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Acas Policy Discussion Papers

Collective consultation on redundancies

The *Acas Policy Discussion Papers* series is designed to stimulate discussion and debate about key employment relations issues.

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We welcome your comments and opinions. These should be sent to the author c/o strategy@acas.org.uk

A consequence of the recession is the necessity for employers to consider workforce reductions through redundancies. There are considerable volumes of labour law surrounding the whole area of redundancy including the requirement to consult with employee representatives. A growing number of enquiries Acas is receiving relate to requests for information on the legislative aspects of consultation as well as requests for practical advice on how, when and where to consult. This paper explores the practical implications of the legal requirements where collective redundancies are proposed, including:

- a consideration of whether the collective consultation provisions are being deployed on the ground in workplaces;
- whether employers and employee representatives are aware of what the process involves; and
- the challenges that exist for both parties in these situations.

There are many good reasons, irrespective of the law, why employers should consult with individuals or their representatives. The purpose of consultation is to provide an early opportunity for all concerned to share the problem and explore the options and alternatives. It can stimulate better cooperation between managers 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 prove inevitable, ways of minimising hardship. Discussing issues helps to promote trust and minimise misunderstanding. These benefits are most keenly felt during times of major change and particularly where large scale redundancies are occurring.

A recent survey of 3,000 employees conducted for the Chartered Institute of Personnel and Development (CIPD) found that that seven in 10 (70%) employees report that redundancies have damaged their 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. The findings also suggest that employees believe that frequent and honest communications (53%), more meaningful consultation (35%) and giving employees greater voice in the workplace (30%) would have the greatest impact on improving trust.[1] Redundancy situations not only effect those employees who are made redundant but also those who are left behind. A positive consultation exercise can help to minimise the negative impact for both.

The purpose of the legislation is to encourage meaningful consultation in circumstances of large scale redundancies, eg 20 or more workers to be made redundant in a 90 day period. In practice there are many difficulties employers can experience in engaging in consultation, but many benefits too. This paper looks at both sides in some depth.

Legislative requirements

The origin of the collective redundancy legislation was the requirement to consult laid out in the EU's Collective Redundancy Directive 1975. This has been amended over the years with the current directive dating from 1998 and the provisions brought into UK law through amendments to the Trade Union and Labour Relations Act (TULRA), section 188.

Collective redundancy

A collective redundancy situation arises where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. The employer has a duty to consult with the appropriate representatives of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals. The appropriate representatives are:

- trade union representatives where an independent trade union is recognised (regardless of whether the affected employees are members or not) **or**

- employee representatives who have not been appointed or elected specifically for the purpose of redundancy consultations (e.g members of a works councils or staff consultative committee) but who have authority to receive information or be consulted about proposed dismissals or

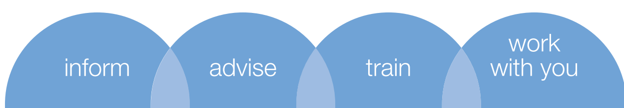
- employee representatives who have been elected by the affected employees especially for consultation purposes in an election.

The election must satisfy the provisions in the legislation. If an employer has issued an invitation, in good time, asking affected employees to elect representatives and they fail to respond to the invitation, the employer still has a duty to provide necessary information to each and every affected employee.

> A large telecommunications company had an existing elected employee consultative council, which included 16 employees located across the UK, that met quarterly to discuss the business direction of the company. However, when facing collective redundancies, the company opted to hold an election to appoint employee representatives to participate in management/employee consultation specifically for the period of the redundancy. The manager explained why a separate consultation arrangement for these and previous rounds of redundancies had been chosen instead of using the standing consultative council. The nature of the consultative council meant it did not necessarily comprise employees that had a direct interest or involvement in the current redundancies. Creating a 'bespoke' consultation process, the manager believed, would ensure that the focus on questions and discussions would be more pertinent to the immediate needs of those facing redundancies.

Definition of dismissal

Redundancy has two different meanings for the purposes of UK employment law, one to establish entitlement to redundancy payments and one for the right to be consulted. For the purposes of consultation in cases of collective redundancies, the law defines redundancy as dismissal not for a reason related to



the individual concerned. This definition might include, for example, where dismissals are not related to the conduct or capability of the individual. This definition is important because it provides a broader requirement for consultation. For example, it may create a requirement to consult where an employer decides to offer alternative employment or change an employee's hours by giving lawful notice of termination of their contracts and re-engaging them on different terms and conditions.

Consultation

The duty to consult under TULRA is not linked to a dismissal as such but to a proposal to dismiss. The intention is that the employer should set out what is proposed as a basis for discussion. The proposals do not have to be the employer's final and unalterable thoughts; on the contrary, they cannot be for the aim is to achieve agreement with the appropriate representatives, and the employer must therefore enter discussions in a frame of mind that is open to persuasion. If a redundancy situation is presented as a fait accompli then subsequent consultations may be not be considered genuine.

The purpose of consultation is to consult about ways of:

- avoiding the dismissals
- reducing the number of employees to be dismissed; and
- mitigating the consequences of the redundancies.

The first two items may include consideration of alternatives such as re-deployment, reducing overtime or offering employees more flexible hours, such as job share.

Case law emphasises the need for consultation to be meaningful. The tests adopted by the courts[2] are:

- consulting with representatives when proposals are still at a formative stage
- adequate information which provides a basis for the employee representatives to formulate a response
- adequate time in which to respond; and
- a conscientious consideration by the employer of the employee representatives' response.

An employer will not have complied with the legislation if, before the employer meets the appropriate representatives, a decision has already been made that there are going to be redundancy dismissals[3], or if the employer is merely going through the motions of consultation.[4]

Disclosures

The legislation lists what the employer needs to disclose in writing to the appropriate representative:[5]

- the reasons for his proposals
- the numbers and descriptions of employees whom it is proposed to dismiss as redundant
- the total number of employees of that description employed by the employer at that establishment
- the proposed method of selecting the employees who may be dismissed
- the proposed method of carrying out the dismissals, with due regard to agreed procedure, including the period over which dismissals to take effect; and
- the proposed method for calculating the amount of any redundancy payments to be made, other than statutory redundancy pay.

Following the landmark decision in the UK Coal Mining v NUM[6] case, it is clear that employers need to consult over the business reasons for the redundancies; for example, where a plant closure and dismissals are inextricably linked. The duty to consult over the reasons for the plant closure will necessarily form part of the consultation.

How much consultation is occurring?

Acas has been dealing with a rising tide of enquiries from employers about redundancy via our national Helpline and through senior advisers in the regional offices. Increasingly, we are receiving requests to train managers to deal with collective redundancy handling and consultation with employee representatives. The amount of advisory meetings and in-depth phone calls that Acas advisers have dealt with in relation to redundancy as a proportion of their total advisory work increased from 6% in May 2008 to 18% in May 2009, with a peak of 32% in January/February 2009. However, there is mixed evidence about the extent to which consultation is actually occurring and the quality of such consultation.

Provisional employment tribunal figures for the period April 2008 to February 2009 show that claims on failure to inform and consult over redundancy plans have increased from the period April 2007 to February 2008, from 4,480 to 7,382.[7] This represents an 80% increase in claims. It is unclear, however, whether this just reflects the surge in the number of redundancy announcements or a growing failure on the part of employers to consult, or to consult properly.

Ipsos MORI recently conducted a survey of London workers and found that 49% of all those working in places where redundancies had been announced or carried out did not agree that there was a genuine redundancy situation in their company. A partner in the legal firm that commissioned the research was quoted as saying "while these figures do not tell us whether the redundancy exercises actually were genuine, the fact that they were perceived not to be by so many indicate serious problems with the consultation process…the point of consultation is to explain why the redundancies are needed, to look for ways of avoiding those redundancies, and to mitigate the consequences for those affected. If this is not happening, it is not a proper consultation." The research also found that 19% of respondents whose employer had announced or made redundant more than 20 employees in the last six months say that their employer had not consulted either trade unions or employee representatives.

Similar evidence emerged from another survey involving 200 business leaders ranging from managing directors, finance directors, HR directors and in-house counsel. More than eight in 10 (84%) respondents indicated they were considering making redundancies in the coming six months and were unaware of the correct length of time required to consult with employees. A further 28% were not aware that a failure to consult employees could result in a penalty against the company.[8]

Acas' experience is that where the law requires collective consultation, the majority of employers that advisers have dealt with are aware they have some duty to consult. But in some circumstances the content of this consultation can be quite thin, or there are problems with the process, leading to a feeling that that management is simply paying lip service to the provisions in the legislation and causing anxiety and mistrust among employee representatives. The evidence therefore suggests that, despite the explicit legislation in this area, there are many challenges to the proper execution of consultation as required by law. This begs the question, why do some employers fail to consult or fail to consult in a meaningful way in dealing with redundancy?

Where consultation is not occurring, why not?

Complex legal terminology

As a consequence of the recession many employers and employee representatives are grappling with the legislation for the first time, and may be unfamiliar with amendments, or the consequences of more recent case law in the area. This point is illustrated by the example of a medium-sized multimedia technology provider that Acas recently assisted. Although having previously gone through smaller redundancy exercises, it was the first time there had been a situation involving the possible loss of 20 jobs, and therefore the first time that the statutory duty to consult with employees on the process had been triggered. The company felt it needed help

in what was, for the management, a very new area; it therefore approached Acas.

For many organisations the legal requirements are not always clear cut. Miscalculating the proposed number of employees in a given establishment may be one factor that results in employers failing to consult. The term 'establishment' is not clearly defined in the legislation and has been subject to interpretation by the tribunals on many occasions, both at the national and the EU level, and there exists a European Court of Justice ruling on the issue. In essence, an establishment is the local employment unit as opposed to the whole of the enterprise or undertaking and the unit need not be endowed with a management that can effect collective redundancies. This can mean that in a multi-establishment company a redundancy announcement concerning 20 or more employees may not meet the size trigger.

There is anecdotal evidence from our advisers that employers struggle, where redundancy numbers are significant, with how to deal with the issue of volunteers. The obligations to consult apply to compulsory redundancies, but may also apply to voluntary redundancies. If the employer is contemplating 20 or more redundancies and is not sure whether there will be sufficient volunteers, or whether some of the redundancies can be avoided, then the obligation to consult employees will apply. There is also anecdotal evidence that some employers, and indeed some employee representatives, are not aware of and are not including voluntary redundancies in the head count required for consultation. However, the Employment Appeal Tribunal (EAT) has held that employees who volunteer for redundancy are considered dismissed for the purpose of including them in the head count of 20.[10]

Protective award

Where an employer has failed to comply with the collective consultation provisions in the Act and a complaint to this effect is made by a representative, the tribunal can make a declaration that the employer has not complied with consultation provisions and issue a protective award. A protective award entitles each affected employee to one week's pay for each week of the protected period. The period is discretionary and the tribunal determines it based on the circumstances and seriousness of the employer's default; however, the period cannot exceed 90 days.

Some see this sanction available against an employer as wholly inadequate. They believe that the financial penalty ultimately allows an employer to buy its way out of a legal obligation and fails to take into account the fact that consultation may have prevented the job losses altogether – because an essential part of the consultation process is to consider other alternatives.

Where there has been a failure to consult, a 2007 EAT decision sets out that the starting point for the calculation as 90 days, and that this presumption of a 90-day protective award applies in the same way when the minimum period of consultation is 30, rather than 90, days. The 90 day period should only be reduced if there are mitigating circumstances justifying a reduction.[11] Some argue that the use of the upper limit means that the protective award is, in fact, punitive and thus a deterrent.

Anecdotal evidence from Acas advisers is that they have had to mention protective awards to employers on occasions, suggesting a lack of comprehensive understanding about the sanction associated with the failure to consult. However, the majority of employers that are aware of the sanction, or are made aware of it, acknowledge that a potential 90-day protective award per employee is hugely expensive if they get it wrong, particularly when compounded by existing financial difficulties. It may be that in times of recession the sanction of a protective award may be more effective in acting as an incentive to follow the legal requirements.

It should be noted that employers may be able to defend non-compliance with the collective consultation provisions where special circumstances exist. However, the threshold set by the courts appears quite high, such

as a sudden disaster requiring redundancies. Where tribunals have found that there has been a gradual deterioration so that the employer could see the writing on the wall then this has not constituted a special circumstance. If there are special circumstances then the employer is not necessarily excused of their duty to consult altogether but should do as much towards full compliance as is reasonably practicable in the circumstances.

Commercial decisions

There is evidence that a failure to consult may be a result of employers' concerns about commercial 'in confidence' issues or concerns about future work. In these situations employers might make a commercial decision not to consult, despite the law requiring them to do so. One such example known to Acas involved an engineering firm whose contract was nearing completion with no prospect of future work, making redundancies likely. The employer was concerned about sabotage on their current project as there had already been one incident which management felt may have been an effort to generate further repair work. In this case the union agreed, with the help of Acas, to reach agreement on compensation packages linked with signing settlement agreements to avoid liability for not going through the consultation period.

It is now well established that "the obligation to consult over avoiding the proposed redundancies inevitably involves engaging with the reasons for the dismissals, and that in turn requires consultation over the reasons for the closure".[12]

The point has also been raised that the requirement to consult around the business decisions for the proposed redundancies may create commercial difficulties for companies who are considering, for example, moving some of their operations off shore and that for confidentiality reasons companies will not want to discuss the issue with their staff until the deal has been done. This has been mirrored in cases before the Central Arbitration Committee (CAC) where, traditionally, stock exchange regulations have been given as the reason why employers cannot give commercially sensitive information to employee representatives. However, stock exchange rules do not preclude employee representatives being informed and consulted in advance where collective redundancies are planned in connection with a restructuring which may involve price sensitive information. Provisions can be made for employee representatives to be subject to confidentiality constraints for a specified period, but at the same time be sufficiently informed to hold meaningful consultations with the employer.[13]

Where consultation is occurring what challenges arise?

We have explored some possible reasons why consultation does not occur in practice; the paper will now explore the seemingly bigger issue of potential barriers to effective consultation processes.

Timeframes

There are two points to be raised about the impact of timeframes on the consultation period. The first is that in order for the consultation to be meaningful, there should be adequate time allowed for employee representatives to respond and, second, there needs to be a conscientious consideration by the employer of that response. Both of these requirements necessitate suitable timetabling for the parties to meet and discuss the information/proposals being exchanged.

One Acas adviser has been involved with an organisation in the third sector that encountered problems with the consultation process due to a failure on the employer's part to factor in a sensible approach to timeframes. The employee representatives considered the consultation process to be a sham; management allowed the representatives to go back and speak to their constituents and gather their views over a period of three or four days but once the representatives presented feedback on management proposals, management took less than one hour to respond to the employee representatives. Given the timeframe it is doubtful that a conscientious consideration of that response could have been undertaken by management. The employee representatives in this instance felt they were being railroaded by management. Acas advisers often find it necessary to explain the features of meaningful consultation and emphasise the importance of adequate timeframes. An important point to be made about a meaningful consultation process is that it is sequential with information being exchanged, digested and responded to. It is therefore necessarily time-consuming but is likely to result in attaining an agreed solution more quickly than if the representatives are not properly engaged in the process.

A food manufacturing company was going through a process of restructuring. Initially the employer proposed making 140 employees redundant. Acas was called on to sit in on consultation meetings. The consultation process was approached by the company in a structured and sensible way. It was a 90-day process and meetings were scheduled in both the company's northern and southern sites every three weeks to allow enough to time for feedback to be gathered and for the representatives to take back proposals to the employees. The agenda for each meeting was determined jointly with some aspects led by the representatives. For example, the company had wanted to hold back on discussing voluntary redundancy packages in the early stages but the representatives indicated that this was a high priority item for the employees and so management accommodated this request.
Despite initial predictions of 140 redundancies, the consultation process was very successful, particularly regarding alternatives to compulsory redundancy such as voluntary redundancies, job sharing and part-time arrangements by agreement. This resulted in only having to make 50 people redundant, a little over a third of the company's original proposals.

Where Acas advisers have identified problems with consultation processes due to timeframes, these have occurred because employers were not confident in their understanding of what a meaningful consultation process involved or, in some instances, there were what could be described as 'rogue' managers who tended to shoot from the hip rather than employing a more considered approach. In both situations Acas training for both employee representatives and employers has facilitated better dialogue between the parties.

The second point to make about timeframes is that the legislation is prescriptive about when consultation should begin and for how long. It states that consultation must begin in good time. If the employer is proposing to dismiss more than 20 but less than 100 employees within the 90-day period then consultation must commence 30 days prior to the first dismissal taking effect. If the employer is proposing to dismiss 100 or more within 90 days or less, consultation must begin at least 90 days before the dismissals take effect. The term 'takes effect' has been held to mean before the date that the first dismissal would take effect if the employer's proposals were implemented.[14]

The employer is also required to complete the process of consultation before issuing any notices of dismissal. The Act marks only the beginning of the minimum period of consultation. It does not require that the consultation should necessarily continue throughout the stipulated period if an agreed solution can be successfully agreed in a shorter period. However, it may be more difficult to determine the position where agreement proves unattainable; the employer must be prepared to consult, and if necessary, to continue to consult at least until the expiry of the relevant statutory minimum period.

While the case has been made for ensuring that appropriate lengths of time elapse between proposals being made and responded to, there is some debate about the length of the legislated minimum timeframe. A review conducted by the then Department of Trade and Industry (DTI) in 1999 found that the requirement to consult over either a 30-day or 90-day period had caused few problems. Most employers accepted that the consultation period was built into their planned timetable and felt that the processes were not handicapped by this.[15] However, the CBI has recently called for the Government to review the length of consultation for redundancies particularly in relation to the 90-day time period where more than 100 employees are being dismissed. The CBI argues that the timeframe prolongs uncertainty for staff and delays firms trying to adapt to rapidly changing circumstances.[16]

Anecdotal evidence from our advisers confirms that this view is often both explicitly expressed and implied by employers. That said, it is felt that most employers understand that agreements and decisions can be reached within the timescale. Perhaps more surprising is the suggestion that some employee representatives share this view, particularly with reference to placing employees in a state of anxiety for almost three months. Another observation reported by an Acas adviser was that trades unions, more so than other employee representatives, have sought ways of drawing out discussions to exhaust the timescale, very occasionally resulting in the original 'offer' from management being reduced due to worsening economic conditions. It is interesting to observe this shift in opinion in relation to the 90-day timeframe. There may be a number of factors causing this but it is probable that the impact of the recession and heightened economic instability has made the timeframe less palatable for those involved.

Negotiation versus consultation

The law provides that consultation with appropriate representatives does not mean reaching agreement but should be undertaken by the employer with a view to reaching agreement. The English courts have found that if, despite the employer's best efforts, agreement proves impossible, then management ultimately has the power unilaterally to impose its will.[17] The difficulties with the distinction between consultation and negotiation tend to arise during the course of collective redundancy consultation. In Acas' experience, some trade union representatives, who are used to representing

employees for the purposes of collective bargaining, are well used to negotiating and this may lead to both parties polarising their positions.

The distinction between consultation and negotiation is an important one. Negotiation can be described as a process where parties adopt positions, and the two sides attempt to close the gap by finding a mutually acceptable agreement. Consultation is better described as problem solving, where the employer puts forward a proposal and asks for the views and concerns of the employees and, where possible, takes these into account in what is ultimately a management decision.[18] One Acas adviser suggested that management are clear that they are not there to negotiate and that ultimately consultation does not detract from their managerial prerogative. Acas advisers' experience is that employee representatives welcome the differentiation. For example, one adviser explained: "Pointing out what negotiation is may initially result in representatives concluding that consultation is a limp alternative; however, when you explain what meaningful consultation involves and the nature of the discussions, they realise it is more than merely talking. It is about managing expectations of representatives and employers, making training crucial".

One example of Acas training for employee representatives was where the company did not recognise a trade union and had set up employee consultation arrangements. In this example, the HR manager claimed that one of the most effective elements of the training was the understanding of the difference between consultation and negotiation – "…it helped improve the dialogue and cut out wasted time on issues that could not be dealt with as part of the consultation process. Instead they were able to come with concrete proposals such as swapping holiday pay for training for their next job, which we did."

Disclosure of information

Disputes can occur during a consultation period in relation to the duty to disclose. As we have seen, the legislation lists the various things that the employer has a duty to disclose. One of the issues that can arise is the interpretation of that duty. One Acas adviser is currently involved in some work with a company where the employer has provided average rate of pay figures to the representatives in relation to cost savings; but the representatives do not believe that the figures they have been presented with should be average figures. This has created a break down in communication between the parties. This is a common point of discussion in Acas training sessions – representatives often want to debate the figures and go into micro analysis. In a recent case where Acas was involved, the adviser often heard the representatives use the phrase "give us the metrics" to justify why each post identified was going to have to go. The law is clear about what must be disclosed, but if a complaint is made the level of detail required is ultimately a question for the tribunal. Case law indicates that the employer does not at this time have to spell out every last detail of the proposed redundancy programme. They are simply required to provide the information specified in the relevant section, and to provide it in sufficient detail to enable meaningful discussions to take place.[19] Employers and representatives can find that debating the level of detail and analysis is often time-consuming and problematic, and can lead to the process stalling.

Conflicting agendas

One argument put forward about the difficulty facing trade union representatives is the dual complexity of having to serve their members when some want to take voluntary redundancies – where packages are better than the statutory pay that would have been paid – and others who want the union representatives to push consultation in terms of alternatives to redundancies. "Caught in a pincer movement between managerial strategy and individualist opportunism upon the part of members, trade unions soon found themselves to be powerless in the face of voluntary redundancy

schemes."[20] This argument may have held sway before the recession, but in the current climate it is unlikely that many employers will be able to afford very generous voluntary redundancy schemes. One adviser commented: "the word is that the ability to get high payouts has changed in this recession." Combine this with high levels of unemployment and employees may also be more reluctant to accept voluntary redundancy and far more interested in exploring alternatives to job losses.

Alternatives to redundancy

The law makes clear that the purpose of consultation is to consult on ways of avoiding the dismissals and reducing the number of employees to be dismissed. Acas' experience suggests employers are increasingly receptive to thinking about creative ways to retain staff and avoid compulsory redundancies. These might include early retirement, reducing overtime and looking at agency workers as well as considering new ideas such as short-time working and sabbaticals.

The most recent IRS redundancies survey published in February 2009 also indicates that respondents seem to be making considerable efforts to minimise the number of compulsory redundancies. It found that, on average, organisations are employing three or more measures to minimise compulsory redundancies such as reducing contract or agency staff, voluntary redundancies, redeployment or natural wastage. The survey also found that one in five respondents introduced short-term working or reduced overtime to minimise the number of compulsory redundancies in 2008.[21]

Ten years ago a DTI paper, based on eight case studies, reported that the requirement that consultation must entail ways of avoiding redundancy was in practice not seriously addressed because the key decision has been made before the start of the consultation process. All cases identified were as a result of re-organisation for either strategic or competitive purposes and not related to recession. In times of recession, therefore, where the economic, social and reputational cost of making people redundant is perhaps more heavily felt, consultation on alternatives might be a more attractive option. Or perhaps employers have learnt from past experience that when the upturn comes, having gaps in their employee skill base will put them behind their competitors. Lord Eatwell, chief economist at the Chartered Management Institute (CMI) was quoted as saying: "It is encouraging to see employers looking for ways to avoid redundancy rather than adding length to the dole queue without a second thought. It shows that business is growing up because today, unlike in 1991, there seems to be more determination to retain skilled staff. Perhaps it is because employers are finally beginning to recognise that retaining competence is a far more cost-effective option than rebuilding a talented team from scratch."[22]

There are other circumstances where an employer may simply be looking at cost saving measures – short of proposing any redundancies – that could include reducing employee hours etc. In such a case the consultation requirements under the legislation have not been triggered because no proposals to dismiss have been made. However, an employer needs to be mindful that this *could* trigger the requirement to consult. For example, if an employer cannot get agreement to reduce employees' hours it will often mean giving notice to terminate existing contracts and then re-engaging them on contracts with different terms and conditions. If there are more than 20 employees in this situation this would require consultation, as the definition of redundancy for consultation purposes is quite broad. This issue is one that Acas advisers often have to point out to employers when they receive enquiries related to redundancy alternatives.

However, under the Information and Consultation of Employees Regulations 2004, where the standard provisions apply, there is a need for employers to provide information and consult over 'the probable development of employment.... and on any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking'.

Despite the evidence that employers are exploring alternative options with appropriate representatives, the consultation can prove difficult. One adviser commented that the timescale, with no guarantee of success when seeking significant contractual changes such as new shift patterns, can act as a disincentive. That said, there is also anecdotal evidence that representatives have accepted short-time working and lay-offs without the need for notice to be given, even where it might otherwise be necessary.

Acas encourages employers and representatives to engage in meaningful consultation: what needs to be done?

Training is vital

The legislation around consultation on redundancy can be complex to understand and interpret in a real workplace situation. Providing effective training for managers and employee representatives is therefore key. Some of the most common concerns that arise during Acas training sessions, on the part of non-union representatives, relate to:

- their lack of knowledge of contract variation and their ability on behalf of constituents to commit to it
- how they feedback to constituents; and
- how to take their views back to management particularly where they feel there is insufficient time for them to make informed judgements and decisions.

An example where training has encouraged a mutually beneficial outcome involved an IT company with 250-plus employees. The jobs were being moved offshore and the company was consulting with elected employee representatives. About one-third of the way through the consultation exercise, it had become very adversarial. The employee reps contacted Acas for help on redundancy, and the employer agreed to a conciliation meeting separate to consultation. The meetings (a mixture of joint and separate) assisted the parties to understand the law better, reduce the level of disagreement on the process and help them understand their respective roles and obligations better. The employee representatives were educated, white collar IT professionals who just needed to be made aware of their role as elected reps. The feedback provided to the adviser after delivering the training on redundancy consultation was positive from both parties.

Similarly, another employer made this statement in relation to training provided to its employee representatives:

> "The training allows our people to understand where a consultation sits in the process; what the value of it is; what the benefits are; what the limitations are; and actually deliver, at the end, a change programme where not everyone is going to end up happy but at least they appreciate and understand what we're doing, why we're doing it and what we are doing to improve their lot."

Genuine consultation reaps benefits for the organisation

Consultation can make a difference to the outcome of redundancy proposals, with some workforces being able to suggest ways of avoiding compulsory redundancy altogether. The TUC provides examples in some workplaces where all staff have volunteered to work fewer hours in the knowledge that trading conditions may well improve in the future. In other workplaces the consultations have led to fairer ways of choosing

redundancy, perhaps by improving redundancy payments to the point where there are enough volunteers.[23]

Acas advisers have similar experiences through their interactions with organisations facing redundancy situations. For example, in the multimedia company example discussed overleaf, employee representatives' involvement in the consultation meant they were able to save about six jobs through redeployment to newly created roles on a temporary basis. Even where alternatives to compulsory redundancy have not been viable, meaningful consultation is still necessary to maintain good employment relations in an organisation during times of change and hardship for affected employees.

The groundswell of enquiries to the Acas Helpline on consultation about redundancy rights means not only that there has been a big increase in redundancies but that many in the workplace need additional advice when confronted with the legal complexities and best practice in this area. Many of the challenges discussed in this paper can be overcome by employers understanding the consultation provisions and representatives who are trained and understand their role in the process. Acas' experience in training elected employee representatives, and feedback from the participants and employers, is that consultation has progressed far better when everyone is aware of their rights and obligations.

End note

Rumours persist that the worst of the recession may be over. But most commentators are clear that the negative impact of the recession on employment is far from finished. The lag between any expected economic recovery and a rejuvenation of the employment market means that unemployment will continue to rise for many months to come. This means that many organisations will continue to be in the difficult situation of having to make workforce reductions. This is undoubtedly the most downbeat form of workplace change that HR and managers will have to manage in their careers. But, done properly, in a genuinely consultative manner, it does not have to lead to the negative employment relations fall out that is so commonly associated with redundancy situations. As the examples in this paper prove, it is possible to maintain employee engagement during these challenging times, and even build a stronger employment relationship for the recovery ahead.

1. *"Employee survey highlights fundamental lack of trust in UK plc senior management, as redundancy takes toll on the survivors"*, 7 August 2009, www.cipd.co.uk
2. *see R v British Coal Corporation, ex p price [1994] IRLR 72*
3. *see Middlesbrough council v TGWU* [2002] IRLR 332 EAT
4. *see GMB v Susie Radin Ltd* [2004] EWCA Civ 180
5. s188(4) of the Trade Union and Labour Relations Act (TULRA) 1992
6. *UK Coal Mining Ltd v National Union of Mineworkers* [2008] IRLR 4 EAT
7. *"Provisional employment tribunal figures for 2008/09 show rise in redundancy claims"*, 23/03/09, www.XpertHR.com
8. *"Business at risk from redundancy claims"*, www.financeweek.co.uk/management/business-risk-redundancy-claims
9. BIS Redundancy consultation and notification: guidance, www.bis.gov.uk
10. see *Optare Group Ltd v Transport and General Workers Union*
11. Evans & Or v Permacell Finesse Limited [2007] UKEAT/0350/07
12. *UK Coal Mining Ltd v National Union of Mineworkers 2008* ICR 163
13. BIS Redundancy consultation and notification: guidance, www.bis.gov.uk
14. see *E Green & Sons (Castings) Ltd v Association of Scientific, Technical and Managerial Staff* [1984] IRLR 135, [1984] ICR 352 EAT

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[23] www.tuc.org.uk/extras/redundancy.pdf

Notes

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