changes to the collective redundancy regime. This consultation is seeking views on a package of changes which aims to encourage better quality consultation in large-scale redundancies.

Issued: 21 June 2012

Respond by: 19 September 2012

Name: Sampson Low and Michelle Singleton (Policy Unit) and Camilla Belich (Legal Officer)

UNISON – the public service union

Address: 130 Euston Road, London, NW1 2AY

	Business representative organisation/trade body
	Central government
	Charity or social enterprise
	Individual
	Large business (over 250 staff)
	Legal representative
	Local government
	Medium business (50 to 250 staff)
	Micro business (up to 9 staff)
	Small business (10 to 49 staff)
x	Trade union or staff association
	Other (please describe):

About UNISON

UNISON is the UK's largest public service trade union with 1.3 million members. Our members are people working in the public services, for private contractors providing public services and in the essential utilities. They include frontline staff and managers working full or part time in local authorities, the NHS, the police service, colleges and schools, the electricity, gas and water industries, transport and the voluntary sector.

UNISON is involved in hundreds of collective redundancy consultations each year covering tens of thousands of individual members of staff. This can range from contract variations in very small voluntary organisations to the recent case in Birmingham where the entire council workforce was issued with notices under section 188 involving the dismissal and re-engagement of up to 26,000 employees.

Supplementary information relating to this consultation.

UNISON responded in great detail to the call for evidence on the operation of the rules for collective redundancy consultation in January 2012. This covered the process of consultation, the minimum periods for consultation and notification, the issue of high impact redundancies and the link between redundancy, TUPE and insolvency legislation.

The resulting consultation document, amongst other things, has concluded that there should be a move to reduce the minimum consultation period for redundancies involving 100 or more employees from 90 days to either 45 or 30 days.

Whilst we will respond in full to the individual detailed questions in this consultation, including issues of guidance and a potential code of practice, we would also like to re-iterate our position regarding reducing the consultation period and the misuse of section 188 notices.

Reduction in minimum consultation periods.

In our response to the call for evidence we gave substantial evidence that ineffective or inadequate consultation and communication around redundancies can be a false economy for employers as the knock on effects in terms of morale and detriment to workers health means that the cost savings and productivity gains hoped for are often not fully realised (see our fuller response on Question 15 of our call to evidence response)

The impact of redundancy, collective or otherwise, is the same for the individual employee. The danger of a reduction in minimum periods is that this will place undue pressure on all those involved, with an impact upon income and on workplace relations. Furthermore, realistic alternatives to redundancy could not be considered and it is highly likely to increase the stress placed on employees with a risk of an increased level of ill health.

Main Concerns

UNISON has some fundamental concerns about the purpose of this consultation. Our main concern is the potential move away from the primary objective of the current legislation which is to explore ways of avoiding or reducing the need for dismissals and mitigating the consequences of dismissal.

The underlying assumption that simplicity is all important is not reason enough. It is understood that "good employers" will recognise that this is only a "minimum" period but we need to ensure that managers that simply want to avoid meaningful consultation at any cost are not given the impression that 30 days should be enough.

From a basis of evidence, we do not believe it is.

As mentioned above, we have outlined the substantial evidence that ineffective or inadequate consultation and communication around redundancies can be a false economy for employers not just as the knock on effects in terms of morale and detriment to workers health means that the cost savings and productivity gains hoped for are often not fully realised, but also, as opportunities for cost savings and indeed revenue generation need time to be fully identified and explored.

Employers must give serious consideration to any proposals suggested by employees and in our experience employees often wish to engage constructively in this process.

Formulation of such ideas by employees, followed by analysis/costing of them by the employer and the undertaking of a comparison with the initial proposals, takes time; 90 days is not always enough. UNISON believes that, at its best, there can be an obvious link with the potential use of the 90 day period to improve service quality, productivity and efficiency as well as redundancy avoidance.

Allowing time for staff to suggest counter proposals requires time to research and put together.

Current redundancy legislation can be misused by employers who are unwilling to consult in a meaningful way and merely see the exercise as a distraction from progressing their perceived business needs. Current law continues to be based on a simple model where the numbers performing a very similar or the same role are being clearly reduced by the employer so the same jobs will remain at the end, just in far fewer numbers (e.g. 250 workers on a production line who all do the same job being reduced to 100 workers following closure of part of a factory). In reality we have found that many employers in the public sector will manipulate the current requirements. They may change the entire grading structure and the names/roles of all jobs, split groups up or run a succession of restructures that they will then position as separate, meaning that periods of collective consultation with staff are shorter and they may not hit the threshold for even a 30 day consultation, let alone a 90 day consultation.

It is therefore clear that even the current regulations can often fail to protect employees in practice and often fail to enforce obligations to truly mitigate redundancy; rather we find that the current laws often mean the requirement to seek to mitigate redundancies can support a high degree of flexibility (or manipulation) by the employer in terms of their duty to consult.

We maintain that a move away from a minimum 90 day consultation period would severely damage the stated purpose of avoiding and mitigating redundancies and could even be counterproductive for achieving employers stated objectives.

Importantly, a longer period also allows individuals to prepare for possible redundancy both psychologically and practically in terms of restructuring finances and considering alternative work opportunities. Moving to a shorter period would risk undue increased stress levels and is likely to increase the incidences of ill heath related absence from work (see evidence given in our call for evidence response in January 2012).

The misuse of section 188 for mass changes to terms and conditions

In this consultation recognition was given to the contentious nature of this issue as raised in our response to the call for evidence. However, we are disappointed that it has been decided that it should not form part of this debate. The purpose of this debate is to improve the current collective redundancy processes it would seem the ideal opportunity to consider these issues.

As we discussed in our previous response, this is one of our biggest concerns and is becoming more and more prevalent.

For example, in September 2010 Birmingham City Council issued section 188 notices to 25,837 employees under the Trade Union and Labour Relations Act, making it clear that anyone refusing to accept new contracts will be fired without compensation. Chief executive Stephen Hughes, commenting on the requirement to make significant savings, said:

"Tinkering round the edges doesn't work in this context. We have to work out a plan and be ruthless in implementing it."

This is one example where the intended use of section 188 as a tool to mitigate genuine redundancy issues resulting from the need to restructure, has been subverted to a crude cost cutting tool whereby a Council can contemplate sacking and rehiring all its staff as an expedient way to cut pay or terms and conditions that have been previously negotiated and form the employees contract of employment.

Even without actually implementing section 188, many employers use the threat of it as a powerful tool. By making clear that if unions and their members do not accept proposed revised terms and conditions, perhaps with some sort of buy-out or compensation payment, they will be subject to a section 188 dismissal and re-engagement, employers are sometimes able to scare many workers into accepting inferior terms.

As previously stated, we do not believe that this was the intention of those writing the legislation and UNISON believes this misuse needs to be addressed as a matter of urgency.

We would urge that the misuse of section 188 notices is part of the considerations of this consultation.

For all other aspects of this consultation please refer to our responses to the questions 1 – 12 below.

Question 1	**Do you agree with the Government's overall approach to the rules on collective redundancy consultation?** These are leading and closed questions. Example - in Q2 below - on the auto response form provided by BIS the only options are "30 days", "45 days" or "Unsure" - we don't believe either option "SHOULD" replace 90 days but if we answer the only remaining option of "unsure" that discounts our view. We are sure - it should be neither. That option does not exist in your question. If the question was "If the 90 day minimum is going to be replaced which would you prefer?" that we could answer: 45 days is better than 30 but both are inadequate in our view. We do not agree with the Governments overall approach to the rules on collective redundancy. As stated above, we believe that time is needed to seriously consider alternatives to redundancy and that the 90 day minimum time period should remain. In addition the 20 employee threshold should be removed so that there is a duty to consult in all redundancy situations for all workers.
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.** We believe that 90 days minimum period should remain and are strongly opposed to any reduction. This measure will not protect jobs or improve economic performance. Anything less than 90 days in complex large scale redundancy exercises makes it infeasible for employers to consult on the reasons for redundancies, alternatives, selection procedures and redeployment. If the government are going ahead then 45 days is better than 30 days.
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.** As stated in the consultation document, in the case of *Rockfom A/A v Specialarbejderforbundet i Danmark*[1] the term 'establishment' is defined by EU Community Law. It follows that it is likely that even if there was a

[1] Case C-449/93, reported at [1996] IRLR 168.

	domestic definition of the term 'establishment', the Community Law definition would take precedence. UNISON supports a broad definition of the term 'establishment' as outlined in *Athinaiki Chartopoiia AE v Panagiotidis and others*[2] and employees should be assumed to be part of the same establishment unless it can be proved otherwise. UNISON would resist any moves to limit or restrict the application of the collective consultation requirements through the re-definition of the term 'establishment' through either legislation or a Code of Practice. Some employers have divided their operations to try and limit or avoid consultation on redundancies. That is why it would be a good practise to remove the 20 employee threshold to prevent avoidance tactics and give workers in small firms the same rights as others.
Question 4	**Will defining 'establishment' in a Code of Practice give sufficient clarity?** See answer to question 3 above. UNISON does not consider that it would be practical for domestic law to re-define the term 'establishment' if this were to differ from the EU Community Law definition. If the Government decides to define the term 'establishment' in a Code of Practice then UNISON would need to consider the proposed definition before we could conclude whether or not it provided sufficient clarity.
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.** The *University of Stirling v University and College Union*[3] Employment Appeal Tribunal decision was a surprising decision for many because it concluded that dismissals resulting for the end of fixed-term contracts would not necessarily be counted as redundancies for the purposes of collective consultation. The Honourable Lady Smith found that the inclusion of fixed-term appointees would depend on the reasons for the non-renewal of the fixed-term contract. UNISON understands that the UCU has appealed this decision to the Court of Session, so it may be that the law in this area is reversed. If the Code of Practice covers this matter, it should be flexible enough to be updated with relevant case law when appropriate. UNISON does not consider that there should be an exemption for fixed-term appointees from collective redundancy consultation. This would

[2] Case C- 270/05, reported at [2007] IRLR 284.

[3] The Honourable Lady Smith, 8 November 2011 UKEATS/0001/11/BI.

	breach the Fixed Term Employees (prevention of less favourable treatment) regulations 2002. In fact the regulations should be extended to include agency and other casual workers and this would be compatible with the directive. Guidance could also remind Employers that before dismissing a fix term employee as a redundancy there should be individual consultation and consideration of redeployment.
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?** No. The Consultation on Changes to the Rules document dated June 2012 (the Consultation document) states that the Code of Practice would cover when the consultation should start.[4] This may be appropriate to include in a Code of Practice but is also a matter to be contained in statute. The Consultation document also suggests that a Code of Practice would help to identify who should be consulted.[5] Whether the correct parties are consulted is also a matter of law. The Consultation document also states that the Code of Practice will cover what should be covered in collective consultation.[6] There is relevant guidance in the European Directive in Article 2(3): To enable workers' representatives to make constructive proposals, the employers shall in good time during the course of the consultations: (a) Supply them with all relevant information and (b) In any event notify them in writing of: (i) the reasons for the projected redundancies; (ii) the number of categories of workers to be made redundant; (iii) the number and categories of workers normally employed; (iv) the period over which the projected redundancies are to be effected; (v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefor[e] upon the employer; (vi) the method for calculating any redundancy payments other than those arising out of national legislation and/or

[4] See paragraph 3.24, page 20.

[5] See paragraph 3.24, page 20.

[6] See paragraph 3.24, page 20.

	practice. The Employer shall forward to the competent public authority a copy of, at least, the elements of written communication which are provided for in the first subparagraph, point (b) subpoints (i) to (v).[7] The Consultation document seeks views on whether the business decision behind the redundancies should be provided to employee representatives.[8] The above extract from the Directive seems to imply that the business decision behind the redundancies should be provided during collective consultation. UNISON's view is that the business decision behind the redundancies should be clearly communicated to employee representatives. UNISON would welcome further clarity and guidance in a Code of Practice relation to conducting collective redundancy consultation in TUPE transfer situations. We believe the law and Code should make clear that redundancy notices cannot be issued until the consultation is complete. UNISON would support a Code of Practice if it encourages more meaningful collective consultation, however, until a Code of Practice is published it will be impossible to fully answer this question. UNISON would also support the development of a Code of Practice with involvement of trade unions in focus groups. UNISON would be willing to participate in the development of guidance or case studies.
Question 7	**What changes are needed to the existing government guidance?** As per our introductory remarks about the use of "minimum" periods of consultation we would urge that there is strong advice and guidance on best practice regarding the use of "minimum" consultation periods - reiterating the primary objectives and advantages of properly utilising the consultation period to explore all possible options to improve orgnanisational performance and avoid redundancies. The existing guidance could be updated to better reflect European case law with a view to encourage not just consultation but employers consulting with a view to reaching agreement. To this end the guidance should encourage the granting of extra facility time to trade union representatives during the consultation period. In addition it should advise the support and

[7] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to Collective Redundancies

[8] See paragraph 3.24, page 20.

	training needed for workers to be redeployed to other jobs including clear rules on what is suitable alternative work.
Question 8	**How can we ensure the Code of Practice helps deliver the necessary culture change?** The government should involve trade unions in drawing up the Code of Practise and use examples of how conducting consultation need not be onerous and can benefits organisations by improving performance and saving skills and jobs. The best organisation to draw up a code of practise would be ACAS. The Government as part of a 'carrot and stick' approach should consider strengthening the sanctions which apply when an employer fails to consult on collective redundancies and that Tribunals should have the power to order dismissals are ceased until such time as consultation is complete. Greater government focus should be applied to promoting the Information and Consultation of Employee Regulations 2004 as a way of changing organisational culture.
Question 9	**Are there other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.** It would be helpful if central government were to resist attacks on the availability of trade union facility time in the public sector whilst promoting their positive engagement in such sensitive matters as large scale redundancies. A new piece of research[9] regarding the value of trade union facility time conducted by the National Centre of Social Research for UNISON has found that facility time for trade union reps in the public sector saves the taxpayer money, cuts the number of strikes and disputes and improves workplace relations. ACAS should have resources to offer employers training on handling redundancies, possibly jointly done with union representatives to build a shred understanding. Finally, employers should negotiate their redundancy policies and procedures with their trade unions in advance.

[9] http://www.unison.org.uk/file/Value%20of%20Union%20Facility%20Time%20-%20FULL%20REPORT%20_FINAL_.pdf

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.** We would challenge whether "uncertainty" really is the primary concern of employees as suggested in this consultation. In our overwhelming direct experience of supporting employees through a redundancy process, it is our experience that the fear of losing your job, and related family income, is the primary concern. A fear too exacerbated in areas where there is high unemployment and a shortage of jobs available. Any amount of uncertainty would be accepted as a necessary evil if there is a real possibility of avoiding that outcome. As highlighted in our introduction, it is our experience that exploring detailed, well thought out, positive alternative proposals to redundancy can take more time but can be mutually beneficial to both employer and employees. We certainly don't recognise "uncertainty" as the biggest concern to our members above the fear of losing their job. We note the following points from the Impact Assessment: • UNISON does not agree that there is nothing to show that 100 redundancies is a trigger for higher impact or greater costs socially or economically (page 11 of Collective Redundancies: Consultation on changes to the rules). The higher the number of redundancies, the greater the impact on the local community. • The Call for Evidence is allegedly to remove barriers to restructurings to create an environment for long –term growth (Page 11 of Collective Redundancies: Consultation on changes to the rules). UNISON does not consider that making it quicker and easier implement mass redundancies will create an environment for long-term growth, e.g. German model of workforce retention has lead to a quicker recovery following the recession than the UK. • UNISON is surprised that the chief issue was the impact on morale and productivity caused by the uncertainty of extended consultation periods (page 13 of Collective Redundancies: Consultation on changes to the rules). UNISON does not considers that morale would be more adversely affected if there were higher number of redundancies due to a shorter and less meaningful consultation period. • Employees allegedly value certainty as early as possible (page 13, Collective Redundancies: Consultation on changes to the rules). UNISON would consider that employees are more likely to value a higher chance of maintaining their employment when compared with early certainty of unemployment. The proposals risk reducing the quality

	of consultations. • Page 2 of the Impact Assessment – alleges that UK regulations gold-plates the Directive. We reject this. • Page 7 of Impact Assessment – UK has one of the most flexible labour markets in the world according to the OECDs employment protection index. This is a point against reducing the period for collective consultation. • Table 2 of Impact Assessment shows that in all other EU countries listed there is the same or a lower number of redundancies required to trigger consultation. The non-EU countries listed are not bound to incorporate Council Directive 98/59 into law. • Page 9 of Impact Assessment states that 67% of respondents to a 2004 survey stated that options for reducing the number of redundancies were covered during the redundancy consultation, additionally 10% of respondents stated that consultation led to changes in the managers' original proposals that means that there were reductions made in the numbers of people made redundant. • Page 11, the 90-day minimum period has driven negative behaviour by both employers and employees' representatives. Evidence of employees' representatives drawing out ostensibly complete consultations until the 90th day in order to ensure that their constituents continue to draw a salary as long as possible. Is the Government planning on releasing the evidence of this? Has this evidence come from employee representatives or reputable employers? • Page 12 of Impact Assessment, states that there is no objective reason why employees affected by redundancies of 20 or more employees should receive greater protection in this regard than those affected by smaller redundancies. A reason maybe that there is a greater impact on society in general and the community in question the more redundancies are made. • The real reason for these proposed changes? Page 16, point 63 – if redundancies took place one week earlier this would result in approximately £35 million per annum saving to employers across the private and public sectors.
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?** UNISON has been involved in hundreds of collective redundancy consultations in the last 5 years. In the most part, large scale

	redundancies of 100 or more employees took in excess of the 90 day minimum period. In most cases the resultant agreement meant that redundancies were reduced, plans were positively rethought and adapted and the impact on both staff and organisation was minimised. Please see our examples given as part of response to Question 12 below.
Question 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?** In our experience there have been many benefits of a full and fair consultation process; • Human Resources departments involved in large scale redundancies often find it difficult to cope with the increased workload involved in preparing for and supporting potential redundancies in a short timescale. • If staff feel genuinely informed, involved, included and feel their opinions have been heard in the process then morale is improved but it takes time for all those objectives to be realistically achieved • If employers can avoid staff morale being too badly affected during the process (as described above) then the impact on business as usual is much minimised **Examples of positive impact on business of a longer consultation;** 1. "*.....With much hard work the staff side were able to hold the employer to 90 days consultation in the face of a specifically hired consultant and team. Success in arguing for 90 days consultation meant the staff side were able to gain a lot of information from members which ultimately resulted in* ***many of the proposals being rethought, altered and posts retained, and quality services protected for members of the public****."* Quote from UNISON Regional Officer. 2. "*.....We were thanked by the Chair of the Finance Committee, a conservative member with his own business who remarked that he had never dealt with unions, had a negative view of unions and had had that view changed by the way in which we had conducted the consultation saving the council and the tax payer what would have been significant sums in redundancy payments."* ***"In this case a 30 day consultation would have resulted in unnecessary redundancies at significant cost to the public purse in terms of redundancy payments. It would also introduce the real risk of unfair selection for redundancy and as a consequence claims for unfair dismissal."*** Quote from UNISON

	Regional Officer 3. *".....Similarly, as a consequence of meaningful consultation with the unions over the 90+ day period, the employer has significantly amended their proposals re terms and conditions. The new proposals, whilst achieving the savings of £1.5 million do not impact upon NJC Part 2 Terms & Conditions and are therefore more likely to avoid industrial unrest.* *There is no doubt that if this consultation has been reduced to a 30 day period the consequence would have been large scale compulsory redundancies and industrial unrest both of which* ***would have had damaging consequences for the employer and community.***" Quote from UNISON Regional Officer.

1. Your name:

Unite - John Usher

2. What organisation do you represent (if any)?

Unite the Union

3. E-mail address:

John.Usher@unitetheunion.org

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

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

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

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

No Response

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

No Response

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

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

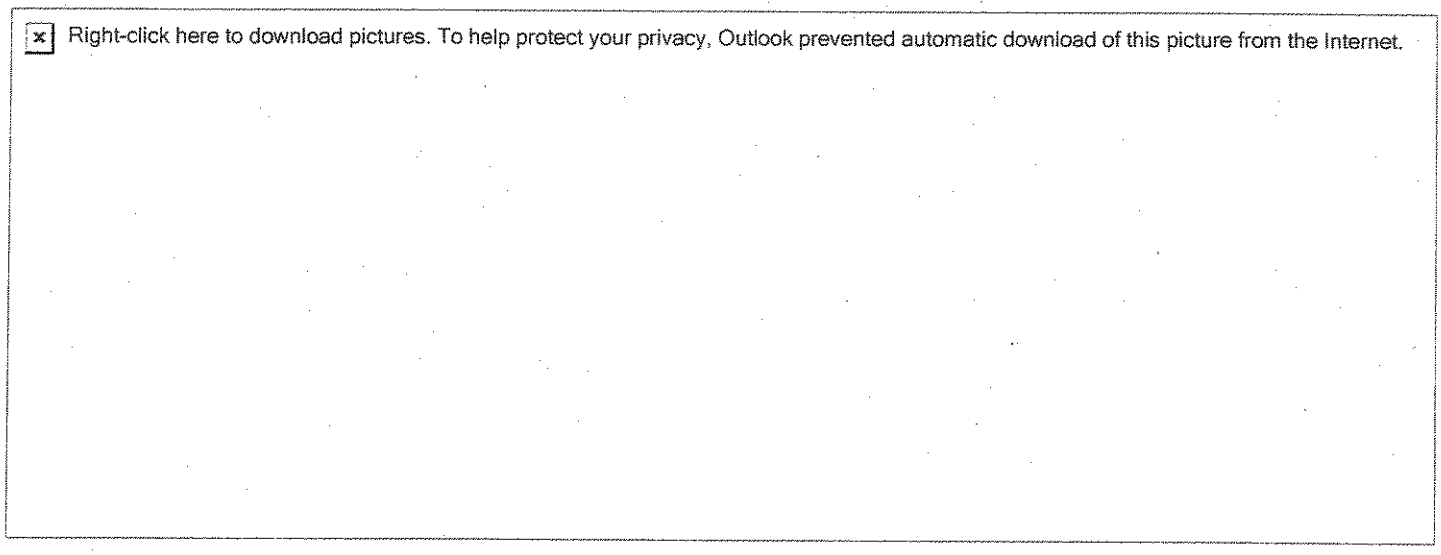
21. If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time?

No Response

Repro Colour

From: Usher, John [John.Usher@unitetheunion.org]
Sent: 19 September 2012 10:45
To: Collective Redundancies
Cc: Beckett, Howard; Earls, John
Subject: Unite response to the BIS consultation on changes to Collective Redundancy rules
Attachments: 19s12 FINAL Unite response to the BIS consultation on changes to Collective Redundancy rules.doc

Please find attached the response to the BIS consultation on changes to collective redundancy rules.



Response from Unite the Union to BIS Consultation –
Collective Redundancies: Consultation on changes to the rules

Response due by 19 September 2012 to collectiveredundancies@bis.gsi.gov.uk

This response is submitted by Unite the Union. Unite is the UK's largest trade union with 1.5 million members across the private and public sectors. The union's members work in a range of industries including manufacturing, financial services, print, media, construction, transport and local Government, education, health and not for profit sectors.

Executive Summary

- Unite is opposed to the reduction in obligations to consult over collective redundancies: this will do nothing to save jobs nor will it improve the UK's economic performance.
- There is evidence that longer periods of effective consultation benefits the UK economy and saves jobs.[1]
- There is no evidence that the opposite is the case; only mere speculation and dogma. Such evidence that there might be is described in the consultation paper as "anecdotal" (paragraph 2.14).
- The statements from Government, the call for evidence and this consultation encourage unscrupulous employers that refuse to consult properly or at all.

[1] See for example Unite's evidence in response to the call for evidence earlier this year: http://www.epolitix.com/fileadmin/epolitix/stakeholders/Unite_evidence_to_the_BIS_Call_for_Evidence_on_Collective_Redundancy_editANON.pdf

- The Government flagrantly flouts its obligations under international law to encourage collective bargaining, including over collective redundancies[2].
- Unite believes that non statutory guidance and a Code of Practice are not sufficient to improve the quality of consultation.
- Unite believes that collective redundancy consultation legislation and consultation in general needs to be strengthened and properly enforced in the interests of the economy, equality and democracy. This will create greater clarity for employers, a level playing field and make sure the genuine good quality consultation takes place.

The Unite response in detail:

1. Introduction

1.1. Unite is extremely disappointed with having to respond to this consultation following the earlier call for evidence. The Government case for these reforms is flimsy and based on warped logic and spurious "evidence". This Government seems to have decided long ago what its intentions are regarding employment law.

1.2. There is a clear misrepresentation of the evidence that was received in this consultation – for example including 'Annex B: list of individuals/ organisations consulted' which includes both "Unite the Union" and the "Transport and General Workers Union" (part of Unite since May 2007). When challenged on this the civil servant's response was that this was not the list of organisations that had responded but rather the list of organisations that "the consultation was sent to."

1.3. Unite believes that this is disingenuous and further illustrates just how little interest the Government has in listening to representative bodies and public consultation.

[2] See for example Demir and Baykara v. Turkey http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89558#{"itemid":["001-89558"]}

1.4. Unite would like to see the balance of evidence received from the organisations listed in point 2.13 in order to make a detailed assessment of any "consensus" achieved.

2. Collective redundancy rights

2.1. The rights and obligations under section 188-198 of the Trade Union and Labour Relations (Consolidation) Act 1992 are helpful to aiding good working relationships with employers.

2.2. Unite's previous evidence has shown[3] that the collective redundancy consultation obligations have been of significant benefit to both workers and employers. There is no doubt that others, including other trade unions will have provided similar evidence. These rights have helped:

- save jobs,
- save money for employers,
- secure a better deal for workers,
- safeguard vital skills,
- develop stronger business models going forward
- affected families and communities
- improve the economy including by greater production of goods and by workers having income spend and pay taxes on and
- reduce the number of people out of work and claiming benefits.

2.3. Unite disagrees with the Government that UK law is "gold plated" and the "legislation is too restrictive." This does not mean that Unite believes that employment law is perfect. Unite would welcome many improvements to the quality and nature of consultation with employers. Unfortunately while this consultation claims to support the aim it offers no details as to how this can be improved. Better guidance and more

[3] http://www.epolitix.com/fileadmin/epolitix/stakeholders/Unite_evidence_to_the_BIS_Call_for_Evidence_on_Collective_Redundancy_editANON.pdf

effective legislation that guarantees real consultation of employees in redundancy situations would be welcome. Non statutory guidance (which we are yet to see) may help good employers to follow the law but will have no impact on bad employers. Bad employers will have no increased obligations to consult properly than now. The only difference is that they will be able to make people redundant faster. Government proposals essentially act as a green light for employers to make redundancies without consultation.

3. Employment law and the economy

3.1. Unite has seen no evidence that current UK regulations on collective redundancy consultation are having any negative impacts on the British economy. The myth that employment legislation damages the economy is based on an extremist ideology about market deregulation and "efficiency". The view that employment rights and trade unions are obstacles to market equilibrium, e.g. the "barriers" to business success that the minister refers to in his forward.

3.2. The financial crisis that started in 2008 has shown just how flawed these arguments really are – to the cost of millions of people's jobs and livelihoods. Markets are structures that embody unequal power relations – for example, the relationship between employers and workers, or the relationship between big employers and small businesses. Regulations are necessary in order for these markets to function better; they create a level playing field and help avoid distortions and injustices like those that we have seen with the deregulated financial markets.

3.3. As with all employment law, it is not the good employers that complain about these regulations. Many of the best employers welcome and meet regularly with employee trade unions in order to involve them in decisions, as well as to improve performance and HR practice. This helps pre-empt and avoid serious disputes and saves both employees

and employers from undue disruption and cost. In the best cases statutory minimum requirements are greatly exceeded and consultation goes on continuously.

4. International Comparitors

4.1. The rights in the UK that emanate from the European *Collective Redundancies Directive* (98/59/EC) are already considerably weaker than in many other European countries. There is no evidence that this has helped the UK economy overall.

4.2. If anything Unite believes that the British economy would benefit from these rules being strengthened rather than watered down. The example of the level of consultation that workers representatives in Germany[4] or in the Scandinavian economies should illustrate that, far from having a negative effect on economic performance, employment rights help improve productivity and industrial relations.

4.3. The impact assessment document recognises that even though other countries may have shorter consultation periods their broader employment rights regimes are much stronger - "*Some of the competitor nations listed (including France and Germany) rely on strict enforcement and monitoring regimes to ensure minimum standards of consultation*". Without this enforcement UK workers rely heavily on trade union strength in order to get real consultation from unscrupulous employers. This can take a long time if employers are determined not to consult. Often in employers without trade unions genuine consultation does not happen.

4.4. In much of the EU, where consultation arrangements involve genuine engagement and co-determination between employers and worker representatives, such arrangements help to support long term planning

[4] http://www.tuc.org.uk/economy/tuc-20488-f0.cfm

and increased productivity within organisations. Unite would like to see a similar set of regulations and protections implemented here in the UK, that requires companies to fully engage with trade union representatives on all matters involving the workforce and the future of the business. In this way it would be possible to avoid or pre-empt many redundancies.

4.5. Unite believes that currently UK law fails to comply with the existing EU Directive on Collective Redundancies in two main respects. Firstly, the UK has failed to implement the *Junk*[5] decision properly and as a result it is possible under UK law for employers to issue redundancy notices before consultation has been completed. Secondly, the duty to consult on collective redundancies only applies to employees in the UK. The EU Directive, however, has a broader scope and also applies to 'workers', including agency workers, freelancers and casual workers. Unite believes that UK law should be brought into line with EU law, on these two issues.

Changes to Collective Redundancy Rules - Consultation Questions

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

5.1. No – Government plans will act as a green light not to consult for bad employers. 30 or 45 days are insufficient time for proper consultation to take place in large redundancy situations, especially in cases where employers are determined not to consult. Cutting the time for consultation will not improve the quality of consultation and the, yet unseen, new non statutory guidance will not oblige bad employers to behave any differently.

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5 Junk v Kühnel [2005] IRLR 310 ECJ

5.2. In fact, any reduction in consultation periods will have a negative impact on the quality of consultation. Limiting the ability for employers and unions to develop alternatives to redundancies, including redeployment and short-term working. As a result, unnecessary redundancies will take place, employers will lose skilled staff, unemployment levels are likely to rise. Staff being made redundant will also lose out on income and the time and resources needed to access training and new employment.

5.3. The suggestion that these changes will improve "morale", "productivity" and "reduce stress" and are otherwise in the interest of workers is wrong and insulting to the intelligence. The consultation document even recognises that this is "*counter intuitive*" based on "*a disappointingly small amount of quantitative data on the impact of current rules*" and could lead to "*superficial consultation*". Fundamentally redundancy consultation is to help those people being made redundant. These people will clearly be much worse off due to these proposals. Those people who are not made redundant will also feel less secure in their jobs due to decreased protections and the increased threat of redundancy at short notice. Redundancy consultation in many cases will be worse and superficial, while it will be less likely that alternatives to redundancy that save jobs to be developed. The establishment of voluntary redundancy schemes will also be less common, again creating more insecurity and stress for workers.

5.4. Viewed as a whole, Government policy is obsessed with making it easier to sack people, either through these draconian changes to employment law or through dragging the UK economy back into recession by slashing budgets and its ideological austerity programme.

5.5. This is a false economy and will lead to decreased tax revenue to the exchequer, increases in people reliant on benefits and, due to the

simultaneous assault on benefits, also greater numbers of people living in poverty[6].

5.6. The evidence that the Government has reported on suggests that there is a need to improve the quality of consultation. Unite would be very happy to enter discussions with the Government about this. Improving guidance will be a small part of that but non statutory guidance will do little to improve that consultation for employers determined not to consult. Unite believes that the enforcement regime for consultation should be strengthened to bring it in-line with the rules in other European states (e.g. France, Germany and Scandinavian countries). Another suggestion would be to oblige employers to carry out on-going and general consultation of workers and their unions (for example with workers representatives on company boards like in Germany). There should be better Government support for workers being made redundant and the reintroduction of enforceable sector wide collective agreements that would allow workers to move more easily between employers due to similar skill and levels of remuneration – again as happens in other European countries.

5.7. Unite is in favour of the establishment of a body to look at industrial policy in the economy. This could include employer, union and Government representatives and could be complemented by a state investment bank to support British industry, stimulate job creation and innovation.

5.8. Unite would like to see controls put on predatory financial sector organisations, such as private equity firms and hedge funds, that engage in buying out companies, asset stripping them, closing workplaces and moving jobs abroad. Before the financial crisis this was the most common cause of mass redundancies. These controls could also involve changes to company management legislation to make

[6] http://www.jrf.org.uk/sites/files/jrf/employment-inequality-income-full.pdf

company boards consider the long term interests of their company, employees and communities rather than simply maximising short term shareholder value.

5.9. Unite is pleased that the Government has decided against changes to protective awards and the primacy of trade unions in collective redundancy consultations. Unite is, however, disappointed that the Government has not included any changes to the enforcement regime for cases of insolvency.

6. **<u>Question 2:</u> 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.**

6.1. Neither - the 90 day minimum period should not be changed.

6.2. This is just another way for bad employers to mistreat workers. Good employers will continue to consult with their employees for as long as they need. It is only bad employers that will benefit from this proposal. This will allow them to continue to undercut good employers, driving down terms and conditions and leading to more ruthless redundancy situations. These bad organizations seek to hoard money at the expense of the economy and UK citizens.

7. **<u>Question 3:</u> 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.**

7.1. No. Unite maintains that the definition of an "undertaking" is the most appropriate way to avoid much of the confusion surrounding the issue of 'establishment'. The Government's assessment of the risks of legislating on this boils down to an unwillingness to regulate employers in relation to their consultation obligations properly.

7.2. Unite would support greater clarity on the definition of which workers are covered by consultation rights. In Unite's experience unscrupulous employers often succeed in avoiding the duty to consult by relying on the vagaries of the definition of an "establishment" and breaking up businesses into smaller units. Unite officers have reported that this has been common in several sectors including IT, computing, finance and media. In order to prevent such avoidance tactics it is essential that the meaning of an "establishment" is broadly defined in any Government guidance, in line with recent ECJ judgments.

7.3. Unite believes that this duty to consult should be based on the number of employees at risk of redundancy in an 'undertaking' rather than in an 'establishment'. This would ensure that whenever larger organisations propose to make collective redundancies, the duty to consult would apply regardless of existing business structures.

7.4. Unite also maintains it view that the 20-employee threshold for consultation rights should be either removed or reduced. Table 2 in the Impact Assessment highlights that we are out of step with most comparable economies on the use of a 20-employee threshold to trigger consultation. In most countries the right is triggered where 5 or 10 employees are affected. In France the duty to consult applies wherever two or more workers face redundancy. The Government proposal seem to be very selective about which bits of comparable employment law they want to implement in the UK.

8. <u>Question 4:</u> Will defining 'establishment' in a Code of Practice give sufficient clarity?

8.1. No: see question 5 above. A definition without legislative authority cannot reduce legal disputes.

8.2. The case of Stirling v UCU (referred to in paragraph 3.20 of the consultation document) is subject to appeal and consideration of revising the Code of Practice in relation to that judgment would be ill advised at present.

9. <u>Question 5:</u> 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.

9.1. Unite objects to any moves for employers to exclude fixed term staff from consultations. In UK law the failure to renew a fixed term contract is considered as a redundancy and fixed term employees are included in collective redundancy consultation arrangements. Unite believes that this should not change, especially given workers with fixed term contracts have legitimate rights to equal treatment more generally. For example, it is unlawful for employers to select individuals for redundancy pay on the grounds that they are employed on a fixed term basis. Fixed term employees are entitled to equal treatment on redundancy pay and on access to redeployment. It therefore makes sense for employers always to consider issues relating to fixed term employees as part of the wider consultation arrangements.

9.2. The decision in *Lancaster University v UCU (EAT 2010)* makes clear that employers are obliged to collectively consult the recognised union where there are 20 or more fixed term employees whose contracts expire within a 90 day period. Typically the contracts of fixed term employees end on a variety of dates so it is important for unions to ask employers to provide the details of fixed term contracts due to expire within 90 days. Unite would therefore be strongly against revising existing laws on this issue.

10. **<u>Question 6:</u> Have we got the balance right between what is for statute and what is contained in Government guidance and a Code of Practice?**

10.1. No: as previously stated the only way to improve the quality of consultation will be to introduce stronger legislative obligation and enforcement powers. Non statutory Government guidance and a Code of Practice will not make sufficient impact as unscrupulous employers will simply ignore them. Nor will they offset the major losses to consultation caused by reducing the minimum period.

11. **<u>Question 7:</u> What changes are needed to the existing Government guidance?**

11.1 Please see response to Question 9 below.

12. **<u>Question 8:</u> How can we ensure the Code of Practice helps deliver the necessary culture change?**

12.1 Please see response to Question 9 below.

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

13.1 Yes: absolutely. The Government should encourage collective bargaining and comply with its obligations under international law in that regard. The drive for a culture change should encompass this.

13.2 Trade unions are aware of the issues and can encourage employers otherwise to engage in proper consultation. This is consistent with the Government's stated aim of having "A positive relationship between the employer and employees' representatives" and "Ongoing engagement and a positive working relationship between the employer and

employees' representatives" at the core of improving the quality of consultation" (paragraph 3.6). It goes without saying this Government is being disingenuous particularly in this regard.

14. **<u>Question 10:</u> 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.**

14.1. No – The impact assessment to these proposals is trying to justify the unjustifiable. This move is wholly in the interests of bad employers and offers no benefits to working people. Orwell's Ministry of Truth could not have done a better job of taking away workers rights while simultaneously telling them that it was in their own interests.

14.2. The impact of the proposed changes will be that it will be easier for employers to sack people. As the impact assessment itself recognises cutting the time-period for consultation will have no impact on improving the quality of that consultation. It will also not reduce the stress and anxiety experienced by those people who are actually made redundant. These are the people that redundancy legislation is designed to protect, in the best interests of the economy, equality and democracy.

14.3. The issues skimmed over by points 100-104 in the impact assessment are the most likely outcomes of this legislation. Paragraph 100 says "*It is possible, though, that some employers will reduce the amount of time for which they consult without addressing the quality of consultation. This could result in significant reductions in consultation periods over and above those envisaged for the variants of option 2, and worse outcomes for employees.*" The irony of this paragraph recommending that unions are more involved in "ensuring employers' compliance" is galling. The Government has engaged in a constant propaganda war against union facility time and regularly called for further laws to hamstring unions' capacity to act.

14.4. Paragraph 101 highlights that "*employers are free to dismiss their employees and re-employ them on altered terms and conditions of employment*". This ruthless behaviour is increasingly common in post financial crisis Britain with even NHS trusts now considering this option. As the impact assessment rightly points out proposals to cut consultation time will make this behaviour much easier for employers and more common - described as a "*positive impact on employer's flexibility*". For employees this experience will have "*an adverse effect on the quality of employees' continued employment*" or in plain English it will be a disaster leading to worse pay and terms.

14.5. Paragraph 102 rightly points out that reducing the minimum consultation period would "*reduce the Government's ability to intervene in redundancies that could have a high social, economic or political impact*" and could also lead to "*greater expense to the Exchequer due to longer-term unemployment of those affected*". Unite does not share the Government's optimism that in these high impact situations the employer will "*recognise the significance of their actions*" and 'play nice'. This is not Unite's experience in such cases, with many employers only agreeing to consult properly after a high profile and public campaign.

14.6. Paragraph 103 undermines the whole premise for these reforms – that they will be good for the UK economy. After highlighting that other countries have much better employment regulation (see above 5.5.) the impact assessment concludes that "*it is therefore unlikely that these measures would have a significant impact on the attractiveness of operating a business in the UK*". This is anecdote at best and dogma at worst. In response to the call for evidence, Unite cited a number of cases. One such involved Novellis, where jobs were preserved in France and Germany at the expense of jobs and production in Britain.

14.7. These reforms are unnecessary, unfair and unhelpful to the UK economy and job creation. To quote John Kenneth Galbraith it appears that the Government is engaged in one of humanity's "*oldest exercises in moral philosophy; that is, the search for a superior moral justification for selfishness.*"

15. 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?

15.1. Please refer to Unite's submission to the Call for Evidence. Unite gave numerous examples of where consultation processes helped protect workers. Please do not continue to ignore this evidence.

16. Question 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?

16.1. Unite as an employer has always sought to carry out redundancy through the use of voluntary redundancy schemes.

17/09/2012

This response has been submitted on behalf of Unite the Union by:

Howard Beckett
Director of Legal and Affiliated Services
Unite the Union
Howard.Beckett@unitetheunion.org

For further information or clarifications please contact:
James Lazou
Research Officer
James.Lazou@unitetheunion.org

020 7611 2504
Unite House,
128 Theobalds Road,
Holborn, London, WC1X 8TN

To: Carl Davies
3rd floor Abbey 2
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
collectiveredundancies@bis.gsi.gov.uk

1. Your name:

University and College Union - Michael Scott

2. What organisation do you represent (if any)?

University and College Union

3. E-mail address:

MScott@UCU.ORG.UK

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

Not sure

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - Neither

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

Not sure

9. Please provide comments to support your answer.

No Response

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

No Response

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

No

12. Please provide comments to support your answer.

No Response

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

Not sure

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

No Response

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

No Response

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

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No

19. If you have any evidence relating to possible impacts we would be happy to receive it.

Line1 - UCU notes the EIA and would observe that in our sector and in our experience, in relation to fixed term appointments,

Line2 - there is some evidence that a higher proportion of women and BME staff would be affected if consultation was forgone.

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

No Response

21. 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?

No Response

Repro Colour

From: Michael Scott [MScott@UCU.ORG.UK]
Sent: 19 September 2012 10:26
To: Collective Redundancies
Subject: Response from UCU
Attachments: Collective Redundancy Consultation Response.pdf

Dear Sir or Madam

I attach the response from UCU.

Yours sincerely

Michael Scott

National Head of Legal Services and Employment Law
University and College Union
Carlow Street
London
NW1 7LH
Direct dial: 020 7756 2615
please quote this reference on all communications: 120712-000011

University and College Union

UCU Response to BIS Consultation:
collective redundancy - consultation on changes to the rules

Introduction

The loss of employment through redundancy is a major event in any worker's working life. It affects them and their families in such a major way that it is right that no stone should be left unturned to avoid a redundancy dismissal. It should never be forgotten that a true redundancy is never a reflection on the employee's ability to do the job, rather it is because their employer purports to have a reduced need for workers to carry out the work.

In this context, UCU considers that collective consultation plays a major role in mitigating and avoiding redundancy dismissals. Quite simply, a trade union can bring to the discussion table with the employer a breadth of knowledge and expertise which an individual employee would never be able to bring in a one to one consultation. Furthermore, because of the obligation on the employer to provide information to the trade union to a far greater extent than would be the case in a consultation with an employee, the trade union is enabled to respond based on a far greater amount of information.

UCU would, therefore, oppose any dilution in the redundancy consultation rules, and trusts that any Code of Practice or guidance firmly promotes the positive aspects of engagement in meaningful consultation.

The Questions and UCU's Responses

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

No-one would argue that steps to improve the quality of consultation should not be welcomed. UCU acknowledges that balancing the interests of the employees, the employer and the employees who remain employed is not a straightforward matter. The legislation, both domestic and European, and case law emanating from it has, it is true to say, made more complex and less certain the precise obligations and responsibilities of employers, and the rights and entitlements of trade unions and employee representatives. However, the leap to a conclusion that a shortening of the 90 period to 45-60 days is inexplicable. There is not obvious correlation between the length of the consultation period and the effectiveness of the process from both sides' viewpoints. The introduction of a Code of Practice is cautiously welcomed; though in the absence of seeing a draft no real view can be given. The same applies to the proposed guidance.

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.

There is nothing in the current provisions, or in the Directive, which stipulates the length of the consultation period. The stipulation is that consultation should start "in good time", according to the Directive, and case law has determined that no dismissal notices should be sent to employees until the consultation process has ended. We accept that in practice the union will want to press the employer to maintain throughout the 90 day period set out in s 188(1A). We see nothing to criticise in that. Particularly in large scale redundancies, every avenue should be explored to find ways of reducing the numbers of redundancies or to mitigate the impact of any which prove to be genuinely unavoidable. The Government appears to draw a distinction between the length of the period of consultation and the length of an employee's individual entitlement to notice. The suggestion is that shortening the consultation period will not adversely impact on the employee. However, this fails to take account of the reality of the situation in which employers seek to bring the employees' employments to an end using compromise agreements which include a term whereby the employee waives their right to their contractual notice period. This circumvention of the employee's notice period, coupled with the proposed shortening of the 90 period, would seriously adversely impact on the redundant employees.

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.

We recognise that the term "establishment" is one of community law which makes it difficult to construct a precise definition for inclusion in an amended statute. However, until we see what the Code has to say on the subject, we cannot give our definitive view.

The issue would of course be otiose if the minimum threshold of 20 employees was removed, thus permitting the union and employer to engage on each occasion when proposed redundancies are threatened.

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

UCU's experience is that the employers in our sector routinely take the view that an establishment is the whole of the organisation, and not particular faculties, schools, departments, locations or similar. UCU would regard it as an extremely retrograde step if the proposed Guidance facilitated our sector's employers taking a different and worse position.

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.

UCU welcomes the decision to maintain the right to consultation in regard to fixed term appointees.

As the consultation document notes, a recent decision of the Employment Appeal Tribunal in a case taken by UCU has challenged conventional thinking in the area of the applicability of the consultation requirements relating to the expiration of fixed term appointees. The decision is currently under appeal at the Court of Session. UCU firmly believes that the EAT decision was wrong in law. Many legal commentators and law firms have similarly criticised it. That said, there is no doubt that the current legislative framework makes it difficult to apply to fixed term appointees. For example, when does an employer "propose to dismiss" a fixed term appointee? Is it at the start of the fixed term, or when the employee decides that it will take no steps to renew the contract, or otherwise engage the employee on another contract? Furthermore, the extended definition of "redundancy" in s 195 means that the tribunal is required to look for "reasons" for the dismissal, which makes little sense in the context of a fixed term appointment coming to an end by effluxion of time.

UCU would therefore argue the following changes to the legislation are required:

1. making it clear in s 195 that the reference to a "dismissal" includes the non-renewal or non-reengagement of a fixed term appointee, and,
2. for the purposes of calculating the 90 day period within which 20 or more employees are at risk of dismissal, the employer should count all fixed term contracts which are due to expire in that 90 day period irrespective of whether or not the employer has plans to renew or reengage;

UCU would not be opposed to this topic also being covered in the Code/guidance, but as before, it is difficult to provide a definitive view without the draft text. However, in order to achieve the Government's aim to keep the obligation to consult in relation to fixed term appointees, the statutory framework must be altered. Otherwise, there is a significant risk that if the Court of Session does not overturn the EAT decision in the *Stirling* case, the Code, not being legally binding, will have no practical impact.

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?

Without seeing what a code of practice will contain it is difficult to answer this question. However, we would say that it is troubling to note the second bullet point of paragraph 3.24 which suggests that the Code may advise that in some instances fixed term appointees are not covered by the consultation requirements.

It is also worth noting that much of the to-ing and fro-ing between employers and trade unions relates to the provision of information to enable the consultation to be effective. This is an area the Code could make a helpful impact on taking account of case law which relates in particular to situations where the redundancies arise from a proposed closure.

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

The emphasis should be on the appropriate measures which will more likely than not facilitate a successful outcome, that is to say a reduction in the numbers of dismissals and the mitigation of the effects of any unavoidable ones. Employers should be encouraged not to be defensive and secretive about their plans, but open and transparent so that meaningful consultations can take place.

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

A response to this question is difficult without first seeing the Code of Practice. But otherwise see above.

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

The knowledge of all professionals engaged in this area should be regularly updated and we would encourage any steps which have that effect, such as online training.

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.

UCU notes the EIA and would observe that in our sector and in our experience, in relation to fixed term appointments, there is some evidence that a higher proportion of women and BME staff would be affected if consultation was forgone.

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?

UCU is regularly involved in collective consultations. The time taken to reach agreement varies but UCU seeks to continue the consultative process for the maximum period of 90 days (or 30) as applies.

Question 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?

This is a question for the employer.

Other comments

UCU has spent a considerable amount of time and effort trying to reach local collective agreements to protect our members from risk of redundancy by persuading the HE employers to adopt redundancy avoidance measures. We firmly believe that this collective approach coupled with a firm policy of taking s 189 claims against employers whom we believe have not met their legal obligations, has led to significant improvements in the extent and quality of collective consultation. We are by no means complacent, however, and remain firmly focused on achieving the best outcomes for our members whenever the scourge of redundancy is raised.

1. Your name:

University of Aberdeen -Joint Consultative Committee on Redundancy Avoidance

2. What organisation do you represent (if any)?

University of Aberdeen

3. E-mail address:

g.stewart@abdn.ac.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Large business (over 250 staff)

Trade union or staff association

University

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

Yes

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - A review of the rules regarding collective redundancies is a positive step. Any review that gives clarity on the rules and allows for improved collaborative working between employers,

Line2 - employees and trade unions is welcomed.

Line3 - We do however hold the view that there would be a detriment to collective consultation should the review result in a reduced period of under 90 days in which to undertake consultation.

Line5 - Neither, we wish the 90 day minimum period to remain unchanged.

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

Yes

9. Please provide comments to support your answer.

Line1 - We are content with the definition of an Establishment as currently given, and also with the threshold of 20 redundancies within any individual establishment.

Line2 - As an organisation with multiple establishments this does not preclude how our collective consultation process currently operates.

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

Yes

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

No

12. Please provide comments to support your answer.

Line1 - This should be addressed in both legislation and guidance so that the legislation is accompanied by guidance addressing management issues around fixed term contracts. Only by having the issue

Line2 - addressed in both can employers manage fixed term contracts correctly and consistently.

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

Not sure

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

Line1 - Without seeing what a code of practice will contain it is difficult to answer this question.

Line2 - Clarification on non-standard situations could be given (an example being whether a partial redundancy is simply a reduction in fte and what compensation would/should an

Line3 - individual be entitled to in such circumstances).

Line4 - With reference to questions 3 and 4, guidance detailing the level of authority required within an establishment to dismiss on the grounds of redundancy.

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

Line1 - A response to this question is difficult without first seeing the Code of Practice.

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

Yes

17. If yes, please explain what other approaches you consider appropriate.

Line1 - As a larger organisation we are able to provide training to all those involved in consultation and may even move to a position whereby training is mandatory for all those who will become involved

Line2 - in consultation.

Line3 - Smaller employers may find that training and other support may be beneficial to them if they have not undertaken collective consultation before.

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

Yes

19. If you have any evidence relating to possible impacts we would be happy to receive it.

Line1 - The potential impacts noted within the assessment would result from the different lengths of time during which collective consultation would take place e.g. 30 days, 45 days or 90 days.

Line2 - The contrasting impacts between a longer and shorter period of consultation may be considered to be advantageous, or otherwise, depending on the circumstances surrounding individual employers and

Line3 - employees.

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

Line1 - Within our organisation we carry out collective redundancy consultation on an ongoing basis due to the nature of the activity.

Line2 - Discussions regarding consultation as part of this process have been, and continue to be ongoing in order to mitigate potential redundancies.

21. 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?

Line1 - As noted in our answer to Question 11, consultation and its associated impacts are ongoing. We have however put into place policies, procedures and resource which minimise the impacts of ongoing

Line2 - consultation. This allows us to treat all individuals at risk of redundancy and their representative groups equally, giving them access to the same support and resource should they become at risk of

Line3 - redundancy.

Line4 - Contrary to the administrative burden noted in paragraph 4.62 within the document we have also found that having established policies,

Line5 - procedures and resource in place allows us to minimise this burden and manage it along with its associated risks effectively.

Repro Colour

From: Stewart, Graeme J [g.stewart@abdn.ac.uk]
Sent: 18 September 2012 15:31
To: Collective Redundancies
Subject: Collective Redundancies: Consultation Response- University of Aberdeen JCCRA Response
Attachments: University of Aberdeen JCCRA BIS Response.pdf; University of Aberdeen JCCRA - BIS Response.docx

Please find attached, also attached is a word document containing the response.

If you have any questions please let me know.

Graeme Stewart
HR Co-ordinator
School of Medicine and Dentistry
Ext 01224 437076

Annex C: Collective Redundancies: Consultation on changes to the rules response form

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is 19/09/2012

Name: LYNDA JOHNSTON OR GRAEME STEWART
Organisation (if applicable): UNIVERSITY OF ABERDEEN JOINT CONSULTATIVE COMMITTEE ON REDUNDANCY AVOIDANCE
Address: KINGS COLLEGE, ABERDEEN
AB24 3FX

Please return completed forms to:

Carl Davies,

3rd Floor Abbey 2, 1 Victoria Street

London SW1 H 0ET

Telephone: 020 7215 6220
Fax: 020 7215 6414
email: collectiveredundancies@bis.gsi.gov.uk

If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group from the list below.

	Business representative organisation/trade body
	Central government
	Charity or social enterprise
	Individual
	Large business (over 250 staff)
	Legal representative
	Local Government
	Medium business (50 to 250 staff)
	Micro business (up to 9 staff)
	Small business (10 to 49 staff)
	Trade union or staff association
✓	Other (please describe)

THIS RESPONSE IS A JOINT RESPONSE AGREED BY THE REPRESENTATIVES OF THE UNIVERSITY'S JOINT CONSULTATIVE COMMITTEE ON REDUNDANCY AVOIDANCE, THE COMMITTEE REPRESENTATIVES ARE NOTED WITHIN THE FURTHER COMMENTS SECTION.

Question 1

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

☑ Yes ☐ No ☐ Not sure

Comments:

A REVIEW OF THE RULES RELATING COLLECTIVE REDUNDANCIES IS A POSITIVE STEP. ANY REVIEW THAT GIVES CLARITY OF THE RULES AND ALLOWS FOR IMPROVED COLLABORATIVE WORKING BETWEEN EMPLOYERS, EMPLOYEES AND TRADE UNIONS IS WELCOMED.

WE DO HOWEVER HOLD THE VIEW THAT THERE WOULD BE A DETRIMENT TO COLLECTIVE CONSULTATION SHOULD THE REVIEW RESULT IN A REDUCED PERIOD OF UNDER 90 DAYS IN WHICH TO UNDERTAKE CONSULTATION.

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.

☐ 30 ☐ 45 ☐ Not sure

Comments:

NEITHER WE WISH THE 90 DAY MINIMUM PERIOD TO REMAIN UNCHANGED.

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.

☑ Yes ☐ No ☐ Not sure

Comments:

SEE COMMENTS UNDER QUESTION 4.

Question 4

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

☑ Yes ☐ No ☐ Not sure

Comments:

WE ARE CONTENT WITH THE DEFINITION OF AN ESTABLISHMENT AS CURRENTLY GIVEN, AND ALSO WITH THE THRESHOLD OF 20 REDUNDANCIES WITHIN ANY INDIVIDUAL ESTABLISHMENT. AS AN ORGANISATION WITH MULTIPLE ESTABLISHMENTS THIS DOES NOT PRECLUDE HOW OUR COLLECTIVE CONSULTATION PROCESS CURRENTLY OPERATES.

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.

☐ Yes ☐ No ☐ Not sure

Comments:

THIS SHOULD BE ADDRESSED IN BOTH LEGISLATION AND GUIDANCE SO THAT THE LEGISLATION IS ACCOMPANIED BY GUIDANCE ADDRESSING MANAGEMENT ISSUES AROUND FIXED TERM CONTRACTS. ONLY BY HAVING THE ISSUE ADDRESSED IN BOTH CAN EMPLOYERS MANAGE FIXED TERM CONTRACTS CORRECTLY AND CONSISTENTLY.

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?

☐ Yes ☐ No ☑ Not sure

Comments:

WITHOUT SEEING WHAT A CODE OF PRACTICE WILL CONTAIN IT IS DIFFICULT TO ANSWER THIS QUESTION.

Question 7

What changes are needed to the existing Government guidance?

CLARIFICATION ON NON STANDARD SITUATIONS COULD BE GIVEN. (AN EXAMPLE BEING WHETHER A PARTIAL REDUNDANCY IS SIMPLY A REDUCTION IN FTE AND WHAT COMPENSATION WOULD/SHOULD AN INDIVIDUAL BE ENTITLED TO IN SUCH CIRCUMSTANCES).

WITH REFERENCE TO QUESTIONS 3 AND 4, GUIDANCE DETAILING THE LEVEL OF AUTHORITY REQUIRED WITHIN AN ESTABLISHMENT TO DISMISS ON THE GROUNDS OF REDUNDANCY.

Question 8

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

A RESPONSE TO THIS QUESTION IS DIFFICULT WITHOUT FIRST SEEING THE CODE OF PRACTICE.

Question 9

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

☑ Yes ☐ No ☐ Not sure

Comments:

AS A LARGER ORGANISATION WE ARE ABLE TO PROVIDE TRAINING TO ALL THOSE INVOLVED IN CONSULTATION AND MAY EVEN MOVE TO A POSITION WHEREBY TRAINING IS MANDATORY FOR ALL THOSE WHO WILL BECOME INVOLVED IN CONSULTATION.

SMALLER EMPLOYERS MAY FIND THAT TRAINING AND OTHER SUPPORT MAY BE BENEFICIAL TO THEM IF THEY HAVE NOT UNDERTAKEN COLLECTIVE CONSULTATION BEFORE.

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.

☑ Yes ☐ No ☐ Not sure

Comments:

THE POTENTIAL IMPACTS NOTED WITHIN THE ASSESSMENT WOULD RESULT FROM THE DIFFERENT LENGTHS OF TIME DURING WHICH COLLECTIVE CONSULTATION WOULD TAKE PLACE EG 30 DAYS, 45 DAYS OR 90 DAYS.

THE CONTRASTING IMPACTS BETWEEN A LONGER AND SHORTER PERIOD OF CONSULTATION MAY BE CONSIDERED TO BE ADVANTAGEOUS, OR OTHERWISE, DEPENDING ON THE CIRCUMSTANCES SURROUNDING INDIVIDUAL EMPLOYERS AND EMPLOYEES.

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?

WITHIN OUR ORGANISATION WE CARRY OUT COLLECTIVE REDUNDANCY CONSULTATION ON AN ONGOING BASIS DUE TO THE NATURE OF THE ACTIVITY. DISCUSSIONS REGARDING CONSULTATION AS PART OF THIS PROCESS HAVE BEEN, AND CONTINUE TO BE ONGOING IN ORDER TO MITIGATE POTENTIAL REDUNDANCIES.

Question 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?

AS NOTED IN OUR ANSWER TO QUESTION 11, CONSULTATION AND ITS ASSOCIATED IMPACTS ARE ONGOING. WE HAVE HOWEVER PUT INTO PLACE POLICIES, PROCEDURES AND RESOURCE WHICH MINIMISE THE IMPACTS OF ONGOING CONSULTATION. THIS ALLOWS US TO TREAT ALL INDIVIDUALS AT RISK OF REDUNDANCY AND THEIR REPRESENTATIVE GROUPS EQUALLY, GIVING THEM ACCESS TO THE SAME SUPPORT AND RESOURCE SHOULD THEY BECOME AT RISK OF REDUNDANCY.

CONTRARY TO THE ADMINISTRATIVE BURDEN NOTED IN PARAGRAPH 4.62 WITHIN THE DOCUMENT WE HAVE ALSO FOUND THAT HAVING ESTABLISHED POLICIES, PROCEDURES AND RESOURCE IN PLACE ALLOWS US TO MINIMISE THIS BURDEN AND MANAGE IT ALONG WITH ITS ASSOCIATED RISKS EFFECTIVELY.

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

AS ONE OF THE HIGHER EDUCATIONAL INSTITUTIONS NOTED IN THE DOCUMENT AS BEING REQUIRED TO CARRY OUT COLLECTIVE CONSULTATION ON AN ANNUAL BASIS, WE HAVE FOUND THAT ESTABLISHING POLICIES, PROCEDURES AND RESOURCE WITH WHICH TO CARRY OUT THE CONSULTATION PROCESS, HAS RESULTED IN BOTH CONSTRUCTIVE CONSULTATION WITH A RATE OF REDUNDANCY AVOIDANCE COMPARABLE TO, AND IN SOME CASES BETTER THAN, OTHER INSTITUTIONS IN THE SECTOR. STAFF RETENTION IN THE HIGHER EDUCATION SECTOR IS A KEY ELEMENT IN MAINTAINING CURRENT LEVELS OF FUNDING AND IN TURN, MINIMISING THE REQUIREMENT FOR CONSULTATION.

WE ALSO RECOGNISE THAT INDIVIDUAL CONSULTATION IS OF EQUAL IMPORTANCE AND CARRY OUT OUR COLLECTIVE CONSULTATION TAKING COGNISANCE OF THE MANAGEMENT AND EMPLOYEE ISSUES RELATING TO BOTH.

SHOULD THE CONSULTATION RESULT IN THE SHORTENING OF THE MINIMUM PERIOD, WE WOULD CONTINUE OPERATING TO THE CURRENT LENGTH OF CONSULTATION AS SET OUT IN OUR POLICY WHICH IS GREATER THAN THE STATUTORY MINIMUM AT PRESENT.

IT IS OUR OPINION THAT A CODE OF PRACTICE WOULD BE BENEFICIAL TO ORGANISATIONS UNDERTAKING COLLECTIVE CONSULTATION AND WE WOULD BE INTERESTED IN FINDING OUT THE VIEWS OF OTHER HIGHER EDUCATIONAL INSTITUTIONS ON THIS CONSULTATION IF THIS IS POSSIBLE

THIS RESPONSE HAS BEEN SUBMITTED BY THE UNIVERSITY OF ABERDEEN'S JOINT CONSULTATIVE COMMITTEE ON REDUNDANCY AVOIDANCE. THE COMMITTEE COMPRISES REPRESENTATIVES FROM UNIVERSITY SENIOR MANAGEMENT AND HUMAN RESOURCES, AND THE UCU, UNITE, UNISON AND PROSPECT TRADE UNIONS. IT SHOULD BE NOTED THAT REPRESENTATIVES FROM UNISON AND PROSPECT AT THE UNIVERSITY WERE UNABLE TO PARTICIPATE IN *

ME

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below. *THE DISCUSSION SPECIFICALLY REGARDING THIS RESPONSE.

Please acknowledge this reply ☑

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☑ Yes ☐ No

University of Aberdeen Joint Consultative Committee on Redundancy Avoidance

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

A review of the rules regarding collective redundancies is a positive step. Any review that gives clarity on the rules and allows for improved collaborative working between employers, employees and trade unions is welcomed.

We do however hold the view that there would be a detriment to collective consultation should the review result in a reduced period of under 90 days in which to undertake consultation.

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.

Neither, we wish the 90 day minimum period to remain unchanged.

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 Yes

See comments under Question 4

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

We are content with the definition of an Establishment as currently given, and also with the threshold of 20 redundancies within any individual establishment. As an organisation with multiple establishments this does not preclude how our collective consultation process currently operates.

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.

This should be addressed in both legislation and guidance so that the legislation is accompanied by guidance addressing management issues around fixed term contracts. Only by having the issue addressed in both can employers manage fixed term contracts correctly and consistently.

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? Not sure

Without seeing what a code of practice will contain it is difficult to answer this question.

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

Clarification on non-standard situations could be given (an example being whether a partial redundancy is simply a reduction in fte and what compensation would/should an individual be entitled to in such circumstances).

With reference to questions 3 and 4, guidance detailing the level of authority required within an establishment to dismiss on the grounds of redundancy.

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

A response to this question is difficult without first seeing the Code of Practice.

Question 9

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

As a larger organisation we are able to provide training to all those involved in consultation and may even move to a position whereby training is mandatory for all those who will become involved in consultation.

Smaller employers may find that training and other support may be beneficial to them if they have not undertaken collective consultation before.

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. Yes

The potential impacts noted within the assessment would result from the different lengths of time during which collective consultation would take place e.g. 30 days, 45 days or 90 days.

The contrasting impacts between a longer and shorter period of consultation may be considered to be advantageous, or otherwise, depending on the circumstances surrounding individual employers and employees.

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?

Within our organisation we carry out collective redundancy consultation on an ongoing basis due to the nature of the activity. Discussions regarding consultation as part of this process have been, and continue to be ongoing in order to mitigate potential redundancies.

Question 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?

As noted in our answer to Question 11, consultation and its associated impacts are ongoing. We have however put into place policies, procedures and resource which minimise the impacts of ongoing consultation. This allows us to treat all individuals at risk of redundancy and their representative groups equally, giving them access to the same support and resource should they become at risk of redundancy.

Contrary to the administrative burden noted in paragraph 4.62 within the document we have also found that having established policies, procedures and resource in place allows us to minimise this burden and manage it along with its associated risks effectively.

Other comments

As one of the Higher Educational Institutions noted in the document as being required to carry out collective consultation on an ongoing basis, we have found that establishing policies, procedures and resource with which to carry out the consultation process, has resulted in both constructive consultation with a rate of redundancy avoidance comparable to, and in some cases better than, other institutions within the sector. Staff retention in the higher education sector is a key element in maintaining current levels of funding and in turn, minimising the requirement for consultation

We also recognise that individual consultation is of equal importance and carry out our collective consultation taking cognisance of the management and employee issues relating to both.

Should the consultation result in the shortening of the minimum period, we would continue operating to the current length of consultation as set out in our policy which is greater than the statutory minimum at present.

It is our opinion that a Code of Practice would be beneficial to organisations undertaking collective consultation and we would be interested in finding out the views of other Higher Educational Institutions on this consultation if this is possible.

This response has been submitted by the University of Aberdeen's Joint Consultative Committee on Redundancy Avoidance. The Committee comprises representatives from University Senior Management and Human Resources, and the UCU, Unite, UNISON and Prospect Trade Unions. It should be noted that representatives from UNISON and Prospect at the University were unable to participate in the discussion specifically regarding this response.

1. Your name:

USDAW - Christina Taylor

2. What organisation do you represent (if any)?

USDAW

3. E-mail address:

christina.taylor@usdaw.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

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

No

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

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - Neither

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

Yes

9. Please provide comments to support your answer.

No Response

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

No Response

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

Yes

12. Please provide comments to support your answer.

No Response

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

No

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

No Response

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

No Response

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

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

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

No

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

21. 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?

No Response

Repro Colour

From: Christina Taylor [Christina.Taylor@USDAW.ORG.UK]
Sent: 19 September 2012 14:20
To: Collective Redundancies
Cc: Fiona Wilson; Clare Jones; Darren Miller
Subject: Collective Redundancies - Consultation on changes to the rules
Importance: High
Attachments: Collective Redundancies - Consultation on Changes to the Rules - Usdaw Response - 17 Sept 2012 (2).doc

Please find attached response from the trade union Usdaw. I would be grateful if you could acknowledge this reply.

Kind regards,

Christina Taylor

Christina Taylor

Please confirm receipt of this e-mail by return; please telephone, fax or e-mail to confirm the same.

Tel: 0161 - 224 2804 Ext. 1510

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Usdaw
Union of Shop, Distributive and Allied Workers

COLLECTIVE REDUNDANCIES

CONSULTATION ON CHANGES TO THE RULES

19 September 2012

Introduction

Usdaw is the UK's fourth biggest trade union organising exclusively in the private sector with over 421,000 members. About 75% of Usdaw members work in retail and we have well-established relationships with top retailers, including Tesco, Sainsbury's, Morrisons and the Co-op Group. We also have significant membership in other sectors, including Road Transport and Distribution, Home Shopping, Food and Drink Manufacturing, Chemical Processing, Pharmaceuticals and Insurance.

Usdaw responded to the BIS Call for Evidence on the Collective Redundancy Consultation Rules. Usdaw has vast experience in redundancy consultations and has gone through various change processes, including administrations and restructuring, with many companies.

Our knowledge of collective redundancy consultation will clearly be of interest to the Government.

Question 1

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

No.

Usdaw believes there is no convincing evidence that suggests that the current rules on collective redundancy consultation need to be relaxed.

According to the TUC, the 90-day consultation period only applies in 16% of all redundancy or restructuring situations and, therefore, does not represent a significant burden on business.

In our experience the 90-days notice is advantageous to employers, employees and the community, in particular in cases of large scale redundancies.

As we stated in the previous consultation, the length of the statutory minimum time periods for meaningful consultation to take place in instances of high-impact redundancies is particularly critical for the following reasons:

1. In our experience, the bigger the organisation, the longer it tends to take for employers to respond once they have received the Union's response to their business case.

2. Every employee has the right to individual consultation. Those one-to-ones can take a considerable length of time, so the current statutory redundancy minimum period is crucial as everyone should feel that they have been through a fair process.

3. It takes time to bring in employment specialists to get people new jobs, retrain them etc.

A minimum 90-day consultation period allows for enough time for negotiations and a proper dialogue to take place to find alternatives to redundancy. It gives everyone the opportunity to find the best possible outcomes for all staff concerned by exploring redeployment options within the business, build proper support structures, bring in outside agencies to maximise external employment opportunities, etc.

A reduction would limit meaningful consultation and opportunities for redeployment because it negates the need to bring in employment specialists to help people find work as it limits the time, and, ultimately, will put more people out of work.

A reduction is also likely to increase the number of tribunals. That is why the Co-op Group, for example, has developed a tool kit for redundancy consultation and gives 90-days on every redundancy, irrespective of numbers involved.

The opportunity to shorten the current 90-days already exists. Usdaw uses the 90-days as a guideline. If 90-days (or sometimes more) are needed, we will use them. If not, we will end consultation earlier.

Obligations in relation to consultation will only be fulfilled where employers and unions have carried out detailed consultations akin to negotiations on all relevant issues, ie about ways of avoiding dismissals, reducing the numbers to be dismissed and mitigating the consequences of dismissals which are three separate elements of the duty to consult. The Union must be given time to consider the proposals and make counter-proposals which in turn must be considered with care.

Until that has been accomplished it is inappropriate to shorten the consultation period and Usdaw would resist very strongly any mechanism which allows an employer to circumvent the obligation of meaningful consultation.

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.

For the reasons stated in Question 1, Usdaw believes there are very strong business reasons to retain the 90-day minimum period. If the Government chooses to ignore the clear evidence from those dealing with redundancies, we would expect the reduction to still provide the greatest possible time to protect jobs and support economic recovery for businesses.

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.

Usdaw agrees with the Government's view that if the 'establishment test' is to be retained, it is sensible not to legislate on it. What counts as an establishment is an issue for EU law and the courts have said the term must be interpreted broadly. It is, therefore, essential that any accompanying guidance/Code of Practice provides a very broad definition of an establishment.

However, the current statutory framework, ie no obligation to consult where the number of redundancies in any given workplace is less than 20, even where this is part of a centrally driven restructure in which the overall number of redundancies is substantial, is not fit for purpose. This applies to the retail sector in particular where there are national chains, no store autonomy, centrally determined strategies and the total redundancies in a restructuring exercise may run to hundreds of dismissals but the numbers in any given store is less than 20.

Employers who operate fair employment practices recognise the absurdity of this and enter into meaningful consultations to ensure that the exercise is conducted smoothly and value the contribution that the Union brings to managing such change effectively.

However in our experience, some employers take advantage of this lacuna in the law to try to avoid consultation on redundancies when making redundancies at a number of different outlets where the total redundancies amount to more than 20.

Usdaw contends that this gap in the UK legislation is not compatible with the European Directive.

For instance, in Woolworths 27,000 employees were made redundant in a single redundancy exercise following the company being placed in Administration and the closure of the business.

In that example approximately 24,000 employees were entitled to a Protective Award. These being staff employed in the Distribution Depots and the 600 stores with 20 or more employees. In 200 stores, where fewer than 20 employees were employed, approximately 3,000 employees were not entitled to anything, notwithstanding the fact that their circumstances were exactly the same as the successful Claimants in every respect save for the size of the store. Thus an absurd postcode lottery created substantial and inexplicable injustice.

Almost 30,000 employees were made redundant from Woolworths at the same time and for the same reason, so the suggestion that 3,000 of them did not constitute a collective redundancy does not make sense.

The Woolworth example illustrates the absurd situation created by S188(1) TULR (C) Act as interpreted by the tribunal in the United Kingdom.

It is the Union's contention that S181 does not properly transpose the European Directive on Collective Redundancies and Dismissals 75/129/EEC.

The intention of the Directive is such that if route (ii) is adopted (as it has been in the UK), then the statute should make provision for protection where the number of redundancies **overall** is at least 20.

It is an artificial and incorrect construction of the Directive to confine the head count to each individual establishment in circumstances such as this.

In short, it is wrong in situations where there is a single source decision, which results in one redundancy exercise, relating to a number of different workplaces, which results in substantial numbers of redundancies to waive the obligation to consult and to exclude from entitlement workers from a particular workplace, where the number happens to fall below 20.

Usdaw does not agree that the use of an 'undertaking test' would be inconsistent with the Directive. Arguably under the Directive the key test is whether the employer is considering making more than 20 employees redundant in 'establishments', ie not 20 or more in any one establishment/location. In our opinion the UK legislation is narrower than the requirements of the Directive. One way of remedying this would be the use of a broader 'undertaking test'. This would mean that the duty to consult would apply in virtually all instances where an employer was contemplating more than 20 redundancies. It would make no difference whether the affected staff were dispersed across different departments, divisions, regional offices or retail outlets within a business. The use of the 'undertaking' test would also reduce uncertainty for businesses and trade unions as well as the need for costly litigation on when the duty to consult applies. Another remedy would be to revise the 1992 Act to state that the duty to consult applies wherever the employer is considering making 20 or more employees redundant, regardless of the number of establishments they work in.

Usdaw also believes that the 20 employee threshold for information and consultation rights on collective redundancies should be removed.

Question 4

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

The Government proposes the introduction of a Code of Practice. Usdaw would like this to be an ACAS Code of Practice. Unless it is a statutory Code of Practice, it is not enforceable and merely relies on employers to do the right thing. Whilst employers who operate fair employment practices are likely to adhere to the Code of Practice, some employers will just ignore it.

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.

Usdaw agrees with the TUC and strongly opposes any change to UK legislation which sought to exclude individuals employed on fixed term contracts from the scope of the right to consultation on collective redundancies.

The future Code of Practice or non-statutory guidance should not suggest that employers can exclude staff on fixed term contracts from consultation arrangements. This approach would not be compatible with the requirements of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

The EAT decision in the *Stirling* case is not consistent with previous case law on this issue and therefore may well be revisited by the tribunals and courts in the future. Therefore, it should not form the basis of guidance.

Rather the guidance should highlight employers' obligations not to treat fixed term employees less favourably in relation to:

- Selection for redundancy. It is unlawful for an employer to select an individual for redundancy on the grounds that they are employed on a fixed term contract;
- general terms and conditions of employment; and
- redundancy pay.

It should also remind employers that before deciding to make a fixed term employee redundant they are required to carry out individual consultation meetings and to explore any redeployment opportunities. Failure to do so can result in a successful complaint to an employment tribunal for unfair dismissal.

The guidance should highlight the benefits of including fixed term workers in consultation arrangements in terms of workforce morale and team-building. It also reduces the risk of employment tribunal complaints.

The duty to consult on collective redundancies should be extended to cover agency workers and other casual workers. The terms of the Directive are not limited to 'employees', as is the case in the UK. Rather the Directive applies where an employer contemplates making 'workers' redundant. Usdaw agrees with the TUC that UK law is not consistent with the Directive and should be amended.

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?

Usdaw agrees with the TUC and does not believe that the Government has got the balance right between what is for statute and what is for guidance and a Code of Practice.

We recognise that employers, employees and trade unions could benefit from clear guidance on collective redundancy rules. However, we are not convinced that the introduction of guidance by itself will improve the quality of consultation on redundancies or improving compliance with EU law.

Usdaw believes that EU law should be strengthened in a number of key aspects:

- The duty to consult on collective redundancies should be extended so that it applies to all workers, including agency workers, casual workers and freelancers.
- The 20 employee threshold should be removed.
- The 'establishment' test should be replaced by an 'undertaking' test.
- The law should be amended in line with the EJC decision in *Junk*. It should clearly state that redundancy notices cannot be issued before consultation has been completed.
- The sanctions for failure to consult should be reviewed and strengthened.

Question 7

What changes are needed to the existing Government guidance?

Existing guidance is already very clear. A non-statutory Code of practice will not improve things and some employers will continue to ignore it. If the Government intends to go ahead with those proposals, we would expect them to work closely with trade unions when drawing up the guidelines.

Question 8

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

Usdaw believes a Code of Practice has to be statutory to ensure that it is adhered to and would like to see an ACAS Code of Practice.

It is essential that employers understand and do not disregard their obligation to consult. In our experience problems most frequently arise when the Union is merely informed of a redundancy decision as a fait accompli.

Question 9

Are there other non-legislative approaches that could assist – eg training? If yes, please explain what other approaches you consider appropriate.

Agreement is far more likely if companies consult with experienced and trained people. As a trade union, we have officials and reps who have a wealth of experience regarding redundancy consultation and the employers we deal with make use of our expertise and resources for the mutual benefit of the employees affected.

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.

The Government is pursuing reform in order to improve consultation quality, 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.

The Government does not consider that it is the purpose of the minimum periods to provide time for employees to seek alternative employment or sort out their personal affairs.

To focus solely on the impact on businesses is in our opinion a too narrow view.

It is in the interest of Government and society as a whole to safeguard jobs whenever possible, as economic recovery relies on people being in work.

Proper consultation, particularly when there are large scale redundancies, takes time.

Redundancies arising from closure, particularly of a large site, will have a wider adverse social impact if the local labour market is suddenly flooded with job seekers. An adequate consultation period enables both the employer and the Union to work together involving local agencies to prepare workers for the labour market.

Consultation includes mechanisms for preparing redundant employees for the open job market. This takes time, especially in the case of large scale redundancies. Arrangements for career guidance, or preparation and early release are key features.

Also, restructuring and new ways of working will often be an important element of consultation, as is the impact on retained staff, alongside dismissals.

Usdaw will always look for alternatives to job losses, eg redeployment, shift transfers, amendment to terms and conditions that does not cause industrial unrest. This does not only benefit the employee but also the employer as it reduces the cost of redundancy as well as retaining staff and, therefore, keeping hold of the skills and knowledge base.

For example, we contact Enterprise Zones and ask what shortages there are in particular areas, set up job boards and contact local companies we have agreements with.

As already mentioned in the first consultation, Next, for example, consulted with us before they made a final decision to move call centre staff to India. The Union believed this to be damaging to the business, but agreed to a trial. Following the trial, the company decided against the move and instead opened call centres in Dundee and Cardiff, ie creating jobs in the UK.

As a result of our consultation with Shop Direct, redundancy numbers were reduced to appropriate levels, we negotiated changes to terms and conditions that did not cause industrial unrest and we took the opportunity to see whether alternative business could be found. When Shop Direct announced the closure of its Crosby site, Usdaw brought in support and job shops through which those who wanted to found alternative work. We also negotiated enhanced redundancy pay and phased voluntary redundancy. As a result, the redundancies did not impact on the local area.

Through consultation in other companies within the Home Shopping sector, eg Grattan's and Redcats, redundancies have been reduced and avoided. We went through the consultative process, tested and challenged their proposal and came up with new proposals. Both companies have come back into profitability.

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?

Over the last five years Usdaw has dealt with numerous small and large scale redundancies, including redundancies at Tesco, Co-op travel, Dairy Farmers of Britain, Makro, Woolworths, Ethel Austin, TJ Hughes, Shop Direct, CFS, Milk Link, Palmer & Harvey, HDNL (Yodel) and Next Distribution.

The vast majority of employers we deal with tend to use the 90-days consultation period. If employers give less than 90-days notice which sometimes happens, generally because of commercial sensitivity, they will always pay staff 90-days notice in recognition of the substantial disadvantages and injustice to workers of an unplanned redundancy process.

Question 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?

In our experience, in redundancies arising from restructuring the employer and Usdaw have common objectives to ensure a smooth and trouble free transition to maintain morale and productivity to secure the future of the business and job security. The union has an essential role to play in supporting both the management and the workforce and our employers value the contribution that we make. The sooner an employer consults with us, the smoother the process tends to be and an agreement is more likely to be reached as it allows us to work together in social partnership. If the process is managed well, it often results in fewer people being made redundant. As already mentioned above, Next, for example, consulted with us before they made a final decision to move call centre staff to India. The Union believed this to be damaging to the business, but agreed to a trial. Following the trial, the company decided against the move and instead opened call centres in Dundee and Cardiff, ie creating jobs in the UK. Consultation has to be meaningful and the quality of the business case is an important factor. Tesco, for example, has developed a best practice document in respect of redundancy consultation which has evolved over time. So when Tesco announced plans to close their National Distribution Centre at Fenny Lock in March 2011, we were provided with all the relevant information, we had regular meetings, everything was up front and led by our senior representatives. The Co-op Group is another employer who has a toolkit for the redundancy consultation process. It is seen by them as essential to avoid possible tribunal cases.

Do you have any other comments that might aid the consultation process as a whole?

No.

John Hannett
General Secretary
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