COLLECTIVE REDUNDANCIES CALL FOR EVIDENCE

Acas welcomes the opportunity to respond to this call for evidence. We have had considerable experience of dealing with collective redundancies, particularly in the past few years. For instance, in 2010/11 we conciliated in some 130 collective conciliation cases involving redundancy and of the 950,000 calls to our helpline around 20 per cent were seeking information on redundancy related situations.

Though redundancies are an inevitable part of the economic cycle, dealing with them is stressful for all concerned and it is important that the situation is well handled whenever it arises. How redundancies are dealt with can also have a longer term impact on an organisation’s employment relations. Properly handled they can engender a positive spirit of trust and goodwill which is particularly important in managing those employees who are left after redundancies have taken place. Consultation is an important part of the process and it can bring many advantages. For instance, it can stimulate better cooperation between managers and employees, reduce uncertainty and, crucially, lead to better decision making. But these advantages will only be realised if the consultation is undertaken effectively and in good time.

As you will see we have not attempted to answer all of the questions you pose in your call for evidence but have concentrated on those where we feel we can contribute some useful insights from our own experience.

Yours sincerely

Ed Sweeney
Q 6. Are you aware of your rights and obligations under sections 188-198 of the Trade Union and Labour Relations (Consolidation) Act 1992?

Acas’ experience is that where the law requires collective consultation, the majority of employers are aware that they have some duty to consult. However, in some circumstances we have found that the content of this consultation can be quite thin, or there can be problems with the process which can lead to a feeling that management is simply paying lip service to the provisions of the legislation causing anxiety and mistrust among employee reps.

Part of the problem is that the legislation around consultation on redundancy can be complex to understand and interpret in a real workplace situation. Some indication of this can be seen in the fact that in 2010/11 around 20 per cent of the 950,000 calls to our helpline were about redundancies and over 10 per cent of our collective conciliations involved disputes over redundancies. We have found that difficulties can arise in calculating the proposed number of employees in an establishment which can sometimes result in employers failing to consult when they should. We have also found that the fact that the term ‘establishment’ is not clearly defined in the legislation and has been subject to judicial interpretation on many occasions can lead to confusion over whether to consult or not.

We have anecdotal evidence from our operational staff that one issue where employers often struggle, where redundancy numbers are significant, is how to deal with the issue of volunteers. The obligation to consult applies to compulsory redundancies but may also apply to voluntary redundancies - a fact some employers fail to recognise. 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 EAT has held that employees who volunteer for redundancy are considered dismissed for the purpose of including them in the head count of 20.

In view of this complexity we have found that training for managers and employee reps is crucial for ensuring that consultation is carried out smoothly and effectively.

Q 7. With whom do you consult about collective redundancies? What are the advantages and disadvantages of engaging with different types of representatives?

The law requires employers to consult with appropriate representatives of any employee potentially affected by the proposed redundancies. Where the employer recognises an independent trade union as covering affected employees then the representatives of this union will be the people to be consulted. As Trade Union representatives usually have some support from their union we have found that they are more aware of their role and also more aware of its limitations in practical terms if the company is facing serious problems. Our anecdotal experience is that union representatives are generally more pragmatic about what is possible in redundancy situations compared to non-union reps and that where non-union representatives have to be elected for the purpose of
redundancy consultation they can sometimes have unrealistic expectations about what
the consultation will achieve.

Q 10. What happens during consultation?

The key word here is consult but we find that sometimes there can be confusion between
consultation and negotiation, particularly where trade unions are recognised in the
workplace and thus both parties have a history of negotiating agreements.

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 courts have found that if, despite the employer’s best efforts, agreement
cannot be reached then management ultimately has the power unilaterally to impose its
will. This, can sometime lead to problems with the parties becoming unsure whether
they are consulting or negotiating during collective redundancy situations. Unlike
negotiation, which is a process where the 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 views and concerns and where possible takes these into account in making their
decision. It is important to bear this distinction in mind during collective redundancy
consultations.

Q 15. What are the advantages or disadvantages of the current 90 day
minimum consultation period work, in your experience (a) for employers (b) for
employees? In particular, what is the relevance of employees’ statutory or
contractual notice periods?

There clearly needs to be an appropriate amount of time for employers to discuss with
their employees and their representatives proposed redundancies and how these might
best be managed. It should be noted that some employers take longer than 90 days to
carry out their consultations. In other cases, with the agreement of employees and/or
their representatives, the consultation process can be shorter than the legal minimum.
A recent piece of research commissioned by Acas on the experiences of envoys in public
sector organisations who have to deliver the bad news about redundancies may shed
some light on this issue. The review found that in the public sector consultations over
redundancies appeared to take far longer than in private sector companies. The main
reason for this, according to the review, was the priority given in the public sector to re-
development as an approach to downsizing. Re-deployment in the public sector can be a
slow process, involving skills audits, waiting for vacancies to arise, conducting job
interviews and even engaging in trial periods. This contrasts with a situation where
redundancy is the only real option on the table. It has to be emphasised that this piece
of research only relates to the public sector but it lends support to the idea that the
amount of time needed for consultation may well depend on what outcomes are
expected from the consultation exercise.

If a whole organisation is closing and there is nowhere to redeploy people then there is
less to talk about than where a part of an organisation is closing and redeployment,
retraining etc is an option. It is a matter of public policy reflected in Employment
Tribunal decisions that employers are expected to make reasonable efforts to avoid
redundancies if possible by seriously considering alternatives and consequently discussions in the latter instance are likely to be lengthier.