

## Unit 2

### Subject matter

This unit deals with the subject matter of information and consultation and, in particular, the following:

- the information that employees need to do their jobs and contribute effectively
- the subject matter of consultation and main approaches that can be adopted
- the relationship between the ICE Regulations and other information and consultation requirements
- key reference points in handling restructuring
- confidentiality and
- the implications of Stock Exchange regulations

### Employees' information requirements

Information and consultation are the basic building blocks of good employment relations and essential to creating the effective workplace. Employees are only able to perform at their best if they know their duties, obligations and rights and have opportunities to make their views known to management on issues that affect them.

Regardless of the ICE Regulations, you need to ensure that employees have the information they require to do their jobs. *Acas' Employee communications and consultation* advisory booklet contains a detailed list of recommendations, covering conditions of employment, the job and the organisation. It is repeated in Annex 2.1 in the belief that it continues to be the best source available.

## The subject matter of consultation

The Regulations follow the Directive in being brief in their coverage of the subject matter about which employers should be informing and consulting with employees. Both the provisions for 'preexisting' and 'negotiated' agreements leave it up to the parties. Only in the 'standard provisions' are there any details:

- a) the recent and probable development of undertaking's activities and economic situation;
- b) the situation, structure and probable development of employment within undertaking and any anticipatory measures envisaged, in particular, where a threat to employment;
- c) decisions likely to lead to substantial changes in work organisation or in contractual relations.

Employers must provide representatives with information on (a), (b) and (c) and consult with them on (b) and (c). Information must also be given at such time, in such fashion and with such content as are appropriate to enable representatives to conduct adequate study and, where necessary, prepare for consultation.

In terms of agreement coverage, there are two main approaches that can be adopted: *inclusive* and *exclusive*. Under the former, the parties draw up a detailed list of issues about which it is felt appropriate to inform and consult. The section dealing with 'Information about the organisation' that appears later in the Annex in this unit should be especially helpful here.

The disadvantage is that, every time an issue emerges that is not listed, you risk wasting a lot of time in discussing whether you should include it. The alternative approach is to list the subject matter you feel it would be NOT be appropriate to consult about, making it clear that everything else is. Issues generally regarded as not appropriate are individual grievances and disciplinary matters.

Depending on the arrangements for collective bargaining, it may also be sensible to exclude pay and conditions of employment. In organisations where trade unions are recognised, these subjects have traditionally been seen as the preserve of separate negotiating bodies. Further details on this point will be found in Methods and structures.

## Handling restructuring

When handling restructuring that you will need to take into account the implications of existing legislation dealing with collective redundancies, pensions and transfers of undertakings (see Annex 2.2).

### *Relationship to existing information and consultation requirements*

The final version of the ICE Regulations deals with one of the main concerns that had been worrying practitioners, namely the potential overlap between these Regulations and the legislation on collective redundancies, pensions and business transfers. Put briefly, the changes are designed to avoid a situation where employers could be subject to different legal requirements to consult about the same decision. Employers subject to the standard information and consultation provisions are relieved of the obligation to inform and consult I&C representatives about collective redundancies, pensions or business transfers where they notify them in writing that they will be consulting under the legislation on those issues.

You have two main options for dealing with any potential overlap:

- have different sets of arrangements to deal with the different pieces of legislation, or
- have a single set of arrangements with provisions built in for handling collective redundancies, pensions and business transfers respecting the specific Regulations

### *The case for combined arrangements*

There may be situations where the first course is appropriate, for example, where there are complex patterns of union and non-union arrangements that are discussed in Appendix 3.2 of Methods and structures dealing with 'Mixed constituencies'. In general, however, it would be sensible to use the opportunity of reaching an agreement on information and consultation to mesh handling of the general issues involved in restructuring with any specific instances involving collective redundancies, pensions and/or business transfers.

There are many benefits to seeing handling restructuring as an integral part of the on-going arrangements for informing and consulting with employees. Indeed, as is spelt out in more detail below, it is because effective information and consultation arrangements have a critical role to play in the management of change that the EU introduced the I&C Directive in the first place.

These benefits include:

- improved employee input into decision making - employees will be better equipped to feed in suggestions and ideas grounded in their day-to-day experience, with employee representatives in particular more likely to develop the knowledge and expertise to make a meaningful contribution
- better understanding of the need for change and increased acceptability of decisions - employees will be more aware of the state of the business, the challenges it faces and the necessity, from time to time, for uncomfortable decisions
- better intelligence about the likely reaction of employees at an early stage in decision making
- an increase in trust and co-operation and so improved business performance

#### *Consultation with a view to reaching agreement*

Another frequently raised issue about the I&C Directive and the ICE Regulations' 'standard provisions' is the requirement that consultation should be 'with a view to reaching an agreement' in the case of 'decisions likely to lead to substantial changes in work organisation or in contractual relations'. Although, strictly speaking, this requirement will only apply where the 'standard provisions' prevail, there are implications for those who want to reach pre-existing agreements that are as robust as possible.

There are two points to note here. First, this is not a new requirement – it has existed in UK law since 1993 in respect of consultation over impending collective redundancies and business transfers. Second, it does not require agreement to be reached – if this was the case, in the DTI's words, it would be 'co-decision'.

It does mean, though, that every attempt should be made to achieve as much consensus as possible. This way the change process is likely to be smoother and employee contribution to it greater. Simply adopting a 'take it or leave it' approach is likely to lead to bitterness and resentment, which could wreak long term damage to the business' prospects.

#### *Handling restructuring - key reference points*

The handling of restructuring is one of the main reasons for the EU I&C Directive. In the words of Clauses 8 and 9 of the preamble 8: "There is a need, in particular, to promote and enhance information and consultation on the situation and likely development of employment within the undertaking and, where the employer's evaluation suggests that employment within the undertaking may be under threat, the possible anticipatory measures envisaged, in particular in terms of employee training and skill development, with a view to offsetting the negative developments or their consequences and increasing the employability and adaptability of the employees likely to be affected."

9. Timely information and consultation is a prerequisite for the success of the restructuring and adaptation of undertakings to the new conditions created by globalisation of the economy, particularly through the development of new forms of organisation of work.

A prime concern in the UK has been the amount and timing of information and consultation where closures and collective redundancies have been involved. There have been complaints that, notwithstanding the specific legislation dealing with these matters, employers often do not consult on impending redundancies at an early enough stage. The result, in effect, has been to deny trade unions and employee representatives any opportunity to put forward their alternatives to redundancy or their suggestions for maximising the opportunities of the affected employees in terms of re-location or training or compensation. In some high profile cases the first employees have heard about the take over or redundancy is from news bulletins or text messages.

Management and employee representatives looking for guidance on handling restructuring are advised to take into account the European-level social partner organisations' joint text entitled "Orientations for reference in managing change and its social consequences", which was arrived at in 29 October 2003. The joint text emphasises that:

- It is "essential" for management to "explain and give the reasons for change in good time to workers and/or their representatives.
- The obligations arising from the legislative and contractual framework on worker information and consultation as well as on confidentiality must be met.
- Beyond these obligations, recommended "tools" include a specific annual report, distribution of information prepared for shareholders and inviting the input of employees into the design of restructuring plans.
- It is important to maintain and develop workers' competences and qualifications to 'foster internal and external mobility and ensure the success of the business'.
- There is a need for concerted action by a range of key agencies, including the public authorities, when economic and social changes have serious repercussions for an entire region or locality.
- There should "a concern to explore all possible alternatives to dismissals", including redeployment, training and support for business creation.

The full text of the “orientations” can be found on the UNICE website ([www.unice.org](http://www.unice.org)), along with a summary of the 10 case studies that form their basis.

## **Confidentiality**

If the major concern for trade unions is likely to be the handling of restructuring, confidentiality is likely to be the matter that will most worry managers. This is likely to be especially the case where managers have little or no experience of consultation.

In the event, if properly dealt with in the agreement, confidentiality should not be the problem that many managers fear. There is considerable experience to draw on in drafting appropriate provisions, including that of the many companies who negotiated voluntary agreements under the

European Works Council Directive. Significantly, too, this confirms other experience: very rarely do employees and/or their representatives breach the confidentiality understandings they enter into.

As in other areas, dealing with confidentiality means working out what is reasonable and practical in the organisation’s particular circumstances. There are, though, a number of key principles that the parties are encouraged to follow:

- There should be a commitment to as much openness as possible. In order to build trust and understanding, ‘no go’ areas should be kept to an absolute minimum, being reserved for reasons of general commercial practice or because of stock market regulations (see next section).
- There should be a clear distinction between the position of employee representatives and employees, reflecting general commercial practice and stock market regulations. Other things being equal, it would be expected that employee representatives would be informed and consulted about even the most sensitive issues. They would be bound by an obligation of nondisclosure to employees, however, where sensitive commercial issues were involved.
- In other matters, the assumption should be that employee representatives are not bound by a confidentiality obligation, unless management explicitly asks for it. Requiring employee representatives to treat everything as confidential will make a sensible dialogue with their constituents virtually impossible.
- In cases where employee representatives are asked to maintain confidentiality, managers should be prepared to give good reasons.

- There should be provisions covering the breach of confidentiality by employee representatives including loss of office and other disciplinary action. Such provisions might even cover legal action where the misuse of information damages the company. Including such provisions may seem harsh, but it clearly demonstrates the very high level of trust that is being expected as well leaving people in no doubt about what will happen in the event of any breach.
- There should be a clear understanding about which information is to be treated as confidential within the organisation or which employees and their representatives are free to discuss outside.
- There should also be a clear understanding about the position of any external advisers and experts such as full time trade union officials – they need to know what information they will be expected to treat as confidential and why.
- There should be arrangements for handling any disputes arising over what is or is not to be regarded as confidential. These could be dealt with in a particular procedure or, more practically, under a general procedure covering any dispute arising from the agreement. Further details of what might be involved will be found in Resolving disputes.

### *Stock Exchange regulations*

Managers frequently cite commercial sensitivity, particularly where the information might affect the share price of a company, as a reason why they cannot inform and consult with employees and/or their representatives about some issues. The Stock Exchange's 'Listing Rules', which are often referred to on such occasions, are not as restrictive as they are often said to be, however, they certainly rarely justify an overall restrictive approach to information and consultation on all commercial matters.

The critical point to note is that these 'Listing Rules' effectively distinguish between employees and employee representatives. They do prevent the organisation from informing employees before the market is notified, although they may be informed simultaneously. They do NOT prevent the organisation from informing employee representatives, however.

Organisations may give price sensitive information about impending developments in confidence to a range of recipients including representatives of the company's employees or trade unions acting on their behalf.

A very full discussion of the issues will be found in the Annex to *The Information and Consultation Employees Regulations 2004 DTI Guidance (January 2005)* ('Dealing with price sensitive information'), which can be found on [www.dti.gov.uk/er](http://www.dti.gov.uk/er). The DTI's Annex also deals with the

implications of the relevant New York Stock Exchange regulations – these too are not as restrictive as sometimes quoted.

## **Annex 2.1 Employees' information requirements**

The recommendations in this Annex are taken from Acas' advisory booklet on *Employee communications and consultation*.

### **Information about conditions of employment**

Information about pay and conditions of employment is essential to all employees. As Other legislation on information and consultation at work describes, employers are required by law to give employees written statements specifying the main contractual details. Employers must also notify employees in writing of any alteration in their pay and conditions and are also required by law to give employees itemised pay statements whenever payments are made. The *Acas Code of Practice No 1 Disciplinary and Grievance Procedures* urges employers to make every effort to ensure that employees know and understand the disciplinary rules that apply and are aware of the likely consequences of breaking those rules. Such explanations and full coverage of the subject should be included in the induction programme of new employees.

### **Information about the job**

Employees need a wide range of job-related and operational information about:

- the workplace
- work objectives and performance
- operating and technical instructions
- discipline and grievance procedures
- health and safety
- who is who, where they are and what they do.

Employees require general information, not covered elsewhere, about their workplace, especially when just starting. On joining, and also when subsequent changes take place, they need to be told about arrangements relating to:

- working conditions
- supervision and management
- administrative procedures
- training and development opportunities
- flexible working time opportunities
- equal opportunities
- pension arrangements
- social and welfare facilities.

Work objectives and performance targets are key items of information and need to be communicated clearly if misunderstandings are to be prevented. Employees also need to be informed of any arrangements for trade union representation and the relevant negotiating and consultative machinery. Such information should be provided to new employees as part of their induction. The outcome of negotiations needs to be conveyed quickly to each employee and synchronised by management and trade unions. Information is also required by shop stewards and other trade union officials about arrangements such as:

- time off for trade union duties and activities
- access to management, members and recruits
- collection of union dues or subscriptions, including check-off arrangements

Such arrangements should be covered by written agreements negotiated with the appropriate recognised trade union. Operating and technical instructions given to employees should cover:

- the work to be carried out
- method(s) to be used in undertaking the work
- use of equipment, machinery and materials
- standards to be met
- health and safety precautions to be observed
- reporting procedures.

To avoid errors or misunderstandings, managers – including supervisors – should give clear instructions and support them with full explanations where necessary.

Careful attention should be given to the provision of information on *health and safety* matters.

Employers have a statutory obligation to consult with employees on health and safety matters.

They must also provide information necessary for safety representatives or employees to participate fully in the consultation and for representatives to carry out their functions.

Job instructions and information are not enough. Employees also need to know how well they are doing in relation to what is expected of them both on an individual and workgroup basis.

Managers and supervisors should provide information about work objectives and performance and discuss these with all who report to them. Managers should be fully familiar with work-related and other factors affecting performance to ensure effective discussions.

## **Information about the organisation**

Employees have a strong interest in what is happening in the organisation. Information going beyond matters of direct and personal relevance which should be given to employees will vary according to whether the organisation is in the private or the public sector, in manufacturing, construction or services, and on its size and structure. Management should normally report to all employees on the following detail about the organisation, bearing in mind any implications for changes in work organisation, employment and contractual relations:

- objectives and policies
- past and present performance and progress
- future plans and prospects.

Under these broad headings information can be given about:

- financial performance
- management and staff changes
- state of the market and order book
- changes in products or services
- developments in technology and methods
- mergers
- investment.

The emphasis should be on successes and problems and the reasons for them. This information should be provided as part of a regular programme. When successes are achieved, employees need to be told promptly. Similarly they should be given early warning of problems. In times of trouble, good communications assume particular importance and bad news is usually best conveyed by a senior rather than junior manager.

In most organisations information on performance will normally contain financial data about:

- sales
- income and expenditure
- turnover
- profit and loss
- assets and liabilities
- cash flow
- return on investment
- added value

Much of this information has to be made public by law – for example in the Annual Report to Shareholders of a public or private company – and so is already indirectly available to employees (see Other legislation dealing with information and consultation at work for further details). Often it is not readily understood in this form and may be misinterpreted by employees and, indeed, by managers. It is therefore best presented in a carefully explained separate employee report.

## **Annex 2.2 Consultation on collective redundancies, pensions and business transfers**

Employers are obliged by law to inform and consult employee representatives over planned collective redundancies (definition below) certain changes to pensions and transfers of undertakings (the regulations on transfers can apply regardless of the size of the undertaking) - see the Trade Union and Labour Relations (Consolidation) Act 1992, the Occupational and Personal Pension Schemes Regulations 2006 and the Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1987. The employer is also required to allow employee representatives reasonable access to the employees they represent and to accommodation and other facilities as appropriate plus reasonable paid time off to perform their duties and for training.

### **Unionised organisations**

Where there is a recognised independent trade union representing employees who may be affected by a planned collective redundancy, certain changes to pensions or transfer of undertaking, the employer must inform and consult that union. In a multi-union company all unions must be consulted.

### **Non-union organisations**

Where there are employees who may be affected by a planned collective redundancy, changes to pensions or transfer of an undertaking but who are not represented by a recognised trade union, the employer must inform and consult other appropriate representatives of those employees. These may be either existing representatives (provided that their remit and method of election or appointment gives them suitable authority from the employees concerned), or new ones specially elected for the purpose.

### **Collective redundancy**

A collective redundancy is one where twenty or more employees are to be dismissed as redundant at one establishment within a ninety day period. Employers are under no legal obligation to inform and consult employee representatives in cases falling outside these thresholds although it is good practice to do so. They may, however, be at risk of successful unfair dismissal claims if they fail to inform and consult individual employees who are dismissed.

If an employer is thinking of dismissing an employee on the grounds of redundancy they must follow a standard dismissal procedure. The main steps may be summarised as follows:

#### **Step 1**

Write to the employee notifying them of the reason for the redundancy and invite them to a meeting to discuss the matter.

#### **Step 2**

Hold a meeting with the employee to discuss the redundancy - at which the employee has the right to be accompanied. Notify the employee of the decision and the right to appeal.

#### **Step 3**

Hold an appeal meeting (if the employee wishes to appeal) at which the employee has the right to be accompanied - and inform the employee of the final decision. For further information see the Acas Code of Practice - Disciplinary and grievance procedures.

## **Affected employees**

Employees may be affected by a planned collective redundancy, certain changes to pensions or transfer of an undertaking even though they themselves are not to be made redundant have their pension changed or to move to a new employer.

For further details, see Other legislation dealing with information and consultation at work.