Thomas More Chambers

Mass Redundancy in a Covid-Crisis: Don't Forget the Basics

Introduction

1. Employers looking to make 20 or more employees redundant must comply with rigorous procedural safeguards under the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"). Although the disruption caused by Covid-19 may force many employers to suddenly and unexpectedly consider a collective redundancy exercise, these safeguards remain unchanged by HM Government's recent emergency legislation. Failure to follow the correct procedure can expose employers to liability for protective awards, although the current pandemic may well assist in establishing a defence of "special circumstances".

2. This note serves as a quick primer to assist employers and those advising them. It sets out the key concepts and outlines the statutory procedure. For information on the recently announced furlough scheme or other employment law topics, please refer to other articles published by Thomas More Chambers or contact Chambers to arrange a consultation.

When is a dismissal a "redundancy", and what is collective redundancy?

3. Company C makes an employee E redundant if E is dismissed wholly or mainly because:

   a) C stops, or intends to stop, its business;

   b) C moves, or intends to move, its business from the place of E's employment; or

c) The requirements of C's business for employees to carry out work of a particular kind has ceased or diminished.

4. A redundancy exercise involves "collective redundancy" if C proposes to make 20 or more employees redundant within a 90-day period ****.

What procedure must be followed in a collective redundancy exercise?

5. Where C begins a collective redundancy exercise, C has duties under the Trade Union and Labour Relations (Consolidation) Act 1992 to:

   a) Conduct a consultation with all appropriate representatives of the affected employees, and

   b) Notify the Secretary of State for Business, Enterprise, Industry and Skills using form HR1.

6. C must notify the Secretary of State before commencing consultation. Where the redundancy involves 100 or more employees, the notice must be given, and the consultation must begin, no later than 45 days before the first dismissal. If the redundancy involves 20-99 employees, this period is 30 days.

7. The consultation must be with the recognised trade union, if any, or otherwise with directly elected representatives of the affected employees, with a view to reaching agreement about ways to avoid dismissal, reduce the number of employees to be dismissed, and/or mitigate the consequences of the dismissals. C must disclose in writing to the employees' representatives details on 10 specific topics, including the reason for the proposed redundancies, the number and description of affected employees, and methods of selection and dismissal.

8. Remember that individual employment contracts and/or incorporated collective agreements may provide for requirements in addition to the statutory ones set out above.

Statutory redundancy payment

9. Redundant employees with at least 2 years' continuous service at the relevant date (i.e. expiry of notice period, or date of dismissal if no notice period) are entitled to a statutory redundancy payment equal according to the following table:

For each complete year of service where employee was aged 41 or over at the beginning of the year	1.5 weeks' pay
For each complete year of service in which the employee was aged 22-40 at the beginning of the year	1 week's pay
For each complete year of service in which the employee was under the age of 22 for any part of the year	0.5 week's pay

10. If an employer becomes insolvent, the employee may apply to the Secretary of State for the statutory redundancy payment to be paid out of the National Insurance Fund.

Liability for failure to follow correct procedure and defences

11. Failure to notify the Secretary of State is a criminal offence which, upon summary conviction, can result in an unlimited fine. As with many corporate offences, individual directors or similar officers can be convicted if the employer's offence was committed with the consent or connivance of, or was attributable to neglect on the part of, the director. Very few prosecutions have been brought under this provision, but one can anticipate that the Secretary of State will as a matter of policy authorise prosecutions where employers flagrantly breach this notification requirement.

12. More relevant to most employers is the protective award which can be given to affected employees where the employer has failed to comply with the consultation requirement. The protective award can amount to up to 90 days' pay to each employee in respect of whom the employer failed to comply with the consultation requirement.

13. Employers have a defence to a claim for a protective award if the employer can satisfy the Tribunal that:

    a) there were special circumstances which rendered it not reasonably practicable for the employer to comply with the consultation requirement, and

b) the employer nevertheless took all such steps towards compliance with the requirement as were reasonably practicable in the circumstances.

14. It is anticipated that this will be the focus of most Coronavirus redundancy litigation.

15. Special circumstances must be uncommon or out of the ordinary, and mere insolvency will be insufficient: *Clarks of Hove Ltd v Bakers Union* [1978] 1 WLR 1207. The Employment Appeal Tribunal has recently held in *Keeping Kids Co (in compulsory liquidation) v Smith* [2018] IRLR 484 that special circumstances do not exist where an employer awaits the outcome of an application for a government grant where that grant application itself envisages collective redundancy.

16. Employers seeking financial assistance from the Government under recent Covid-19-related schemes must therefore be realistic about whether redundancies will be necessary even if the financial relief is received. It is foreseeable that many companies may be unable to fully satisfy the consultation requirement due to Coronavirus-related circumstances, but employers must remember that they still must take all steps towards compliance with that requirement as are reasonably practicable to avoid a protective award.

Furlough and redundancy

17. Employers participating in the Government-backed furlough scheme may need to make some or all of the furloughed employees redundant when the furlough is over. Employment Tribunals have not previously had to decide any questions on redundancies following mass furloughs in a crisis like today's, but it is expected that employers may start the consultation and notification process on collective redundancies whilst employees are furloughed. Such redundancies, however, should not be implemented until the furlough is over.

Conclusion

18. Covid-19 poses previously unimaginable challenges for businesses and the employment market. Redundancies will be inevitable, but employers must not forget the basics. Employers facing a likely need for collective redundancies should always try to engage in consultation to the fullest extent reasonably practicable.

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In these unprecedented times the Thomas More Chambers Employment Law Team understands the importance of working closely with all our professional clients to best serve the needs of our mutual clients under difficult circumstances.

The Thomas More Chambers Employment Law Team is able to assist instructing sources on any employment law issues, including those arising from the Covid-19 pandemic. We are well used to working remotely and can arrange for confidential telephone or video conferences and meetings on a variety of platforms with you and our mutual clients. In addition, we all are well used to paperless working and to dealing with remote hearings and are always happy to assist in setting them up.

The Thomas More Chambers Employment Law Team is able to assist instructing sources on any employment law issues arising from the Coronavirus crisis. If you need such assistance, please contact Craig Brown, Senior Civil Clerk on 020 7404 7000 or at cbrown@thomasmore.co.uk.

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