REDUNDANCY CONSULTATIONS
A FRESH LOOK

Jonathan Tuck, Paul Harrison and Annabel Mackay of Baker McKenzie explore collective redundancy processes and look at some of the areas that can be particularly difficult for employers to navigate and which can give rise to industrial unrest and litigation.

In the light of current economic uncertainty and the cost of living crisis, more employers are likely to find themselves needing to consider a collective redundancy process (*see box "Redundancy consultations"*). Before embarking on the process, an employer needs to consider the extensive legislative requirements for how a collective redundancy exercise must be conducted. But it must also consider how its workforce and the working environment may have changed since the last time it may have had to look at effecting redundancies, such as the increase in hybrid or remote working following the COVID-19 pandemic.

This article looks at some of the practical issues for redundancy processes that have arisen as a result of changes in trends in working arrangements, recent case law and legislation, including:

- How hybrid working has affected how the relevant legislation applies.
- Changes in approach to interpretation of the legislative requirements following the UK's exit from the EU.
- Recent case law in respect of how a redundancy process and the selection criteria are managed.

ESTABLISHMENT AND AGILE WORKING

An employer will trigger the collective redundancy consultation obligations under the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) where it proposes to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. The question of what constitutes an "establishment" for the purposes of TULRCA has generated a significant body of case law. It is now well-established that an establishment represents the local employment unit to which employees are assigned (*USDAW and another v WW Realisation 1 Ltd (in liquidation) C-80/14; see News brief "Collective redundancy: a definitive return to normality", www.practicallaw.com/1-614-4191*). This concept has a strong geographical element but is also influenced by the organisational structure, that is, the way in which employees are managed, budgets are assigned and work is allocated.

The European Court of Justice (ECJ) has stated that an undertaking "may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and

certain organisational structure allowing for the accomplishment of those tasks". It is not necessary for the establishment to have its own management with the power to make redundancies, although reporting lines have an influence in practice. Nor is it necessary for an establishment to have economic, financial, administrative or technological autonomy.

Employers have always needed to consider carefully how they identify their establishments for collective redundancy purposes. If their approach is too broad, including a large number of employees, then the threshold of 20 proposed redundancies is more likely to be met and they can find themselves engaged in burdensome collective consultation exercises when this is not strictly required. If their approach is too narrow, with workforces carved up artificially, they run the risk of costly protective award claims, particularly in unionised environments. This dilemma has been thrown into sharp relief by the move towards remote and hybrid working models in the last three years (*see News brief "Hybrid working after COVID-19: home is where the work is", www.practicallaw.com/w-031-0840*).

For hybrid workers, the establishment is likely to be defined by reference to the place they work at or from when not homeworking. However, remote workers potentially give rise to more difficult questions. Where remote workers have an association with a regional hub or local office, the establishment is more likely to be considered to be all the workers who are assigned to that regional hub or local office. This is consistent with the strong geographical element that has informed the treatment of what constitutes establishment to date. It also aligns with the way in which the Department for Business and Trade uses the HR1 forms to assess the impact of redundancies on the local market.

In *MSF v Refuge Assurance plc*, members of the sales teams were assigned to a local branch office and managed by the relevant branch office manager (*EAT/1371/99*). As a result, each branch office was a separate establishment. Whatever approach is taken, it is important that the employer acts consistently across redundancy exercises.

However, some remote workers will not have a link with a particular office, either because they are never required to attend an office or because they have the freedom to choose which of a number of offices to attend when required. When considering an establishment in this context, various approaches are possible.

At one extreme it might be argued that each worker operating from a home office would be considered a separate establishment. The ECJ in *USDAW* did contemplate the existence of single worker establishments. However, this is unlikely to be an attractive argument in many cases as it would undermine collective redundancy protections as the threshold of 20 proposed redundancies at a similar establishment would never be met. Also, it will often not reflect the way the employees work in practice. At the other extreme, the remote workforce as a whole could be treated as one establishment.

In *Mills and Allen v Bulwich*, for example, the Employment Appeal Tribunal (EAT) decided that the whole of a field sales staff was one establishment (*EAT/154/99*). This approach assumes that the workers are not linked to a region or office and that their management is highly centralised, that is, the workers are not managed at local level and are treated as one team. It may also be quite administratively burdensome as comparatively small numbers of dismissals could trigger the requirement to consult collectively, once aggregated across all locations. In practice, each case will turn on its own facts and it will be necessary to consider the way the employees are organised and carry out their work.

Redundancy consultations

Under the Trade Union and Labour Relations (Consolidation) Act 1992, collective redundancy consultation obligations are triggered where an employer proposes to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less (*see feature article "Redundancy: the new normal?", www.practicallaw.com/w-027-8151*).

The employer will need to consult with employee representatives for at least 30 days, or at least 45 days where 100 or more redundancies are proposed. Failure to comply with these obligations can lead to a tribunal making a protective award of up to 90 days' uncapped pay for each redundant employee.

In addition, the same triggers give rise to an obligation to notify the government's Redundancy Payments Service of the proposed redundancies on Form HR1. This must be done at least 30 days before the first of the dismissals takes effect where there are 20 or more (but fewer than 100) proposed redundancies and at least 45 days in advance if there are 100 or more proposed redundancies. Failure to comply with this obligation is an offence which can lead to a fine for the employer and for any director, manager, secretary or similar officer of the employer responsible.

NUMBERS AND TIME LIMITS

Another area that remains challenging for employers is identifying the number of redundancies being proposed within the 90-day period. Under TULRCA, where redundancies are implemented in batches, each batch of redundancies is considered separately where collective consultation in respect of the earlier batch has already begun. This means that if an employer proposes 30 redundancies and begins collective consultation, and then proposes a further batch of ten, it does not have to consult collectively about the second batch, assuming that they are genuinely separable, as the first batch can be ignored in determining whether the threshold of 20 redundancies is met.

However, it is questionable whether this is consistent with EU law. There is no equivalent provision in the Collective Redundancy Directive (*98/59/EC*) (the Directive). In *UQ v Marclean Technologies SLU*, the ECJ determined that the 90-day reference period had to be treated as a rolling period of 90 days (*C-300/19*). This means that employers have to look forward and backward in time from the individual dismissal.

Although the UK has now left the EU, under the terms of the EU (Withdrawal)

Act 2018, the courts are still required to interpret the relevant provision of TULRCA compatibly with the provisions of the Directive, if possible, and to give effect to the ECJ's decision in *Marclean*, although it would be open to the Court of Appeal to depart from it. It is unclear whether such an interpretation is possible.

In the light of the current uncertainty on this topic, where an employer may have a number of separate redundancy exercises within a short period of time, it may decide to err on the side of caution and combine what would strictly be separate batches in order to avoid any dispute on this topic. This position may change under the proposed Retained EU Law (Revocation and Reform) Bill, as the need to interpret local legislation so far as possible in accordance with the requirements of the Directive (the *Marleasing* principle) may be removed and there are also proposed to be stronger powers to depart from EU case law (*see News brief "Retained EU Law (Revocation and Reform) Bill: all change, really?", www.practicallaw.com/w-037-3495*).

In some cases, employers will have a proposal for a change, such as a reorganisation or relocation, which will be implemented in phases over a period of several months or even years, and involve redundancies that will extend beyond a period of 90 days rather than a series of announcements in respect of separate batches. In such cases, an employer may prefer to have a single announcement and consultation covering all redundancies. This makes sense from an industrial relations perspective as it avoids the employer having to return to the workforce with successive batches of redundancies every 90 days.

It would also lead to more effective consultation in cases where the employer anticipates that functions will gradually be moved abroad and representatives would not otherwise have an opportunity to influence the outcome if redundancies affecting each individual function were handled separately. In these circumstances, the approach is likely to be welcomed by employees and their representatives, although it may give rise to difficulties in retaining employees.

However, this approach cannot be taken to the submission of the HR1 form and is likely to result in HR1 forms being rejected. Employers are required to submit separate HR1 forms for each 90-day period in respect of which 20 or more redundancies are proposed. It may therefore be necessary to submit a number of HR1s. However, even if different HR1s are required, a joint consultation may still be possible. The obligations in respect of the HR1 form notification and the requirement to consult are separate.

Ultimately, whether a further collective consultation exercise is required for redundancies that take place a significant time after the consultation begins will depend on whether the factual circumstances that informed the original proposals have changed. In *Vauxhall Motors Ltd v Transport and General Workers Union*, the EAT gave the example of an employer proposing redundancies that are deferred as a result of a new order (*UKEAT/0657/05/MAA*). When the employer completed the order and there was no more work available, the obligation to consult in respect of a new batch of redundancies would be triggered.

EMPLOYEE REPRESENTATIVES

The success of any collective redundancy process can depend on the quality of the employee representatives. Where an employer does not have an independent trade union or a standing body of representatives, employee representatives have to be chosen from the workforce. The employer has the burden of showing that the election process is fair, in terms of how it is managed and whether the representatives are drawn from the right sections of the workforce.

The requirements for a fair election process are clearly set out in the legislation but, in the authors' experience, when an employer is under some time pressure to start its redundancy exercise, they can cause difficulties. Employers may not have any prior experience of running balloting processes and may be overwhelmed by the prospect of having to ensure that everybody has a chance to participate and that the process and outcome is a fair one.

Employers may prefer to seek to manage the process with a view to avoiding an election if at all possible. There is no requirement to hold an election if the employer obtains the correct number of nominations. In addition, in *Phillips v Xtera Communications Ltd*, an employer was able to add an extra representative where three people put themselves forward for two positions and the workforce raised no objections (*UKEAT/0244/10*). In *Phillips*, it was significant that there was no suggestion that the employer had interfered with the choice of candidates. However, all affected employees are entitled to be candidates and employers cannot unreasonably exclude employees from the process. Therefore the possible need for elections, at least in some constituencies, cannot be avoided.

A common issue is that no employees put themselves forward to be a representative, either generally or in a particular area. Technically, if an employer has invited affected employees to elect representatives and they do not do so, the employer will not have to consult, although it will have to provide information about the proposed redundancies to employees directly. However, in most cases there will be at least one representative and so consultation will be required. Even where no representatives put themselves forward initially, they can still choose to do so at a later date and consultation will then be triggered.

Therefore, it is usually in the employer's interest to ensure that there is an adequate number of employee representatives. There is nothing to prevent employers from encouraging preferred candidates to put themselves forward for the role of representative, although there is a risk that they are perceived as a tool of management, compromising confidence in the consultation process.

MANAGING THE PROCESS

Having chosen the representatives, the information about the reasons for the proposed redundancies, means of avoiding redundancies and mitigating their effects has to be communicated through those channels. This sounds straightforward but there can be a risk that the representatives do not communicate the output of consultation meetings accurately or at all. Employers therefore often ensure that minutes of consultation meetings and Q&A sessions are available on the intranet to maintain consistency in the communication strategy and to avoid messages being miscommunicated.

An employer can encounter problems if it wishes to go further and have separate

discussions with particular groups of employees at a faster pace. This arises most frequently in relation to senior management, where they are affected by proposed redundancies. From a legal perspective, senior managers are no different from any other affected employees and should be included in the collective consultation and the figures on the HR1.

In practice, an employer will often need to bring senior managers on board at an early stage of the redundancy exercise and this may lead to discussions about their own personal position. The employer may wish to give the senior manager some reassurance and both employer and employee may prefer to deal with the position by individual discussion, rather than through the employee representatives.

In practice, if both parties agree, it may be possible to deal with senior managers separately, although the approach is not without risk. However, care needs to be taken to ensure that those discussions do not undermine the integrity of the consultation exercise. For example, the manager's redundancy should not be finally confirmed until collective consultation over any matters which might affect that redundancy has taken place.

REDUNDANCY SELECTION

The proposed method of carrying out redundancies, including selection criteria, will form part of the collective and individual consultation exercise (*see feature article "Redundancy: the new normal?", www.practicallaw.com/w-027-8151*). Employers are generally familiar with the need to adopt selection criteria that minimise the potential for subjective elements. Common selection criteria include skills and knowledge or experience (that is, performance), attendance, disciplinary records and, to a lesser extent, length of service.

Where assessments are made against these criteria, they should ideally be supported by reliable HR records, such as performance appraisals and absence and disciplinary data. However, even these selection categories have the potential to be tainted by discrimination. This makes it important for an employer to consider the potential pitfalls associated with the chosen selection criteria at the outset and how they might be mitigated.

Family leave protection

The extent of protection available for employees taking family leave is expected to increase with the Protection from Redundancy (Pregnancy and Family Leave) Bill. While it is a private members' bill, the government announced on 21 October 2022 that it was backing it and, at the time of writing, the bill has progressed to the House of Lords.

The Bill would amend the Employment Rights Act 1996 to enable the Secretary of State to make regulations that would provide protection during or after a period of maternity leave, adoption leave or shared parental leave and during or after a "protected period of pregnancy".

In January 2019, the government consulted on the matters contained in the Bill, and the government's July 2019 consultation response suggested that the protection would apply from the date of the employee notifying the employer of the pregnancy until the six months after the end of the period of leave (*www.gov.uk/government/consultations/pregnancy-and-maternity-discrimination-extending-redundancy-protection-for-women-and-new-parents#history*).

The use of performance appraisals relies on managers having completed them in accordance with the agreed timelines and assessed performance objectively. Where there are incomplete appraisals or complaints have been made regarding managerial assessment, a decision will have to be reached as to how that can be addressed; for example, whether another manager can review the performance, whether notional scores could be allocated for the missing period etc. An employer may also want to analyse whether any themes can be identified from the way in which performance appraisals have been completed, such as whether this issue is specific to employees within protected groups, in order to identify any potential bias in the ratings.

It is also important to note that the assessment of skills and knowledge will usually be based on past performance. The employer should only consider future performance where employees are, effectively, competing for a newly designed role rather than a reduced number of existing roles. If an employer starts introducing forward-looking selection criteria, this is another area in which subjectivity can influence the redundancy decision making.

Care needs to be taken regarding attendance records to ensure that any absence levels associated with family leave or disability-related sickness absence have been appropriately discounted. In the case of family leave, the employer must be mindful of addressing the disadvantage caused by a period of family leave but must ensure that it does not go further than is required to rectify the disadvantage (*Eversheds Legal Services Ltd v De Belin UKEAT/0352/10; www.practicallaw.com/9-506-1791*). An employer may have to go back over an extended period to identify an alternative performance rating to use when an employee is absent but should not automatically accord the maximum score to an employee on family leave.

With regard to disability-related sickness absence, it may be considered a reasonable adjustment to discount periods of absence that are typically associated with a disability. This may require input from an occupational health professional, to consider the expected levels of absence and whether any such absence has been perpetuated by a failure to make reasonable adjustments.

The use of disciplinary records is normally less contentious, at least at a collective level. However, the employer must make sure that a reasonable period is chosen that is consistent with its data retention policy. The use of disciplinary sanctions also relies on managers having acted fairly and even-handedly. This is an area where employers may wish to run data analytics to check that the use of disciplinary records does not create a group disadvantage and, if so, whether the use of those records can still be justified objectively.

"Last in first out" remains a criterion that employee representatives are often willing to accept. However, it carries the risk of indirect discrimination on grounds of age and sex discrimination by rewarding long-serving employees with an unbroken career history. The Court of Appeal has held that its use as a tie-breaker could be justified on the facts of one particular case and the effects of its use may be mitigated if it is the subject of collective consultation where it is accepted on behalf of older and younger employees (*Rolls-Royce Plc v Unite the Union [2009] EWCA Civ 387; www.practicallaw.com/7-386-3068*). However, employers will often prefer criteria which ensure that they retain the employees who are best able to perform the role, rather than those who have been employed the longest.

ALTERNATIVE EMPLOYMENT OPPORTUNITIES

Even where the employer has taken considerable care in formulating and testing the selection criteria, complaints of discrimination can still arise after the selection when alternative employment opportunities are being considered.

With regard to maternity, employers need to remember that employees on maternity leave have a right of priority in respect of any suitable alternative vacancy that arises when they are at risk of redundancy during a period of maternity leave. This does not involve taking them out of the redundancy selection pool. However, once selected, if the role is suitable, it must be offered to the employee on maternity leave (*see feature article "Priority rights in redundancy: top of the list", www.practicallaw.com/w-031-9405*). The right also applies to other types of family leave (*see box "Family leave protection"*).

The question of whether employees with disabilities should be afforded a right of priority, as a reasonable adjustment, can also be a source of dispute. It may certainly be a reasonable adjustment to modify elements of the redeployment process to ensure that employees with disabilities who are at risk of redundancy are put in a position where they are not at a substantial disadvantage compared to employees without disabilities. However, that does not mean that disabled employees will automatically enjoy a right of priority for vacancies or be exempt from a competitive interview process.

Related information

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In the recent case of *Hilaire v Luton Borough Council*, the EAT upheld an employment tribunal's decision that Luton council did not breach the duty to make reasonable adjustments by requiring a disabled employee, Mr Hilaire, to participate in a competitive interview process in a redundancy situation (*[2022] EAT 166*).

The EAT noted that the purpose of reasonable adjustments was to alleviate the effects that put Mr Hilaire at a substantial disadvantage compared to a non-disabled employee. A short delay to the interview process would not have allowed him to recover to the point where any disadvantage was alleviated. The EAT found that the tribunal had been entitled to conclude that it would not have been reasonable to postpone the interview for an extended period in circumstances where at least 13 employees were waiting for the outcome of the process and Luton council was under some time pressure to make decisions as it was subject to funding cuts.

Slotting an employee into an existing vacancy could be a reasonable step in some situations; for example, where the employer has a blank canvas about what a future structure would look like or could make minor adjustments to an employee's duties such that they could do the new role. However, in the circumstances of *Hilaire*,

including the impact on other employees, the tribunal was entitled to determine that slotting in was not a reasonable step for Luton council to have to take.

The EAT also held that there was no duty to make an adjustment because Mr Hilaire was not prepared to participate in the interview process for reasons that were unconnected with the effects of his disability. He had concerns about the managers involved in the decision-making process and felt they would have used the process to engineer his dismissal. Accordingly, he could not succeed with his claim that the effects of his condition placed him at a substantial disadvantage in complying with the requirement to attend an interview.

Different considerations arise in relation to disabled employees who are at risk of being dismissed because their disability prevents them from carrying out their current role. In that case, there will be a duty to make reasonable adjustments, which could include offering them an alternative vacancy that they are capable of in priority to other employees, including potentially redundant employees. These considerations, along with the prioritisation accorded to employees on maternity leave, can create some challenging decision making in practice.

GLOBAL REDUCTIONS

For employers that operate in multiple countries, it may be necessary to implement redundancies simultaneously in many different countries. In each country, the employer will need to comply with local requirements for implementing redundancies. The requirements can vary widely as to the circumstances that will justify a dismissal, requirements for consultation with works councils, trade unions or other representatives, the procedure to be followed and entitlements on redundancy.

However, employers will be at risk, both legally and from an employee relations perspective, if they just follow local requirements and do not consider the position globally. For example, there may be changes proposed in countries with no consultation requirements, which can be implemented very quickly in compliance with local law. However, consideration should be given to whether doing so would suggest that related changes in a different country where consultation is ongoing, have become inevitable, undermining the consultation process. Similarly, it may be necessary or desirable to give employees in more than one country the opportunity to apply for alternative vacancies, meaning that the timing of the recruitment of those roles needs to be co-ordinated.

Employers that have a European works council (EWC) will also need to consider when making redundancies whether their proposals trigger an obligation to consult with an EWC. Following Brexit, EU law no longer requires UK workers to be represented on EWCs, but some EWCs continue to cover the UK. The EAT recently upheld the decision of the Central Arbitration Committee that redundancies proposed separately in more than one EEA state at or around the same time constitute a transnational matter, even where they do not share a common economic rationale (*Olsten (UK) Holdings Ltd v Adecco Group European Works Council [2022] EAT 183*). This decision will not be binding on other EU jurisdictions where EWCs may be based, but underlines the importance for global employers to keep track of proposed redundancies across all countries where they operate and ensure a co-ordinated approach, where necessary.

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