

Handling Collective Consultation in the UK: Checklist for Employers

It is going to be one of the sadder consequences of the Coronavirus pandemic that most employers are going to have to look closely at whether or not to make significant job cuts to their current headcount. Whilst some employers may view this as an opportunity to recruit and acquire staff, either generally or in particular areas, most employers are going to be looking at scheduling necessary headcount reductions.

Employers will be required to consider how collective consultation under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 will apply in the current circumstances. Similarly, other employers are likely to be looking at restructuring contracts of employment. If employers are introducing adverse changes and are even contemplating

the prospect that staff who decline those adverse changes would be dismissed, this would also trigger an obligation to consult under section 188. The Government's recent announcement that the Furlough Scheme is to be progressively wound down from 1 August 2020 onwards may also trigger a need for some employers to go through a collective consultation process sooner rather than later.

This checklist highlights the practical steps that employers should consider when handling collective consultation during this challenging time, particularly when staff are working remotely. It should be read alongside our article, [Life in the Time of Corona, Part 3: Handling Collective Consultation in the UK.](#)

TO CONSULT OR NOT TO CONSULT?

- The Coronavirus pandemic is unlikely to qualify as a “special circumstance” which would remove the need for collective consultation under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992. You will still need to do whatever you can to comply with your collective consultation obligations, even if you are able to demonstrate that “special circumstances” had rendered full compliance impossible.

STATUTORY INFORMATION

- You are obliged to consult with the employee representatives of affected employees and to provide certain statutory information to those representatives (this information includes the reasons for the proposals, the numbers and descriptions of employees proposed to be made redundant, and the proposed method of selecting the employees who may be dismissed).
- You do not need to provide all of the statutory information to the representatives before collective consultation can start. However, even if you are unable to obtain some of the statutory information because of difficulties caused by the current working conditions, this does not excuse a lack of consultation. The statutory information to be provided should be delivered to the individual representatives or the recognised trade union. Alternatively, you can post the information to them.

ELECTIONS

- If you do not have a recognised trade union in place for the relevant classes of employees at risk of redundancy, or a standing employee consultative committee, then it will be necessary to enable affected employees to elect employee representatives (however, there may be no need to hold any election if the number of candidates matches the number of representatives sought).
- If a ballot is to be held then the ballot must be secret, but it is not necessary to have a ballot box with physical attendance to drop a ballot paper into it. You may make arrangements for a secret ballot to be conducted online.
- You are obliged to ensure that there are sufficient representatives to represent the interests of the affected employees. You may well lean towards a smaller number of employee representatives where there will be conference calls or video calls. The larger the number of employee representatives, the more difficult it will be to ensure that any conference or video calls are effective.

FURLOUGHED STAFF

- Furloughed staff can be involved in any capacity in a consultation exercise, based on the analogous advice in the Government guidance that union representatives, whether official or elected, are able to carry out representative duties without rendering themselves ineligible for the Furlough Scheme. Similarly, ACAS have said that individuals can participate in their own disciplinary and grievance hearings without being taken out of the Furlough Scheme.
- If a staff body is being elected for the purpose of a collective consultation exercise, you should ensure that furloughed staff are made aware of what is happening and that they can stand as representatives and vote for their choice of representative.

TIMING

- The statutory obligation is not a requirement to consult as soon as you are contemplating or proposing redundancies. It is an obligation to consult in good time, once you have started contemplating or proposing redundancies. In many cases, provided you allow sufficient time for collective consultation before any redundancies take effect, and provided you do not reach any firm decisions before collective consultation starts about what you are going to do, then you do not need to start the consultation immediately after the trigger is reached.

PRACTICAL CONSIDERATIONS

The precise practical issues to be considered before conducting collective consultation will vary from employer to employer and exercise to exercise. The golden rule is to discuss the issue in an open fashion with employee representatives to try and come to an understanding about how this is to work as best it can in the circumstances:

- Ensure that appropriate representatives have access to the affected employees and that those representatives are afforded accommodation and other facilities as may be appropriate.
- Conducting meetings remotely will require careful consideration, e.g., will you provide secure and secret conferencing facilities for meetings with employee representatives and their constituents? Consider whether to meet costs incurred by employees dialling into such calls. Establish whether all employees have video conferencing capability and what alternative to video conferencing would be effective.
- Consider holding a preparatory meeting with employee representatives to discuss how collective consultation will operate remotely. Collective consultation meetings can be quite challenging to manage at the best of times, so a preparatory meeting, where etiquette and protocol is discussed, will go a long way in ensuring that the process is as smooth as possible. Facilitating the consultative exercise will benefit all parties involved.

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- Get consensus on key practical issues at the preparatory meeting, for example:
 - Consider whether the consultation meetings will be recorded if held by video link. Employers need to be alert to the fact that whatever is said may also be recorded without the speaker's knowledge.
 - Make online collective consultation meetings shorter and potentially schedule more of them.
 - It should be agreed that microphones for all participants will be set to mute until someone has been asked to speak, to reduce the likelihood of people speaking over each other.
 - Have a test run at each meeting to ensure everyone's equipment is working and they can hear and be heard.
 - Establish by agreement how participants will indicate that they wish to speak to a point that has just been made.
 - Consider whether the agenda for any meetings be circulated ahead of time so that meetings can be run efficiently. This will also facilitate discussions amongst the representatives themselves to agree on a common position. We would recommend that any agenda for such a consultation meeting has a space for AOB issues to be raised.
 - Where there is no culture of online meetings, consider scheduling some training, perhaps with an external trainer, to enable the attendees to think about challenges and how they can be addressed. This could be attended by employee and employer representatives.
- In relation to the use of documents in online meetings, if the expectation is that they are sent out ahead of time, then agree clearly what is to be treated as confidential and what is open for circulation. Any agreement should be reinforced in the labelling for any documents being sent out. Alternatively, if parties are going to be using video links only, it may be possible to share a screen and work through a document together in the meeting. But this may slow down meetings while parties are allowed time to read and digest the document.
- If conducting remote collective consultation, be mindful of the process of briefing staff about your proposals and the progress of the collective discussions. Uncertainty or rumour are destructive in these circumstances, so think about how you will communicate in a timely fashion with the wider group of staff affected by the proposals and also those not affected by the proposals but who might be worrying that similar measures might be applied to them.
- Consider also whether it is necessary to modify the means by which you will communicate briefings to staff for whom English is not their first language.
- Consider the arrangements for implementing any dismissals. In particular, consider the arrangements for issuing notice to employees. Does the contract permit notice to be served by post or email? Effective planning for every stage of a consultation exercise is essential.

KEY CONTACTS

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